Docket No. 13-56314

In the

United States Court of Appeals

for the

Ninth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOHAMMAD ALI TALAIE, *an individual on behalf of themselves and all others similarly situate*d; ROSA W. TALAIE, *an individual on behalf of themselves and all others similarly situated,*

Plaintiffs - Appellants,

v.

WELLS FARGO BANK, N.A., and U.S. BANK, National Association, as trustee,

Defendants - Appellees.

APPEAL FROM THE U.S. DISTRICT COURT
For the Central District of California, Los Angeles
Case No. 2:12-cv-04959-DMG-AGR The Honorable Dolly M. Gee, Presiding

APPELLANTS' PETITION FOR PANEL REHEARING AND HEARING EN BANC

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I. ISSUE PRESENTED

The panel decision finding that 15 USC § 1641(g) which was part of the national "Helping Families Save Their Homes Act of 2009" (1) does not apply retroactively or (2) that execution of an assignment of deed of trust was not a "transfer should be reheard because the court overlooked four important facts concerning:

1. The Presidential Program ("HAMP")
2. Mortgage Backed Securitized Trust Documents
3. Statutory Construction of "Sold or Transferred"
4. Landgraf

Second, the California Court of Appeal held that tender was not required to allege a Cancellation of Documents cause of action when a homeowner is seeking a loan modification in order to avoid foreclosure in *Majd v Bank of America* Case No. G050250 (Cal App 4/3 12/21/15) after the unpublished memorandum holding that tender was required in this case.

These issues are of exceptional importance and substantially affects the rights of all persons in the nation who purchased homes with a loan predating the enactment of 15 USC §1641(g) so en banc consideration should be entertained.

II. ARGUMENT

A. THIS COURT SHOULD GRANT A REHEARING WITH SUGGESTION FOR REHEARING EN BANC ON THE ISSUE OF WHETHER 15 USC § 1641(G) SHOULD BE APPLIED RETROACTIVELY TO BORROWERS WHO ARE CURRENTLY BEING FORECLOSED UPON BY LENDERS

On December 14, 2015 this Circuit held "that 15 USC § 1641(g) does not apply retroactively because Congress did not express a clear intent that it does so. Landgraf, 511 U.S. at 280." Opn p. 6. This published decision is now binding precedent upon all courts in this circuit and has such a profound effect on the housing market that rehearing en banc should be considered.

1. A REHEARING EN BANC IS WARRANTED ON THE GROUNDS A MATERIAL POINT OF FACT WAS OVERLOOKED IN THE DECISION

The Ninth Circuit found that there was no clear Congressional intent that 15 USC § 1641(g) was meant to be applied retroactively. However, to leap to that conclusion, then it is necessary to find that Congress' reference that this Bill would assist homeowners under the Presidential Plan ("HAMP") could be achieved without retroactive application.

a. PRESIDENTIAL PLAN

The Presidential program (Making Home Affordable program aka "HAMP") was meant to assist homeowners with existing mortgages who were currently in trouble and losing their homes through foreclosure.

Congress enacted the HELPING FAMILIES SAVE THEIR HOMES ACT OF 2009 which included the amendment at issue in this case. Captions are important when interpreting Congressional intent. It was not called the "Helping *Future Families* of the *Next Recession* Save Their Homes Act." It was not called the "*Pretending* to Help Families Save Their Homes Act of 2009 for Another Vote in Congress." It was called "**Helping Families Save Their Homes Act of 2009**." [155 Cong Rec. S 5097-99, 5173-74]

The title denotes present action. Congress further evoked its intent of present action when Senator Boxer said, without objection that this "gives borrowers an additional tool to fight illegitimate foreclosures or to negotiate loan modifications that would keep them in their homes." [155 Cong. Rec. S5099][bold added]

Using the interpretation and holding of this court, no homeowner would be kept in their homes or be able to use this amendment as an additional tool to fight illegitimate foreclosures or to negotiate a loan modification. Defendants may believe that Congress would have expressly stated that the amendment was retroactive, but they did not point to any facts to support that belief when it is just

as reasonable and more likely that Congress intended the word "transfer" to include assignments of deed of trust that the beneficiary would record prior to foreclosure.

There is nothing in the record to substantiate a conclusion that Senator Boxer was making this statement with knowledge that the passing of this bill would not in fact "give[] borrowers an additional tool to fight illegitimate foreclosures or to negotiate loan modifications that would keep them in their homes." This court's interpretation necessarily leads to that conclusion.

Further proof that the amendment was supposed to apply to current loans that had already been made was by the statement that the amendment was "very important to the financial security of the country" at a time this country was in a recession. [155 Cong Rec S5098]

There was nothing mentioned that Congress intended the current generation of homeowners to be left out in the cold. This is not the first time this country was in a mortgage crisis. In 1933 this country faced a mortgage and foreclosure crises and the legislation that was passed was applied to current borrowers facing foreclosure regardless if the U.S. Supreme Court expressly stated the legislation was retroactive or not while the banks screamed all the way to the U.S. Supreme

Court that the legislation did not apply to deeds of trust that were recorded before the law was passed. *See, East N. Y. Sav. Bank v Hahn*, 326 U.S. 230 (1945).

Senator Boxer even gave an example of a homeowner who had her lawsuit dismissed because Deutsche Bank hid its identity until the statute of limitations ran on a rescission claim. She concluded

> So this kind of hide-and-seek situation has real-life ramifications. It certainly does with the **President's plan** now that says, if someone has a mortgage that is under water, they can renegotiate, they have a chance. **But if they do not know who holds the mortgage, it is a hollow kind of plan.**
>
> [155 Cong Rec S5098]

Considering the statements made on the floor of Congress, it is more reasonable to conclude that the Senate believed that the amendment applied to loans that already existed in order to help families in the present economic climate.

There was absolutely no discussion on the floor of Congress to find that Congress intended any different.

There would be no other way to make sure the President's plan was not a "hollow one" by having the Senate pass this amendment.

She said it was "common sense if you have a mortgage on your home, you ought to know who holds the mortgage." [155 Cong Rec S5098] The phrase "if

you have a mortgage" is more proof that Congress intended this legislation to apply to current mortgage holders, which under the analysis of the Ninth Circuit would mean mortgage holders who had their loans already sold to the mortgage backed securitized trust. Consequently, if the Ninth is going to continue with that stance then it must also find that Congress clearly intended it to be applied retroactively.

b. MBS TRUST

The Ninth Circuit missed the fact that the Senate did take into consideration how a mortgage backed securitized trust worked. Senator Dodd said "Today, with securitization of mortgages, that mortgage no longer stays at your bank for the length of that mortgage. Today, it is sold off very quickly. When homeowners want to find out who actually has that mortgage, it is almost impossible to discover that. Senator Boxer's amendment makes that possible once again, and it is a very valuable contribution to the bill." [155 Cong Rec S 5173-74]

Combining Senator Boxer's statements clearly articulating that the amendment would help homeowners with existing mortgages who were trying to avoid foreclosure in conjunction with Senator Dodd's statements acknowledging these loans are sold off, and at the same time that this amendment would in fact help families currently in this crises, the only logical conclusion is that Congress

believed the assignments that would later occur in order to finalize the foreclosure process were in fact a transfer covered by 15 USC § 1641g. It is the only way to make Congress' intent a reality when applying the statute to current cases.

Second, this court overlooked the rules of evidence and the record when it also opined "[j]udicially noticed securitization contracts *establish* that Wells Fargo transferred Plaintiffs' deed of trust to U.S. Bank in 2006, three years before Congress enacted [15 USC] § 1641(g)." Opn. P. 3. [italics added]

Securitization documents should be not judicially recognized. They are nothing more than private contracts being later recorded. That does not transform them into public records. Moreover, the court did more than recognize that the documents existed; it also recognized hearsay statements in the documents as the truth. It is inadmissible hearsay under the Federal Rules of Evidence.

Not only should it be reversible error to judicially recognize the documents provided; the documents that were erroneously judicially recognized did not contain any fact *establishing* Wells Fargo actually transferred Mr. and Mrs. Talaie's deed of trust (assigned it) to U.S. Bank in 2006. Mr. and Mrs. Talaie's deed of trust was executed on September 21, 2005. In order to keep IRS tax shelter provisions in place this deed of trust and note had to be transferred to the trust by December 21, 2005. However, the closing date on this trust was April 27, 2006.

Nothing was presented to show that U.S. Bank received the loan by December 21, 2005. All the defendants provided was a generic forward looking statement that the cut-off date and closing date for the trust was April 1, 2006 and April 27, 2006, respectively. [EOR 2:122] They never provided the actual "Mortgage Loan Schedule" which was annexed as Exhibit A that listed the actual loans which were transferred to this trust in 2006. [EOR 2:107] In fact, it was "intentionally omitted." [EOR 2:126 and 145] Defendants also omitted the Servicing criteria (Exhibit H) which outlined whether or not Wells Fargo Bank could modify the loan. That exhibit was material to proving that the fraud claim failed as a matter of law. [EOR 2:102] In fact, the entire Pooling and Servicing Agreement was not provided in this instance.

