California Homeowner Bill of Rights COLLABORATIVE

National Housing Law Project
Western Center on Law & Poverty
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March 2015 Newsletter

In this issue—

Our new Litigating under HBOR Practice Guide is out! This new guide updates advocates on HBOR and other foreclosure-related case law from the past five months. Make sure to replace your current version of the guide with this updated copy!

Summaries of important new cases following *Alvarez* on negligence claims, and evaluating HBOR attorney's fees motions and requests.

Litigating under California's Homeowner Bill of Rights & Nonjudicial Foreclosure Framework (Updated through March 1, 2015)

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

[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.

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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 $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 and single point of contact requirements and restrictions on dual-tracking.

There are 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"

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[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.

[5] For example, "robo-signing" and dual tracking. *See* Servicing Standards Highlights 1-3, https://d9klfgibkcquc.cloudfront.net/Servicing%20Standards%20Highlights.pdf.

[6] *See*, *e.g.*, Citi Consent Judgment Ex. E, § J(2), United States v. Bank of Am., No. 1:12-cv-00361-RMC (D.D.C. Apr. 4, 2012), *available at* https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_Citibank-4-11-12.pdf ("An enforcement action under this Consent Judgment may be brought by any Party to this Consent Judgment or the Monitoring Committee.").

[7] *See* CAL. CIV. CODE §§ 2924.12 & 2924.19 (2013); *see also* A.B. 278, *supra* note 2, at 22 (After California's nonjudicial foreclosure process was hit with the foreclosure crisis, this "place[ed] an overwhelming amount of authority and judgment in the hands of servicers . . . .)."

[8] Press Release, State of Cal. Dep't of Justice, Office of the Attorney Gen., California Homeowner Bill of Rights Takes Key Step to Passage (June 27, 2012), http://oag.ca.gov/news/press-releases/california-homeowner-bill-rights-takes-key-step-passage ("The goal of the Homeowner Bill of Rights is to take many of the mortgage reforms extracted from banks in a national mortgage settlement and write them into California law so they could apply to all mortgage-holders in the state.").

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

requirement in the complaint,[10] but only one plaintiff need comply with 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 (NMS) 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] Servicers have attempted to argue that, to allege HBOR claims, a borrower must plead a servicer's *non*compliance with the NMS in the borrower's complaint. Courts have roundly rejected this tactic.[15] Relatedly, there is also a "safe harbor"

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[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).

[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 a private right of action against large servicers), *with* § 2924.19 (listing sections with a private right of action against small servicers, defined as servicers that conducted fewer than 175 foreclosures in the previous fiscal year, as determined by CAL. CIV. CODE § 2924.18(b)). "Large servicers" are 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).

[15] *See* Gilmore v. Wells Fargo Bank, __ F. Supp. 3d __, 2014 WL 7183796, at *3 (N.D. Cal. Dec. 16, 2014) (rejecting servicer's argument that its NMS compliance is presumed and finding NMS compliance an affirmative defense to be proved by the servicer); Banks v. JP Morgan Chase, 2014 WL 6476139, at *7 (C.D. Cal. Nov. 19, 2014) (HBOR immunity based on NMS compliance is an affirmative defense best asserted by servicer at summary judgment, not as part of a motion to dismiss); Segura v. Wells Fargo Bank, N.A., 2014 WL 4798890, at *5-6 (C.D. Cal. Sept. 26, 2014) (same); Stokes v. Citimortgage, 2014 WL 4359193, at *8 (C.D. Cal. Sept. 3,

provision protecting servicers that remedy their HBOR violations before completing the foreclosure by recording a trustee's deed upon sale.[16] Though still somewhat unsettled, "correct[ing] and remed[ying]" an HBOR violation should require rescinding any improperly recorded Notice of Default (NOD) or Notice of Trustee Sale (NTS).[17] Fifth, relief (in either the pre-sale injunctive form or as post-sale damages) is only available for a servicer's "material" HBOR violations.[18] Courts have differed widely on what constitutes a material violation, or if that question is even appropriately resolved at the pleading stage.[19] Sixth,

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2014) (same); Bowman v. Wells Fargo Home Mortg., 2014 WL 1921829, at *4 (N.D. Cal. May 13, 2014) (same); Rijhwani v. Wells Fargo Home Mortg., Inc., 2014 WL 890016, at *9 (N.D. Cal. Mar. 3, 2014) (same); *cf.* 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.); 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 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).

[16] CAL. CIV. CODE §§ 2924.12(c), 2924.19(c) (2013).

[17] *See* Hestrin v. Citimortgage, 2015 WL 847132, at *1 (C.D. Cal. Feb. 25, 2015) (finding that "the possibility [of a servicer's] remediation does not render an ongoing breach moot" and that only rescinding an improperly recorded NOD could moot a borrower's dual tracking claim); 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 claim based on a CC 2923.55 violation); Leonard v. JP Morgan Chase, No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Oct. 21, 2014) (servicer's rescission of NTS, but not NOD, insufficient to remedy dual tracking 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.). *But cf.* Gilmore v. Wells Fargo Bank, __ F. Supp. 3d __, 2014 WL 7183796, at *6-7 (N.D. Cal. Dec. 16, 2014) (rejecting borrower's attempt to force servicer to rescind a dual tracked NTS because rescission is not a "remedy" under HBOR, but interpreting borrower's cause of action as one for injunctive relief, rather than dismissing the claim).

[18] CAL. CIV. CODE §§ 2924.12(a), 2924.19(a) (2013). Neither statute defines a "material" violation.

[19] *See, e.g.*, *Hestrin*, 2015 WL 847132, at *3 (finding servicer's failure to perform the required pre-NOD outreach under CC 2923.55 a material HBOR violation, rejecting servicer's argument that borrower must plead that the outreach would have led him to avoid default); Rizk v. Residential Credit Solutions, Inc., 2015 WL 573944, at *12 (C.D. Cal. Feb. 10, 2015) (finding dual tracked NOD and NTS going to "the very essence of the statute and failure to abide by the straightforward language of the statute is a material violation."); Colom v. Wells Fargo, 2014 WL 5361421, at *1-2 (N.D. Cal. Oct. 20, 2014) (servicer's failure to cite NPV numbers in a denial letter,

only "borrowers," as defined by HBOR, may sue under the statute.[20] Finally, HBOR exempts bona fide purchasers from liability.[21]

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,[22] or diligently attempting to contact, the borrower to discuss alternatives to foreclosure.[23] The statutes provide specific instructions on the nature and content of the communication.[24]

With each version of the law, some courts accept bare assertions that a borrower was never contacted pre-NOD as sufficient to pass the

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and the SPOC's failure to return emails and phone calls not considered "material" violations of HBOR); Hixson v. Wells Fargo Bank, 2014 WL 3870004, at *6 (N.D. Cal. Aug. 6, 2014) (denying servicer's MTD borrower's dual tracking claim in part because borrower's failure to allege how servicer's dual tracking violation was "material" is not required at the pleading stage).

[20] CAL. CIV. CODE § 2920.5(c) (2013). Most notably, "borrowers" do not include debtors in active bankruptcies. § 2929.5(c)(2)(C). Successors-in-interest who inherit title to property, but who are not borrowers on the note or deed of trust, are not currently protected by HBOR because they are not included in the definition of "borrower." Assembly Bill 244, introduced in the California legislature in early 2015, seeks to expand the definition of "borrower" to include certain types of successors-in-interest. *See* Press Release, Cal. Reinvestment Coal., New California Bill Clarifies that Widows are also Protected by California Homeowner Bill of Rights (Feb. 9, 2015), *available at* http://calreinvest.org/news/new-california-bill-clarifies-that-widows-are-also-protected-by-california-homeowner-bill-of-rights. 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.).

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

[22] 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).

[23] *See* CAL. CIV. CODE §§ 2923.5(a) & 2923.55(a) (2013) (applying to small and large servicers, respectively). For specific due diligence requirements, see §§ 2923.5(e)(1)-(5) & 2923.55(f)(1)-(5) (2013).

[24] *See* McNeil v. Wells Fargo Bank, N.A., 2014 WL 6681604, at *4 (N.D. Cal. Nov. 25, 2014) (allowing borrowers to assert a pre-NOD outreach claim based on servicer's failure to provide borrowers with a copy of the note, identify the loan beneficiary, or any assignment or accounting of the loan); 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).

pleading stage,[25] while others require more specific allegations to overcome a servicer's NOD declaration attesting to its due diligence.[26] Because the statute requires the servicer to initiate specific contact, *borrower*-initiated loan modification inquiries, or general contact, does not satisfy the pre-NOD contact requirements.[27]

HBOR's pre-NOD outreach requirements expand upon existing communication requirements. For example, the former Civil Code Section 2923.5 only applied to deeds of trust originated between 2003

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[25] *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).

[26] *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.). *But see* 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); *but cf.* Shapiro v. Sage Point Lender Servs., 2014 WL 5419721, at *3-4 (C.D. Cal. Oct. 24, 2014) (failing to find that servicer's inaccurate NOD declaration prejudiced borrower, and granting servicer's MTD).

[27] *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"). *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.).

and 2007; HBOR removed this time limitation.[28] Borrowers who successfully brought claims under the pre-HBOR law were limited to postponing a foreclosure until the servicer complied with the outreach requirements.[29] Enjoining a sale is still a remedy, but HBOR makes damages available after a foreclosure sale.[30]

HBOR requires a number of additional outreach requirements from large servicers. These servicers must alert borrowers that they may request documentation demonstrating the servicer's authority to foreclose.[31] They are also required to provide *post*-NOD outreach if the borrower has not yet exhausted the loan modification process.[32]

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]"[33] and provide borrower with a "direct

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[28] *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.

[29] *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.").

[30] CAL. CIV. CODE §§ 2924.12 & § 2924.19 (2013) (applying to large and small servicers, respectively).

[31] *Compare* § 2923.5 (2013) (small servicers), *with* § 2923.55(b)(1)(B) (2013) (large servicers). *See* Rahbarian v. JP Morgan Chase, 2014 WL 5823103, at *3 (E.D. Cal. Nov. 10, 2014) (finding borrower's assertion that he never received the notices required by CC 2923.55 sufficient to state a claim and rejecting servicer's argument that its NOD declaration–which did not discuss this new disclosure aspect of CC 2923.55—signified its compliance with the statute); *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).

[32] CAL CIV. CODE § 2924.9 (2013) (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).

[33] § 2923.7 (2013); *see* Pura v. Citimortgage, Inc., 2015 WL 81980, at *1 (C.D. Cal. Jan. 2, 2015) (finding a viable SPOC claim where borrower spoke with servicer representatives, but was never assigned an identifiable SPOC); 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).

means of communication" with that SPOC.[34] 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.[35]

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.[36] Many courts have considered SPOC "shuffling" and there appears to be no clear pattern on this issue; some find that incessant SPOC reassignments constitute a valid SPOC claim,[37] while others require borrower to plead that, not only were SPOCs shuffled, but that none of the SPOCs could perform their statutory duties.[38] To bring a valid claim based on SPOC

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[34] 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.).

[35] *See*, *e.g.*, Hild v. Bank of Am., N.A., 2015 WL 401316, at *7 (C.D. Cal. Jan. 29, 2015); 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*. Shapiro v. Sage Point Lender Servs., 2014 WL 5419721, at *6 (C.D. Cal. Oct. 24, 2014) (To fulfill SPOC duties and comply with HBOR's dual tracking rules, a SPOC must necessarily be appointed before an NOD is recorded.); 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.). *But see* Rizk v. Residential Credit Solutions, Inc., 2015 WL 573944, at *9 (C.D. Cal. Feb. 10, 2015) (agreeing with servicer that borrower had to specifically request a SPOC to trigger servicer's SPOC obligations and dismissing borrower's claim).

[36] CAL. CIV. CODE § 2923.7(e) (2013).

[37] *See, e.g.*, Cortez v. Citimortgage Inc., 2014 WL 7150050, at *6 (C.D. Cal. Dec. 11, 2014) (finding a shuffling of SPOCs prohibited by statute, noting that borrower did not allege she was reassigned to "different members of a team which comprised her SPOC; she alleges that the SPOCs themselves changed"); Banks v. JP Morgan Chase, 2014 WL 6476139, at *9 (C.D. Cal. Nov. 19, 2014) (shuffling SPOCs and the SPOCs' inability to relay deadlines and requests for missing documents constitute SPOC violations); *see also* Shapiro v. Sage Point Lender Servs., 2014 WL 5419721, at *6 (C.D. Cal. Oct. 24, 2014) (finding servicer's computer-generated form letters insufficient evidence that borrower was appointed a "team" of SPOCs).

[38] Johnson v. PNC Mortgage, __ F. Supp. 3d __, 2015 WL 662261, at *5-6 (N.D. Cal. Feb. 12, 2015) (finding a viable claim (alleged as a UCL claim) where none of borrower's many "assigned" SPOCs could perform SPOC duties); Hild v. Bank of Am., N.A., 2015 WL 401316, at *7 (C.D. Cal. Jan. 29, 2015) (A mere shuffling of SPOCs does not constitute a violation, but denying servicer's MTD borrower's SPOC claim because none of the SPOCs performed their statutory duties.); Johnson v. Bank of

shuffling, advocates should allege SPOC violations with as much specificity as possible.[39]

In either the "team" or individual form, SPOCs must 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.[40] 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]"[41] and be able to make important decisions like stopping a foreclosure sale.[42] At least one court has held that a servicer cannot avoid SPOC obligations by simply claiming there is "nothing to communicate" after denying

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Am., 2015 WL 351210, at *5-6 (N.D. Cal. Jan. 23, 2015) (same); Rahbarian v. JP Morgan Chase, 2014 WL 5823103, at *4 (E.D. Cal. Nov. 10, 2014) (simple allegation that servicer shuffled SPOCs, without more factual information, insufficient to state a SPOC violation); 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 (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 cf.* 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).

