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In the Supreme Court of the State of California

KWANG K. SHEEN,

Plaintiff and Appellant,

v.

WELLS FARGO BANK, N.A, et al.,

Defendant and Respondent.

Case No. S258019

Second Appellate District, Div. Eight, Case No. B289003
Los Angeles County Superior Court, Case No. BC631510
The Honorable Judge Robert L. Hess

BRIEF OF THE CALIFORNIA ATTORNEY GENERAL AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF

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INTRODUCTION AND STATEMENT OF INTEREST

The Attorney General submits this *amicus curiae* brief to provide additional support for the position that mortgage servicers owe a duty under California law to act with reasonable care when handling a distressed homeowner's application for loan modification. The costs imposed by unnecessary foreclosures—which are borne not only by families forced out of their homes, but also by their communities and the State's economy—are well documented and steep. Combating abuse in the mortgage marketplace and preserving homeownership have been among the Attorney General's top concerns since the Great Recession, and they remain critical to the State's well-being today.

The Court has asked whether a mortgage servicer owes a homeowner a duty of care to refrain from making material misrepresentations about the status of a foreclosure sale after a homeowner has submitted, and the servicer has agreed to review, the homeowner's application to modify a mortgage loan. The Attorney General submits that, consistent with decades of precedent, a duty of care arises in these circumstances given the parties' special relationship, the homeowner's reliance on the servicer's expertise, and the significant adverse implications for public welfare if mortgage servicers may act free from any potential liability in negligence.[1] A duty of care would not impose onerous obligations on servicers, and would not require servicers to approve modifications if homeowners do not qualify. Rather, the duty simply requires servicers to act with reasonable care when handling a request for loan modification—such as by acknowledging and processing modification requests in a timely fashion; tracking and

[1] The Attorney General takes no position on the ultimate merits of the case, only on the legal and public-policy questions of whether mortgage servicers owe homeowners a duty of care in this context.

organizing homeowners' paperwork to avoid unreasonable delay and the need for re-submission; providing correct information to homeowners; and accurately evaluating homeowners' eligibility for modification or other relief.

This duty exists regardless of whether any particular servicer and borrower are in privity of contract. Contract law does not provide homeowners adequate safeguards against substandard mortgage servicing. Most homeowners do not have the technical knowledge of mortgage servicing that would be necessary to request meaningful, consumer-protective contract terms. Moreover, most homeowners never contract directly with their mortgage servicers in any capacity, and the minority of homeowners who do contract directly with their servicers have no opportunity to bargain over their servicers' performance, including how they will handle a modification request.

Other causes of action that do not require a duty of care, such as promissory estoppel and misrepresentation, also do not adequately protect homeowners. These causes of action do not address the type of harmful conduct homeowners are most likely to face from their servicers—not intentional or deceitful acts, but sloppiness, manifesting in errors and unreasonable delays in the handling of a homeowner's account. Negligence occupies an important space, protecting homeowners from conduct that, though unintentional, is still highly detrimental to homeowners who need their servicers' help to avoid foreclosure.

Recognizing servicers' duty of care to distressed homeowners is not only consistent with this Court's precedent—which expressly takes into account public policy rationales for imposing a duty of care—but also aligns with laws the Legislature has passed to ensure that homeowners who are facing financial difficulties receive meaningful consideration for loan modification. The Attorney General urges the Court to make clear that

servicers owe homeowners a duty of reasonable care in tort law during the loan-modification process.

ARGUMENT

I. MORTGAGE SERVICERS OWE HOMEOWNERS A DUTY OF REASONABLE CARE IN HANDLING MORTGAGE MODIFICATION REQUESTS

California's approach to tort law has long been pragmatic and cognizant of policy concerns. Our courts have "repeatedly eschewed overly rigid common law formulations of duty in favor of allowing compensation for foreseeable injuries caused by a defendant's want of ordinary care." (*J'Aire Corp. v. Gregor*y (1979) 24 Cal.3d 799, 805 (*J'Aire*).) Although the existence of a duty is a question of law, duty is "'not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'" (*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 573 (*Beacon*), quoting *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397 (*Bily*).)