What was provided demonstrated that the assignment should have been executed in 2006 if the Appellant's loan was actually part of this trust because their deed of trust *did not* name MERS. The agreement explained that if the mortgage was not recorded in the name of MERS that all intervening assignments with "evidence of recording thereon" should be in the file before the closing date, April 27, 2006. [EOR 2:122]

> For any Mortgage Loan not recorded in the name of MERS, originals or certified true copies of documents sent for recordation of all intervening assignments of the Mortgage with evidence of recording

> thereon, …shall [be] deliver[ed] or cause[d] to be delivered to the Custodian…[before closing].
> [EOR 2:120]

This process was reaffirmed on page 26 of the trust document provided to the court. [EOR 2:116] As commanded in section 2.04 of the trust agreement, each loan file containing the note, deed of trust and each assignment was required to be delivered to the Custodian before the closing date to ensure that all documents were in the file before closing. [EOR 2:111]

Also, the sale was required to be placed on U.S. Bank's financial records.

> The sale of each Mortgage Loan shall be reflected on the Company's balance sheet and other financial statements as a sale of assets by the Company. The Company shall be responsible for maintaining, and shall maintain, a complete set of books and records for each Mortgage Loan which shall be marked clearly to reflect the ownership of each Mortgage Loan by the Purchaser.
> [EOR 2:110]

> The Company shall keep at its servicing office books and records in which, subject to such reasonable regulations as it may prescribe, the Company shall note transfers of Mortgage Loans. No transfer of a Mortgage Loan may be made unless such transfer is in compliance with the terms hereof.
> [EOR 2:110]

However, U.S. Bank and Wells Fargo did not provide the court a copy of their financial records or books. Consequently, the documents that Defendants

provided to the district court in opposition to the FRCP 12(b)(6) motion to dismiss should have been ruled irrelevant.

Instead of providing the court with the documents containing the facts to prove whether or not U.S. Bank was the true beneficiary and whether or not U.S. Bank became the true beneficiary in 2006, the banks provided the court these scant sections of the trust agreement that are in the excerpts of record which tell the court absolutely nothing dispositive at all.

What their documents do show is that the closing date of the trust was in April 27, 2006 which is when all assignments of this loan had to be executed by in the name U.S. Bank. [EOR 2:122] On the other hand, the assignment from Wells Fargo Bank to U.S. Bank was not even executed (much less recorded) until February 22, 2012. [EOR 2:152] So, the Defendants' own documents conflicted with the terms of the trust and did not follow the rules that the trust provided making Plaintiff's allegations "plausible."

Moreover, the actual Mortgage Loan Schedule demonstrating that this specific loan was transferred to this mortgage backed securitized trust in 2006, as referenced in the papers submitted, was not actually submitted to the court, although Defendants could have done so. [EOR 2:107, 126 and 145]

Under normal rules of evidence, this Court can conclude that the banks could have proffered stronger evidence, but did not do so because it would have hurt their position. So the allegation that the loan was transferred in 2012 was plausible making the retroactivity of 15 USC § 1641(g) irrelevant.

c. SOLD OR TRANSFERRED

This circuit's opinion also jumped over the statutory construction analysis for 15 USC § 1641(g) as to what a sale or transfer including the assignment of deed of trust. The entire purpose of TILA since its inception in 1968 is to give notice to consumers.

As stated on the legislative floor in May 2009 by Senator Boxer,

> The Boxer amendment provides borrowers with the basic right to know who owns their loan by requiring that any time a mortgage loan is **sold or transferred**, the new note owner shall notify the borrower within 30 days of the following: the identity, address, and telephone number of the new creditor; the date of transfer; how to reach an agent or party with the authority to act on behalf of the new creditor; the location of the place where the transfer is recorded; and any other relevant information regarding the new creditor. [155 Cong. Rec. S5098] [bold added]

The use of the conjunction "or" demonstrates that sold does not equal transfer and both are not necessary for the amendment to apply. To transfer means

to move, convey, take, bring, shift, remove, carry, or transport. Google online. A sale on the other hand is when a commodity is exchanged for money.

The assignment conveyed the status of beneficiary to U.S. Bank from Wells Fargo, consequently the assignment of deed of trust executed on or about February 22, 2012 would fit the definition of "transfer" and the Congressional intent of a trigger date for U.S. Bank and Wells Fargo to comply with 15 USC §1641(g). [EOR 2:152]

Applying the statute in this fashion would fulfil the intent of Congress to make sure that the President's plan was not a hollow one.

d. LANDGRAF

Finally, the court found that under Landgraf, retroactive application would be inappropriate due to the profound effect on the financial industry. However, there is no profound effect.

The evidence shows that the Senate studied the effects of the legislation that they were passing when Senator Boxer said "[t]his is a very narrowly targeted amendment with little cost to the industry. But the benefit to homeowners and communities would be absolutely enormous." [155 Cong. Rec. S5099]

The obligations of the creditor or assignee and the borrower under the contract remain the same. "Each provision of that contract is as enforceable now as

it was prior to the issuance of [subsection g of 15 USC §1641]." *Thorpe* at 279. The Court opined it would burden the Lender and change the terms of the deed of trust which said that the Lender may transfer or sell the loan without notice to the borrower. That is not true. The amendment had no burden on the Lender. The amendment affected the obligations of the Servicer, Wells Fargo, and new assignee, U.S. Bank, both of whom were not even parties to the deed of trust when it was executed by the borrowers.

In fact, one district court *Squires v. BAC Home Loans Servicing, LP*, 2011 U.S. Dist. LEXIS 137581, 2011 WL 5966948, *3 (S.D. Ala. Nov. 29, 2011) that thoroughly looked at the issue came to the same conclusion.

The U.S. Supreme Court is steeped in precedent showing that it does not interpret legislation meant to save the homeowner against the homeowner's own interests. In *East N. Y. Sav. Bank v Hahn*, 326 U.S. 230 (1945), a case cited by Appellants' in their supplemental brief, a court had to determine if a statute enacted after the deed of trust and default occurred would be applied to a current foreclosure for nonpayment of mortgage. In 1932 the borrowers had defaulted. In 1933 the Legislature enacted a foreclosure moratorium. In 1945 the United States Supreme Court affirmed judgment against the bank that wanted the court to find the moratorium did not apply to this homeowner. In similar circumstance US Bank

and Wells Fargo wants this court to reach back to the date the deed of trust was executed to avoid the application of 15 USC §1641(g). However, like the moratorium legislation, the purpose of enacting 15 USC §1641(g) was to give the homeowner another tool to fight against illegitimate foreclosure and obtain a loan modification to save homeownership. There should be no difference in result. So long as the loan exists, the Borrower is entitled to the protection of 15 USC §1641(g) just like a borrower would be protected by the moratorium of 1933.

Landgraf v USI Film Products, 511 U.S. 244, 114 S.Ct. 1483 (1994) is inapposite. It was not a case dealing with foreclosure during an economic crisis like *East N. Y. Sav. Bank v Hahn*, 326 U.S. 230 (1945). It was not even dealing with legislation affecting residential tenant rights like *Thorpe*. The petition for rehearing should be granted.

B. THIS COURT SHOULD GRANT A REHEARING WITH SUGGESTION FOR REHEARING EN BANC ON THE ISSUE OF WHETHER TENDER WAS REQUIRED FOR THE CANCELLATION OF DOCUMENTS CAUSE OF ACTION

Next, the Ninth Circuit held that tender was required for the Cancellation of Documents and Quiet title claim in the Unpublished memorandum. Whether or not tender is required is a state law issue where federal courts will follow state law and precedent. After this court's memorandum was issued, the California Court of

Appeal opined that tender *is not* required for a Cancellation of Documents cause of action when a homeowner is attempting to modify their loan in order to avoid foreclosure. *See*, *Majd v Bank of America* Case No. G050250 (Cal App 4/3 12/21/15) (Addendum)

1. **A REHEARING EN BANC IS WARRANTED ON THE GROUNDS A NEW CALIFORNIA APPELLATE DECISION (UNPUBLISHED) HAS COME FORWARD MAKING IT CLEAR THAT TENDER IS NOT REQUIRED BY HOMEOWNERS WHO ARE ATTEMPTING TO MODIFY THEIR LOAN WHEN THEY PLEAD A CANCELLATION OF INSTRUMENTS CLAIM**

In *Majd v Bank of America*, the California Court of Appeal explained why the tender rule does not apply to modification cases:

> The purpose of the modification rules is to avoid a foreclosure despite the borrower being incapable of complying with the terms of the original loan. It would be contradictory to require the borrower to tender the amount due on the original loan in such circumstances. Moreover, the purpose of the tender rule is to dismiss suits at an early stage, where, despite any irregularities in the lender's foreclosure activities, the borrower will ultimately have to pay the amount due on the loan, but cannot do so. Such suits are essentially futile. This is not such a case, as a loan modification is an alternative to foreclosure that does not require the borrower to pay pursuant to the terms of the original loan.