[39] *See* Hestrin v. Citimortgage, 2015 WL 847132, at *4, n.6 (C.D. Cal. Feb. 25, 2015) (granting servicer's MTD borrower's SPOC claim because the borrower did not state the "who, what, or when" of the alleged SPOC violation, including descriptions of conversations with different representatives).

[40] 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).

[41] CAL. CIV. CODE § 2923.7(b)(3)-(4) (2013). *Compare* Colom v. Wells Fargo, 2014 WL 5361421, at *1-2 (N.D. Cal. Oct. 20, 2014) (denying borrower's SPOC claim because the SPOC's failure to return phone calls and emails was not shown to be a material violation of SPOC duties and because borrower was ultimately informed of his application's status by the denial letter), *with* 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).

[42] 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).

borrower's application.[43] 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 and in the early stages of its third 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 "recording" an NOD or NTS, or "conducting" a foreclosure sale.[44] Courts disagree on the meaning of this statutory language.[45] Regardless of whether postponing a sale is considered "conducting" a sale, however, injunctive relief based on dual tracking claims is still possible when the sale has been postponed.[46]

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[43] Arbib v. Nationstar Mortg., 2014 WL 6612414, at *6 (S.D. Cal. Nov. 19, 2014) (rejecting servicer's argument that an unresponsive SPOC had "nothing to communicate" where borrower alleged the SPOC failed to consider updated financial information).

[44] CAL. CIV. CODE §§ 2923.6(c) (large servicers), 2924.18 (small servicers) (2013).

[45] *Compare* Foronda v. Wells Fargo, 2014 WL 6706815, at *6 (N.D. Cal. Nov. 26, 2014) (scheduling and refusing to postpone a sale is "conducting" a sale and prohibited by statute), 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), 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), *and* 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), *with Arbib*, 2014 WL 6612414, at *7 (no dual tracking claim where servicer repeatedly threatened to record an NOD, but had not actually done so), Johnson v. SunTrust Mortg., 2014 WL 3845205, at *5 (C.D. Cal. Aug. 4, 2014) (merely keeping a sale 'scheduled' (*i.e.*, refusing to cancel it) does not violate CC 2923.6), *and* 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).

[46] *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).

1. Timing logistics

Dual tracking protections apply even if the loan modification application was submitted prior to 2013, as long as the servicer moved forward with a foreclosure after January 1, 2013, with the application still pending.[47] 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.[48] 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 of the denial in writing, 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] . . . 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.[49] If a servicer offers a modification, borrowers

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[47] *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 v. Suntrust Mortg., N.A., 2013 WL 2929377, at *1-2 (C.D. Cal. June 7, 2013) (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).

[48] *See* Bingham v. Ocwen Loan Servicing, LLC, 2014 WL 1494005, at *5 (N.D. Cal. Apr. 16, 2014) (rejecting servicer's argument that borrower's application does not deserve dual tracking protection because servicer does not offer 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 to bring a dual tracking claim).

[49] CAL. CIV. CODE § 2924.10(a) (2013); Hestrin v. Citimortgage, 2015 WL 847132, at *4 (C.D. Cal. Feb. 25, 2015) (finding a viable claim by inferring servicer did not timely acknowledge receipt of borrower's application because borrower submitted the application 25 days before receiving a response); Pura v. Citimortgage, Inc., 2015 WL 81980, at *1 (C.D. Cal. Jan. 2, 2015) (finding a viable claim where servicer never acknowledged any of borrower's application materials in writing); Banks v. JP Morgan Chase, 2014 WL 6476139, at *10 (C.D. Cal. Nov. 19, 2014) (finding a viable claim where servicer failed to alert borrower it required utility bills to verify her address, then later denied her application for failing to provide those bills). *But see*

have 14 days to accept or reject that offer before the servicer can move ahead with foreclosure.[50] 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.[51] Further, servicers may not proceed with the foreclosure until 31 days after denying borrower's application, in writing,[52] or 15 days after denying borrower's appeal.[53] Servicers are prohibited from charging borrowers late fees during either the

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Shapiro v. Sage Point Lender Servs., 2014 WL 5419721, at *7 (C.D. Cal. Oct. 24, 2014) (dismissing borrower's claim for failure to plead any harm suffered from a clear violation of CC 2924.10).

[50] CAL. CIV. CODE § 2923.6(c)(2) (2013). A borrower's counteroffer, or request to continue negotiations, is considered a rejection of servicer's offer. *See* Johnson v. PNC Mortg., 2014 WL 6629585, at *6 (N.D. Cal. Nov. 21, 2014).

[51] CAL. CIV. CODE § 2923.6(f) (2013); *see* Weber v. PNC Bank, 2015 WL 269473, at *5 (E.D. Cal. Jan. 21, 2015) (finding a valid dual tracking claim where servicer used incorrect income figures to miscalculate borrowers' NPV numbers, denied their modification, and vaguely dismissed their appeal); 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). *But see* Colom v. Wells Fargo, 2014 WL 5361421, at *1 (N.D. Cal. Oct. 20, 2014) (finding servicer's failure to cite NPV numbers or explain other foreclosure alternatives in borrower's denial letter did not violate CC 2923.6(f) because the denial was not predicated on the NPV test and borrower did not show why servicer's failure to list alternatives was a material violation). 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).

[52] CAL. CIV. CODE § 2923.6(d) (2013); *see* Copeland v. Ocwen Loan Servicing, LLC, 2014 WL 304976, at *5 (C.D. Cal. Jan. 3, 2014) (denying MTD 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); 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).

[53] CAL CIV. CODE § 2923.6(e)(1)-(2) (2013); *see* Lane v. Citimortgage, 2014 WL 5036512, at *1 (E.D. Cal. Oct. 7, 2014) (granting a TRO because borrower pled servicer planned to continue with sale before responding to borrower's timely appeal and because servicer may have denied borrower based on incorrect information); 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). *But see* Lane v. Citimortgage, Inc., 2014 WL 6670648, at *4 (E.D. Cal. Nov. 21, 2014) (dissolving the court's previous TRO (see above) and denying a PI because servicer *had* formally denied borrower's appeal before the TRO and had postponed the sale for more than 15 days post-denial, complying with the statute).

application or appeal processes.[54] 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.[55]

2. "Complete" applications

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.[56] An application may be complete even if the servicer states that it may request further documentation.[57] Some courts have

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[54] CAL. CIV. CODE § 2924.11(f) (2013); *see also* Leonard v. JP Morgan Chase, No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Oct. 21, 2014) (finding a viable fee-related claim where borrower pointed to servicer's written notice his account was "incurring delinquency related fees and charges" while his modification application was pending). *But see* Beck v. Ocwen Loan Servs., LLC, 2015 WL 519052, at *3 (C.D. Cal. Feb. 6, 2015) (rejecting borrowers' fee claim because they alleged only that servicer threatened to charge fees during the modification process, not that servicer *actually* exacted those fees).

[55] 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.).

[56] *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* 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); 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*).

[57] 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

declined to decide the "completeness" of an application during the pleading stages of litigation.[58] Recently, courts have considered whether servicers may request duplicative or unnecessary information, and/or falsely claim documents were not received, to assert that an application was incomplete, thereby escaping dual tracking liability. So far, courts have sided with borrowers on this issue.[59]

3. Subsequent applications

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.[60] For

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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).

[58] *See, e.g.*, Hestrin v. Citimortgage, 2015 WL 847132, at *3 (C.D. Cal. Feb. 25, 2015) (accepting borrower's assertion that he submitted a "complete" application sufficient and denying servicer's MTD); Medrano v. Caliber Home Loans, 2014 WL 7236925, at *7 (C.D. Cal. Dec. 19, 2014) (borrower need not use specific statutory language in asserting that her application was "complete"); Gonzales v. Citimortgage, 2014 WL 7927627, at *1 (N.D. Cal. Oct. 10, 2014) (finding whether borrower submitted enough information to constitute a "complete" application *despite* using an incorrect form, according to the servicer, is a factual issue giving rise to "serious questions" on the merits of borrower's dual tracking claim and granting her PI); *cf. Penermon*, 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").

[59] *See*, *e.g.*, Shapiro v. Sage Point Lender Servs., 2014 WL 5419721, at *4-5 (C.D. Cal. Oct. 24, 2014) (rejecting as "absurd" servicer's assertion that borrower's application was incomplete because servicer representative told borrower he should ignore servicer's form letter stating that all requested documents were not received); *Gilmore*, 2014 WL 3749984, at *5 (granting a 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).

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

borrowers who had prior reviews,[61] this provision is critical because a second application under that circumstance will still trigger dual tracking protections. 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.[62] Courts have differed over the degree that a borrower must document a change in financial circumstances, most accepting specific dollar-amount specificity,[63] and a minority accepting a borrower's simple assertion that a change was documented as part of a subsequent, complete application.[64] Courts have also extended dual tracking protections to borrowers who can show that their servicer voluntarily

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[61] 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).

[62] *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). *But cf.* 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).

[63] *See, e.g.*, Gilmore v. Wells Fargo Bank, __ F. Supp. 3d __, 2014 WL 7183796, at *6 (N.D. Cal. Dec. 16, 2014 (borrower's subsequent application specifying a $5,400/month income increase and a $1,000/month decrease in expenses sufficiently stated a dual tracking claim); Penaloza v. Select Portfolio Servicing, Inc., 2014 WL 6910334, at *10 (C.D. Cal. Dec. 8, 2014) (borrower demonstrated material change in circumstances with an income increase of $5,500 per month and a $1,500 decrease in monthly expenses); Banks v. JP Morgan Chase, 2014 WL 6476139, at *8 (C.D. Cal. Nov. 19, 2014) (accepting borrower's assertion that she notified servicer of an $8,000 increase in monthly income as part of a subsequent application as adequately alleging she "documented" and "submitted" a material change in financial circumstances, though she did not explain the specific reasons behind the increase); *cf.* 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). *But see* Winterbower v. Wells Fargo, 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/month to $10,000/month).

[64] 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). *But see* 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); 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). *But cf.* 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.).

agreed to review a subsequent application,[65] or that the servicer never reviewed borrower's previous applications.[66] Importantly, the manner in which a loan servicer reviews a subsequent application is not regulated by statute.[67]

4. Other dual tracking protections

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.[68] 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.[69] The servicer must also rescind the NOD and cancel a pending sale.[70]

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[65] *See, e.g.*, 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.); *see also* Foronda v. Wells Fargo, 2014 WL 6706815, at *7 (N.D. Cal. Nov. 26, 2014) (court found viable dual tracking claim where servicer requested that borrower *re*submit her already existing application, then scheduled and refused to postpone a sale); *cf.* Rizk v. Residential Credit Solutions, Inc., 2015 WL 573944, at *12 (C.D. Cal. Feb. 10, 2015) (Servicer's solicitation of multiple applications, coupled with its denial of those applications based on their contents, rather than on missing documents, gives rise to dual tracking claim even where it was unclear if borrower submitted "complete" applications).

[66] *See, e.g.*, Johnson v. Bank of Am., 2015 WL 351210, at *4-5 (N.D. Cal. Jan. 23, 2015) (finding servicer never gave borrower a fair opportunity to be evaluated because it denied the application for lack of documents, not on its merits, and because servicer had previously acknowledged borrower's application as complete); 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).

[67] 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.*

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

[69] § 2924.11(b) (2013); *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). *But see* Beck v. Ocwen Loan Servs., LLC, 2015 WL

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

Created by the Dodd-Frank Act,[71] 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 (TILA),[72] 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),[73] they should consider whether HBOR actually gives greater protection, or better remedies, to their client.[74] 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,[75] 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

519052, at *2 (C.D. Cal. Feb. 6, 2015) (dismissing borrower's dual tracking claim because they did not allege they received a fully executed copy of their TPP agreement from their servicer, as required by the TPP's language).

[70] CAL. CIV. CODE § 2924.11(d) (2013).

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

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

[73] Whether a borrower may allege RESPA violations for servicer conduct occurring after January 10, 2014, but related to a complete modification application submitted *before* January 10, 2014, is unclear. *See* Lage v. Ocwen Loan Servicing, 2015 WL 631014, at *2-3 (S.D. Fla. Feb. 11, 2015) (finding the date servicer received borrower's application unclear, but opining that even if borrower submitted the application slightly before January 10, 2014, the new RESPA regulations could still apply to servicer).

[74] 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 rules involving the transferring of servicing rights. *See* 12 C.F.R. § 1024.33(d) (effective Jan. 10, 2014).

[75] *But see* discussion *infra* section II.D (using the UCL to enforce RESPA).

days delinquent before recording the notice of default.[76] 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.[77] HBOR specifies that pre-NOD contact be made "in person or by telephone," to discuss foreclosure alternatives,[78] 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.[79] Next, by the borrower's 45th day of delinquency, a servicer must make (or attempt) written contact.[80] HBOR requires a post-NOD notice,[81] 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.

