State Cases

Challenging the Authority to Foreclose Requires Specific Factual Allegations

Siliga v. Mortg. Elec. Registration Sys., Inc., __ Cal. App. 4th __, 2013 WL 4522474 (Aug. 27, 2013): Nonjudicial foreclosures are regulated by statute. Borrowers may not bring the foreclosing entities to court to require them to prove anything *outside* of what is already required by statute. These types of actions are "preemptive" in that they do not seek redress for specific misconduct (which *would* create a valid cause of action), but rather generally allege that the entity initiating a foreclosure lacks the authority to do so. "Such an action is 'preemptive' if the plaintiff alleges no '*specific factual* [*basis*]' for the claim that the foreclosure was not initiated by the correct person" (emphasis added).

Here, borrowers alleged MERS lacked the authority to foreclose because: 1) when the lender went out of business, their agreement with MERS (making MERS the DOT beneficiary and the lender's nominee) "lapsed," negating any authority to foreclose MERS did possess; 2) MERS had no authority to assign the note, and any DOT assignment without a note assignment is void; and 3) MERS required the lender's authorization to assign the DOT and the note to satisfy the statute of frauds, authorization it did not have. As to the first allegation, the borrowers failed to allege in the complaint that the lender had gone out of business. The lender's chapter 11 bankruptcy indicates reorganization, but "neither the company's death nor an incapacity to contract." Second, MERS' authority to assign the note derives from its "agency agreement" with the lender. A general allegation that MERS lacked authority, without alleging a specific problem with the agency agreement, is not sufficient to state a claim. Lastly, the claim that MERS lacked written authorization to assign the note and DOT, without a more factual allegation, attempts to make MERS prove its authority to foreclose outside the statutory scheme. Without sufficient factual allegations, the court affirmed the dismissal of borrower's complaint.

Litigation Privilege Does Not Bar a UCL Claim Based on Rosenthal Act and FDCPA Violations

People v. Persolve, LLC, __ Cal. App. 4th __, 2013 WL 4354386 (Aug. 15, 2013): California's litigation privilege bars suits based on any communication "made in judicial or quasi-judicial proceedings . . . to achieve the object of the litigation." CC § 47. If the privilege directly conflicts with a "coequal" state statute, a court will decide which takes precedence by evaluating which is more specific, the statute or the privilege, and whether application of the privilege would render the statute "significantly or wholly inoperable." Usually an UCL claim would fail the specificity element because Bus. & Prof. Code § 17200 is much broader than the litigation privilege. Because this UCL claim was based on alleged violations of the FDCPA and Rosenthal Act, however, the privilege does not bar this UCL claim. Not only are those two statutes more specific than the litigation privilege (explicitly forbidding creditors from misleading debtors, providing false information, etc.), but applying the privilege to prevent FDPCA and RFDPCA-based claims would render those statutes "meaningless." The whole point of the FDCPA and RFDPCA is to regulate debt collection conduct, much of which occurs in litigation, or in preparation for litigation. The Court of Appeal reversed the trial court's dismissal and allowed the county D.A.'s UCL claim to continue.

CCP § 1162 Notice Requirements; CCP § 1161a's Required Compliance with CC § 2924

Bank of New York Mellon v. Preciado, Nos. 1-12-AP-001360 & 1-12-AP-001361 (Cal. App. Div. Super. Ct. Aug. 19, 2013): To be effective, UD notices to quit must be properly served: 1) by personal service; 2) or if personal service failed, by leaving the notice with a person of "suitable age and discretion" at the residence or business of the tenant (or former borrower) and then mailing a copy; 3) or if the first two methods failed, by posting a notice at the residence and mailing a copy. CC § 1162. Here, the process server's affidavit stated that "after due and diligent effort," he executed "post and mail" service. The trial court accepted this statement as evidence of compliance with CC § 1162, but the appellate division reversed. The statute indicates that "post and mail" is the *last* available method of service, not the first. Since the affidavit does not specifically assert that personal service was ever attempted, the trial court erred in assuming that service complied with CC § 1162. Further, defendants' appeal based on defective service was not barred because they failed to assert it as an affirmative defense. Proper service is an "essential [UD] element" and tenants' "general denial" of each statement in the complaint put service at issue.

Post-foreclosure UD plaintiffs must also demonstrate duly perfected title and compliance with CC § 2924 foreclosure procedures. CCP § 1161a. "Duly" perfected title encompasses all aspects of purchasing the property, not just recorded title. The trial court relied on plaintiff's trustee's deed upon sale, showing plaintiffs purchased the property at the foreclosure sale. The court ignored contradicting testimony alleging that the property was sold to the loan's servicer, not plaintiff. Further, "to prove compliance with section 2924, the plaintiff must necessarily prove the sale was conducted by the trustee." Here, the trustee's deed upon sale identifies one trustee, but the DOT identifies another. The trial court erred in accepting the recorded trustee's deed upon sale as conclusive evidence of compliance with § 2924, and the appellate division reversed.