Majd v Bank of America Case No. G050250 p. 20 (Cal App 4/3 12/21/15)

The Majd court found a cause of action for Cancellation of Instruments appropriate "[t]o the extent plaintiff seeks to cancel the notice of trustee's sale and trustee's deed upon sale" against the beneficiary. In the case of Talaie that would be U.S. Bank. *Majd v Bank of America* Case No. G050250 p. 23 (Cal App 4/3 12/21/15)

Mr. and Mrs. Talaie alleged that after a notice of default was recorded on November 29, 2010 Wells Fargo told them that if they paid $19,197.04 they would be able to obtain a loan modification and any outstanding arrearages would be added to the new modified loan. They paid Wells Fargo $19,197.04 but then Wells Fargo did not modify their loan without giving a reason as to why the investor was denying the modification. Plaintiffs also alleged that the CCP §2923.5 declaration was missing which would prohibit the bank from recording a Notice of Sale and proceeding. [EOR 2:44-45]

Like Majd, they were homeowners attempting to modify their loan in order to save themselves from foreclosure. They relied on the same case precedent of *Lona* in both appeals. Both Majd and Talaie even had the same appellate counsel. Since, the California Court of Appeal came out with an opposite conclusion to the Ninth Circuit on the tender issue, a rehearing would be appropriate.

2. A REVERSAL ON EITHER OF THE ABOVE WOULD WARRANT REVERSAL OF THE FRAUD AND CAL BUS & PROF CODE § 17200 CLAIM

The Ninth Circuit also held that "Wells Fargo's statements are not specific and in our view do not seem to have been intended to defraud." Memo. P. 4.

The Ninth circuit found that the assurances in the letters encouraging modification were not definite enough and did not find any duty to disclose this

information to the borrower during the modification process. [EOR 2:47-52] However, where leave to amend can be granted to state a cause of action, then leave should be granted in order to have the case tried on its merits. Here, leave should be granted to amend to allege that on March 15, 2012 Wells Fargo told Mr. and Mrs. Talaie that they were denied a loan modification on the grounds that investor declined modification, but they were *never given the reason* for the denial from the investor. The denial letter dated March 15, 2012 was attached to the pleading. [EOR 2:84-85] The failure to give the reason for the denial prior to foreclosure sale violated the President's Plan under HAMP and the National Mortgage Settlement Agreement. By asserting that the letter dated March 15, 2012 was a "denial letter" that would trigger the 30-day appeal period, was false on the grounds that it did not include the reason for denial. Wells Fargo knew or should have known that labeling the March 15, 2012 letter a "denial letter" was false or was reckless when it did so. Plaintiff's relied on the letter being a denial letter and spent time and money trying to figure out who owned the loan so that they could negotiate a modification. [EOR 2:34-36, 38, 84-85] Mr. and Mrs. Talaie were never given the reason for the investor denial. They even put their request in writing and faxed it to their customer service representative on May 11, 2012.

[EOR 2:38] Their home was set to sell at foreclosure auction on June 7, 2012 and the sued.

Both HAMP Guidelines and the National Mortgage Settlement provided Mr. and Mrs. Talaie a thirty-day period to appeal after they were given a reason for the denial of their loan modification. [EOR 2:40] In this case, Mr. and Mrs. Talaie did not get the thirty days to appeal the reason for denying a loan modification to them on the grounds Defendants never gave them the reason for denial. Instead they set foreclosure sale for June 7, 2012. [EOR 2:149]

From March 2012 to the time of the lawsuit, Mr. and Mrs. Talaie spent time and expense in trying to fix the "denial" while being foreclosed upon and running against the clock. This caused emotional distress entitling them to general damages. Their reliance on Wells Fargo's representations were reasonable on the grounds the representation of the loan denial was on Wells Fargo's letterhead and they were speaking to Wells Fargo employees on the phone at the Wells Fargo designated phone bank. From 2012 to the present neither US Bank nor its agent Wells Fargo have given Mr. and Mrs. Talaie their reason for denying the loan modification in March 2012. The policy for amending is supposed to be liberally construed whenever the facts warrant it. The facts warrant it in this situation.

The same situation would require reversal for the Cal Bus & Prof Code § 17200 cause of action because such practice would be unlawful, unfair, and fraudulent.

III. CONCLUSION

For the foregoing reasons Appellants respectfully request a rehearing on these issues.

Dated: December 28, 2015

Respectfully Submitted,
Law Offices of Lenore Albert

/s/ Lenore L. Albert
Lenore L. Albert, Esq.
Counsel for Plaintiff/Appellants
Mohammad Talaie and Rosa Talaie.
on behalf of themselves and all others
similarly situated

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the Court's Order of November 3, 2015. The brief's type size and type face comply with Federal Rules of Civil Procedure, rule 32(a)(5) and (6). This brief has 4,179 words not including this Certificate and Certificate of Service.

Dated: December 28, 2015

Respectfully Submitted,
LAW OFFICES OF LENORE ALBERT

/s/ Lenore Albert
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 28, 2015.
Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.
I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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Dated: December 28, 2015

/s/ Lenore Albert
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOHAMMAD ALI TALAIE, an individual on behalf of himself and all others similarly situated; ROSA W. TALAIE, an individual on behalf of herself and all others similarly situated, *Plaintiffs-Appellants*, v. WELLS FARGO BANK, NA; US BANK NA, National Association as Trustee, *Defendants-Appellees*.	No. 13-56314 D.C. No. 2:12-cv-04959-DMG-AGR OPINION

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted
November 2, 2015—Pasadena, California

Filed December 14, 2015

Before: William A. Fletcher and Ronald M. Gould, Circuit Judges, and Dana L. Christensen,* Chief District Judge.

Opinion by Judge Gould

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* The Honorable Dana L. Christensen, Chief District Judge for the U.S. District Court for the District of Montana, sitting by designation.

SUMMARY**

Truth in Lending Act

The panel affirmed the district court, and held that 15 U.S.C § 1641(g), a 2009 amendment to the 1968 Truth in Lending Act which requires a creditor who obtains a mortgage loan by sale or transfer to notify the borrower on the transfer in writing, does not apply retroactively because Congress did express a clear intent that it do so.

COUNSEL

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Paul W. Sweeney (argued), Kevin S. Asfour, and Nancy C. Hagan, K&L Gates LLP, Los Angeles, California, for Defendants-Appellees.

OPINION

GOULD, Circuit Judge:

We consider the retroactivity of 15 U.S.C. § 1641(g), a 2009 amendment to the 1968 Truth in Lending Act (TILA). Section 1641(g) requires a creditor who obtains a mortgage

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

loan by sale or transfer to notify the borrower of the transfer in writing. Although several district courts have issued decisions on this statute's retroactive effect, this is an issue of first impression in our circuit.

Plaintiffs Mohammad and Rosa Talaie brought a putative class action against Wells Fargo Bank and U.S. Bank, alleging various federal and state law claims arising out of the modification of the deed of trust for the Talaies' home. One of Plaintiffs' claims is that Defendants did not comply with § 1641(g).[1] Judicially noticed securitization contracts establish that Wells Fargo transferred Plaintiffs' deed of trust to U.S. Bank in 2006, three years before Congress enacted § 1641(g). The reporting requirement of § 1641(g) would apply to this loan transfer only if § 1641(g) had retroactive effect. For the reasons that follow, we hold that 15 U.S.C. § 1641(g) does not apply retroactively.

Section 1641(g) requires that "not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer," and must include the date of the transfer, contact information for the new creditor, and other relevant information. 15 U.S.C. § 1641(g). If the new creditor does not comply with this duty, Congress authorized the borrower to sue the creditor to recover actual damages, a statutory penalty of up to $4,000 in individual claims or up to $1 million in a class action, plus costs and attorney's fees. 15 U.S.C. § 1640(a).

[1] We resolve all other issues and affirm the district court in a memorandum disposition filed concurrently with this opinion.

In general, retroactive application of statutes is disfavored. The Supreme Court has held that the presumption against retroactive legislation is "deeply rooted in our jurisprudence," and can only be overcome where Congress expresses a clear and unambiguous intent to do so. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). In *Landgraf*, the Court considered § 102 of the Civil Rights Act of 1991, which created a right to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964. *Landgraf*, 511 U.S. at 247. Section 102 significantly expanded the monetary relief available to plaintiffs entitled to back pay under prior law, and also gave monetary relief for "some forms of workplace discrimination that would not previously have justified *any* relief under Title VII." *Id.* at 254. The issue was whether § 102 applied to conduct predating its enactment. The Supreme Court, in declining to make the statute retroactive, first observed the principle that "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place," to avoid the "unfairness of imposing new burdens on persons after the fact." *Id.* at 265, 270. If a new statute would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," then courts should not give retroactive effect to the statute without "clear congressional intent favoring such a result." *Id.* at 280.