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.[82] 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.[83] 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."[84] The CFPB rules provide complete dual tracking protections to borrowers who submit their application in their first 120 days of delinquency or before their

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[76] 12 C.F.R. § 1024.41(f) (effective Jan. 10, 2014).
[77] CAL. CIV. CODE §§ 2923.5, 2923.55 (2013); *see* discussion *supra* section I.A.
[78] § 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).
[79] 12 C.F.R. § 1024.39(a) (effective Jan. 10, 2014).
[80] § 1024.39(b) (effective Jan. 10, 2014).
[81] CAL. CIV. CODE § 2924.9(a) (2013). The notice is only required if the borrower has not yet "exhausted" modification attempts. *Id*.
[82] § 2923.6(g); *see also* discussion *supra*, section I.C.2.
[83] 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.
[84] 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* discussion in section I.C.1.

loan is referred to foreclosure.[85] 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,[86] but only borrowers who submit their application 90 or more days pre-sale are entitled to an appeal of this decision.[87] By contrast, all borrowers (with large servicers)[88] receive an appeal opportunity under HBOR.[89] Borrowers who submit their application less than 37 days before a scheduled foreclosure sale receive no dual tracking protections from the CFPB rules.[90] 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.[91] HBOR contains no such distinctions and leaves the "completeness" of an application up to the servicer and to the courts.[92]

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.[93] Advocates should note that in December 2014 the CFPB issued proposed rules that

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[85] 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).

[86] § 1024.41(g) (effective Jan. 10, 2014). Servicers must notify borrowers of their evaluation within 30 days of receiving borrower's complete application. § 1024.41(c); *see* Lage v. Ocwen Loan Servicing, 2015 WL 631014, at *2-3 (S.D. Fla. Feb. 11, 2015) (finding a viable RESPA claim where servicer did not evaluate borrower's application until two months after borrower's application submission).

[87] § 1024.41(h) (effective Jan. 10, 2014).

[88] 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).

[89] *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).

[90] *See* 12 C.F.R. § 1024.41(g) (effective Jan. 10, 2014).

[91] § 1024.41(c)(2)(iv) (effective Jan. 10, 2014).

[92] *See* discussion *supra* section I.C.2.

[93] *See also* HBOR Collaborative, *Too Many Choices: Navigating the Mortgage Servicing Maze*, SEPTEMBER FORECLOSURE NEWSLETTER (Sept. 2014).

would add to and amend the existing servicing regulations.[94] Major proposed revisions include protections for successors-in-interest, more regulations governing servicing transfers, and a rule requiring servicers to notify borrowers when applications are "complete."

II. Non-HBOR Causes of Action

Because HBOR limits injunctive relief to actions brought before the trustee's deed upon sale is recorded,[95] advocates with post-foreclosure cases should explore whether other claims could overturn a completed foreclosure sale. HBOR explicitly preserves remedies available under other laws.[96]

A. Wrongful Foreclosure Claims

Wrongful foreclosure claims (which can set aside or "undo" foreclosure sales)[97] are important for borrowers who were unable to bring pre-sale claims. Generally, claims challenging the foreclosing party's authority to foreclose[98] are unavailable before the sale because courts are hesitant to add new requirements to the non-judicial foreclosure statutes.[99] As a result, most wrongful foreclosure claims are

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[94] Bureau of Consumer Financial Protection, Amendments to the 2013 Mortgage Rules under the Real Estate Settlement and Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 74,176 (Dec. 15, 2014). NHLP submitted comments to these proposed rules in March, 2015, in collaboration with the California Reinvestment Coalition. The rules are expected to be finalized in late 2015, and effective in 2016.

[95] *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).

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

[97] See CEB, *supra* note 28, §§ 7.67A, 10.75, & 10.76, for descriptions of the different bases for wrongful foreclosure claims.

[98] 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).

[99] *See* Rahbarian v. JP Morgan Chase, 2014 WL 5823103, at *9 (E.D. Cal. Nov. 10, 2014) (dismissing pre-sale wrongful foreclosure/CC 2924(a)(6) claim based on robo-signing allegations as premature); 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

brought after the sale.[100] Advocates may find it easier to challenge the validity of the foreclosure in a post-sale unlawful detainer action,[101] where the servicer must affirmatively demonstrate proper authority.[102]

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.[103] A beneficiary's assignee must obtain an assignment of the deed of trust

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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).

[100] *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). Wrongful foreclosure issues may also be resolved in bankruptcy. *In re* Takowsky, 2014 WL 5861379 (B.A.P. 9th Cir. Nov. 12, 2014).

[101] 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."

[102] *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).

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

before moving forward with the foreclosure process.[104] While foreclosing entities have always required the authority to foreclose, HBOR codified this requirement in Civil Code Section 2924(a)(6).[105] 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.[106]

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.[107] This failed assignment attempt rendered the assignment void, not voidable, and led to the wrong party foreclosing.[108]

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.[109] The

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[104] *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).

[105] *See supra* note 98.

[106] *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).

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

[108] *Id.*

[109] *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.

California Supreme Court recently granted review of three cases that explicitly reject *Glaski*,[110] and will ultimately decide whether borrowers have standing to challenge loan assignments within the next year. Notably, the Bankruptcy Appellate Panel of the Ninth Circuit upheld a *Glaski*-like claim in a bankruptcy context as an objection to the creditor's proof of claim.[111]

In any case, generally alleging that the foreclosing entity is not the "true beneficiary" will fail.[112] To survive summary judgment, a borrower must produce evidence supporting his or her allegations attacking the authority to foreclose.[113] 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.[114]

Cal. Oct. 3, 2013) (same); Mendoza v. JP Morgan Chase Bank, N.A., 228 Cal. App. 4th 1020, 1034 (2014) (same), *depublished and review granted*, 337 P.3d 493 (Cal. 2014); *cf.* Kan v. Guild Mortg. Co., 230 Cal. App. 4th 736 (2014) (declining to consider the *Glaski* holding, distinguishing it as challenging a *completed* foreclosure, and noting that even the *Glaski* court did not take issue with the long-standing principle that borrowers may not bring pre-foreclosure actions that impose additional requirements to the statutory foreclosure structure).

[110] 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); *Mendoza*, 228 Cal. App. 4th 1020 (2014), *depublished and review granted*, 337 P.3d 493 (Cal. 2014) (deferring the matter, pending consideration and disposition of *Yvanova*); Keshtgar v. US Bank, N.A., 226 Cal. App. 4th 1201 (2014), *depublished and review granted*, 334 P.3d 686 (Cal. 2014) (same).

[111] *In re* Rivera, 2014 WL 6675693, at *9 (B.A.P. 9th Cir. Nov. 24, 2014) (allowing debtor to assert *Glaski*-like claim to contest creditor-beneficiary's proof of claim and asserted right to foreclose in the bankruptcy context, as opposed to an affirmative wrongful foreclosure suit to prevent or undo a sale).

[112] *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); 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.).

[113] *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).

[114] *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

Courts in California have allowed claims that servicers backdated assignments to reach the trial stage.[115] California law, however, does not require that assignments be recorded.[116]

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.[117] 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.[118]

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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, *depublished and review granted*, 337 P.3d 493 (Cal. 2014); 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. *But see* Ram v. Onewest Bank, FSB, 234 Cal. App. 4th 1, 12 (2015) (A borrower that alleges that the foreclosure sale was void, rather than voidable, need not allege prejudice or tender.).

[115] *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).

[116] *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). *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).

[117] *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).

[118] *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.

2. Possession of promissory note

Challenges based on possession of the note have generally been unsuccessful because assignees need not demonstrate physical possession of the promissory note to foreclose in California.[119] However, borrowers may succeed if they allege specific facts claiming a servicer lacked authority to foreclose.[120]

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.[121] Without a proper substitution of trustee, any foreclosure procedures (including sales)

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"); 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.).

[119] *Jenkins*, 216 Cal. App. 4th at 513; Debrunner v. Deutsche Bank Nat'l Tr. Co., 204 Cal. App. 4th 433, 440 (2012).

[120] *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).

[121] CAL. CIV. CODE § 2934a (2012). The statute provides a very relaxed standard governing the timing of this recording. The substitution may be executed and recorded after the substituted trustee records the NOD, if a copy of the substitution and an affidavit are mailed to the borrower. § 2934a(c). But even this disclosure requirement may be contracted around in the DOT. *See* Ram v. Onewest Bank, FSB, 234 Cal. App. 4th 1, 16 (2015).

initiated by an unauthorized trustee are void.[122] Courts have upheld challenges when the signer of the substitution may have lacked authority or the proper agency relationship with the beneficiary.[123] Courts have also allowed cases to proceed when the substitution of trustee was allegedly backdated.[124]

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[125] and must tender the unpaid principal balance of the loan.[126]

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[122] *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); *Ram*, 234 Cal. App. 4th at 17-18 (finding an NOD allegedly signed by an incorrect trustee not prejudicial to the borrowers because they received all pertinent information to rectify their default, rendering the sale voidable, not void).

[123] *See Engler*, 2013 WL 6815013, at *6 (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 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); *Sacchi*, 2011 WL 2533029, at *24 (denying servicer's motion to dismiss because an unauthorized entity executed a substitution of a trustee). *But see Ram*, 234 Cal. App. 4th at 13-14 (granting MTD in part because borrowers agreed that the substituted trustee maintained an agency relationship with the original trustee when it recorded the NOD, even if it was before the substitution was executed).

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

[125] *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

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.[127]

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.[128] 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.[129]

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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.'").

[126] *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.

[127] *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 § 2924.11 (2013) (prohibiting foreclosure action where borrower is compliant with a written foreclosure prevention alternative).

[128] 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 Ctr., *Foreclosures* § 3.2 (4th ed. 2012).

[129] *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.

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.[130] If the foreclosure commenced on or after 2013, this conduct may also form the basis for an HBOR claim under Civil Code Section 2924.17.[131]

B. Contract Claims

Breach of contract claims have succeeded against servicers that foreclose while the borrower is compliant with a Trial Period Plan (TPP)[132] or permanent modification.[133] An increasing number of state

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May 22, 2014) (declining to dismiss borrower's wrongful foreclosure claim on the grounds that *Pfeifer* only contemplates pre-sale injunctions).

[130] *See In re* Takowsky, 2014 WL 5861379, at *4-8 (B.A.P. 9th Cir. Nov. 12, 2014) (affirming the bankruptcy court's decision to recognize borrower's wrongful foreclosure claim when borrower had tendered the amount due on the notice of default).

[131] 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), *depublished and review granted*, 337 P.3d 493 (Cal. 2014) for an example), some borrowers have successfully asserted CC 2924.17 claims unrelated to robo-signing. *See*, *e.g.*, Henderson v. Ocwen Loan Servicing, 2014 WL 5461955, at *3 (N.D. Cal. Oct. 27, 2014) (rejecting servicer's argument that CC 2924.17 requires an allegation of widespread and repeated robo-signing and finding that the NOD could not have been "supported by competent and reliable evidence" because borrower was never in default); 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) (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).

[132] *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.); Curley v. Wells Fargo & Co.,

and federal courts have found that TPP agreements require servicers to offer permanent modifications to TPP-compliant borrowers.[134] This is now established law in both California state court and the Ninth Circuit.[135]

1. The statute of frauds defense

Servicers have invoked the statute of frauds to defend these contract claims.[136] In *Corvello v. Wells Fargo Bank*, for example, a borrower's oral TPP agreement modified her written deed of trust, so

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2014 WL 7336462, at *5 (N.D. Cal. Dec. 23, 2014) (servicer improperly failed to send borrower a permanent loan modification, or a notification that he did not qualify for a permanent modification, and foreclosed on borrower after borrower complied with the TPP and returned signed copies of the TPP); Harris v. Bank of Am., 2014 WL 1116356, at *4-6 (C.D. Cal. Mar. 17, 2014) (breach of contract claim 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).

[133] *See*, *e.g.*, Moreno v. Wells Fargo Home Mortg., 2014 WL 5934722, at *7 (E.D. Cal. Nov. 12, 2014) (denying servicer's MTD borrowers' oral contract claim where borrowers made a lump-sum payment and servicer began withdrawing monthly payments but never modified the mortgage as agreed); 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).

[134] *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).

[135] *See* California state and federal cases cited *supra* note 132; *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).

[136] 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).

her servicer argued statute of frauds.[137] The Ninth Circuit reasoned the borrower's full TPP performance allowed her to enforce the oral agreement, regardless of the statute of frauds.[138]

The statute of frauds defense has also failed when a servicer merely neglects to execute a permanent modification agreement by signing the final documents.[139] 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.[140]

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.[141] 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.[142]

2. Non-HAMP breach of contract claims

Breach of contract claims are also possible outside the HAMP context.[143] In 2013, a California Superior Court held that *Corvello* and *Barroso* could apply to borrower's breach of contract claim even though those cases dealt with *HAMP* TPPs and permanent modifications, while the "Loan Workout Plan" relied upon by this borrower was a

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[137] *Corvello*, 728 F.3d at 882, 885.
[138] *Id.* at 885.
[139] 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).
[140] *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.
[141] *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.
[142] *Chavez*, 219 Cal. App. 4th at 1062.
[143] *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 alternatives in "good faith," relying on the reasoning in *West v. JP Morgan Chase Bank*, 214 Cal. App. 4th 780 (2013)).

"proprietary" modification, created by the servicer, not HAMP.[144] 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.[145] The court agreed and overruled servicer's demurrer.[146] 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."[147] 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.[148] A federal district court and the California Court of Appeal have also found viable deceit, promissory estoppel, and negligence claims based on a borrower's proprietary TPP agreement.[149]

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

[145] *See* Corvello v. Wells Fargo Bank, N.A., 728 F.3d 878, 883-85 (9th Cir. 2013). At least one federal court has expressed suspicion that the HAMP nature of the TPP at issue in *Corvello* did not affect the outcome in that case. Beck v. Ocwen Loan Servs., LLC, 2015 WL 519052, at *3 (C.D. Cal. Feb. 6, 2015) (distinguishing *Corvello* as applying only to *HAMP* TPP agreements and noting Treasury Directive 09-01, which imposes rules on HAMP contracts that do not govern proprietary contracts, but declining to dismiss borrower's contract claim without further discussion on the TPP's language).