Decades of precedent establish that a duty of care arises where two parties have a special relationship, meaning where one engages in a certain activity for the other's benefit; where one party relies on the other's specialized expertise or is otherwise less capable than the other party of protecting its interests; or where the parties' relationship has significant implications for public welfare. These categories are not wholly discrete, but share overlapping considerations, and all reflect a policy judgment that finding a duty of care is reasonable under the circumstances, incentivizes socially responsible conduct on the part of potential tortfeasors, and is necessary to provide recourse to injured parties. Each of these considerations provides a basis for the Court to recognize that mortgage

servicers owe a duty to act with reasonable care when handling modification requests.

A. A Duty of Care Exists Where the Parties Have a Special Relationship

For over 60 years, California courts have held that a duty of care arises where a plaintiff and defendant have a "special relationship." As this Court recently explained, "What we mean by special relationship is that the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant's negligence in carrying it out." (*Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 400 (*Gas Leak Cases*), citing *J'Aire*, *supra*, 24 Cal.3d at p. 804 and *Biakanja v. Irving*, (1958) 49 Cal.2d 647, 650 (*Biakanja*).)

Biakanja is the leading special-relationship case and sets forth six factors for determining whether a special relationship exists that gives rise to a duty of care:

> [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm.

(49 Cal.2d at p. 650). This Court has cited *Biakanja* and analyzed its factors in nearly three dozen decisions, including several times within the last decade, confirming its enduring importance to duty-of-care analyses.[2]

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[2] See *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc*. (2016) 1 Cal.5th 994, 1014-1017 (assessing each *Biakanja* factor and holding that health care plans owe duty of care to providers of emergency medical services to ensure payment claims submitted by emergency providers are not delegated to insolvent agents of health care plans); *Beacon, supra*, 59 Cal.4th at pp. 585-586 (assessing each *Biakanja* factor and holding that architecture firm responsible for

(continued…)

In *Biakanja*, *supra* 49 Cal.2d at p. 648, the plaintiff and defendant were not in privity of contract: plaintiff was the sole beneficiary of a will that the defendant notary had drafted but failed to have properly attested. Although the *Biakanja* test has often been used for negligence cases involving third-party plaintiffs, its use is not limited to that context. In *Connor v. Great Western Savings and Loan Association* (1968) 69 Cal.2d 850, 865-868 (*Connor*), for example, this Court applied the *Biakanja* test after acknowledging that the parties were not strangers. (See *id.* at pp. 867-868 [holding that plaintiffs, who were in privity with bank that had originated their mortgages, could sue bank in negligence for its role in facilitating the faulty construction of their homes].)

The *Biakanja* factors strongly support finding a duty here, for all the reasons discussed at length in Plaintiff's opening brief. The first two factors—"the extent to which the transaction was intended to affect the plaintiff" and "the foreseeability of harm to him," *Biakanja*, *supra*, 49 Cal.2d at p. 650, are critically important. (See *Tarasoff v. Regents of Univ. of California* (1976) 17 Cal.3d 425, 434 [calling foreseeability "the most important of [the duty-of-care] considerations"]; *T.H. v. Novartis Pharmaceuticals Corp*. (2017) 4 Cal.5th 145, 166 [similar]). Both these factors unambiguously point to a duty of care.

(…continued)
design of residential building owes duty of care to future owners of the building); see also *Gas Leak Cases, supra*, 7 Cal.5th at pp. 400-403 (discussing *Biakanja*, and evaluating countervailing considerations, in holding that economic-loss doctrine bars recovery of economic damages by businesses affected by months-long gas leak); *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 837-841 (citing *Biakanja* and finding no special relationship in holding that payroll vendor does not owe duty of care to employee of company to which it provides services).