Here, § 1641(g) was introduced by Senator Boxer on May 1, 2009 as an amendment to Senate Bill 896. 155 Cong. Rec. S5027-03 (2009). Senator Boxer stated that while existing law required that borrowers be informed of a change in *servicer* of their mortgage loan, there was no such notice requirement for a change in loan owner. 155 Cong. Rec. S5098–99 (2009). The amendment was meant to provide

"borrowers with the basic right to know who owns their loan by requiring that any time a mortgage loan is sold or transferred, the new note owner shall notify the borrower within 30 days . . . ." *Id.* Senator Boxer noted that "[t]his is a very narrowly targeted amendment with little cost to the industry." *Id.*

Retroactive application of § 1641(g) would implicate the concerns highlighted in *Landgraf*, 511 U.S. at 280. First, retroactive application would impair rights Defendants possessed when they acted, because, consistent with the loan documents and the law at the time they were signed, Defendants had a right to sell or transfer the loan without notice to the borrower. Second, retroactive application of the statute would increase Defendants' "liability for past conduct," because the 2009 TILA amendments provide new private rights of action including damages, attorney's fees, and statutory penalties, for failure to give notice of a loan transfer. *Id.*; *see* 15 U.S.C. § 1640(a). Third, retroactive application would impose "new duties" on transactions already completed; the very purpose of the statute was to require a loan transferee to give notice where none was previously required. *See* 16 U.S.C. § 1641(g); 155 Cong. Rec. S5098–99. Given that all three of the retroactivity concerns in *Landgraf* are present, we next determine whether Congress expressed a clear and unambiguous intent that § 1641(g) apply retroactively. *Landgraf*, 511 U.S. at 280.

There is no clear indication, in § 1641(g)'s text or in its legislative history, that Congress intended for it to apply to loans that had been transferred before its enactment. The statute requires notice within 30 days of loan transfer and authorizes damages and statutory penalties for failure to comply. 15 U.S.C. §§ 1641(g)(1), 1640(a). If the statute

were given retroactive effect, this 30-day reporting period would have already lapsed for all loan transfers that occurred more than a month before enactment, and it would have been impossible for those creditors to comply with the reporting requirement. It is unlikely that Congress would have broadly subjected creditors to civil liability and statutory penalties without at least giving them a way to comply with § 1641(g) for loan transfers that predated its enactment. We conclude that Congress did not make any such intention clear or unambiguous. *See Landgraf*, 511 U.S. at 268.

Congress has demonstrated, moreover, that it knows how to specify the effective date of statutory provisions. First, another provision of TILA, 15 U.S.C. § 1641(f), states that "[t]his subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995." This effective date for a parallel statutory provision strongly suggests that § 1641(g), which does not specify an express date, applies prospectively but does not extend to loan transfers predating its enactment. Second, Public Law 111-22, which implemented § 1641(g) along with several other TILA amendments, provided a "retroactive effective date" for a different component of the same bill. Section 105, which addressed the distribution of funds under the Neighborhood Stabilization Program, includes a "retroactive effective date" stating that the amendment "shall take effect as if enacted on the date of enactment of the Foreclosure Prevention Act of 2008 (Public Law 110-289)." P.L. 111-22, 123 Stat. 1632, 1638 (2009).

We hold that § 1641(g) does not apply retroactively because Congress did not express a clear intent that it do so. *Landgraf*, 511 U.S. at 280. Our holding is consistent with numerous district court decisions interpreting § 1641(g). *See,*

e.g., *Bradford v. HSBC Mortg. Corp.*, 829 F. Supp. 2d 340, 353 (E.D. Va. 2011); *Diunugala v. JP Morgan Chase Bank, N.A.*, No. 12-2106, 2015 WL 3966119, at *4 (S.D. Cal. Jun. 30, 2015); *Zinzuwadia v. Mortg. Elec. Registr., Inc.*, No. 12-2281, 2013 WL 6782856, at *11–12 (E.D. Cal. Dec. 19, 2013).

AFFIRMED.

FILED

DEC 14 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MOHAMMAD ALI TALAIE, an individual on behalf of themselves and all others similarly situated; ROSA W. TALAIE, an individual on behalf of themselves and all others similarly situated, Plaintiffs - Appellants, v. WELLS FARGO BANK, NA; US BANK NA, National Association as Trustee, Defendants - Appellees.	No. 13-56314 D.C. No. 2:12-cv-04959-DMG-AGR MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted November 2, 2015
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: W. FLETCHER and GOULD, Circuit Judges and CHRISTENSEN,*** Chief District Judge.

Plaintiffs Mohammad and Rosa Talaie appeal the district court's dismissal of their putative class action against Wells Fargo Bank and U.S. Bank, alleging claims arising out of the modification of the Talaies' two home loans. We affirm.

Plaintiffs defaulted on their loans in 2009 and sought a loan modification from Wells Fargo. Plaintiffs contend that Wells Fargo found them eligible for a loan modification, but Wells Fargo's response is that its correspondence equivocally states Plaintiffs *may* be eligible if they take certain actions. Wells Fargo advised Plaintiffs that they needed to pay off the amount in arrears on their first loan to be considered for a modification. Wells Fargo eventually denied the requested loan modification on the ground that U.S. Bank, which owned the mortgage, did not approve it. Plaintiffs brought this action, which the district court dismissed.

1. Plaintiffs first alleged that Defendants violated 15 U.S.C. § 1641(g), a provision of the Truth in Lending Act, by failing to notify Plaintiffs when their loan was transferred from Wells Fargo to U.S. Bank. We reject this claim in an opinion filed jointly with this memorandum disposition. Plaintiffs also contend

*** The Honorable Dana L. Christensen, Chief District Judge for the U.S. District Court for the District of Montana, sitting by designation.

that U.S. Bank had a duty to comply with § 1641(g) in 2012, when Wells Fargo assigned the deed of trust to U.S. Bank via a Corporate Assignment of Deed of Trust. But as the district court correctly noted, the 2012 assignment was only a formality and did not constitute a new transfer of the loan. Under California law, U.S. Bank became the beneficiary under Plaintiffs' deed of trust in 2006, when the loan was transferred, regardless of whether an assignment was ever recorded between Wells Fargo and U.S. Bank. *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497, 518 (2013). Section 1641(g) does not apply to the 2012 Corporate Assignment of Deed of Trust.

2. Plaintiffs brought cancellation of documents and quiet title claims. To support these claims, a borrower must show that he tendered or offered to tender the amount of the secured indebtedness, or was excused from doing so. *Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 104 (2011). Although there are exceptions to the tender rule, such as where the borrower attacks the validity of the underlying debt, none of those exceptions apply here. *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 213 (2010), also does not establish any exception to the tender rule because Plaintiffs did not allege violation of Cal. Civ. Code § 2923.5.

3. Plaintiffs also alleged fraud based on Wells Fargo's suggestion that paying off the amount in arrears may lead to a loan modification. A fraud claim requires a

misrepresentation with knowledge of its falsity and intent to defraud. *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 990 (2004). Wells Fargo's statements are not specific and in our view do not seem to have been intended to defraud.

4. Plaintiffs also alleged violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq*., which prohibits any "unlawful, unfair, or fraudulent business act or practice." Plaintiffs have not alleged an injury within the meaning of the Unfair Competition Law, and so have not established standing to support a cause of action. The district court properly dismissed these claims.

AFFIRMED.

COURT OF APPEAL - 4TH DIST DIV 3

FILED

Dec 21, 2015

Deputy Clerk: D. Saporito

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KAZEM MAJD, Plaintiff and Appellant, v. BANK OF AMERICA, N.A., et al., Defendants and Respondents.	G050250 (Super. Ct. No. 30-2012-00603633) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Andrew P. Banks, Judge. Affirmed in part and reversed in part.

Kazem Majd, in pro. per.; Law Offices of Lenore Albert and Lenore L. Albert for Plaintiff and Appellant.

Akerman, Justin D. Balser, Jeffrey Rasmussen and Karen Palladino Ciccone for Defendants and Respondents.

* * *

Plaintiff alleges defendants wrongfully foreclosed on his home. The court sustained a demurrer to the third amended complaint and entered a judgment of dismissal. On appeal, plaintiff contends the foreclosure was wrongful because irregularities in the securitization of his mortgage deprived defendants of authority to foreclose, and because the foreclosure occurred while the loan servicer was reviewing his loan for a modification under the Home Affordable Modification Program (HAMP). We agree with the latter contention and reverse as to plaintiff's cause of action against the loan servicer for violation of Business and Professions Code section 17200 et seq. (UCL). We also reverse some of the orders denying leave to amend. We conclude that plaintiff has otherwise stated a cause of action for wrongful foreclosure, provided the party conducting the foreclosure sale was an agent of the loan servicer. Plaintiff should be given leave to amend to allege that agency relationship, if true. Finally, plaintiff has otherwise stated a cause of action for cancellation of the trustee's deed upon sale, but has failed to join the foreclosing trust deed beneficiary as a defendant. The foreclosing beneficiary, who allegedly purchased the property at the foreclosure sale, is an indispensable party. Provided the property is still owned of record by the foreclosing beneficiary, and not by a bona fide purchaser for value, plaintiff should be given leave to amend to add the foreclosing beneficiary as a party to the cause of action for cancellation of instruments. In all other respects the judgment is affirmed.