TPP Requires Servicer to "Re-review" Borrower for Permanent Modification

Lovelace v. Nationstar Mortg. LLC, No. 34-2012-00119643-CU-BC-GDS (Cal. Super. Ct. Sacramento Co. Aug. 22, 2013): Borrowers must allege performance, breach, consideration, and damages to plead a breach of contract claim. Here, borrowers sufficiently alleged each element and defendant's demurrer was overruled. The predecessor servicer sent borrowers a TPP agreement and letter, requiring borrowers to sign and return the agreement, make their payments, and contact the servicer when the TPP ended, so servicer could "re-review" them for a permanent modification. Borrowers performed all aspects of the contract, but Nationstar, the current servicer, breached by refusing to "re-review" them for a modification. To show consideration and damages, borrowers successfully alleged the time and effort required in applying for a modification. Nationstar argued that the TPP agreement and letter only constituted an "agreement to agree in the future." The TPP language clearly indicated, though, that the servicer *would* perform a re-review *if* the borrower met the other requirements, so this argument was unavailing.

Preliminary Injunction Granted on SPOC Claim; Dual Tracking: First Application Requirement

Rogers v. OneWest Bank FSB, No. 34-2013-00144866-CU-WE-GDS (Cal. Super. Ct. Sacramento Co. Aug. 19, 2013): HBOR's single-point-of-contact provision requires servicers to provide borrowers seeking foreclosure alternatives with a single person (or team) that handles the borrower's application, has updated information, and the authority to stop a foreclosure sale. Here, the court granted borrower's request for a preliminary injunction to stop the foreclosure of her home because her servicer gave her at least three points of contact over the course of one month. One of these contacts informed her she did not qualify for a HAMP modification. This contact, though, should have remained borrower's contact until the servicer determined she did not qualify for *any* foreclosure alternative, as required by CC § 2923.7(c). Because the borrower was shuffled to different people after this HAMP denial but *before* she was denied for other alternatives, the court granted the injunction and set a $10,000 bond.

HBOR prohibits dual tracking while a servicer reviews a borrower's *first* modification application. Even when the first application was submitted pre-HBOR (1/1/13), if the servicer gave it a full review and denied the application, the servicer has no duty to halt the foreclosure process until it considered a second application (absent a change in financial circumstances). Here, borrower submitted their first application in 2012, which was denied by defendant in April 2013. Borrower's second application was submitted, at defendant's invitation, in May 2013, and defendant subsequently recorded an NTS. Borrower argued that her 2012 application should not bar the dual tracking claim based on her second application because HBOR "does not apply retroactively to a 2012 loan modification request." The court pointed to the language in CC § 2923.6(g) (specifically including pre-1/1/13 applications in its "first lien loan modification" definition) and found the borrower unlikely to prevail on the merits of her dual tracking claim.

Motion to Quash UD Service: CCP § 1161b's 90-day Notice Requirement

Deutsche Bank Nat'l Trust Co. vs. Pastor, No. 1417736 (Cal. Super. Ct., Santa Barbara Co. Aug. 9, 2013): A motion to quash is the correct procedural challenge to a court's exercise of personal jurisdiction. In the unlawful detainer context, a defendant should bring a motion to quash if the notice period is inappropriate. Here, plaintiff served tenant a 30-day notice instead of the 90-day notice required for tenants occupying foreclosed property. CCP § 1161b. Plaintiff argued that as the daughter of the former homeowners, who still occupied the property, the tenant only required a 30-day notice. Tenant provided credible evidence that her parents no longer occupied the property, convincing the court to grant the motion to quash. Plaintiff must serve tenant with a 90-day notice in accordance with CCP § 1161b, and can only move forward with a UD after those 90 days.

Federal Cases

Fair Credit Reporting Act

Ferguson v. Wells Fargo Bank, __ F. App'x __, 2013 WL 4406843 (9th Cir. Aug. 19, 2013): The Fair Credit Reporting Act requires furnishers of credit information (including servicers of mortgage loans) to, upon notification of a dispute, "investigate and report" on their calculations and conclusions. Here, borrower alleged that though Wells Fargo may have responded to the dispute notification by completing and returning a form sent by the credit-reporting agency, they incorrectly reported that the borrower had gone through bankruptcy. Upon production of this form, the district court granted summary judgment to Wells Fargo. A factual dispute exists, however, because Wells Fargo left a space blank instead of entering a particular code, which would presumably have indicated that the borrower had not gone through bankruptcy. The Ninth Circuit reversed and remanded.