Loan modification processes generally, and servicers' communications with homeowners individually, are clearly intended to affect homeowners, even if other entities with an interest in the property are also impacted. Harm to homeowners similar to what Plaintiff has alleged here—including not just the loss of one's home to foreclosure, but also missed opportunities to pursue other mitigation options and otherwise limit damage to one's credit history, see Op. Br. at p. 42—is foreseeable if servicers mishandle modification applications or make inaccurate statements to homeowners about the status of modification or foreclosure. (See *Clinton v. Select Portfolio Servicing, Inc.* (E.D. Cal. 2016) 225 F.Supp.3d 1168, 1175 [denying motion to dismiss negligence claim, where homeowner pleaded servicer's delay in handling modification application caused damages including lost opportunity to "prevent[] further arrearage," decline in homeowner's credit score, and costs incurred due to "repeatedly faxing and mailing documents"].)

The third, fourth, and fifth *Biakanja* factors—"the degree of certainty that the plaintiff suffered injury," "closeness of the connection between the defendant's conduct and the injury suffered, [and] the moral blame attached to the defendant's conduct," *supra*, 49 Cal.2d at p. 650—generally weigh in favor of recognizing a duty where a plaintiff alleges their servicer's failure to act with reasonable care prevented them from obtaining a mortgage modification or pursuing other options in lieu of foreclosure. Further, as some appellate decisions finding a duty have noted, "it is highly relevant" to the fifth *Biakanja* factor "that the borrower's 'ability to protect his own interests in the loan modification process is practically nil' and the bank holds 'all the cards.'" (*Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 949 (*Alvarez*), quoting *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 900 (*Jolley*); see also *Rossetta v.*

CitiMortgage, Inc. (2017) 18 Cal.App.5th 628, 642, quoting *Alvarez*, *supra*, at p. 949.)

The sixth *Biakanja* factor, *supra*, 49 Cal.2d at p. 650, asks whether recognizing a duty of care would advance a public policy "of preventing future harm." Like foreseeability, this is a crucial factor driving the duty analysis. (See *Barrera v. State Farm Mut. Automobile Ins. Co.* (1969) 71 Cal.2d 659, 679 (*Barrera*) ["basic reason for the imposition of a duty" is to avoid "known hazard" to public]; *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1081 (*Burgess*) ["One of the purposes of tort law is to deter future harm."].) This factor also weighs in favor of a duty. There is little doubt that careless mortgage-servicing practices harm homeowners and the communities in which they live. This is particularly true of homeowners who experience financial difficulty and reach out to their mortgage servicer in hope of finding an alternative to foreclosure.

Homeownership confers a variety of benefits on families and the areas where they live. Homeownership boosts families financially, allowing them to accumulate more wealth than non-owners, with particularly strong effects for Black and Latino homeowners. (See Goodman & Mayer, *Homeownership and the American Dream* (2018) 32:1 J. of Economic Perspectives 31, 53.[3]) Owning a home typically has financial advantages over renting, and on average results in a higher return than other types of investments. (*Id.* at pp. 45-47 [analysis of financial return associated with median home purchased in 2002].) Homeowners are also more likely to be engaged in voluntary or political organizations in their communities, and are found to have higher rates of happiness and self-satisfaction than renters. (See, e.g., Rohe et al., *The social benefits and costs of*

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[3] Available at <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.32.1.31> (as of Sep. 15, 2020).

homeownership: a critical assessment of the research in The Affordable Housing Reader (Tighe & Mueller, edits., 2013) pp. 197-198, 205-206.) Homeownership provides stability to communities across California, *id.* at 203-205, strengthening their schools and businesses and fostering a shared sense of purpose and engagement among residents.