FACTS

Plaintiff's third amended complaint alleged the following facts.

Plaintiff owns property in Irvine, California (the subject property). In March 2006, plaintiff obtained an interest-only, adjustable-rate mortgage on the subject property for $600,000 from Country Wide Home Loans, Inc., which ultimately merged into defendant Bank of America, N.A. (Bank of America). "Because of the constant

increases in the monthly payment, the loan became unaffordable. . . . [I]n the Spring of 2011, Plaintiff's mortgage payments jumped from $3,231.56 to $5,311.92."

In November 2011, the deed of trust was assigned to Citibank, N.A. (Citibank), as trustee for a securitized trust, of which defendant Wells Fargo Bank, N.A. was the master servicer, trust administrator, and custodian of the certificate holders. Citibank is not a party to this lawsuit.[1] The assignment was signed by Loryn Stone on behalf of Mortgage Electronic Registration Systems, Inc. (MERS), who is also not a party to this lawsuit. Plaintiff alleged Stone "is a robo-signer for Bank of America who signs documents . . . and did not have the capacity to sign the documents. As a result, the document is defective and invalid. As the foreclosure action was based on these documents, the foreclosure action is also defective and invalid."

"Plaintiff alleges that the chain of title is broken because the transfer from [Bank of America] to the securitized trust occurred years after the closing date of the trust," which was in 2006. From this plaintiff concludes "the foreclosure is based upon void documents."

In November 2011, a notice of default was recorded by Recontrust Company, N.A. (Recontrust). Recontrust is not a party to this lawsuit.

In February 2012, plaintiff contacted Bank of America to inquire about a home loan modification. Bank of America assigned Lea Fontenot to the case and promptly scheduled a meeting. Plaintiff was told his request would be reviewed once he submitted his application and certain financial information. "Plaintiff promptly returned the documentation requested. [Bank of America] then requested different information. Plaintiff submitted the documentation requested and [was] then told . . . that he needed to reapply. Plaintiff complied with this request without delay."

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[1] Originally, Citibank was a named defendant. For reasons not apparent in the record, plaintiff dropped Citibank when he filed the first amended complaint.

"On or about February 23, 2012, . . . a Notice of Trustee's Sale was recorded. This recording took place while Plaintiff was in loan modification review. [Bank of America] was dual tracking the foreclosure and the loan modification." The notice of trustee's sale was recorded by Recontrust.

"In early March, 2012, the underwriter for [Bank of America] requested more documentation for the active loan modification review. Plaintiff contacted . . . his CPA. It took approximately two months before [Bank of America] considered documentation from the CPA to be acceptable to them. By this time, the underwriter declined the modification and Ms. Fontenot from [Bank of America] informed Plaintiff that he would have to reapply for a loan modification. Plaintiff did so immediately."

Plaintiff met with Fontenot in May 2012, where she asked for additional bank statements, which plaintiff faxed on June 11, 2012.

On June 15, 2012, "Ms. Fontenot . . . requested via e-mail . . . information that had previously been faxed to [Bank of America] on May 29, 2012." That same day, Bank of America informed plaintiff by letter that his home loan modification application had been denied "because you did not provide us with the documents we requested." When plaintiff e-mailed Fontenot to update her, she replied, "That's not an issue at all, so don't worry."[2]

"On or about August 11, 2012, Plaintiff worked cooperatively and submitted all documents requested by [Bank of America]. It was confirmed that [Bank of America] received the completed loan modification package and did not request any

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[2] At this point in the complaint, plaintiff starts playing fast and loose with the facts. He claims that he then received a letter from Bank of America thanking him for sending "*your complete financial and hardship documentation package*." However, the letter itself indicates a different loan than the loan at issue here. Plaintiff later claims he received an e-mail from Fontenot stating, "Congratulations on Your Trial Mod!!!" However, in a subsequent e-mail, Fontenot indicated that the "trial mod" pertained to a San Diego property.

additional documents. [Bank of America] stated that the foreclosure would not go forward during the loan modification process."

On August 14, 2012, plaintiff contacted Fontenot and reminded her that the subject property was scheduled to be sold on August 17, 2012. "Ms. Fontenot told Plaintiff that there was no reason for concern as she had already processed the request for postponement and the postponement is usually granted the day before the scheduled sale date."

In the evening of August 16, 2012, plaintiff received an e-mail from Fontenot stating the investor was not willing to postpone the trustee sale. The next day, Recontrust sold the subject property to Citibank as trustee for the securitized trust. On August 22, 2012, Bank of America wrote to plaintiff rejecting his loan modification application, stating, "Your loan is not eligible for a modification because you did not provide us with the documents we requested."

Sometime afterwards, "[p]laintiff's attorney was notified that [Bank of America] recently transferred the servicing of Plaintiff's loan to Defendant Nationstar while in negotiations for resolution with [Bank of America]."

Plaintiff filed suit in October 2012 against Bank of America, Wells Fargo, and Citibank. Although the record does not contain a copy of any of the pleadings prior to the third amended complaint, the minutes indicate that the defendants demurred. Rather than oppose the demurrer, plaintiff amended his complaint, naming only Bank of America and Wells Fargo as defendants. The defendants demurred to the amended complaint. The demurrer was sustained with leave to amend (with the exception of the demurrer to a cause of action for violation of the Homeowners' Bill of Rights, which was sustained without leave to amend). Plaintiff then filed a second amended complaint which added Nationstar as a defendant. Defendants demurred. The court again sustained the demurrer with leave to amend.

The operative complaint for purposes of this appeal is the third amended complaint, filed in December 2013. It alleged the following causes of action: wrongful foreclosure, negligent misrepresentation, violation of duty of good faith and fair dealing, promissory fraud/estoppel, unfair and deceptive practices (Bus. & Prof. Code, § 17200), and cancellation of instruments. The named defendants were Wells Fargo, Bank of America, and Nationstar. Defendants again demurred.

This time the court sustained the demurrer without leave to amend on two bases. First, the "Third Amended Complaint fails to allege that Plaintiff has tendered the balance due on his Loan." Second, the complaint failed to state sufficient facts to support any of the causes of action. Plaintiff timely appealed from the ensuing judgment of dismissal.

DISCUSSION

There are two distinct theories of liability running throughout plaintiff's complaint. The first is the foreclosure sale was void because the foreclosing parties lacked authority to foreclose because of defects in the securitization of plaintiff's mortgage. The second theory is the foreclosure was wrongful because it occurred during the review period for his loan modification request. We address each theory in turn.

Plaintiff Lacks Standing to Assert Defects in the Securitization of His Loan

From a steady line of recent cases in this state, the rule has emerged that a homeowner generally may not challenge a nonjudicial foreclosure on the basis that the wrong party is foreclosing without specific facts indicating it is the wrong party, together with prejudice to the homeowner.

The first of this line of cases was *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149 (*Gomes*). There, the homeowner defaulted on a home loan

with a deed of trust that identified MERS as the beneficiary. (*Id.* at p. 1151.) The notice of default was sent, and a nonjudicial foreclosure process initiated, by parties not on the original deed of trust. (*Id.* at pp. 1151-1152.) The homeowner filed suit, alleging he did not know the identity of the note's beneficial owner, and alleged on information and belief that the parties carrying out the foreclosure process were not acting with the rightful owner's authority. (*Id.* at p. 1152.) The trial court sustained a demurrer. (*Id.* at p. 1153.)

The *Gomes* court affirmed. It premised its holding on the nature of California's nonjudicial foreclosure scheme (Civ. Code, §§ 2924-2924k), which provides "'a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust.' [Citation.] 'These provisions cover every aspect of exercise of the power of sale contained in a deed of trust.' [Citation.] 'The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.' [Citation.] 'Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.'" (*Gomes, supra,* 192 Cal.App.4th at p. 1154.)

Given the exhaustive nature of the system, the court rejected the homeowner's argument that the statutory scheme, by "'necessary implication,'" permits a homeowner to "test whether the person initiating the foreclosure has the authority to do so." (*Gomes, supra,* 192 Cal.App.4th at p. 1155.) "Section 2924, subdivision (a)(1) states that a 'trustee, mortgagee, or beneficiary, or any of their authorized agents' may initiate the foreclosure process. However, nowhere does the statute provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized, and we see no ground for implying such an action. [Citation.] Significantly,

'[n]onjudicial foreclosure is less expensive and more quickly concluded than judicial foreclosure, since there is no oversight by a court, "[n]either appraisal nor judicial determination of fair value is required," and the debtor has no postsale right of redemption.' [Citation.] The recognition of the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures." (*Id.* at p. 1155.)