HOLA Does Not Preempt State Tort Law Claims; Tender; Specifically Pled Fraud Claim; Modification Does Not Give Rise to a Duty of Care

Wickman v. Aurora Loan Servs., LLC, 2013 WL 4517247 (S.D. Cal. Aug. 23, 2013): State laws regulating or affecting the "processing, origination, servicing, sale or purchase of . . . mortgages" are preempted by the Home Owner's Loan Act, as applied to federal savings associations. State tort law claims that only incidentally affect those areas of banking, however, are not preempted. Here, borrower claimed fraud, negligent misrepresentation, and promissory estoppel based on their servicer's promise to work with the borrower on a loan modification in good faith. Laws based in the "general duty not to engage in fraud," do not require anything additional from the servicer, and do not demand or require a modification. These laws only incidentally affect defendant's business practices, and borrower's claims are therefore not preempted by HOLA.

Tender is usually required to bring a claim for wrongful foreclosure. There are at least three exceptions to this general rule: 1) when it would be inequitable to demand tender; 2) when the borrower seeks to prevent a sale from happening, rather than undo a completed sale; and 3) when the sale is (or would be) void, rather than voidable. This borrower brought his wrongful foreclosure claim after a notice of trustee sale was recorded, but before an actual sale. Accordingly, tender was not required here.

Fraud claims demand very specific pleading of: 1) a misrepresentation; 2) defendant's knowledge that the misrepresentation is false; 3) defendant's intent to induce borrower's reliance; 4) the borrower's justifiable reliance; and 5) damages. Many claims for fraud in wrongful foreclosure cases are dismissed for lack of specificity. But here, borrower was able to describe several conversations with a specific employee of defendant, when those conversations occurred, and the misrepresentations made. Not all statements were ultimately held to constitute a claim for fraud, but the employee's statement assuring borrower he was eligible for a loan modification despite his unemployed status does serve as the basis for a fraud claim. The employee told the borrower that being unemployed would actually help him qualify for a modification because of "financial hardship." Borrower alleged defendant knew this statement was false, maintained a policy of denying modifications based on unemployed status, and never intended to review him for a modification in good faith. The fraud claim based on this statement survived the motion to dismiss.

As outlined in *Rosenfeld* (above), a claim for negligent misrepresentation requires the establishment of a duty of care owed from the lender/servicer to the borrower. The court declined to find a duty here, where defendant allegedly misrepresented the borrower's ability to secure a modification while unemployed. The court does not imply that any and all modification negotiations fail to give rise to a duty of care, only that this particular negotiation and assurance does not.

Dual Tracking: "Document" & "Submit" Requirements for a Second Application; Modification Does Not Give Rise to a Duty of Care

Rosenfeld v. Nationstar Mortg., LLC, 2013 WL 4479008 (C.D. Cal. Aug. 19, 2013): Dual tracking protections are afforded to borrowers who submit a second modification application if they can "document" and "submit" to their servicer a "material change in financial circumstances." Here, borrowers submitted their first modification application in 2012, and *while that application was under review*, alerted their servicer that their income was reduced. With this information, the servicer put them on a TPP plan, and then offered a permanent modification in 2013. Borrowers objected to the terms of the modification, asserting that the servicer did not consider the reduction in income. Defendant scheduled a foreclosure sale, concluding that borrowers had rejected the loan modification offer. While the sale was scheduled, borrowers contend their financial circumstances changed a *second* time, because they paid off credit card debt, reducing their expenses. Their CC § 2923.6 claim alleges that dual tracking protections should extend to a second modification application, which they should be allowed to submit based on their changed circumstances. The court disagreed, largely because borrowers' complaint did not allege when the credit card debt was extinguished, or when (and if) borrowers made their servicer aware of this change, as required. Alleging a change in financial circumstances in a complaint does not fulfill the "document" and "submit" requirements in CC § 2923.6(c). The court dismissed borrower's UCL claim based on the alleged dual track.

To state a claim for negligence, a plaintiff must establish that defendant owed them a duty of care. Generally, there is no duty of care between a financial institution and a borrower, if their relationship is confined to a usual lender-borrower relationship. This court determined "that activities related to loan modifications fall squarely within defendants' traditional money-lending role." Without a duty of care, the borrowers' negligence claim was dismissed.

CC § 2923.5 Pleading Requirements vs. Preliminary Injunction Requirements

Weber v. PNC Bank, N.A., 2013 WL 4432040 (E.D. Cal. Aug. 16, 2013): A servicer may not record an NOD until 30 days after they contact the borrower to discuss foreclosure alternatives. Servicers must make a diligent effort to contact the borrower under specific statute requirements. A servicer must record an NOD declaration (with the NOD) attesting to their statutory compliance. Here, borrowers' 2923.5 claim survived a motion to dismiss because they alleged not only that their servicer never contacted them before recording an NOD, but that the servicer could not have made a diligent attempt to contact them. The specificity of this second allegation was crucial to their claim: they asserted that their home telephone number had not changed since loan origination, the servicer had successfully contacted borrowers in the past, they had a working, automated answering machine that recorded no messages from the servicer, and that they never received a certified letter from servicer. These factual allegations put the veracity of defendant's NOD declaration at issue and defeated the motion to dismiss. The court also indicated that, if borrowers' allegations were true, not only would defendant have violated CC § 2923.5, but the NOD itself would be invalid, stopping the foreclosure.