Substandard mortgage-servicing practices endanger the public good of homeownership, however—especially during periods of widespread economic upheaval. During the Great Recession, 800,000 homes in California entered foreclosure. (Gabriel et al., *A Crisis of Missed Opportunities? Foreclosure Costs and Modification During the Great Recession* (2020) Fin. and Econ. Disc. Series 2020-053, Bd. of Governors of the Fed. Reserve System, at p. 1.[4]) Extensive federal and state investigations found that mortgage-servicing practices—especially those concerning the servicing of delinquent mortgages—contributed to the crisis, in some cases causing foreclosures that could have been averted, as well as other harms to homeowners. (See Fed. Reserve System, et al., *Interagency Review of Foreclosure Policies and Practices* (Apr. 2011), at pp. 5, 7-11;[5] Complaint, *United States, et al. v. Bank of America Corp., et al.* (D.D.C. Mar. 14, 2012, No. 1:12-cv-00361-RMC) Dkt. 4-1, at ¶¶ 51, 58, 104, 107 ("Complaint").) Servicers routinely failed to hire and train enough staff to handle requests for mortgage modification, lost borrowers'

[4] Available at <https://www.federalreserve.gov/econres/feds/a-crisis-of-missed-opportunities.htm> (as of Sep. 15, 2020). This article finds that that the number of foreclosures likely would have been even higher, had the Legislature not taken steps in the middle of the crisis to slow the processing of non-judicial foreclosures. (See *id.* at pp. 1-4 [discussing Stats. 2008, ch. 69 [Sen. Bill. 1137] and Stats. 2009-2010, 2nd Ex. Sess. ch. 4 [Sen. Bill. 7].)

[5] Available at <https://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf > (as of Sep. 15, 2020).

modification and loss-aversion paperwork, gave borrowers false information and failed to respond to inquiries, and wrongfully rejected modification applications, among other misconduct. (Complaint, *supra*, at ¶¶ 51, 58, 104, 107.)[6] Given the crucial role servicers play in either helping homeowners pursue alternatives to foreclosure, or hindering their access to such alternatives, the final *Biakanja* factor weighs heavily in favor of a duty of care.

B. A Duty of Care Exists Where One Party Must Rely on the Other's Specialized Expertise

California courts have also long recognized a duty of care in cases where one party has specialized expertise—typically where that party provides professional or specialized services in fields like law, accounting, and medicine. (See, e.g., *Burgess, supra*, 2 Cal.4th at p. 1075, 1081 [discussing physician's duty of care to patient]; *Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 530 [attorney's duty of care to client].) While these cases could be viewed as a subset of the "special relationship" category, the specialized-expertise cases often involve parties who contracted directly with each other, with the defendant's alleged negligence occurring in the course of performing that contract.

Specialized-expertise cases are a departure from the general rule that there can be no liability in tort for economic losses resulting from the performance of a contract between two parties. As discussed *infra*, at

[6] In 2012, California joined 48 other states and the federal government to reach a $50 billion settlement with the nation's five largest mortgage servicers. (See, e.g., Joint State-Federal Mortgage Servicing Settlements, *About the Settlement*, available at <http://www.nationalmortgagesettlement.com/about.html> [as of Sep. 15, 2020]; see also generally Consent Judgment, *United States, et al. v. Bank of America Corp., et al.* (D.D.C. Apr. 14, 2012, No. 1:12-cv-00361-RMC), Dkt. 14 [between plaintiffs and Wells Fargo].))

Section II, this rule is not absolute. In the specialized-services context, a duty of care is necessary because clients are unlikely to protect their interests adequately through contractual bargaining. "The imbalance of knowledge between the typical professional and client" means that "one side is not in a position to negotiate effectively with the other" when entering into the contract and allocating the risk of economic loss. (Rest.3d Torts Liability for Economic Harm. (Tent. Draft No. 1, Apr. 4, 2012) § 1 com. d(1).) Furthermore, the provider of specialized services contracts "to foster the plaintiff's interests," and the parties "are not contracting as adversarial bargainers or competitors." (Dobbs, et al., The Law of Torts § 615 (2d ed. 2011 & 2020 supp.). Under those circumstances, "the right allocation of responsibility" for economic losses "between the parties"—to the professional, not to the client—"is clear enough as a matter of public policy." (Rest.3d Torts Liability for Economic Harm (Tent. Draft No. 1, *supra*) § 1 com. d(1).)