Despite this apparently inflexible rule, *Gomes*, *supra*, 192 Cal.App.4th at page 1155, distinguished three similar federal district court cases where plaintiffs were permitted to proceed with a cause of action on the basis that, in those cases, the plaintiff identified a "*specific factual basis* for alleging that the foreclosure was not initiated by the correct party." (*Id.* at p. 1156.)

This language gave rise to a split of authority concerning whether a plaintiff may ever bring a cause of action to challenge a foreclosing party's authority in the context of a nonjudicial foreclosure, and our Supreme Court has recently granted review of a case on the issue. (*Yvanova v. New Century Mortgage Corp.*, review granted Aug. 27, 2014, S218973.) Plaintiff relies upon the only case to hold a plaintiff can bring such a claim, *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 (*Glaski*).~**(AOB 24)**~

In *Glaski*, the homeowner's note and deed of trust were transferred to a securitization trust, and, as in the instant case, plaintiff alleged the transfer was defective because "the attempted transfers were made *after the closing date* of the securitized trust holding the pooled mortgages . . . ." (*Glaski*, *supra*, 218 Cal.App.4th at p. 1082.) The *Glaski* court concluded that "a borrower may challenge the securitized trust's chain of ownership by alleging the attempts to transfer the deed of trust to the securitized trust (which was formed under N.Y. law) occurred after the trust's closing date. Transfers that violate the terms of the trust instrument are void under New York trust law, and

borrowers have standing to challenge void assignments of their loans even though they are not a party to, or a third party beneficiary of, the assignment agreement." (*Id.* at p. 1083.)

With respect to standing, the *Glaski* court reasoned that while third parties have no standing to challenge an assignment merely *voidable* at the election of the assignor, a homeowner may challenge an assignment that is *void*. (*Glaski*, *supra*, 218 Cal.App.4th at pp. 1094-1095.) Interpreting a New York statute that had generated conflicting interpretations among various courts, the *Glaski* court concluded the best interpretation was that the attempted transfer to the securitization trust was void. This conclusion, it reasoned, "protects the beneficiaries of the . . . Securitized Trust from the potential adverse tax consequence of the trust losing its status as a [real estate mortgage investment conduit] trust under the Internal Revenue Code." (*Id.* at p. 1097.)

The *Glaski* court distinguished *Gomes* on two grounds. First, it narrowly interpreted *Gomes* as limited to challenges to the ability of the *nominee*, MERS, to participate in the foreclosure process. (*Glaski*, *supra*, 218 Cal.App.4th at pp. 1098-1099.) Second, the court relied on the "specific factual basis" language *Gomes* employed to distinguish the federal cases. (*Id.* at p. 1099.) *Glaski* found the plaintiff's allegations had met that requirement.

Several cases both before and after *Glaski* have reached the opposite conclusion. (E.g., *Mendoza v. JPMorgan Chase Bank, N.A.*, review granted Nov. 12, 2014, S220675; *Keshtgar v. U.S. Bank, N.A.*, review granted Oct. 1, 2014, S220012; *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75; *Herrera v. Federal National Mortgage Assn*. (2012) 205 Cal.App.4th 1495; *Jenkins v. JPMorgan Chase Bank, N.A.* (2012) 216 Cal.App.4th 497; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256.) Federal courts have likewise largely rejected *Glaski* as unpersuasive. (See *Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 744 [collecting cases].) In particular, the Second Circuit Court of Appeals has rejected

the *Glaski* court's analysis of the standing issue, holding that under New York law an improper transfer to an investment trust is *voidable*, not void, and thus a third party plaintiff has no standing to challenge such a transfer. (*Rajamin v. Deutsche Bank National Trust Co.* (2d Cir. 2014) 757 F.3d 79, 90.) And more recently the New York Supreme Court, Appellate Division, concluded a borrower has no standing to challenge improper assignments in this context. (*Wells Fargo Bank, N.A. v. Erobobo* (N.Y. 2015) 127 A.D.3d 1176, 1178 [9 N.Y.S.3d 312, 314] ["Erobobo, as a mortgagor whose loan is owned by a trust, does not have standing to challenge the plaintiff's possession or status as assignee of the note and mortgage based on purported noncompliance with certain provisions of the [pooling and servicing agreement]"].)

In our view, the principal defect in the *Glaski* court's analysis is its failure to assess prejudice. A plaintiff alleging a defect in the assignment of a mortgage must demonstrate prejudice. For example, in *Siliga v. Mortgage Electronic Registration Systems, Inc.*, *supra*, 219 Cal.App.4th 75, where the plaintiffs made essentially the same allegations as those made here, the court sustained a demurrer on, among other grounds, the plaintiffs' inability to demonstrate prejudice: "[T]he [plaintiffs] fail to allege any facts showing that they suffered prejudice as a result of any lack of authority of the parties participating in the foreclosure process. The [plaintiffs] do not dispute that they are in default under the note. The assignment of the deed of trust and the note did not change the [plaintiffs'] obligations under the note, and there is no reason to believe that . . . the original lender would have refrained from foreclosure in these circumstances. Absent any prejudice, the [plaintiffs] have no standing to complain about any alleged lack of authority or defective assignment." (*Id*. at p. 85.) Likewise, in *Fontenot v. Wells Fargo Bank, N.A.*, *supra*, 198 Cal.App.4th 256, where the plaintiff also challenged a foreclosure based on an invalid assignment of a mortgage, the court sustained a demurrer on the basis that plaintiff could not demonstrate prejudice: "Even if MERS lacked authority to transfer the note, it is difficult to conceive how plaintiff was prejudiced by

MERS's purported assignment, and there is no allegation to this effect. Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note. Plaintiff effectively concedes she was in default, and she does not allege that the transfer to HSBC interfered in any manner with her payment of the note [citation], nor that the original lender would have refrained from foreclosure under the circumstances presented. If MERS indeed lacked authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a $1 million promissory note." (*Id*. p. 272.)

The *Glaski* court's failure to assess prejudice is fatal to its holding, and thus we decline to follow it. In the absence of prejudice, a cause of action based on technicalities in the note and deed of trust's chain of title serves no other purpose than to permit the borrower to continue living in the home without paying for it. To the extent the various financial institutions involved object to the manner or validity of the assignments involved, they can sort the matter out themselves, probably without recourse to the courts. We see no benefit in permitting a defaulted borrower to maintain such a suit in the absence of real harm to the borrower.

And plaintiff has not alleged any such harm here. He has not alleged that transfers of his note and deed of trust interfered with his ability to pay. Nor has he alleged facts indicating that, absent the improper transfer, a foreclosure would not have proceeded. Nor has he alleged any other harm caused by the allegedly improper transfer. Accordingly, he does not have standing to challenge the foreclosure based on defects on the securitization process.

Plaintiff Stated Causes of Action for Violation of the UCL and Wrongful Foreclosure

We conclude, however, that plaintiff's second theory of liability — that foreclosure was improper during the modification review process — is a viable theory on which to base causes of action for violation of the UCL, wrongful foreclosure, and, potentially, cancellation of the trustee's deed upon sale. We begin by discussing the legal context for plaintiff's modification request. Next, we explain why plaintiff's allegations are sufficient. And we conclude by addressing the procedural bars urged by defendants, including standing and the tender rule.

1. *Loan Modifications Under the HAMP*

Plaintiff alleges he requested a loan modification pursuant to HAMP. To provide the legal context for HAMP, its requirements, and its procedures, we quote extensively from *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547 (*Wigod*).

"In response to rapidly deteriorating financial market conditions in the late summer and early fall of 2008, Congress enacted the Emergency Economic Stabilization Act, P.L. 110–343, 122 Stat. 3765. The centerpiece of the Act was the Troubled Asset Relief Program (TARP), which required the Secretary of the Treasury, among many other duties and powers, to 'implement a plan that seeks to maximize assistance for homeowners and . . . encourage the servicers of the underlying mortgages . . . to take advantage of . . . available programs to minimize foreclosures.' [Citation.] Congress also granted the Secretary the authority to 'use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures.' [Citation.]