[146] *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."); *see also* Natan v. Citimortgage, 2014 WL 4923091, at *2 (C.D. Cal. Oct. 1, 2014) (finding that nothing in *Corvello* suggests that borrowers must be HAMP eligible to bring contract-related claims based on TPPs – it was the *language* of the TPP in *Corvello* that was determinative, not the fact it was a HAMP TPP).

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

[148] *Id.* If a proprietary TPP does not closely track the HAMP language or framework, courts are more skeptical of contract claims. *See* Nava v. JP Morgan Chase, 2014 WL 6886071, at *2, n.1 (C.D. Cal. Nov. 25, 2014) (allowing borrower's contract claim to move passed the pleading stage, but noting it was disinclined to find that servicer owed borrower a permanent modification because the TPP's language merely stated that borrower's TPP default "*eliminate[d] the opportunity* for a final loan modification").

[149] *See, e.g.*, *Natan*, 2014 WL 4923091, at *2 (promissory estoppel claim survived MTD, even assuming borrowers were not HAMP eligible, where TPP was "hopelessly

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 found *Corvello* inapposite.[150] A California Superior Court came to a similar conclusion.[151]

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.[152]

3. Promissory estoppel claims

Because promissory estoppel claims are exempt from the statute of frauds,[153] borrowers often bring them when there is no written modification agreement. To state a claim, borrowers must show not

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ambiguous"); Akinshin v. Bank of Am., N.A., 2014 WL 3728731, at *4-8 (Cal. Ct. App. July 29, 2014) (unpublished decision finding viable deceit, promissory estoppel, and negligence claims based on a proprietary TPP).

[150] Morgan v. Aurora Loan Servs., LLC, 2014 WL 47939, at *4-5 (C.D. Cal. Jan. 6, 2014). *But see Beck*, 2015 WL 519052, at *3 (declining to dismiss borrower's contract claim without further discussion on the language in her proprietary TPP, noting that *Morgan* focused on the language in a HAMP TPP compared to the borrower's FAA and WAG at issue).

[151] *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).

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

[153] *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).

only that the servicer promised a benefit (like postponing the sale,[154] not reporting a default to a credit reporting agency,[155] or offering a permanent modification[156]) and went back on that promise, but that the borrower detrimentally relied on that promise. Some courts require borrowers to demonstrate specific changes in their actions to show reliance,[157] while others take for granted that the borrowers *would*

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[154] *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).

[155] *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).

[156] *See*, *e.g.*, McNeil v. Wells Fargo Bank, N.A., 2014 WL 6681604, at *4 (N.D. Cal. Nov. 25, 2014) (denying servicer's MTD borrowers' PE claim based on servicer's agreement to modify borrower's mortgage and then breach of the agreed-to terms by improperly inflating borrowers' escrow); 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 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).

[157] *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); Jones v. Wachovia Bank, 230 Cal. App. 4th 935, 948-49 (2014) (finding that borrowers' informal, unrealized plans to borrow reinstatement funds from a friend and/or seek a sale postponement insufficient to show detrimental reliance); 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).

have acted differently absent servicer's promise.[158] If the claim *is* based in a written TPP agreement (sometimes brought in conjunction with a breach of contract claim),[159] the court may count the TPP payments themselves as reliance and injury.[160] Even though a promissory estoppel claim may not, in most cases, overturn a completed sale,[161] if the lender promised to postpone a foreclosure sale, a Section 2924g(c) claim could cancel the sale.[162] This type of claim does not require a borrower to show detrimental reliance.[163]

4. Breach of the 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."[164] Advocates have been successful with these claims (sometimes brought alongside

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[158] *See*, *e.g.*, Blankenchip v. Citimortgage, Inc., 2014 WL 6835688, at *5 (E.D. Cal. Dec. 3, 2014) (PE claim survived MTD where, relying on servicer's promise not to foreclose during TPP, borrowers opted for the TPP instead of pursuing other foreclosure alternatives); 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); 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).

[159] 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.

[160] *See* Alimena v. Vericrest Fin., Inc., 964 F. Supp. 2d 1200, 1218 (E.D. Cal. 2013).

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

[162] 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).

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

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

breach of contract claims), by asserting that servicers have frustrated borrowers' realization of the benefits of their TPP or permanent modification agreements.[165] They have been less successful bringing these claims based on original deeds of trust.[166]

C. Tort Claims

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[165] *See*, *e.g.*, Curley v. Wells Fargo & Co., 2014 WL 7336462, at *5 (N.D. Cal. Dec. 23, 2014) (finding a viable good faith claim based on servicer's failure to permanently modify after borrower complied with the TPP, frustrating borrower's ability to benefit from the TPP agreement); Silkes v. Select Portfolio Servicing, 2014 WL 6992144, at *5 (Cal. Ct. App. Dec. 11, 2014) (finding a viable claim where servicer refused to accept modified payments and instead tripled borrower's escrow, which was not agreed to in the modification); Blankenchip v. Citimortgage, Inc., 2014 WL 6835688, at *4-5 (E.D. Cal. Dec. 3, 2014) (valid claim where servicer foreclosed during TPP and before due-date to submit additional TPP documents expired); Henderson v. Ocwen Loan Servicing, 2014 WL 5461955, at *4 (N.D. Cal. Oct. 27, 2014) (Servicer improperly refused to accept borrower's automated, permanently modified mortgage payments, lied about returning payments, and failed to correct an improper default.); Lanini v. JP Morgan Chase Bank, 2014 WL 1347365, at *6 (E.D. Cal. Apr. 4, 2014) (valid 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); Fleet v. Bank of Am., 229 Cal. App. 4th 1403, 1409-10 (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); *Bushell*, 220 Cal. App. 4th at 929 (Servicer frustrated borrower's ability to benefit from a successful TPP agreement in finally receiving a permanent modification offer.).

[166] *See*, *e.g.*, Fevinger v. Bank of Am., 2014 WL 3866077, at *5 (N.D. Cal. Aug. 4, 2014) (agreeing to forestall foreclosure if borrower stopped 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 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) (successfully arguing that 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).

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.[167] 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.[168] "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.[169]

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 that process with the borrower, it owes a duty of care not to mishandle the application or negligently conduct the modification process.[170] Though most courts have, in the past, failed to find a duty

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

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

[169] *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).

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

of care created by engaging in the modification process,[171] *Alvarez* has begun to significantly shift judges' calculus on the negligence issue.[172]

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[171] *See, e.g.*, Benson v. Ocwen Loan Servicing, LLC, 562 F. App'x 567, 570 (9th Cir. 2014) (distinguishing *Jolley* as a construction loan case); 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"); *cf.* 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.); 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).

[172] *See*, *e.g.*, Duran v. Bank of Am., N.A., 2015 WL 794672, at *10 (C.D. Cal. Feb. 24, 2015) (following *Alvarez* to find a viable negligence claim where servicer's admitted but uncorrected clerical error led to a modification denial); Johnson v. PNC Mortgage, __ F. Supp. 3d __, 2015 WL 662261, at *3-4 (N.D. Cal. Feb. 12, 2015) (following *Alvarez* and finding a negligence claim where servicer used inflated income numbers to calculate borrower's modification, resulting in unaffordable payments); Medrano v. Caliber Home Loans, 2014 WL 7236925, at *11 (C.D. Cal. Dec. 19, 2014) (following *Alvarez* to find that servicer breached its duty of care by losing one application and wrongfully denying a second for missing documents while simultaneously acknowledging that application as "complete"); Gilmore v. Wells Fargo Bank, __ F. Supp. 3d __, 2014 WL 7183796, at *8-10 (N.D. Cal. Dec. 16, 2014) (citing *Alvarez*, and finding that servicer breached its duty of care by recording an NTS and scheduling a sale while a complete application was pending); Banks v. JP Morgan Chase, 2014 WL 6476139, at *12 (C.D. Cal. Nov. 19, 2014) (following *Alvarez* where servicer allegedly solicited borrowers HAMP applications knowing she could not qualify and then lost or mishandled the applications); Shapiro v. Sage Point Lender Servs., 2014 WL 5419721, at *8-10 (C.D. Cal. Oct. 24, 2014) (following *Alvarez* and inferring that servicer mishandled borrower's application by telling borrower both that documents were missing and that his application was complete); 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); *cf.* Curley v. Wells Fargo & Co., 2014 WL 7336462, at *6-7 (N.D. Cal. Dec. 23, 2014) (denying servicer's MTD borrower's constructive fraud claim, finding servicer owed borrower a duty of care once it entered into a TPP with borrower, and breached that duty by foreclosing while borrower was TPP compliant); Sokoloski v. PNC Mortg., 2014 WL 6473810, at *8 (E.D. Cal. Nov. 18, 2014) (relying on *Jolley*, rather than *Alvarez*, but finding servicer's offer of a permanent modification, through the TPP, created a duty of care). *But see* Geake v. JP Morgan Chase Bank, 2015 WL 331104, at *6-7 (C.D. Cal. Jan. 23, 2015) (distinguishing *Alvarez* and declining to find a duty of care where transferee servicer (after a servicing transfer) refused to permanently modify borrower's loan based on a TPP with the transferor servicer, sent borrower confusing communications, and refused to answer borrowers' questions); Campos-Riedel v. JP Morgan Chase, 2014 WL 6835203, at *5 (E.D. Cal.

Though *Alvarez* has been the main catalyst of change for negligence claims, the shift began even earlier than *Alvarez*, 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.[173]

Borrowers may of course also bring negligence claims outside of, or tangentially related to, the modification process. But there too, borrowers must usually demonstrate that the servicer owed the borrower a duty of care and breached it.[174] And though it is technically a rule of evidence, at least two courts have allowed advocates to allege claims under a negligence *per se* theory.[175]

If the servicer misleads the borrower during the loan modification process, the borrower may state a fraud or misrepresentation claim

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Dec. 3, 2014) (declining to find a duty of care where servicer sent NOD and NTS to borrower's ex-husband, from whom she had properly assumed the loan years before).

[173] *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).

[174] *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 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").

[175] Weber v. PNC Bank, 2015 WL 269473, at *5-6 (E.D. Cal. Jan. 21, 2015) (finding a viable negligence claim based on a negligence *per se* theory because borrowers are members of the class of people meant to be protected by HBOR's dual tracking statutes; and 2) borrowers need not prove servicer owed them a duty of care since the doctrine "'borrows' statutes to prove duty of care."); Leonard v. JP Morgan Chase, No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Oct. 21, 2014) (reframing borrower's negligence *per se* claim as a negligence claim and allowing it to survive servicer's demurrer).

against the servicer,[176] and possibly the servicer representatives.[177] An intentional wrongful foreclosure may also subject the lender to an intentional infliction of emotional distress claim,[178] though borrowers have been somewhat more successful in alleging emotional distress *damages* related to other types of claims.[179]

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[176] *See* Khan v. ReconTrust Co., __ F. Supp. 3d __, 2015 WL 798966, at *6-7 (N.D. Cal. Feb. 23, 2015) (fraud claim based on completed TPP and servicer's withdrawal of permanent modification offer because it "did not receive" final income verification from borrower); Morris v. Residential Credit Solutions, Inc., 2015 WL 428114, at *5-10 (E.D. Cal. Feb. 2, 2015) (granting PI based on borrowers' fraud claim, which was rooted in servicer's dual tracking activity); Johnson v. Bank of Am., 2015 WL 351210, at *7 (N.D. Cal. Jan. 23, 2015) (Servicer misrepresented to borrower on five occasions that her applications were complete, only to later deny receipt of those applications, or reject the applications themselves due to missing documents.); Curley v. Wells Fargo & Co., 2014 WL 7336462, at *8 (N.D. Cal. Dec. 23, 2014) (Borrower alleged viable fraud claim where servicer falsely misrepresented it would refrain from foreclosing while borrower was TPP-compliant.); Medrano v. Caliber Home Loans, 2014 WL 7236925, at *9 (C.D. Cal. Dec. 19, 2014) (finding borrower was not required to double-check county property records to confirm servicer's misrepresentation that no foreclosure would occur, and a viable fraudulent misrepresentation claim); Blankenchip v. Citimortgage, Inc., 2014 WL 6835688, at *6 (E.D. Cal. Dec. 3, 2014) (denying servicer's MTD borrower's fraud claim where borrowers pled that servicer never intended to permanently modify their mortgage and simply "lured" them into the TPP to extract more money, citing servicer's foreclosure before the deadline for filing additional documents expired.); Fleet v. Bank of Am., 229 Cal. App. 4th 1403, 1410 (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). *But see* 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).

[177] *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*, 229 Cal. App. 4th at 1411-12 (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.).

[178] *See* Smith v. JP Morgan Chase, 2014 WL 6886030, at *4 (C.D. Cal. Nov. 26, 2014) (IIED claim upheld where servicer put borrower into default though she was current on her mortgage, continued with foreclosure after admitting its error, and then forced borrower to pay $20,000 she did not owe to stop the wrongful foreclosure); Ragland v. U.S. Bank Nat'l Ass'n, 209 Cal. App. 4th 182, 203-05 (2012).

[179] *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

D. UCL Claims

California's Unfair Competition Law (UCL) provides another opportunity for borrowers to obtain restitution or to stop or postpone a foreclosure[180] if they can show the servicer engaged in an unlawful, unfair, or fraudulent practice.[181]

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.[182] For example, borrowers have used UCL claims to challenge allegedly unlawful assignments, even though the underlying statute does not provide a right of action.[183] An "unlawful" UCL claim may also be based on statutory violations *with* a private right of action,[184] and even common law causes of action.[185] In addition, because UCL's remedies are cumulative to existing remedies, an unlawful prong claim might

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emotional distress as part of her damages, to 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).

[180] CAL. BUS. & PROF. CODE § 17203 (2004). For a full explanation of UCL claims and available remedies in the foreclosure context, see CEB, *supra* note 28, § 12.27.

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

[182] *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).

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

[184] *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.).