The court allowed the § 2923.5 claim to move forward, but denied borrowers' request for a preliminary injunction. To win a PI, a moving party must demonstrate that they are likely to succeed on the merits of their claim. Here, even though borrowers pled their § 2923.5 claim with sufficient specificity, they failed to provide sufficient evidence to show that they are likely to prevail on the merits. Defendant offered evidence of a diligent effort to contact borrowers, and of actual contact. Defendant produced copies of letters allegedly sent to borrowers offering to discuss financial options regarding their loan. The letters also memorialize several telephone conversations with borrowers. Borrowers' argument that these phone conversations were initiated by *them*, not by the servicer, as required by statute, was deemed "likely unmeritorious" by the court, which denied the PI.

Dual Tracking: PI Granted on 2011 Application

Ware v. Bayview Loan Servicing, LLC, 2013 WL 4446804 (S.D. Cal. Aug. 16, 2013): In California federal district courts, a party seeking a preliminary injunction must show they are likely to succeed on the merits, to suffer irreparable harm without the PI, that the balance of equities tips in their favor, and that the PI serves the public interest. Here, borrowers sought a PI to prevent the foreclosure of their property, alleging three separate violations of HBOR's dual tracking provision. First, they claimed that defendant's cursory denial of their short sale application violated CC § 2923.6(f), which requires servicers to identify reasons for a denial. The measure only applies to loan modifications however, not short sales, so this claim was deemed unlikely to prevail on the merits. Second, borrowers claimed they should be granted dual tracking protections on their second modification application because they sent a letter to their servicer asserting an increase in "routine expenses." This "barebones" description of a change in financial circumstances does not constitute "documentation" under CC § 2923.6(g). Lastly, borrowers alleged a dual tracking violation based on 2013 foreclosure actions, which occurred before defendant made a determination on borrower's 2011 modification application. Defendant pointed to their internal policy of denying modifications to borrowers in bankruptcy (which borrowers were in, from 2011-2013) as proof of the evaluation and denial. The court determined that this policy did not, by itself, constitute an "evaluation" for purposes of CC §

2923.6. To proceed with a foreclosure after HBOR became effective, defendant had to “expressly” deny borrower’s 2011 modification application. Because borrowers are likely to prevail on this third dual tracking claim, foreclosure constitutes irreparable harm, a mere delay does not unduly burden defendants, and because it is in the public’s interest to enforce a newly enacted state law, the court granted the PI.

Wrongful Foreclosure Burden of Proof

Barrionuevo v. Chase Bank, 2013 WL 4103606 (N.D. Cal. Aug. 12, 2013): Wrongful foreclosure plaintiffs normally bear the burden of proving a defendant lacked authority to foreclose. If, however, 1) no foreclosure has taken place; and 2) the borrower has alleged a “specific factual basis” attacking the servicer’s authority to foreclose, the burden shifts to defendant to prove authority. (The court implies this burden shifting is unsettled law and does not seem certain the burden *should* shift to defendant, but goes through the analysis anyway.) Here, the borrower pled an authority to foreclose theory based on WaMu’s securitization (selling) of borrower’s loan. When Chase subsequently purchased all of WaMu’s assets, the loan could not have been included in the purchase because the loan was no longer WaMu’s to sell. Purchasing and owning nothing, Chase lacked authority to foreclose. This theory was specific enough to survive a motion to dismiss and shift the burden to defendant. Chase provided evidence to support their assertion that the loan was not securitized before Chase’s purchase: sworn testimony that it possesses the original note and DOT, electronic records attesting to its authority to foreclose, and the absence of borrower’s loan number in the WaMu trust. Even if the burden had not shifted to Chase, the court found borrower’s evidence insufficient to survive a summary judgment motion. The court was not persuaded by their expert’s research into the WaMu trust, reasoning that, absent proof that borrower’s specific loan was sold to the trust, the expert’s findings amounted to speculation and opinion. A jury could reasonably conclude from Chase’s evidence that Chase had authority to foreclose on borrower’s property.