"Pursuant to this authority, in February 2009 the Secretary set aside up to $50 billion of TARP funds to induce lenders to refinance mortgages with more favorable interest rates and thereby allow homeowners to avoid foreclosure. The Secretary negotiated Servicer Participation Agreements (SPAs) with dozens of home loan servicers . . . . Under the terms of the SPAs, servicers agreed to identify homeowners

who were in default or would likely soon be in default on their mortgage payments, and to modify the loans of those eligible under the program. In exchange, servicers would receive a $1,000 payment for each permanent modification, along with other incentives. The SPAs stated that servicers 'shall perform the loan modification . . . described in . . . the Program guidelines and procedures issued by the Treasury . . . and . . . any supplemental documentation, instructions, bulletins, letters, directives, or other communications . . . issued by the Treasury.' In such supplemental guidelines, Treasury directed servicers to determine each borrower's eligibility for a modification by following what amounted to a three-step process:

"First, the borrower had to meet certain threshold requirements, including that the loan originated on or before January 1, 2009; it was secured by the borrower's primary residence; the mortgage payments were more than 31 percent of the borrower's monthly income; and, for a one-unit home, the current unpaid principal balance was no greater than $729,750.

"Second, the servicer calculated a modification using a 'waterfall' method, applying enumerated changes in a specified order until the borrower's monthly mortgage payment ratio dropped 'as close as possible to 31 percent.'

"Third, the servicer applied a Net Present Value (NPV) test to assess whether the modified mortgage's value to the servicer would be greater than the return on the mortgage if unmodified. The NPV test is 'essentially an accounting calculation to determine whether it is more profitable to modify the loan or allow the loan to go into foreclosure.' [Citation.] If the NPV result was negative — that is, the value of the modified mortgage would be lower than the servicer's expected return after foreclosure — the servicer was not obliged to offer a modification. If the NPV was positive, however, the Treasury directives said that 'the servicer MUST offer the modification.'" (*Wigod*, *supra*, 673 F.3d at pp. 556-557, fn. omitted.)

"Where a borrower qualified for a HAMP loan modification, the modification process itself consisted of two stages. After determining a borrower was eligible, the servicer implemented a Trial Period Plan (TPP) under the new loan repayment terms it formulated using the waterfall method. The trial period under the TPP lasted three or more months, during which time the lender 'must service the mortgage loan . . . in the same manner as it would service a loan in forbearance.' [Citation.] After the trial period, if the borrower complied with all terms of the TPP Agreement — including making all required payments and providing all required documentation — and if the borrower's representations remained true and correct, the servicer had to offer a permanent modification." (*Wigod*, *supra*, 673 F.3d at p. 557.)

Of particular relevance to the present case, in 2010 the United States Department of the Treasury promulgated HAMP Supplemental Directive 10-02, which states, "A servicer may not refer any loan to foreclosure or conduct a scheduled foreclosure sale <u>*unless*</u> and <u>*until*</u> at least one of the following circumstances exists: [¶] The borrower is evaluated for HAMP *and is determined to be ineligible for the program*." (Last italics added.) HAMP Supplemental Directive 10-02 also provides a 30-day foreclosure moratorium following denial of a modification to permit borrowers to respond to the denial. "The servicer may not conduct a foreclosure sale within the 30 calendar days after the date of a Non-Approval Notice or any longer period required to review supplemental material provided by the borrower in response to a Non-Approval Notice unless the reason for the non-approval is" based on factors not pertinent here. (Making Home Affordable (Mar. 24, 2010) Supplemental Directive 10-02 at p. 5, <https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1002.pdf> [as of Dec. 14, 2015] (Supplemental Directive 10-02).) In other words, the servicer cannot foreclose until at least 30 days after the loan modification review is completed.

2. *Plaintiff's Allegations State Causes of Action for Violation of the UCL and Wrongful Foreclosure*

Plaintiff alleges he was dual tracked — that is, Bank of America initiated a loan modification review while simultaneously proceeding with foreclosure, ultimately foreclosing on plaintiff's property before the modification review was completed. Plaintiff claims this conduct violates the UCL. We agree.

Business and Professions Code section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. . . ." "'Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition — acts or practices which are unlawful, or unfair, or fraudulent.'" (*Cel–Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.)

"'[A]n "unfair" business practice occurs when that practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." [Citation.]'" (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 719.) "'[W]here a claim of an unfair act or practice is predicated on public policy, . . . the public policy which is a predicate to the action must be "tethered" to specific constitutional, statutory or regulatory provisions.'" (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940.)

Civil Code section 2923.6 was amended in 2012 to prohibit dual tracking. (Stats. 2012, ch. 87, § 7.) It currently provides, "A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale or conduct a trustee's sale until any of the following occurs: [¶] (1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired." (Civ. Code, § 2923.6 (c)(1).) This provision is not directly applicable here, however, because

Bank of America's actions in this case predate it. Nonetheless, the court in *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872 (*Jolley*) concluded the new legislation is still relevant in determining whether dual tracking is unfair: "[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." (*Id*. at p. 907-908)

Jolley concluded that the practice of dual-tracking is unfair in the context of a construction loan where, notably, HAMP was not an issue. (*Jolley*, *supra*, 213 Cal.App.4th at p. 877.) All the more so, therefore, is dual-tracking unfair in the HAMP context, where not only does the policy of Civil Code section 2923.6 so counsel, but the HAMP guidelines in effect during the relevant time period *did* prohibit foreclosure while the modification request was pending. (Supplemental Directive 10-02, *supra*, at p. 5.) The guidelines went even further and prohibited foreclosure until 30 days after denial of a modification request to permit plaintiff to provide supplemental information to salvage his modification request. (*Ibid.*) In *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49 (*Lueras*), we determined that "'[s]elling the home at foreclosure within 30 days of receiving the written denial of modification in violation of the Making Home Affordable Guidelines'" was an unfair practice under the UCL. (*Id*. at p. 84.)

Plaintiff has also sufficiently alleged a violation of the UCL in Bank of America's ultimate denial of the modification request (which occurred five days after the foreclosure sale). The modification was ultimately denied on the ground that plaintiff failed to provide the documentation Bank of America requested. Plaintiff's complaint, however, alleges that he repeatedly provided Bank of America with the documentation it requested. In *Lueras* we held that "'[f]alsely representing that . . . [plaintiff] did not qualify for HAMP modification when, in fact . . . [plaintiff] did qualify for a HAMP modification" was an unfair practice under the UCL. (*Lueras*, *supra*, 221 Cal.App.4th at

p. 84.) Plaintiff's allegation here is similar: that Bank of America falsely asserted plaintiff had failed to provide the required documentation.

3. *UCL Standing and the Tender Rule*

Having concluded plaintiff's allegations state a claim under the UCL, we now consider whether plaintiff has standing to assert the claim. Only a plaintiff who has "suffered injury in fact and has lost money or property as a result of the unfair competition" has standing to sue. (Bus. & Prof. Code, § 17204.) This requires a plaintiff to "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by* the unfair business practice or false advertising that is the gravamen of the claim." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322 (*Kwikset*).)

There is no question that plaintiff alleged economic injury in the form of the loss of his home. (*Lueras, supra*, 221 Cal.App.4th at p. 82 ["the allegation that [plaintiff's] home was sold at a foreclosure sale is sufficient to satisfy the economic injury prong of the standing requirement of [Business and Professional Code] section 17204"].) The question is whether this injury was caused by Bank of America's conduct or, instead, by plaintiff's inability to pay his mortgage. We conclude plaintiff has sufficiently alleged causation in that, had Bank of America properly waited to foreclose until 30 days after denying the loan modification request, plaintiff may have proven he *was* eligible for a modification.

Bank of America responds by asserting that plaintiff cannot establish prejudice because "HAMP does not require a loan servicer or lender to provide a borrower with a HAMP modification even where the borrower meets all of HAMP's eligibility requirements." For this proposition Bank of America cites *Kimball v. Flagstar Bank F.S.B.* (S.D.Cal. 2012) 881 F.Supp.2d 1209, 1224. That court simply repeated a statement found in an unpublished federal district court decision, which decision in turn

repeated a statement found in other unpublished district court decisions. However, this line of cases fails to analyze the relevant United States Department of the Treasury guidelines. As the court stated in *Wigod, supra*, 673 F.3d 547, where a borrower satisfies the relevant criteria, "'the servicer MUST offer the modification.'" (*Id.* at p. 557.) Indeed, the relevant United States Department of the Treasury guidelines state, "Following underwriting, [Net Present Value] evaluation and a determination, based on verified income, that a borrower qualifies for HAMP, servicers *will* place the borrower in a trial period plan (TPP). [¶] The trial period is three months in duration (or longer if necessary to comply with applicable contractual obligations) and governed by terms set forth in the TPP Notice. Borrowers who make all trial period payments timely and who satisfy all other trial period requirements *will* be offered a permanent modification." (Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages (June 1, 2015, version 4.5) <https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_45.pdf>, italics added.) Bank of America's statement, therefore, is simply incorrect.

Finally, we address the trial court's conclusion that plaintiff's claim is barred by his failure to tender the amount due on the loan. "[A]s a condition precedent to an action by the borrower to set aside the trustee's sale on the ground that the sale is voidable because of irregularities in the sale notice or procedure, the borrower must offer to pay the full amount of the debt for which the property was security." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112 (*Lona*).) "The rationale behind the rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower]." (*FPCI RE–HAB 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1022.)