[185] *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).

provide injunctive relief for HBOR violations even after the trustee's deed is recorded.[186] Such post-sale relief would be unavailable under HBOR's statutory remedies.[187] 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.[188]

The unfair prong of the UCL makes unlawful practices that violate legislatively stated public policy,[189] even if the practice is not technically prohibited by statute. It also prohibits practices that are "immoral, unethical, [or] oppressive."[190] For example, even though HBOR did not become effective until 2013, courts have held pre-2013 dual tracking unfair under the UCL.[191] A borrower may also bring an "unfair" claim by alleging that a servicer's conduct or statement was

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[186] *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.).

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

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

[189] *See, e.g.*, Foronda v. Wells Fargo, 2014 WL 6706815, at *10 (N.D. Cal. Nov. 26, 2014) (allegation of dual tracking also states a claim under the UCL as an unfair business practice).

[190] *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).

[191] *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.").

misleading.[192] A servicer's failure to honor a prior servicer's loan modification after servicing transfer can also be an unfair practice.[193]

The fraudulent prong of the UCL prohibits fraudulent practices that are likely to deceive the public.[194] For example, courts have allowed UCL fraudulent claims against banks that offered TPPs that did not comply with HAMP guidelines,[195] that induced borrowers to make TPP payments by promising permanent modifications and then not offering them,[196] and that misrepresented their fee posting method and misapplied service charges to mortgage accounts.[197] One court even found a lender's pursuit of foreclosure without any apparent

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[192] *See*, *e.g.*, Zuniga v. Bank of America, N.A., 2014 WL 7156403, at *8 (C.D. Cal. Dec. 9, 2014) (adopting a three-factor test and finding servicer's verbal offer of a modification and subsequent foreclosure unfair because: 1) loss of property and loss of an *opportunity* to modify constitutes substantial injury; 2) dual tracking practices contribute nothing positive to consumers or to competition; and 3) other reasonable consumers could not have avoided being dual tracked in this situation, regardless of borrower's responsibility for her default); *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.).

[193] *See* Lewis v. Bank of Am., N.A., 2013 WL 7118066, at *3 (C.D. Cal. Dec. 18, 2013).
[194] Daugherty v. Am. Honda Motor Co., Inc., 144 Cal. App. 4th 824, 838 (2006).
[195] 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).
[196] 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.
[197] *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).

authority to foreclose a business practice likely to deceive the public and a valid fraudulent-prong UCL claim.[198]

Because of Proposition 64, a borrower bringing a UCL claim must show: (1) lost money or property that is (2) directly caused by the unfair competition.[199] Courts have found the initiation of foreclosure proceedings to constitute lost property interest[200] but have demanded that the loss be directly caused by the wrongful conduct,[201] not simply the borrower's monetary default[202] or other actions.[203] Courts have

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[198] Subramani v. Wells Fargo Bank, N.A., 2013 WL 5913789, at *6 (N.D. Cal. Oct. 31, 2013).

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

[200] *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); Barrioneuvo v. Chase Bank, N.A., 885 F. Supp. 2d 964, 977 (N.D. Cal. 2012). *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.).

[201] *See* Nava v. JP Morgan Chase, 2014 WL 6886071, at *3 (C.D. Cal. Nov. 25, 2014) (finding servicer's TPP, and its failure to comply with it, directly led to borrower's injury); 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 servicer providing them with inaccurate loan information, preventing them from refinancing their mortgage with favorable interest rates).

[202] *See* Hernandez v. Specialized Loan Servicing, 2015 WL 350223, at *8 (C.D. Cal. Jan. 22, 2015) (finding borrower's growing loan and clouded title were directly caused by borrower's default, absent an allegation that servicer instructed borrower to become delinquent on her mortgage); Rahbarian v. JP Morgan Chase, 2014 WL 5823103, at *10-11 (E.D. Cal. Nov. 10, 2014) (imminent sale was caused by borrower's default, not servicer's actions); 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

accepted,[204] and rejected,[205] other sources of economic loss, but there does not appear to be a consistent pattern in this regard.

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.[206]

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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).

[203] *See, e.g.*, Johnson v. PNC Mortg., 2014 WL 6629585, at *8 (N.D. Cal. Nov. 21, 2014) (Borrowers failed to allege UCL standing where *their* rejection of servicer's original modification offer—not servicer's SPOC violations—led to borrower's acceptance of a financially worse loss mitigation plan.).

[204] *See*, *e.g.*, Johnson v. PNC Mortgage, __ F. Supp. 3d __, 2015 WL 662261, at *7 (N.D. Cal. Feb. 12, 2015 (accepting borrower's assertion that inflated modified payments—due to servicer's use of an improper income figure in calculating their modification—constituted an economic injury); 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.).

[205] *See*, *e.g.*, Hernandez v. Specialized Loan Servicing, 2015 WL 350223, at *8 (C.D. Cal. Jan. 22, 2015) (damaged credit and time/resources spent applying for modifications do not constitute economic damages for UCL standing); 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 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.).

[206] *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*; *see also* Banks v. JP Morgan Chase, 2014 WL 6476139, at *9 (C.D. Cal. Nov. 19, 2014) (rejecting servicer's MTD borrower's SPOC and CC 2924.10 claims for failure to allege actual economic damages where borrower alleged the

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.[207] 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.[208] At least in federal court, an identical standard governs the issuance of a temporary restraining order.[209] In both state and federal court, the loss of one's home is considered irreparable harm.[210]

Both state and federal courts have enjoined pending foreclosure sales when the servicer violated HBOR.[211] Courts have also granted preliminary injunctions in non-HBOR cases.[212]

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violations were intentional and could recover statutory damages). 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 95.

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

[208] 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.").

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

[210] 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.*, 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).

[211] *See*, *e.g.*, Gonzales v. Citimortgage, 2014 WL 7927627, at *2 (N.D. Cal. Oct. 10, 2014) (PI granted on dual tracking claim); Gilmore v. Wells Fargo Bank, N.A., 2014 WL 3749984, at *2-5 (N.D. Cal. July 29, 2014) (same); *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); 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); 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.

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.[213] 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.[214] In one post-foreclosure case, the court issued a preliminary injunction against enforcement of the writ of possession,[215] and in an HBOR case, the court granted a TRO to prevent servicer from selling the home to a BFP.[216]

C. Tender & Bond Requirements

Capital Loans Inc., 34-2014-00157940-CU-CR-GDS (Cal. Super. Ct. Sacramento Cnty. May 1, 2014) (same); 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.). *See generally* discussion *supra* section I.

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

[213] *See* CAL. CIV. CODE § 2924(c).

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

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

[216] Nguyen v. Trojan Capital Improvements, 2015 WL 268919, at *3 (C.D. Cal. Jan. 16, 2015) (Servicer sold the home without notice to borrower after removing the case to federal court, which dissolved the existing TRO. The federal district court granted a new TRO, finding that borrower will "be permanently denied an opportunity to determine whether his rights were violated, and whether he is entitled to obtain a loan modification" if the home was sold to a BFP.).

To set aside a foreclosure sale, a borrower must generally "tender" (offer and be able to pay) the amount due on their loan.[217] This is especially true when the challenge is premised on a procedural defect in the foreclosure notices.[218] However, tender is not required if it would be inequitable.[219] In addition, courts have excused the tender requirement when (1) the sale is void (e.g., the trustee conducted the sale without legal authority);[220] (2) if the loan was reinstated;[221] (3) if the borrower was current on their loan modification;[222] (4) if the borrower is challenging the validity of the underlying debt;[223] and (5) if the sale has not yet occurred.[224]

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

[218] 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.").

[219] *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).

[220] Aniel v. Aurora Loan Servs., 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, 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).

[221] *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).

[222] Blankenchip v. Citimortgage, Inc., 2014 WL 6835688, at *7 (E.D. Cal. Dec. 3, 2014) (Borrowers were TPP-compliant when servicer foreclosed.); Harris v. Bank of Am., N.A., 2014 WL 1116356, at *7 (C.D. Cal. Mar. 17, 2014) (Borrowers were compliant with their permanent 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).

[223] 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

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.[225] The Legislature, the court reasoned, intended borrowers to enforce those outreach requirements, and requiring tender would financially bar many claims.[226] Several federal and state courts have rejected servicers' tender arguments in HBOR cases.[227] In another case, the court found tender unnecessary simply because "[HBOR] . . . imposes no tender requirement,"[228] and in another, the servicer conceded at the

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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).

[224] 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).

[225] 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.

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

[227] *See* Medrano v. Caliber Home Loans, 2015 WL 848347, at *4-5 (C.D. Cal. Feb. 26, 2015) (noting that tender has been excused where borrowers bring statutory causes of action and where borrower merely seeks damages post-sale, rather than to undo the sale); 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).

[228] 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)).

preliminary injunction hearing that tender is not required in HBOR, pre-sale cases.[229]

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[230] and can be waived for indigent plaintiffs.[231] Courts consider a variety of factors in determining bond amounts. Some use fair market rent of comparable property,[232] the prior mortgage payment,[233] the modified mortgage payment,[234] or the amount of foreseeable damages incurred by a bank

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

[230] *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).

[231] 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.").

[232] *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, 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).

[233] *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).

[234] *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,

in delaying a foreclosure sale.[235] Others have deemed the deed of trust sufficient security and chose not to impose a separate, monetary bond.[236] Some courts set extremely low, one-time bonds.[237] Advocates

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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).

[235] Gonzales v. Citimortgage, 2014 WL 7927627, at *2 (N.D. Cal. Oct. 10, 2014) (setting the bond at $2,000 per month to cover servicer's potential damages caused by the PI); 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").

[236] *See, e.g.,* Lane v. Citimortgage, 2014 WL 5036512, at *2 (E.D. Cal. Oct. 7, 2014) (deeming no monetary bond necessary because "'there is no evidence [servicer] will suffer damages from the injunction'"); 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).

[237] 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, 11-12 (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).

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.[238] In any event, the court should not set the bond at the unpaid amount of the loan or the entire amount of arrearages.[239]

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.[240] 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.[241] Courts are more inclined to take judicial notice if the truth of the declaration's contents is undisputed.[242]

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

[239] *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).

[240] 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.

[241] *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 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).

[242] *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).

E. Attorney's Fees

Prior to HBOR's enactment, loan documents were the only avenue to attorney's fees.[243] Now, HBOR statutes explicitly allow for attorney's fees, even if the borrower obtained only injunctive relief.[244] Advocates have experienced mixed success convincing courts that "injunctive relief" includes TROs and preliminary injunctions, as opposed to permanent injunctions.[245] 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. At least one court has found attorney's fees recoverable because the court denied servicer's motion to dismiss

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[243] 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 28, § 7.23.

[244] "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).

[245] *Compare* Pearson v. Green Tree Servicing, LLC, 2014 WL 6657506, at *4 (N.D. Cal. Nov. 21, 2014) (borrower is "prevailing party" based on issuance of PI which led to servicer's voluntary rescission of dual-tracked NOD); 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"). *See also* Pearson v. Green Tree Servicing, LLC, 2015 WL 632457, at *4-6 (N.D. Cal. Feb. 13, 2015) (granting borrower's attorney's fees motion (see prior *Pearson* case, cited above) for work performed until the NTS was rescinded, and for the work on the attorney's fees motion itself. Any work performed after the NTS was rescinded was not awarded attorney's fees because the rescission "remedied" the HBOR violation under CC 2924.12.).

borrower's dual tracking claim (fees would be recoverable only if borrower ultimately prevails).[246]

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.[247] Since voluntarily dismissing an action prevents any party from prevailing, courts have denied servicers' motions for attorney's fees in these situations.[248]

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).[249] HOLA regulates federal savings associations, the NBA, national banks.[250] State statutes face field preemption under HOLA; the NBA only subjects them to conflict preemption.[251]

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. Some national banks, especially Wells Fargo, commonly assert a HOLA preemption defense where the loan at issue originated with a federal savings association (FSA or FSB) –in Wells Fargo's case, the FSA was World Saving's Bank. Wells argues that HOLA preemption attaches to the loan, and insulates Wells Fargo from HBOR liability, regardless of its own conduct as a national bank. Up until early 2014, most federal courts generally accepted this argument without independent analysis.[252] The

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[246] Rizk v. Residential Credit Solutions, Inc., 2015 WL 573944, at *13 (C.D. Cal. Feb. 10, 2015) (finding borrower correctly requested attorney's fees because the court denied servicer's MTD borrower's dual tracking claim).
[247] CAL. CIV. CODE § 1717(a) (1987).
[248] *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).
[249] HOLA is codified at 12 U.S.C. §§ 1461-1470 (2013), the NBA at 12 U.S.C. §§ 21-216 (2013).
[250] *See* Aguayo v. U.S. Bank, 653 F.3d 912, 919, 921 (9th Cir. 2011).
[251] *Id.* at 922.
[252] *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

tide turned in early 2014, however; most courts now hold that national banks and other servicers who are not savings associations *cannot* invoke HOLA preemption to defend their own conduct.[253]

Courts applying a proper preemption analysis have found former Section 2923.5 not preempted by the NBA.[254] Under a HOLA preemption analysis, state courts have also upheld the statute,[255] but it has not fared as well in federal courts.[256] 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

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*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).

[253] *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. 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).

[254] *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).

[255] *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.).

[256] *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).

HOLA,[257] but not by the NBA.[258] Importantly, the Dodd-Frank Wall Street Reform and Consumer Protection Act amended HOLA in 2011 to adopt the NBA's less strict conflict preemption analysis.[259] Conflict preemption will apply to federal savings associations for conduct occurring in 2011 and beyond.[260] However, the new preemption standard does not affect the application of state law to contracts entered into before July 2010.[261]

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.[262]

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[257] *See*, *e.g.*, Aldana v. Bank of Am., N.A., 2014 WL 6750276, at *5-6 (C.D. Cal. Nov. 26, 2014) (preempting HBOR); 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).