First & Second TPP Agreements as Distinct Bases for Fraud & Promissory Estoppel Claims; Pre-HBOR Authority to Foreclose Theory

Alimena v. Vericrest Fin., Inc., 2013 WL 4049663 (E.D. Cal. Aug. 9 2013): Deceit (a type of common law fraud) requires: 1) misrepresentation; 2) knowledge of falsity; 3) intent to defraud; 4) justifiable reliance; and 5) causal damages. In this case, borrower successfully pled several counts of intentional misrepresentation based on separate misrepresentations by their servicer, Citimortgage. Borrower’s *first* TPP agreement misrepresented Citi’s intentions because it required borrowers to make timely TPP payments and maintain documentation, and bound Citi to consider them for a permanent modification if those conditions were met – something Citi never did. Citi’s alleged conduct during the modification process (oral and written promises, assurances, etc.), coupled with their ultimate refusal to consider borrowers for a permanent modification, shows knowledge and intent to defraud. Absent Citi's TPP agreement and assurances, borrowers would not have made their TPP payments, demonstrating reasonable reliance. Finally, borrowers adequately pled damages – even though their delinquency predated their modification application—by pointing to the "dozens" of "fruitless hours" spent trying to meet Citi's requests (fruitless because Citi never intended to modify), a delayed bankruptcy filing, and the TPP payments themselves. Alleging similar facts, borrowers successfully pled another two counts of intentional misrepresentation against Citi for 1) their promise, and then failure, to honestly review borrower's second HAMP application, and 2) Citi's notice (in letter form) of a *second* TPP and subsequent failure to review them for a modification in good faith. To show damages stemming from the second TPP, borrowers added the sale of their car, which Citi assured borrowers would qualify them for a modification.

From the same set of facts, borrowers successfully stated two claims for promissory estoppel, based on *each* TPP agreement. Central to the court's reasoning was its basic view of the first TPP's language, which "constitutes an enforceable agreement to permanently modify a mortgage" if the requirements are met by the borrower. Those requirements were: 1) making timely TPP payments; 2) continuing to submit requested documentation; and 3) continuing to qualify for the modification under HAMP. To plead a PE claim, borrowers must amend their complaint to allege the third element: that they continued to qualify for HAMP throughout the TPP process. Their PE claim is still viable based on a different allegation, however: that Citi was obligated to evaluate them for a permanent modification *in good faith*, and failed, evidenced by Citi's false accusation that borrowers failed to supply all required documents, resulting in denial. Borrowers also have a viable PE claim based on the second TPP. "After all trial period payments are timely made and you have submitted all the required documents, your mortgage will be permanently modified," is a clear and unambiguous promise, and their TPP payment evidenced justifiable reliance, and constitutes an injury.

Pre-HBOR, CC § 2924 required foreclosing entities to record an NOD, let three months pass, and then record an NTS. HBOR clarified that the foreclosing entity must also possess the authority to foreclose. CC § 2924(a)(6). Even without this additional protection, though, these borrowers successfully pled a wrongful foreclosure claim based on an authority to foreclose theory. They alleged that defendant Lone Star was the beneficiary and note holder when *MERS*, not Lone Star, assigned the DOT to Citi. Because Lone Star held the note, was the loan's beneficiary, and apparently did not appoint MERS as its agent, MERS did not have the authority to assign anything, voiding the foreclosure. (Borrowers must present evidence, showing that MERS was not Lone Star's agent, at a later stage.)

HOLA Preemption; CC § 2923.5 Requirements; Wrongful Foreclosure Claim Based on Loan Securitization

Cerezo v. Wells Fargo Bank, N.A., 2013 WL 4029274 (N.D. Cal. Aug. 6, 2013): California federal district courts have adopted several different analyses to determine whether national banks can invoke HOLA preemption, despite HOLA's application to federal savings associations. This court objected to the popular "bright line method[ ] of applying HOLA wholesale to any successor in interest to a federal savings association . . . ." Logically, it makes more sense to examine the *conduct* being litigated. If the conduct arises from the savings association's activities, apply HOLA. If the conduct arises from the bank's activities, then discern "whether the action stems from the successor's obligations on instruments originating from the [savings association] or whether the successor is acting independently of any requirements from the instruments." The court though, declined to decide the HOLA issue without sufficient briefing.

CC § 2923.5 only applies to owner-occupied property (defined in CC § 2924.15). Borrower's failure to allege compliance with this requirement was not fatal to their claim, however, because defendant conceded this element by requesting judicial notice of their § 2923.5 declaration, in which defendant did not dispute owner-occupancy.

A § 2923.5 declaration attests to a servicer's due diligence in attempting to contact the borrower. Here, borrowers alleged that defendant never contacted them pre-NOD, nor had defendant complied with § 2923.5's due diligence requirements. Further, defendant's § 2923.5 declaration was invalid because it was signed by someone who lacked personal knowledge of its contents. The court found personal knowledge not required to sign a declaration.[26] Borrower's § 2923.5 claim survived anyway, though, because their allegation that they were never contacted is a triable issue. While the claim survived, the court denied borrower's request for an injunction, reasoning that the borrowers may delay the foreclosure by prevailing on the merits.

As in *Barrionuevo* (above), borrower's authority to foreclose theory is premised on the original lender's securitization of the note *before* defendant invalidly purchased it. Other courts have found "that securitization of the . . . note does not result in loss of the power of sale under a DOT," but this court disagrees. Securitizing the note sells the "proceeds from the mortgage," and it would be illogical if the seller somehow retained the right to foreclose on the property.