The *Lona* court, however, identified four exceptions to the tender rule, including this: "[A] tender may not be required where it would be inequitable to impose such a condition on the party challenging the sale." (*Lona, supra,* 202 Cal.App.4th at p. 113.) In *Fonteno v. Wells Fargo Bank, N.A.* (2014) 228 Cal.App.4th 1358 the court relied on this exception to reject a tender requirement where plaintiff claimed the bank foreclosed without first meeting with the borrower face to face, as required by the Federal Department of Housing and Urban Development (HUD) regulations that were incorporated into the deed of trust. A tender requirement, the court reasoned, would "defeat the purpose of paragraph 9 of the deed of trust and the relevant HUD regulations. The parties agreed that, should plaintiffs default, they would attempt to meet face-to-face to discuss loan modifications before any authority to foreclose accrued. Obviously, this provision was intended to govern a circumstance in which plaintiffs could not make full payment of the delinquent amount owed. In other words, defendants could not proceed with foreclosure without first attempting to discuss alternatives with plaintiffs, even though plaintiffs could not tender the full amount owed." (*Id.* at p. 1374.)

Similarly, in *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208 the court held no tender was required where plaintiff sued to stop a foreclosure because the lender had failed to comply with a requirement that it meet with the borrower to explore steps to avoid foreclosure. (*Id.* at p. 213-214.) The court explained, "Case law requiring payment or tender of the full amount of payment before any foreclosure sale can be postponed [citation] arises out of a paradigm where, *by definition,* there is no way that a foreclosure sale can be avoided absent payment of *all* the indebtedness. Any irregularities in the sale would necessarily be harmless to the borrower if there was no full tender. [Citation.] By contrast, the whole point of [Civil Code] section 2923.5 is to create a new, even if limited, right to be contacted about the possibility of *alternatives* to full payment of arrearages. It would be contradictory to thwart the very operation of the statute if enforcement were predicated on full tender." (*Id.* at p. 225.)

The rule applies in a similar fashion here. The purpose of the modification rules is to avoid a foreclosure despite the borrower being incapable of complying with the terms of the original loan. It would be contradictory to require the borrower to tender the amount due on the original loan in such circumstances. Moreover, the purpose of the tender rule is to dismiss suits at an early stage, where, despite any irregularities in the lender's foreclosure activities, the borrower will ultimately have to pay the amount due on the loan, but cannot do so. Such suits are essentially futile. This is not such a case, as a loan modification is an alternative to foreclosure that does not require the borrower to pay pursuant to the terms of the original loan. Accordingly, the tender rule does not apply, and plaintiff may proceed with his UCL claim.

Similar considerations also lead us to conclude plaintiff can allege facts supporting a cause of action for wrongful foreclosure. The elements of the tort of wrongful foreclosure are: "'(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering'"; and (4) "'no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale.'" (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408.) Expanding on the fourth element, we previously explained, "In other words, mere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case." (*Id.* at p. 409.)

Tracking these elements, plaintiff alleged the foreclosure was in breach of Bank of America's legal obligations and that his modification was denied on a false claim that he failed to produce all required documentation. As we explained above, plaintiff alleged prejudice in that he may have been able to avoid the foreclosure had Bank of America completed the modification review process in good faith. Plaintiff was excused from tendering. And, under the facts as alleged, foreclosure was not authorized.

Under the current state of the complaint, however, the wrongful foreclosure claim suffers a fundamental defect — the foreclosure was performed by Recontrust. Recontrust is not a party, and there is no allegation that Recontrust was Bank of America's agent, or that Recontrust was otherwise acting on Bank of America's instructions. This defect, however, would seem to be easily remedied by amendment. Supplemental Directive 10-02, quoted more fully above, states, "A servicer may not *refer* any loan to foreclosure or conduct a scheduled foreclosure sale" until the modification review process is complete. (Supplemental Directive 10-02 at p. 5, italics added.) Here, it is doubtful that Recontrust would have proceeded without the loan servicer's referral, and similar agency allegations are so routinely included in complaints that plaintiff, in fairness, should be given an opportunity to make such an allegation, especially since plaintiff has otherwise adequately stated a claim for wrongful foreclosure.

Plaintiff's Allegations Are Inadequate to Support a Cause of Action for Negligent Misrepresentation

The elements of negligent misrepresentation are: (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant made the representation without reasonable ground for believing it to be true; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.)

Plaintiff's claim fails at the first element. He contends in his opening brief that "he was assured the foreclosure sale of his home was postponed while his loan modification was being processed." But according to the allegations of the operative complaint, Fontenot did not unconditionally say plaintiff's requested postponement would be granted. Instead, she said she had made a request to postpone the foreclosure, and such requests are "usually" granted the day before the sale. And while her comment that plaintiff need not be concerned indicated her expectation that the request would be granted, her comment was not tantamount to a representation that it would be granted. An actionable misrepresentation has not been alleged.

Additionally, the alleged misrepresentation did not cause damages. Plaintiff does not allege any facts indicating he suffered damages in reliance on Fontenot's confidence in her requested postponement of the sale. Plaintiff's conclusory allegation simply states, "Plaintiff reasonably and justifiably relied on the representation to his detriment." There is no allegation, for example, that plaintiff expended any money or declined other available offers in reliance on Fontenot's alleged misrepresentation. To the extent plaintiff was damaged, it was by the foreclosure sale itself, not by any representation about the sale being postponed. This omission is fatal to plaintiff's claim for negligent misrepresentation.

Promissory Fraud, Estoppel, and Good Faith and Fair Dealing

Plaintiff concedes on appeal that his cause of action for promissory fraud/estoppel fails. "Because the parties did not enter into a contract, this cause of action has not been properly alleged and plaintiff does not appeal that ruling." This same consideration defeats his cause of action for violation of a duty of good faith and fair dealing. Such a duty applies to contractual obligations and tort duties under special relationships such as an insurer and insured. But plaintiff has not cited any authority that such a duty would apply here outside of a contract, and we are aware of none.

Cancellation of Instruments

Plaintiff asserted a cause of action for "cancellation of instruments," under Civil Code section 3412 seeking to cancel the assignment of the deed of trust to Citibank, the notice of default, the notice of trustee's sale, and the trustee's deed upon sale. To the extent plaintiff seeks to cancel the assignments involving the securitized trust, we affirm the court's ruling based on plaintiff's lack of standing, as explained above. To the extent plaintiff seeks to cancel the notice of trustee's sale and trustee's deed upon sale, the complaint suffers from another fundamental defect. The complaint alleges Citibank was the purchaser at the foreclosure sale. Yet the operative complaint does not name Citibank as a defendant. Assuming Citibank is still the record owner of the property, it is an indispensable party to any action seeking to cancel the deed by which it acquired the property. "'The controlling test for determining whether a person is an indispensable party is, "Where the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party. [Citation.]" [Citation.] More recently, the same rule is stated, "A person is an indispensable party if his or her rights must necessarily be affected by the judgment."'" (*Tracy Press, Inc. v. Superior Court*, (2008) 164 Cal.App.4th 1290, 1298.) Here, if the trustee's deed upon sale is cancelled, Citibank's interest in the property is injured; thus it is an indispensable party.

However, because defendants did not assert a misjoinder of parties as a ground for their demurrer, either in the trial court or here, and in fairness to plaintiff, leave to amend should be granted to add Citibank as a defendant if warranted. Perhaps a bona fide purchaser has since acquired the property, and cancellation of the trustee's deed is no longer a viable option. (See Civ. Code, § 2924, subd. (c) ["A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law . . . shall constitute . . . conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice"].) Or perhaps the statute of limitations

has run as to Citibank. We do not address these questions as the record does not disclose the present ownership of the property, nor have the parties briefed whether amendment is possible. We merely grant plaintiff leave to amend if he is able to do so.

Defendants Wells Fargo and Nationstar

Plaintiff has not alleged any facts upon which defendants Wells Fargo or Nationstar could be held liable. Wells Fargo is alleged to be the master servicer, trust administrator, and custodian of the certificate holders for the securitized trust. Because we hold plaintiff has no standing to challenge the securitization of his note, and because Wells Fargo played no role in the foreclosure of the subject property, Wells Fargo cannot be liable. Nationstar took over the servicing of the note for Bank of America sometime after the events alleged in the complaint took place. There is no indication that Nationstar played any role in the foreclosure, nor that it accepted liability for Bank of America's earlier actions. Accordingly, we affirm the dismissal as to Wells Fargo and Nationstar.

DISPOSITION

The judgment of dismissal is reversed as to plaintiff's fifth cause of action against Bank of America for violation of the UCL. The order denying leave to amend as to plaintiff's first cause of action for wrongful foreclosure against Bank of America and the sixth cause of action for cancellation of the notice of sale and the trustee's deed upon sale are reversed. In all other respects, the judgment is affirmed. The matter is remanded for further proceedings consistent with this opinion. Plaintiff shall recover his costs incurred on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.