[258] 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).

[259] *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.").

[260] *See* 12 U.S.C. § 5582 (2010).

[261] 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).

[262] *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

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.[263] 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.

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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). *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").

[263] 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.

Summaries of Recent Cases

Published State Cases

Wrongful Foreclosure Analysis of Allegedly Improper Substitution of Trustee: Void vs. Voidable and CC 2934a

Ram v. Onewest Bank, FSB, 234 Cal. App. 4th 1 (2015): In a suit of equity to set aside a completed foreclosure sale, borrowers must allege: 1) that the sale was wrongful, either procedurally or substantively; 2) that borrowers were prejudiced by the wrongful conduct; and 3) tender the amount owed on borrowers' debt. If, however, a borrower alleges that the foreclosure sale was void, rather than voidable, the borrower need not allege prejudice or tender. A sale may be void due to either procedural or substantive defects in the sale, but those defects must be "substantial," where the foreclosing entity lacked authority to foreclose, for example. CC 2924(a)(6) restricts the authority to foreclose to the beneficiary under the DOT, the original or properly substituted trustee, or a designated agent of the beneficiary. When a substitution of trustee is executed after an NOD is recorded, but before an NTS is recorded, servicers must mail a copy of the substitution to anyone who should receive a copy of the NOD, and include an affidavit of compliance with this requirement. CC § 2934a(c). Notably, California courts have held that "parties may lawfully contract as to the form of and procedure to be employed in effecting [a] substitution" that does not comply with CC 2934a. Here, borrowers alleged that the purported trustee improperly recorded the NOD weeks before the actual trustee executed the substitution of trustee, which belatedly gave the purported trustee the authority to foreclose. Borrowers argued this defect was so substantial that it broke the chain of title and rendered the sale void. The Court of Appeal disagreed, as did the trial court. First, executing and recording a substitution of trustee after recording an NOD is explicitly allowed under CC 2934a. The court found that the original trustee "complied with the procedure authorized by the Legislature" (notably, the court did not say "the requirements in CC

2934a(c)),” so there was no defect in the foreclosure process at all, much less a defect substantial enough to render the sale void rather than voidable. Second, not only were the trustee substitution rules complied with, but borrowers do not dispute that the entity that recorded the NOD was acting as the agent of the original trustee. An agent of the trustee has the authority to foreclose under CC 2924(a)(6) as well as CC 2924b(b), which acknowledges that “an agent of the named trustee” may be considered an “authorized agent to record the [NOD].” Third, *even if* the NOD was improperly recorded by an un-substituted, non-agent of the trustee, that entity ultimately had authority to carry out the rest of the foreclosure, including the sale, because it was properly substituted as trustee before foreclosure. *See* CC § 2934a(d) (“Once recorded, the substitution shall constitute conclusive evidence of the authority of the substituted trustee.”). Fourth, the court rejected borrower’s argument that because the original trustee failed to include an affidavit of mailing in the recorded substitution, demonstrating compliance with CC 2934a(c) (see above), the substitution violated CC 2934a(c). Instead, the court looked to the DOT, which gave the original trustee permission to substitute a trustee without an affidavit. The original trustee, in other words, did not have to comply with any aspect of CC 2934a(c) because it had contracted around those requirements, with borrowers. Finally, and related to the court’s first reason, any purported defect in the substitution was not “substantial” enough to render the sale void because the defect did not prejudice the borrowers. The NOD itself provided the borrowers with all pertinent information they could have used to avoid foreclosure: the arrearage and instructions on how to cure it. Any alleged defect in the trustee’s signature on the NOD did not harm the borrowers. The court therefore affirmed the trial court’s sustaining of trustee’s demurrer.

Unpublished State Cases[264]

SB 94 Prohibits "Unbundling" Modification Services and Fees; Disciplinary Analysis

***In re* Scurrah**, 2015 WL 715333 (Cal. Bar Ct. Feb. 12, 2015): Senate Bill (SB) 94 (codified as CC 2944.6 and 2944.7) prohibits anyone, including attorneys, from charging clients upfront fees for doing any type of modification work. Specifically, anyone who negotiates, arranges, or offers to "perform a mortgage loan modification" or any other forbearance agreement, cannot: "claim, demand, charge, collect, or receive *any* compensation until after the person has fully performed *each and every service* the person contracted to perform or represented that he or she would perform" (emphasis added). The State Bar brought this disciplinary action against an attorney who "unbundled" his modification fees. His single retainer agreement broke his services into discrete "phases" and he charged clients at the completion of each phase, rather than at the completion of his entire service. Later, the attorney continued to charge his clients for phases of work, but used separate retainer agreements corresponding to each phase. The Review Department of the State Bar Court followed the only other published case to address this issue, *In re* Matter of Taylor, 5 Cal. State Bar Ct. Rptr. 221 (2013),[265] and agreed with the hearing judge's decision to hold the attorney culpable, and with the recommended discipline. First, under the plain meaning of the statute, the attorney was prohibited from charging for any one service before fully completing "each and every" service contracted to in the retainer. SB 94 is an all or nothing statute: attorneys can only charge their clients once, and then only after *fully* performing *all* services. Second, the Review Department found the attorney's conduct willful. He continued to use a single retainer agreement to collect fees for unbundled services after reading SB 94 and with full knowledge that professionals in this field disagreed as to its application to unbundled services. He knew the risks of violating SB 94 and continued unbundling services anyway.

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[264] Cases without Westlaw citations can be found at the end of the newsletter. Please refer to Cal. Rule of Ct. 8.1115 before citing unpublished decisions.
[265] This case is summarized in our Case Compendium.

Further, the attorney did not act in good faith by consulting other attorneys before unbundling his services and fees. Attorneys may "not rely on another attorney's opinion as a defense to violating rule governing attorney ethics." Additionally, the attorney knew about SB 94 and "chose to adopt his own interpretation" of it.

Bar discipline is determined by weighing the mitigating and aggravating factors specific to each case. The Department agreed with the hearing judge that the attorney's multiple violations (at least nine clients) and the significant harm caused to his clients constituted aggravating factors. It disagreed, however, that the attorney was indifferent. When the Bar suggested using multiple retainer agreements for discrete services, the attorney adopted that strategy. And the attorney did not continue to use a single retainer agreement after the *Taylor* decision. (Notably, the Review Department chose not to decide or comment on the propriety of using multiple retainer agreements, as the misconduct at issue focused solely on the attorney's use of a single retainer.) The Department also agreed with the hearing judge's finding of several mitigating factors: 1) 30-years of practice free from discipline; 2) good faith (in consulting experts in the field—though he received differing opinions—and in refunding several fees); and 3) good character. The Department also found cooperation (stipulating to facts) and community service weighing in the attorney's favor. The court affirmed the hearing judge's recommendation of a 90-day suspension and two-years probation.

Federal Cases

Trustees are Liable under HBOR; Tender Excused where Borrower Seeks Damages Only

Medrano v. Caliber Home Loans, 2015 WL 848347 (C.D. Cal. Feb. 26, 2015):[266] HBOR's dual tracking protections prohibit a "servicer, mortgagee, *trustee*, beneficiary, or authorized agent" from moving

[266] The previous iteration of this case is in the Case Compendium as *Medrano v. Caliber Home Loans*, 2014 WL 7236925 (C.D. Cal. Dec. 19, 2014) (Borrower's dual tracking, fraud, negligent misrepresentation, and negligence claims survived the MTD.).

forward with foreclosure while a borrower's modification application is pending (emphasis added). CC § 2923.6. Here, borrower alleged her servicer violated CC 2923.6, and that the trustee was jointly and severally liable for servicer's HBOR violation because it acted as servicer's agent. Trustee argued it should be dismissed from the suit because HBOR does not apply to trustees, as evidenced by CC 2920.5: "'Mortgage servicer' shall not include a trustee . . . acting under a power of sale pursuant to a [DOT]." The court disagreed with both the borrower's and trustee's arguments. The statute trustee pointed to merely defines a mortgage servicer – it does not restrict HBOR's application to servicers only. Rather, trustees are explicitly listed as entities regulated by CC 2923.6. Under the plain statutory language, then, trustees may be held liable for dual tracking violations. The principal-agent relationship between the servicer and trustee had no effect on the court's calculus. The court denied trustee's motion to dismiss it from the case.

Equitable wrongful foreclosure claims to set aside a foreclosure sale require, *inter alia*, a borrower to tender the amount due on their loan. Here, borrower asserted a wrongful foreclosure claim to set aside the sale *and* to recover damages, including damages to compensate her for her damaged credit. She also failed to allege tender, or any tender exception. The court therefore granted the MTD her claim as it pertained to her request to set aside the sale. The court disagreed with servicer, however, that borrower must tender to recover damages. For support, servicer cited cases involving disputes between senior and junior lienholders, which is not the case here. The court denied servicer's MTD borrower's wrongful foreclosure claim insofar as it seeks to recover damages.

CC 2923.55: "Complete" Application, "Material" Violation, and "Remedy"; SPOC Pleading Specificity; Viable CC 2924.10 Claim

Hestrin v. Citimortgage, 2015 WL 847132 (C.D. Cal. Feb. 25, 2015): Servicers may not file an NOD until 30 days after contacting the borrower to assess the borrower's financial situation and explore foreclosure alternatives. Specifically, a servicer must send a borrower a

written statement that the borrower may request particular information about their loan. CC § 2923.55(b)(1)(B). Here, borrower alleged he received neither the information servicer was supposed to communicate, nor the written statement. Curiously, servicer argued it did not have to comply with this pre-NOD outreach requirement because borrower had not submitted a complete application. The statute, however, does not make submission of *any* application a borrower requirement. Rather, it contemplates situations where a borrower may have just defaulted and is not yet aware of a servicer's loss mitigation programs, let alone applied for one. The only reference to a "complete" application in CC 2923.55 falls in the section that prohibits servicers from recording NODs until they have complied with HBOR's dual tracking rules *and* the contact requirements of CC 2923.55. And this subsection is only triggered "*if* the borrower has provided a complete application" (emphasis added). Submitting an application is completely irrelevant to whether a borrower receives the outreach protections of CC 2923.55; the statute simply provides that once a borrower *does* submit a complete application, a servicer is required to comply with the dual tracking regulations—on top of the outreach requirements—before recording an NOD. Rather than addressing servicer's gross misinterpretation of CC 2923.55, the court denied servicer's MTD on other grounds, finding that borrower's assertion that he submitted a "complete" application sufficient at the pleading stage. The court also cited this conclusion as the basis for denying servicer's MTD borrower's dual tracking claim.

Relief under HBOR is only available for a servicer's "material" violation of the operative statutes. CC § 2924.12. Here, borrower alleged servicer committed a material violation of CC 2923.55 by failing to provide the required pre-NOD outreach. The court accepted this as a "material" violation simply because CC 2923.55 specifically requires pre-NOD outreach. Servicer contended, but cited no supporting authority, that the violation was immaterial because borrower did not allege he would have evaded default had he received the proper pre-NOD outreach. The court denied servicer's MTD.

If a servicer "corrects" or "remedies" its HBOR violation before recording the trustee's deed upon sale, it can escape HBOR liability. CC § 2924.12(c). Here, servicer cited no efforts to either correct or remedy its pre-NOD outreach or dual tracking violations. The court added, "the possibility for remediation does not render an ongoing breach moot." If servicer rescinded a dual tracked NOD, however, that could constitute a "correction" or "remedy" that would moot borrower's HBOR claim. That is not the case here, so the court denied servicer's MTD borrower's pre-NOD outreach and dual tracking claims.

SPOCs may be a "team" of people, or an individual, and must facilitate the loan modification process and document collection, possess current information on the borrower's loan and application, and have the authority to take action, among other duties. Here, borrower's vague allegation that he "contacted [servicer] several times and was given many unjustified delays and inconsistent and vague status updates on [his] file," insufficiently states a SPOC claim. Borrowers must state the "who, what, or when" of a SPOC violation, including descriptions of conversations with representatives, so the court can determine whether a SPOC actually violated the statute. Borrower's SPOC claim was dismissed.

Servicers must respond to a borrower's submission of a modification application within five business days of receipt, acknowledging receipt and requesting any missing documents. CC § 2924.10. Borrower alleged he received written acknowledgment of his application, but not until 25 days after its submission. Though borrower alleged only the date he submitted his application, not when servicer received the application, the court inferred that the servicer received the application more than five days before it sent the written acknowledgment. The court declined to dismiss borrower's CC 2924.10 claim.

Viable Negligence Claim under *Alvarez*; UCL Standing Analysis

Duran v. Bank of Am., N.A., 2015 WL 794672 (C.D. Cal. Feb. 24, 2015): Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical

lender-borrower relationship. A recently published Court of Appeal decision, *Alvarez v. BAC Home Loans Servicing*, 228 Cal. App. 4th 941 (2014) found that while servicers have no duty to initiate the modification process or to grant a modification, once they agree to negotiate a modification they owe a duty to borrowers not to mishandle that process. This court agreed with *Alvarez*. Here, servicer sent borrower a permanent modification offer, which borrower attempted to accept by signing and notarizing the document. The agreement, however, used an incorrect iteration of borrower's name (adding a "Jr."), and could not be notarized. Though a representative promised borrower that servicer would re-do the paperwork and give the borrower extra time to accept the offer, servicer denied borrower the modification for failing to accept the offer. Over the following months and years, borrower asked servicer for a new modification agreement using his proper name. At one point, servicer did send him another modification, but it was again addressed using the incorrect name. Borrower *again* attempted to notarize the agreement and failed. And he was *again* denied the modification for failing to accept it. The court found servicer's mishandling of the modification process to constitute negligence: it erred in drafting the modification documents and it was on notice of its errors. Further, it rejected borrower's application for failing to accept the offer when it instructed borrower to wait for servicer to correct the clerical error. In asserting damages, borrower argued that, but for servicer's negligence, he would have a modification and his arrears would be lower. The court agreed and denied servicer's MTD borrower's negligence claim.