Class Certification on Contract, Rosenthal Act, & UCL Claims Based in TPP Agreements

Gaudin v. Saxon Mortg. Servs. Inc., 2013 WL 4029043 (N.D. Cal. Aug. 5, 2013): The court certified the proposed class in this HAMP TPP breach of contract case because all essential certification elements were met. Notably, the named plaintiff's basic claim – that compliance with TPP requirements created an enforceable contract requiring defendant to provide her with a permanent modification—raised common and typical questions that pertained to a defined, ascertainable class: borrowers who complied with the same TPP agreement, with the same servicer, and were never given permanent modifications. The court analyzed each claim to determine whether they predominate and are superior to the individual class members.

All contract elements (performance, breach, consideration, and damages) must meet the "predominance and superiority" requirement for the breach of contract claim to survive class certification. Here, not only were TPP payments themselves ruled consideration, but so too was applying for a modification (which requires "burdensome documentation"), jeopardizing credit ratings by reduced mortgage payments, and risking a pointless loan extension (with additional interest and late payments) if a permanent modification was never granted. This consideration was common to all class as participants in the same TPP agreement.

Under the FDCPA, entities that collect "'a debt which was not in default at the time it was obtained'" are not considered "debt collectors." There is no similar restriction in the Rosenthal Act. To bring a valid claim under the Rosenthal Act, then, a borrower does not need to be in default, whereas an FDCPA claim requires default to have standing. Plaintiffs' Rosenthal Act claims also meet class certification requirements because the Rosenthal violations are in the "four corners" of the TPP, common to all class members.

There are three possible prongs within a UCL claim: unlawful, unfair, and fraudulent. The unlawful prong bases a UCL violation on another actionable claim. Here, the Rosenthal Act violation provides the basis for borrower's unlawful claim. The unfair prong involves an evaluation of harm to the plaintiff and benefit to the defendant, a public policy, or unfair competition. Here, the TPP agreement itself, and defendant's "uniform" practice of denying permanent modifications, provide the basis for an "unfair" inquiry. Fraudulent practices must be likely to deceive the public. Defendant's systemic practice of denying modifications based on certain criteria, after a borrower complied with their TPP, could deceive the public. All three UCL prongs are actionable as to the entire class.

Valid Dual Tracking Claim After Voluntarily Postponed Sale

Young v. Deutsche Bank Nat'l Trust Co., 2013 WL 3992710 (E.D. Cal. Aug. 2, 2013): A HBOR dual tracking claim may still be viable even when no foreclosure sale is currently scheduled. Here, borrower alleged they submitted a complete modification application to their servicer, who then recorded an NTS without evaluating the application. After borrower filed his complaint, the servicer voluntarily postponed the sale and a modification evaluation is underway. The court still granted borrower leave to amend their complaint to include a dual tracking claim because the NTS violated the statute, even if the statute's goals (a postponed sale and a modification evaluation) are currently being met. That the NOD was recorded pre-HBOR (before 1/1/13) is irrelevant because borrower only alleges that the NTS and the scheduling of the foreclosure sale violated dual tracking provisions.

Pre-Default Foreclosure Claim; Delayed Discovery Rule; UCL Standing; HOLA Preemption; Duty of Care

Gerbery v. Wells Fargo Bank, N.A., 2013 WL 3946065 (S.D. Cal. July 31, 2013): Claim ripeness is determined by: 1) "whether delayed review of the issue would cause hardship to the parties, and 2) whether the issues are fit for judicial decision or would benefit from further factual development." Importantly, the injury to plaintiff does not need to have occurred, if the injury is "certainly impending." In this case, borrowers brought UCL, fraud, negligent misrepresentation, promissory estoppel, and contract claims while current on their mortgage payments. The court nevertheless found these claims ripe because borrower's mortgage payments have increased by over $2,000, an "economic injury sufficient to satisfy the ripeness inquiry." Further, delayed review would drive borrowers closer to foreclosure, and defendant's conduct has already occurred, even if the ultimate harm has not.

Borrower's claims were nevertheless time barred. Usually, statute of limitations clocks begin when the conduct or transaction transpired. Under the doctrine of delayed discovery, SOL clocks can toll until the plaintiff discovered (or had reasonable opportunity to discover) the misconduct. To take advantage of this tolling, a borrower must show: 1) when and how they made their discovery; and 2) why it was unreasonable for them to discover the misconduct sooner. Here, the court dismissed borrower's claims with leave to amend because borrowers made no attempt to assert the doctrine besides claiming that that were unaware of defendant's fraud until 2011 (the loan originated in 2007 and they brought suit in 2013).

UCL standing requires a "distinct and palpable injury" that was caused by the UCL violation. Here, borrower's alleged injuries—foreclosure risk, forgone opportunities to refinance, and hiring an attorney and experts—are not particular enough to constitute UCL standing. The court advised borrowers to plead the increased mortgage payments as an injury.

