# LENDERS CAN'T FORECLOSE WHILE A BORROWER'S LOAN MODIFICATION APPLICATION IS UNDER REVIEW

A recent decision by the California Court of Appeal held that the practice called "dual tracking" – when a lender forecloses on a property while the borrower's application for a loan modification is under review – violates California's Unfair Competition Law.

The case, *Majd v. Bank of America, N.A.*, 2015 WL 9304536 (Cal. Ct. App. Dec. 21, 2015), involves a borrower who obtained an interest-only, adjustable-rate mortgage to purchase a home in 2006. The borrower alleged that he eventually defaulted because he could not afford the monthly payments that had increased to over $5,000 due to interest rate adjustments. In 2012, the borrower submitted an application for a home loan modification. While the modification was still under review, the bank sold the property through a nonjudicial trustee sale. Shortly after the sale, the bank notified the borrower that it rejected his modification.

The borrower filed a complaint claiming, among other things, that the foreclosure was invalid because the lender violated California's Unfair Competition Law (UCL) when they foreclosed on his home before completing the review of his loan modification. The trial court dismissed the complaint for failure to state a claim. On appeal, the Court of Appeals reversed the dismissal, holding that the bank's alleged conduct amounted to "unfair competition" in violation of the UCL.

**"Dual Tracking"**

In the complaint, the borrower claimed that the bank committed an "unfair practice" by foreclosing on his property without first rendering a decision on his loan modification application.

The borrower alleged that he commenced his loan modification application in February 2012 after defaulting on the loan. He alleged that, in the ensuing six months, he worked closely with the bank to complete his application, promptly responding to each of the bank's many requests for additional

documents. In August, the bank informed the borrower that his loan modification application was complete and under review. The borrower asserted that the bank employee who assisted him with the application assured him that the bank would not foreclose on his property while his application was pending. Six days later, however, his property was sold in a trustee sale. Five days after the sale, the bank rejected the borrower's modification.

The borrower argued that bank "dual tracked," that is, initiated a foreclosure while reviewing the borrower's loan modification, in violation of the California's Unfair Competition Law (UCL). The UCL, codified in California's Business & Professions Code § 17200, *et. seq.*, provides in pertinent part that the court has the power to make judgments that may be necessary to prevent use of "any practice which constitutes unfair competition … necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of unfair competition." Essentially, the borrower argued that, had his modification been approved, he could have resumed payments on the loan and reclaimed his property, and the bank deprived him of that opportunity when it preemptively foreclosed on his home.

The lower court dismissed the borrower's cause of action against the bank for alleged violation of the UCL.

**The Appellate Decision**

The Court of Appeal reversed, holding that the borrower had stated a claim because "dual tracking" of loan modification application and foreclosure would violate California's UCL and support a claim of wrongful foreclosure. California's UCL seeks to protect consumers against any unlawful, unfair or fraudulent practices. According to prior precedent, a business practice is "unfair" for purposes of the UCL, when it "offends an established public policy." The public policy that the plaintiff based his case on must be "tethered to specific constitutional, statutory or regulatory provisions."

The court turned to the applicable statutory provision in this case, namely, the mortgage rules under California Civil Code Section 2923.6, and its 2012 amendments. The legislature amended Section 2923.6(c) so that, after the borrower submits a loan modification application, the lenders may not conduct a trustee's sale until "[t]he mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification." While the court recognized that the 2012 amendments did not apply to the loan at issue as the loan predated the amendments, it said the amendments showed that dual tracking violated public policy even at the time that this loan was originated.

In its decision, the court relied largely on two prior precedents: *Jolley v. Chase Home Finance, LLC*, 213 Cal.App.4th 872 (2013) and *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal.App.4th 49 (2013). In *Jolley*, the court held that the 2012 amendments illustrated that dual tracking was "unfair" for purposes of the UCL. In *Lueras*, the court found that foreclosing on a property within 30 days after sending a written denial of modification violated the Making Home Affordable Guidelines and, therefore, also was an "unfair practice" under the UCL.

**Conclusion**

This case underscores that lenders and loan servicers should be mindful of the possible relationship, under state law, between the lender's ability to foreclose and the status of any pending application by the borrower for a loan modification. Although this particular case was based on California law, some states have similar statutory schemes that likewise may have implications for the practice of "dual tracking."