Under California's Unfair Competition Law (UCL), a plaintiff must demonstrate: 1) an injury in fact (lost money or property); 2) caused by the unfair competition. Cal. Bus. & Prof. Code § 17204. Here, borrower alleged servicer's mishandling of his loan modifications resulted in paid TPP payments (for a permanent modification that was never offered), and lost "procedural rights and protections under HBOR that were bargained for and priced into the cost of his loan." The court agreed that TPP payments and accrued arrearage and late fees caused by servicer's delays constituted damages directly stemming from

servicer's misconduct. It disagreed with borrower, however, that HBOR protections were an "economic loss" for UCL purposes. Additionally, the note and DOT in question were signed pre-HBOR, so HBOR protections could not have been part of any bargained-for exchange. The court granted servicer's MTD borrower's UCL claim for failure to allege a substantive violation, but granted that borrower does have UCL standing.

Viable Fraud Claim Based on TPP and Perm Mod Offers

Khan v. ReconTrust Co., __ F. Supp. 3d __, 2015 WL 798966 (N.D. Cal. Feb. 23, 2015): To state a valid fraud claim, borrowers must show that servicer made a fraudulent promise or misstatement, that borrower detrimentally relied on that statement, and resulting damages. Fraud claims have a heightened pleading standard that require borrowers to allege "the who, what, when, where, and how" of the alleged fraudulent conduct. Here, borrower alleged she successfully completed a TPP, completed and submitted the required paperwork for the resulting permanent modification offer, but that her servicer withdrew the offer claiming it never received final proof of income. Borrower also alleged two additional permanent modifications, one of which was cancelled without reason, and the other was breached when servicer recorded an NOD. Though borrower did not identify the names of servicer representatives in her complaint, the documents attached to her complaint identify key players. The documents, coupled with her allegations that she was offered and improperly denied several modifications, state a fraud claim with requisite specificity. Additionally, borrower asserted the detrimental reliance by alleging she would have sought bankruptcy, or other remedies, but for servicer's statements that modifications were forthcoming. Finally, the court rejected servicer's argument that borrower cannot allege damages because she was offered a permanent modification in ADR. Without actual evidence of a modification, the court relied on the allegations in borrower's complaint and found adequately pled damages—lost modifications. The court denied servicer's MTD borrower's fraud claim.

Diversity Jurisdiction: Defendant's Burden to Show No Viable Claims Exist against Trustee to Demonstrate its "Sham" Status

Vasquez v. Bank of Am., N.A., 2015 WL 794545 (C.D. Cal. Feb. 23, 2015): A defendant may remove a state action to federal court based on diversity jurisdiction if the claim(s) arise between citizens of diverse (different) states. In evaluating diversity, federal courts "disregard nominal . . . parties and [evaluate diversity] jurisdiction only upon the citizenship of real parties to the controversy." To overcome the presumption that plaintiffs do not sue "sham" defendants purely to destroy diversity and avoid federal jurisdiction, a defendant must show not only that plaintiff's claims against the nominal defendant fail to meet pleading standards, but that the plaintiff *could not possibly* amend the complaint to state viable claim against that defendant. In the foreclosure context, trustees are frequently considered "nominal" parties in part because trustees cannot be held liable for "good faith error[s] resulting from reliance on information provided in good faith by the beneficiary regarding the nature and amount of the default." CC § 2924(b). Trustees also have privileged immunity related to the "performance of statutorily required . . . foreclosure procedures" (recording the NOD and NTS) under CC 47(c). The immunity, however, does not protect a trustee's malicious conduct, or activities performed outside its scope as trustee. Here, a Californian borrower brought state-law claims against the foreclosing trustee, also a "citizen" of California, for forging the NTS. The court analyzed whether defendants had shown that borrower had no viable claims, and could not amend his complaint to bring viable claims, against trustee. Defendants failed to meet their burden. Borrower specifically pled that trustee had "knowingly and fraudulently" forged the NTS, rendering it void. While borrower's conclusory claims fail at this juncture, borrower may amend his complaint to state viable claims against trustee. Specifically, the court opined, that trustee had gone beyond its role as trustee in forging documents. This activity would not be protected by California's foreclosure framework, or by a privilege. The court therefore remanded the case for lack of diversity.

HBOR Attorney's Fees Awarded After PI, NOD Rescission, and Mooted Case; Attorney's Fees in Foreclosure Cases Unavailable through CCP 1021.5

Pearson v. Green Tree Servicing, LLC, 2015 WL 632457 (N.D. Cal. Feb. 13, 2015):[267] "A court may award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to [HBOR]. 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." CC § 2924.12(i). The statute does not distinguish between a preliminary injunction and a permanent injunction. Here, borrower brought dual tracking claims against her servicer and obtained a preliminary injunction in state court to stop the impending foreclosure sale of her home. Servicer then voluntarily rescinded the dual tracked NOD, removed to federal court, and moved to dismiss the case. Citing *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712 (9th Cir. 2013), borrower asserted that the case should nevertheless be kept open for a fee motion, as she prevailed in the action because she won injunctive relief and the servicer then rescinded the offending notice, mooting borrower's dual tracking claim. In granting servicer's MTD, the court agreed with borrower regarding attorney's fees. The preliminary injunction based on borrower's likely success on the merits, taken together with a mooted case brought about by defendant's voluntary actions, provided borrower with a "prevailing party" status even without a final judgment. The court allowed borrower to move for attorney's fees and costs, and this attorney's fees motion followed. The court awarded fees and costs for work completed through the rescission of the NTS, and the litigation related to the fee motion. But because the servicer "corrected" and "remedied" its HBOR violation with the rescission, any litigation (other than the fee litigation) occurring after the rescission cannot be

[267] Previous iterations of this case can be found in the Case Compendium as *Pearson v. Green Tree Servicing, LLC*, No. C-13-01822 (Cal. Super. Ct. Contra Costa Co. Sept. 13, 2013) (granting a preliminary injunction on borrower's dual tracking claim), and *Pearson v. Green Tree Servicing, LLC*, 2014 WL 6657506 (N.D. Cal. Nov. 21, 2014) (dismissing the case as moot, but allowing borrower's attorney to bring a fee motion because the NOD rescission and mooted claim meant borrower had "prevailed" in the action).

compensated under CC 2924.12(i) because the servicer simply was not liable under HBOR after this point.

While the court predictably granted attorney's fees and costs under CC 2924.12(i), it rejected borrower's new claim for fees based on CCP 1021.5. This statute provides for attorney fees in cases where the plaintiff acts as a "private attorney general," enforcing important rights affecting the public interest. California courts have declined to award CCP 1021.5 fees in foreclosure cases because those cases are intimately tied to the plaintiff's "personal financial stake in the subject property," rather than to any larger public concern. This court followed that precedent and rejected borrower's fee motion based on CCP 1021.5.

Negligence: Duty of Care Based on *Alvarez* and HBOR; Viable UCL Claim Based on SPOC Violations; UCL Standing Based on Improperly Inflated Modified Payments

Johnson v. PNC Mortgage, __ F. Supp. 3d __, 2015 WL 662261 (N.D. Cal. Feb. 12, 2015): Negligence claims require servicers to owe borrowers a duty of care, to breach that duty of care, and for borrowers to show that the breach caused them harm. Within the context of a traditional borrower-lender relationship, banks generally do not owe a duty of care to borrowers. An exception applies, however, if a lender's activities extend beyond this relationship. Recently, the *Alvarez* decision has prompted many courts to find that a servicer who accepts a loan modification application from a borrower owes that borrower a duty of care to not mishandle the application. Here, borrowers alleged their servicer mishandled their modification application by using an inflated income number to calculate their modification, resulting in unaffordable payments. They also alleged that their SPOC falsely assured them he would correct the income mistake, but never did. The SPOC, borrowers claimed, did not actually posses authority to correct that type of mistake. Overall, the income miscalculation and SPOC's bungling amounted to servicer's negligence. The court agreed. Citing notable similarities to the borrowers in *Alvarez*, the court found that in both cases: 1) borrowers asserted a specific servicer error related to

income calculation; 2) the SPOC's mismanagement of SPOC duties "fall[s] well within the duty to use reasonable care in the processing of a loan modification." This court also found the *Alvarez* court's reliance on HBOR instructive: that court found a duty of care not to mishandle the application process ushered in, at least in part, by HBOR. This court agreed, citing HBOR's explicit purpose to ensure that borrowers receive a "meaningful opportunity to obtain" a modification. CC § 2923.4. This court also cited the growing number of federal courts that follow *Alvarez*. This court therefore found that servicer owed borrowers a duty of care when it agreed to evaluate their loan modification application.

"Upon request from a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact." CC § 2923.7. SPOCs may be a "team" of people, or an individual, and must "ensur[e] that a borrower is considered for all foreclosure prevention alternatives," coordinate the modification application process, and have authority to take action where required, like canceling a sale or correcting a borrower's information. Here, borrower's based their UCL claim on servicer's alleged SPOC violations. Specifically, that none of borrowers' many "assigned" SPOCs could actually perform SPOC duties. Also, borrowers were routinely steered toward servicer's "hotline," rather than their SPOCs—who were really SPOCs in name only. Borrowers highlighted the inaction of a particular SPOC who promised to correct an income error that resulted in unaffordable modified payments, but never did so. The court agreed noting that a servicer's mere assigning of SPOCs does not absolve it of liability. SPOCs must actually perform their statutory duties for a servicer to comply with HBOR. The court found SPOC violations, couched as borrowers' UCL claim.

To bring a UCL claim, a plaintiff must demonstrate: 1) an injury in fact (lost money or property); 2) caused by the unfair competition. Cal. Bus. & Prof. Code § 17204. Here, borrowers asserted that after miscalculating borrowers' income, servicer offered a modification with

improperly inflated mortgage payments. The court agreed that these higher payments constitute economic injury directly caused by servicer's error and by the SPOC's failure to correct that error. The higher payments also constituted damages for the purposes of borrowers' negligence claim (see above). Borrowers' UCL claim survived servicer's MTD.

UCL Claim Based on RESPA Violations; UCL Standing Analysis; SPOC Claims Require a Borrower to Request a SPOC; Notifying Borrower of Default Does Not Constitute Dual Tracking; "Complete" Application; "Material" HBOR Violations; Attorney's Fees under HBOR

Rizk v. Residential Credit Solutions, Inc., 2015 WL 573944 (C.D. Cal. Feb. 10, 2015): Under the previous version of RESPA, a servicer had to timely respond to a borrower's qualified written request (QWR) related to the servicing of borrower's loan. 12 U.S.C. § 2605(e). Effective January 10, 2014, the QWR process was bifurcated into Requests for Information (RFI) and Notices of Error (NOE). Here, borrower sent two QWRs to his servicer in 2014, relating to servicer conduct occurring in 2014. Each QWR inquired as to the status of his two pending appeals of modification denials, and asked for the numbers used in calculating those denials. Servicer responded to neither QWR. It is unclear why borrower sent QWRs, rather than RFIs/NOEs, but the court did not question the form of borrower's RESPA claim. Instead, the court found that servicer's failure to respond to the QWRs clearly stated a RESPA violation, which borrower brought through a UCL cause of action for unlawful conduct.

To bring a UCL claim, a borrower must demonstrate: 1) an injury in fact (lost money or property); 2) caused by the unfair competition. Cal. Bus. & Prof. Code § 17204. Here, borrower alleged that servicer's RESPA violations (failing to respond to QWRs) and HBOR violations (dual tracking) directly caused overpayment of interest on his mortgage, reduction in credit limits, increased credit card interest rates, car and credit card application rejections, and attorney's fees.

The court found these damages sufficient to give borrower standing to bring his UCL claims and denied servicer's MTD.

HBOR requires servicers to promptly provide a single point of contact (SPOC) "[u]pon request from a borrower who requests a foreclosure prevention alternative." CC § 2923.7(a). Here, borrower alleged his servicer never assigned him a SPOC during his lengthy loan modification negotiations and multiple applications. Servicer argued that because borrower failed to specifically *request a SPOC*, not just a foreclosure prevention alternative, servicer was under no duty to appoint a SPOC, according to a strict reading of the statute. Without analysis, the court agreed with servicer that because borrower did not "allege in his complaint that he requested a [SPOC] as required for [servicer's] obligation under CC 2923.7 to arise," borrower's SPOC claim failed. Notably, this court expresses a quickly dwindling minority opinion. Most courts have roundly rejected this servicer argument and found that a servicer must appoint a SPOC promptly after borrower inquires about a foreclosure prevention alternative. Here, however, the court granted servicer's MTD borrower's SPOC claim.

Dual tracking prevents a servicer from "record[ing]" an NOD or NTS or "conduct[ing]" a foreclosure sale while a borrower's modification application is pending, or during borrower's appeal. Here, borrower alleged two instances of dual tracking. First, his servicer notified borrower of his default, in writing, while his modification application was pending. The court found that simply notifying a borrower of the status of his loan does not constitute "recording" a NOD or NTS and was therefore not a dual tracking violation. It granted servicer's MTD this part of borrower's dual tracking claim. Second, borrower alleged servicer recorded an NOD and NTS while two of his modification denial appeals were pending. The court agreed that this conduct constituted a dual tracking violation and denied servicer's MTD on this aspect of borrower's claim.