Applying a HOLA preemption analysis to a national bank, this court nevertheless found borrower's UCL, fraud, and negligent misrepresentation claims not preempted. Even though defendant's conduct arguably qualifies as "servicing," and would therefore fall under the purview of HOLA and OTS regulations, the specific type of alleged misrepresentation here, promising to honestly and fairly evaluate borrower's modification application, "'rel[ies] on the general duty not to misrepresent material facts,'" and is not preempted.

To claim negligent misrepresentation, a borrower must show "some type of legal relationship giving rise to a duty of care" between themselves and their servicer. Generally, servicers do not owe a duty of care to a borrower because their relationship does not exceed the usual lender-borrower relationship. The court cites two exceptions to this rule. First, if the servicer's activities go beyond that usual relationship. Second, if the servicer's actions meet the conditions of a six-factor test developed by the California Supreme Court. Here, borrowers' claim that defendant attempted to induce them into skipping mortgage payments so defendant could eventually foreclose, meets both exceptions. "[W]hen the lender takes action intended to induce a borrower to enter into a particular loan transaction that is not only intended to protect the lender – the lender's activities have exceeded those of a conventional lender." Additionally, the court found the dramatic increase in borrower's mortgage payments a basis for establishing a duty of care according to the six-factor California Supreme Court test. The payments were a foreseeable and certain financial strain, directly resulting from defendant's misrepresentations, for which defendant was morally to blame, and finding a duty of care here is in the public's interest. Even with this duty of care though, borrowers need to amend their complaint to meet the specificity requirements for negligent misrepresentation claims.

HOLA Preemption & Laws of General Applicability

Babb v. Wachovia Mortg., FSB, 2013 WL 3985001 (C.D. Cal. July 26, 2013): The Home Owner's Loan Act and its attendant OTS regulations govern federal savings associations. This court adopts the view that a national bank may assert HOLA preemption defensively if it purchased a loan that originated with a federal savings associated. Other California federal district courts have focused on the *conduct* being litigated, rather than loan origination, to determine whether HOLA applies. Here though, Wells Fargo was allowed to assert HOLA preemption because it acquired a loan originated by a FSA.[27]

Under HOLA, "state laws of general applicability . . . are preempted if their enforcement would impact federal savings associations" in relation to loan-related fees, disclosures and advertising, processing, origination, or servicing. Here, borrowers based their promissory estoppel claim on their servicer's delayed response to the modification application. The servicer's actions, though, amounted to loan "servicing," expressly preempted under HOLA. Borrowers' other claims (breach of contract, breach of implied covenant of good faith and fair dealing, negligence, negligent and intentional interference with prospective economic advantage, fraud, and UCL), all based on state laws of general applicability, were also preempted by HOLA and dismissed. The court equated the modification process with loan servicing in every instance.

National Housing Act's Servicing Standards & Federal Jurisdiction

Smith v. Deutsche Bank Nat'l Trust, 2013 WL 3863947 (E.D. Cal. July 24, 2013): Federal courts exercise original jurisdiction over "all civil actions arising under [federal] law." The "mere mention" of a federal law does not, however, automatically bestow federal subject matter jurisdiction. "A claim arises under federal law 'only if it involves a determination respecting the validity, construction, or effect of such a law and the result of the action depends on that determination.'" In other words, the federal question must be "substantial." While not dispositive, the lack of a private right of action in the federal law often indicates that federal jurisdiction is inappropriate. Here, defendant removed borrower's original state case to federal court based on a wrongful foreclosure claim, which stemmed from a violation of the foreclosure prevention servicing requirements in the National Housing Act. The court agreed that this was too tenuous a thread on which to base jurisdiction. Neither the NHA nor its foreclosure prevention provisions provide for a private right of action. Further, the question before the court – a state based wrongful foreclosure claim—does not delve into the "validity, construction, or effect" of the NHA provisions. The case was remanded to the more appropriate state court.

Breach of Contract and Promissory Estoppel Claims Based on Modification Offer Letter

Loftis v. Homeward Residential, Inc., 2013 WL 4045808 (C.D. Cal. June 11, 2013): To plead a breach of contract claim, borrowers must allege a contract, their performance, defendant's breach, and damages. Here, defendant's congratulatory letter, alerting borrowers of their modification eligibility, constituted an express contract. The letter instructed borrowers that they could "accept" the "offer" by (1) completing and returning the agreement and (2) continuing to make TPP payments. Borrowers performed by fulfilling these instructions and defendant breached by refusing to modify, and instead, raising the loan's interest rate. Damages are often difficult to show, if borrower's *default*, not the servicer's refusal to modify, led to foreclosure. Here though, borrowers successfully pled damages by alleging they were current on their mortgage and TPP payments before defendant raised their interest rate. It was this raise (contract breach) that led to increased monthly payments, eventual default, and foreclosure. Defendant's statute of frauds defense failed. The offer letter was printed on defendant's letterhead and signed, complying with the statute of frauds: a writing "subscribed by the party to be charged." Defendant's failure to return a signed copy to borrowers does not change this analysis because the letter already memorialized the contract in writing, and defendant intended to be bound by the contract if the borrower fulfilled its requirements.