It is highly relevant to this case that California courts recognize a duty of care in situations where one party provides specialized expertise to another. Mortgage servicers perform such a role for homeowners who are experiencing financial distress. When a homeowner has difficulty making payments, the servicer assesses whether the homeowner is eligible for any temporary or permanent modifications, such as principal-balance or interest-rate reductions, a modified repayment plan, or forbearance, that could allow the homeowner to stay in their house. (See Weiss & Jones, Cong. Research Serv., *An Overview of the Housing Finance System in the United States*, No. R42995 (2017), at pp. 4-5 & fn. 15.[7]) Homeowners experiencing financial difficulty are told by authoritative sources, including

[7] Available at <https://fas.org/sgp/crs/misc/R42995.pdf> (as of Sep. 15, 2020.)

government agencies, to reach out to their servicers and to work with them toward identifying a solution on their behalf. (See, e.g., See Fed. Trade Com., *Making Payments to Your Mortgage Servicer* (Fed. Trade Com., *Making Payments*); Consumer Fin. Protection Bureau, *If I can't pay my mortgage loan, what are my options?*.[8])

Homeowners are not well equipped to evaluate their own foreclosure-prevention options, and even if they were, they would need their servicer to approve and implement the plan. Eligibility for alternatives to foreclosure depends on several potentially complex factors, including the status of the homeowner's account, their debt-to-income and loan-to-value ratios, the applicability of any federal modification programs, and any restrictions imposed by the entity that holds the interest in the mortgage, among others. (See, e.g., Freddie Mac Single-Family, *Mortgage and Borrower Eligibility Requirements* [outlining eligibility considerations for modification under Home Affordable Modification Program, or HAMP].[9])

The relationship between a homeowner and a mortgage servicer is therefore characterized by an imbalance of knowledge and by the parties' expectation that they will cooperate in a shared goal—the same factors that explain why providers of specialized services like doctors, lawyers, and accountants owe their clients a duty of reasonable care. (See, e.g., Rest.3d Torts Liability for Economic Harm. (Tent. Draft No. 1, *supra*) § 1 com. d(1); Dobbs, et al., The Law of Torts, *supra*, § 615.)

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[8] Available at <https://www.consumer.ftc.gov/articles/0190-making-payments-your-mortgage-servicer> and <https://www.consumerfinance.gov/ask-cfpb/if-i-cant-pay-my-mortgage-loan-what-are-my-options-en-268/> (as of Sep. 15, 2020.)

[9] Available at <https://sf.freddiemac.com/general/mortgage-and-borrower-eligibility-requirements#:~:text=Borrowers%20may%20be%20eligible%20for,an%20affirmation%20of%20financial%20hardship> (as of Sep. 15, 2020).

C. A Duty of Care Exists Where Private Parties' Negligence Significantly Affects Public Welfare

This Court has also recognized a duty of care in certain contexts that significantly affect public welfare. In *Barrera*, *supra*, 71 Cal.2d at pp. 668, for example, the Court held that an automobile insurer owes "a duty both to the [driver] and to the public to conduct a reasonable investigation" of the driver's insurability upon issuing a policy. (*Id.* at p. 668.) It grounded this duty both in the "'quasi-public' nature of the insurance business" and in the bargaining power differential between the insurance provider and the "comparatively weak" consumer. (*Id*. at p. 669.) Recognizing a duty of care was necessary to protect both the driver and the public, since neither could guard against the risk posed by insurers who might issue a policy to an unsafe driver, neglect to assess the driver's insurability, and challenge the policy as void for lack of insurability only after the driver had been in an accident and a claim had been made. (*Id.* at pp. 669-670.) A contrary rule would "thwart[]" the State's public policy of ensuring compensation for those injured by drivers through no fault of their own. (*Id.* at pp. 671-672.)