HBOR's dual tracking protections only apply to a borrower's "complete" first lien loan modification application. Borrower alleged he submitted

several loan modification applications to servicer, most of which were specifically solicited *by servicer*. Without considering borrower's assertion that these application were "complete," the court found that the solicitation of the applications by servicer, coupled with servicer's denials of those applications "based on their contents, not their incompleteness," suggested that borrower submitted "complete" applications. The court allowed borrower's dual tracking claim to survive the MTD.

Relief under HBOR is only available for a servicer's "material" violation of the operative statutes. CC § 2924.12. Here, borrower alleged servicer wrongfully recorded an NOD and NTS while two appeals of modification denials were pending. The court found these to constitute material HBOR violations, as "they are the very essence of the statute and failure to abide by the straightforward language of the statute is a material violation." The court denied servicer's MTD borrower's dual tracking claim.

"A court may award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to [HBOR]. 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." CC § 2924.12(i). The statute does not distinguish between a preliminary injunction and a permanent injunction. Here, borrower requested attorney's fees as part of his dual tracking claim, which was brought pre-sale, requesting injunctive relief. This court held that borrower rightly requested attorney's fees because the court denied servicer's MTD borrower's dual tracking claim. Notably, borrower did not specifically move for a preliminary injunction here; the court simply allowed his dual tracking claim to survive the pleading stage, and found attorney's fees could be awarded on that claim if the borrower ultimately prevails in the case.

CC 2924.11: Dual Tracking During TPP, Late Fees During Application Review; Unclear Application of *Corvello* to Proprietary TPP

Beck v. Ocwen Loan Servs., LLC, 2015 WL 519052 (C.D. Cal. Feb. 6, 2015): If a borrower and servicer agree to a foreclosure prevention alternative, in writing, servicer may not record an NOD, NTS, or conduct a sale while the borrower is compliant with the terms of the plan. CC § 2924.11(a)-(b). Here, borrowers alleged servicer offered them a TPP agreement, which they accepted by executing and returning the contract, submitting proof of insurance, and making timely payments. Servicer accepted those payments but foreclosed on the property anyway. Servicer even continued to accept TPP payments a month after the sale. Borrowers therefore alleged servicer violated CC 2924.11(b) by selling the property while they were compliant with their TPP. The TPP language specified, however, "if ALL of the items above are not completed by the Due Date, which includes the receipt of an executed counterpart to the Agreement signed by all parties, the Agreement will have no force or effect and the original terms of your note will apply." Because borrowers did not allege they received a fully executed TPP from servicer, the court dismissed their CC 2924.11 claim.

A servicer "shall not collect any late fees for periods during which a complete first lien loan modification application is under consideration or a denial is being appealed, the borrower is making timely modification payments, or a foreclosure prevention alternative is being evaluated or exercised." CC § 2924.11(f). Here, borrowers pled that servicer representatives told them that late fees *would* be charged to their loan while their modification application was under review. The court agreed with servicer, though, that its *actual* collection of late fees during borrower's modification review needs to be alleged in the complaint. Servicer's admission to borrowers that it maintains a business practice of continuing to collect late fees in violation of HBOR does not, by itself, sufficiently plead a CC 2924.11(f) claim. The court granted servicer's MTD.

California borrowers who comply with HAMP TPP agreements are entitled to permanent modifications; if a servicer refuses to offer a modification, borrowers may sue for breach of contract. *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013). There are currently no published cases to support this proposition applied to non-HAMP ("proprietary") TPPs.[268] Here, borrowers alleged servicer offered them a TPP agreement, which they accepted by executing and returning the contract, submitting proof of insurance, and making timely payments. Servicer accepted those payments but foreclosed on the property anyway. Borrowers therefore alleged servicer breached the TPP by foreclosing while borrowers were TPP-compliant. First, this court distinguished *Corvello* and its progeny as applying only to *HAMP* TPP agreements, not to proprietary contracts. Specifically, the court pointed to Treasury Directive 09-01, which imposes rules on HAMP contracts that do not govern proprietary contracts. Because borrowers did not allege their TPP was a HAMP TPP, the court found *Corvello* inapposite, at least as currently pled by borrowers. Second, the court also distinguished the sole case servicer cited supporting its argument that *Corvello* is inapplicable to borrowers' claim. In that case, *Morgan v. Aurora Loan Services, LLC*, 2013 WL 5539392 (C.D. Cal. Oct. 7, 2013),[269] the court distinguished borrower's Foreclosure Alternative Agreement (FAA) and Workout Agreement (WAG) from the HAMP TPP in *Corvello*. Importantly, the *Morgan* court focused on the *language* in the *Corvello* TPP, which told the TPP-compliant borrower that their servicer "*will* provide" them with a permanent loan modification (emphasis added). This language guaranteed a permanent modification, whereas the language in the FAA and WAG merely articulated that servicer *may consider* borrower for a permanent modification. In the present case, the court noted the lack of discussion regarding the proprietary TPP's language, compared to the language of a HAMP TPP agreement. The court decided not to dismiss borrower's

[268] *Akinshin v. Bank of Am., N.A.*, No. A138098 (Cal. Ct. App. July 29, 2014), for example, applies this reasoning to a proprietary TPP and borrower's deceit, promissory estoppel, and negligence claims, but is not published (see the Case Compendium for a full summary).
[269] A full summary of *Morgan* is available in the Case Compendium.

contract claim at this stage, "barring a more complete discussion of the applicability of *Corvello* in a non-HAMP setting."

Viable TILA Claim Based on Faulty Disclosures; RESPA Damages; Extending *Corvello* to Find Mortgages as "Consumer Debt" under Rosenthal Act

Marquette v. Bank of Am., N.A., 2015 WL 461852 (S.D. Cal. Feb. 4, 2015): If proper disclosures are not made at loan origination, borrowers may rescind their loan by "notifying the creditor . . . of [the borrower's] intention to do so" within three years of origination. 15 U.S.C. § 1635(a), (f). Within 20 days after receiving a borrower's rescission notice, the lender must return any money paid by the borrower relating to the property, and must terminate the security interest. 15 U.S.C. § 1635(b). Assignees of the loan may also be held liable for a violation of § 1635(b) if the disclosure errors in the loan documents were obvious, including where disclosures are clearly incomplete. 15 U.S.C. § 1641(a). Here, borrower's mortgage broker gave borrower a packet of documents at loan origination, assuring him that the packet contained exact copies of all the closing documents borrower just signed. In reality, the documents borrower received contained three copies of the Notice of Right to Cancel for the two loans, used incorrect dates, and left blank lines for the expiration dates of borrower's right to cancel. Less than two years later, borrower sent a rescission notice to his lender. Neither the lender nor the lender's assignee of the first loan responded to borrower's notice. The court found borrower to have stated a viable TILA claim against both the original lender and the assignee of the first loan. First, the court followed Ninth Circuit precedent in finding a lender's failure to identify expiration dates as a technical, but clear TILA violation that gives a borrower three years to rescind the loan, regardless of "whether the omission was material." Second, the omissions and mistakes cited by borrower were clear on the face of the loan documents, so the assignee lender was on notice that borrower possessed the rescission right and was bound to rescind the loan upon receipt of borrower's timely notice. The court therefore denied the MTD borrower's TILA claim.

RESPA requires a servicer to timely respond to a borrower's qualified written request (QWR). 12 U.S.C. § 2605(e). To recover actual damages, a borrower must show that their loss is "related to the RESPA violation itself." *See* 12 U.S.C. § 2605(f). Many courts, including California federal courts, have interpreted RESPA to require a borrower to plead pecuniary damages to bring a claim. The Ninth Circuit has not yet decided whether emotional distress can be considered pecuniary loss and actual damages under RESPA, and the district courts are split on the issue. Other circuits, however, have held that emotional distress can constitute actual damages under a RESPA damages theory. Here, borrower pled two viable RESPA violations against his lender for its failure to acknowledge receipt of his QWR, and failing to substantively respond to the QWR. He further alleged lost time spent amassing loan modification applications he submitted because he did not know where he stood with this loan, due to lender's RESPA violation. Finally, borrower alleged he suffered severe emotional distress directly resulting from servicer's failure to respond to the QWR. Specifically, he experienced frustration at being in the dark, "uncertainty, anger, fear, and sadness" because he was "left in limbo" and "at an informational disadvantage." The emotional distress manifested itself as lapses in concentration, depression, digestive issues, "weight gain, nausea, anxiety, insomnia, and social withdrawal." The court found borrower to have adequately pled emotional distress as actual damages resulting from lender's failure to comply with RESPA's QWR requirements and denied lender's MTD.

California's Rosenthal Act prohibits unlawful "debt collection," defined as: "any act or practice in connection with the collection of consumer debts." CC § 1788.2(b). Here, borrower alleged his servicer: 1) communicated with borrower about his loans and rescission attempts directly, despite being aware borrower was represented by an attorney; 2) communicated with borrower's roommate, without permission, about borrower's financial situation; 3) used deceptive loan collection methods; 4) attempted to collect amounts not owed; and 5) provided false information to credit reporting bureaus. California courts were split on whether mortgage loans qualify as "consumer debt" under

Rosenthal, but *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013) somewhat decided the issue. There, borrowers alleged that servicer's failure to permanently modify their loan in compliance with their TPP agreement, rendered the TPP—and their payments—an unfair debt collection practice. The Ninth Circuit agreed with borrowers, finding that a servicer engaged in "debt collection" "in connection with [a] residential mortgage loan." This court took the *Corvello* decision one step further, noting: "in order for [the Corvellos' servicer] to have been engaged in 'debt collection,' in connection with a residential mortgage loan, [the court must have decided that] a residential mortgage must qualify as a 'consumer debt.'" The court followed *Corvello* and sided with the reasoning that nothing in the Act's language prevents mortgages from being considered a "debt." Servicer's MTD borrower's Rosenthal claim based on this argument failed.

PI Granted on Fraud Claim Based on Servicer's Dual Tracking Activity

Morris v. Residential Credit Solutions, Inc., 2015 WL 428114 (E.D. Cal. Feb. 2, 2015): To win a preliminary injunction in a California federal court, a borrower must show: 1) at least serious questions going to the merits of his claim; 2) imminent and irreparable harm if the PI does not issue; 3) that the balance of harms tips in their favor; and 4) the PI is in the public interest. This borrower sought a PI based on his fraud claim. Fraud claims require borrowers to show: 1) defendant's misrepresentation; 2) defendant's awareness of the false nature of the misrepresentation; 3) defendant's intent to induce borrower's reliance; 4) borrower's reliance; and 5) damages. Borrower alleged that throughout his lengthy modification negotiations and extended application periods (due to servicer's constant requests for "updated" and duplicative information), servicer assured him that the recorded NOD and NTS were just formalities, and that foreclosure would not occur while this modification(s) were under review. Borrower eventually won a TRO to stop an impending sale. The court found his allegations sufficient to state a viable fraud claim, and at least a "possibility" of prevailing on the merits of that claim.

Specifically, the court found borrower's allegations that servicer knew its representations to be false evidenced by the NOD and NTS. Borrower's allegation that he did not know of servicer's intent to foreclose while dragging out the modification process was sufficient to plead justifiable reliance. Having found a possibility of prevailing on the merits of borrower's fraud claim, the court then turned to the rest of the PI evaluation. First, it found the loss of borrower's home to constitute irreparable injury. Second, the balance of equities weighs in favor of borrower since servicer should not be allowed to benefit from its fraudulent conduct. Here the court also considered and rejected servicer's argument that its TPP offer after the initiation of this lawsuit, and borrower's rejection of that offer, prevented borrower from alleging likely harm if the PI does not issue. The court did not look favorably on the TPP terms, which would have required borrower to waive his foreclosure-related claims, and did not promise a permanent modification upon completion. Finally, the court found that the public interest is served by preventing dual tracking behavior, as evidenced by the passage of HBOR. The court granted borrower's request for injunctive relief.

Out of State Cases

RESPA Claim under New CFPB Rules: Servicer's Failure to Evaluate Modification Application in 30 Days

Lage v. Ocwen Loan Servicing, 2015 WL 631014 (S.D. Fla. Feb. 11, 2015): If a servicer receives a borrower's complete loan modification application more than 37 days before a scheduled foreclosure sale, it must evaluate that application and provide borrower with a decision within 30 days of receipt. 12 C.F.R. § 1024.41(c). This rule is part of the Consumer Financial Protection Bureau's (CFPB) new RESPA rules, which became effective January 10, 2014. Here, borrower alleged he submitted his application "sometime prior to January 28, 2014," and that servicer did not respond to his application until approximately two months later, well outside the 30-day window. Servicer argued it was not obliged to comply with this new rule because borrower submitted his application before the effective date, January 10. The

court found the actual date of borrower's application submission—and servicer's receipt—unclear and refused to dismiss borrower's RESPA claim on the theory that his application was untimely. The court further opined that *even if* servicer received borrower's application before the effective date of the new RESPA rules, allowing servicer to escape RESPA liability would be unfair. Other courts that have dismissed borrower's RESPA claims under the new regulations have done so because foreclosure sales have occurred in those cases months before January 2014. Here by contrast, the issue is whether borrower submitted his application slightly too early to officially fall under the new regulations. Also, as a consumer protection statute, RESPA must be "construed liberally" in the favor of the consumer. Dismissing borrower's claim because his application may have found its way to servicer a day or two before the regulations became effective seems too harsh a reading of the statute. Finally, the court rejected servicer's argument that the CFPB itself contemplated that only applications received after the effective date of the statute could receive the new dual tracking protections. The court dismissed the CFPB's Bulletin stating such as "non-binding authority." The court also cited additional language in the Bulletin that requires servicers to evaluate applications "even if the borrower previously applied for, was granted, or was denied a loss mitigation plan before January 10, 2014." The court denied servicer's MTD borrower's RESPA claim.