Borrower's promissory estoppel claim survives for similar reasons. First, the offer letter constitutes a clear and unambiguous promise: "if you comply . . . we will modify your mortgage loan." Borrowers alleged lost refinancing, bankruptcy, and sale opportunities, and the court agreed that this constituted reasonable, detrimental reliance. Defendant argued that borrowers had time to pursue these opportunities between the alleged breach and the foreclosure sale. The court determined potential opportunities occurring after the breach do not negate reliance.

Correction to August newsletter:

C**aldwell v. Wells Fargo Bank, N.A.**, 2013 WL 3789808 (N.D. Cal. July 16, 2013).

Original: CC § 2923.6(g) allows for resubmission of an application for a *first* lien loan modification. Dual tracking protections therefore do not protect a borrower who previously defaulted on a modification plan. Here, the court found the borrower unlikely to prevail on the merits (for purposes of a TRO request) of her dual tracking claim despite an alleged change in income, because her default on her first modification disqualified her from any further modification evaluation.

Revised: CC § 2923.6(g) provides dual-tracking protections for resubmission of an application for a loan modification if there has been a "material change in the borrower's financial circumstances since the date of the borrower's previous application," which has been documented and submitted to the servicer. Here, the court determined that Wells Fargo evaluated the borrower's second loan modification application and denied the application based on its internal policy of denying second modifications to borrowers who previously defaulted on a modification constitutes an "evaluation" under HBOR. The borrower was deemed unlikely to prevail on the merits of her dual tracking claim because of Wells Fargo's proper denial under its internal modification evaluation policy, not because her previous default disqualified her from HBOR's dual tracking protections on a second modification evaluation. Under CC § 2923.6, she was entitled to a second evaluation because of her change in financial circumstances. She received an evaluation and was denied.

Recent Regulatory Updates

HAMP Supplemental Directive 13-06 (Aug. 30, 2013)

Borrower Notice of Interest Rate Step-Ups

HAMP Tier-1 modifications will soon reach the end of their initial five-year terms. After the first five years, the interest rates on the loan increase by one percent each year until they reach a pre-determined cap. At least 120 days (but not more than 240 days) before the first adjusted payment is due, servicers must notify borrowers of the increase. As the interest rates increase over time, servicers must notify the borrowers of each additional increase at least 60 days (but not more than 120) before the borrower's first payment is due.

Servicing Transfers

When a loan is transferred from one servicer to another, the new servicer must abide by any TPP agreement already in-place between the previous servicer and the borrower. This is true even if the new servicer determines that the old servicer incorrectly calculated borrower's TPP payments. "The borrower must be allowed to complete the trial period plan pursuant to the terms of the trial period plan notice."

Upon successful completion of a TPP, the new servicer *must* offer the borrowers a permanent loan modification. If the TPP payment amount incorrectly exceeded the correct TPP amount by 10% or more, the new servicer *must* re-run the waterfall to determine accurate permanent modification payments. If the TPP payments were incorrectly less than what they should have been, the servicer does not need to re-run the waterfall.

Death & Divorce: Impact on Non-Occupants and Non-Borrowers

Non-occupants who inherit or are awarded property after death or divorce, when the original borrower was successfully completing a TPP, must now be treated as occupant non-borrowers and co-borrowers under HAMP *Handbook*, Chapter 2, sections 8.9.1 and 8.9.2.

Non-borrowers who inherit or are awarded the property when the original borrower was *not* in a TPP plan may apply for HAMP and given a TPP plan if they qualify. These new owners should be "evaluate[d] . . . as if he or she was the borrower." If investor guidelines on a particular loan allow for the loan's assumption, servicers should process the assumption and loan modification simultaneously.

Return of Fully Executed Modification Agreement

Servicers must sign and return a permanent modification agreement to the borrowers no later than 30 days after receiving the signed-borrower copy of the agreement, and the borrower's compliance with the TPP.

Fannie Mae Servicing Guide Announcement SCV– 2013–17 (Aug. 28, 2013)

Widows & Orphans

New owners –widows, orphans, or other survivors of the original borrower—must be allowed to assume the loan, make mortgage payments, and enter into foreclosure prevention alternatives, even if the new owner is not on the original note. Further, servicers must "implement policies and procedures" that will allow them to quickly identify the party that took over ownership of the property, and to communicate with that person. If the loan is delinquent and the new owner cannot bring it current, they must be evaluated for foreclosure prevention alternatives.