Like automobile insurance, mortgage servicing is a "quasi-public" industry, *Barrera*, *supra*, at pp. 667-668, that facilitates the socially beneficial activity of buying homes and living in them. Servicing arrangements allocate rights and responsibilities that may substantially affect non-parties and the broader community, particularly during periods of economic downturn, when large numbers of homeowners may be seeking alternatives to foreclosure. Servicers enjoy superior bargaining power as compared to homeowners, and are uniquely equipped to help struggling homeowners avoid foreclosure whenever viable alternatives exist. Conversely, they are also in a position to impose unnecessary burdens on struggling homeowners and the broader public if they fail to

devote the appropriate resources to modification and loss-aversion, as occurred during the last financial crisis.

II. NEITHER THE ECONOMIC-LOSS RULE, NOR THE EXISTENCE OF A CONTRACT, PRECLUDES A DUTY OF CARE

Wells Fargo points to the economic-loss doctrine as its primary argument against recognizing that mortgage servicers owe homeowners a duty in care in handling their modification requests. (See Ans. Br. at pp. 20-25.) As a general matter, the economic-loss rule is invoked to refer to two distinct but related circumstances in which economic losses are held not compensable through a negligence cause of action. Neither of these circumstances applies here.

First, the economic-loss rule sometimes refers to the principle that "'recovery for stand-alone economic loss is frequently rejected'" even though "'economic loss that results from some other kind of injury may be recoverable'" in negligence. (*Gas Leak Cases*, 7 Cal.5th at p. 400, quoting Dobbs, *An Introduction to Non-Statutory Economic Loss Claims* (2006) 48 Ariz. L.Rev. 713.) The primary concern driving the economic-loss rule in this context is that "[a]n award of damages for pure economic loss suffered by third parties raises the spectre of vast numbers of suits and limitless financial exposure." (*Bily*, 3 Cal.4th at p. 400.) As this Court recently made clear, this "general rule" is not absolute, and the "primary exception to [it] is where the plaintiff and the defendant have a 'special relationship'"—in other words, where the concern raised in *Bily* does not apply. (*Gas Leak Cases*, 7 Cal.5th at p. 400, citing *J'Aire*, *supra*, 24 Cal.3d at p. 807 and *Biakanja*, *supra*, 49 Cal.2d at pp. 650-651.) Thus, the Court in *Gas Leak Cases* expressly distinguished between economic-loss claims arising from industrial accidents—which may lead to "line-drawing problems and potentially overwhelming liability"—and claims arising "*from a financial transaction meant to benefit the plaintiff* (and which is

later botched by the defendant)"—which do not present the same concerns. (*Id.* at p. 403, italics added.)

Second, the economic-loss rule is also invoked to stand for the principle that where two parties have a contract, one may not sue the other in negligence for economic losses resulting from failure to perform as promised under the contract. This general rule is also subject to various limitations and "does not foreclose tort claims based on conduct outside the contract's scope." (Rest.3d Torts Liability for Economic Harm. (Tent. Draft No. 1, *supra*) § 3 com. c.; see also Dobbs, The Law of Torts, *supra*, § 613.)

A. None of the Factors Counseling Against a Duty of Care in Cases Involving Economic Loss Is Present Here

The first variant of the economic-loss rule guards against unfair or limitless liability, which is not present in cases involving mortgage-modification requests. *Bily*, *supra*, 3 Cal.4th at pp. 398, 400, counsels against recognizing a duty of care in cases of purely economic loss if the following circumstances apply: first, if the defendant "faces potential liability far out of proportion to its fault," which may include where the defendant did not have "primary control" over the transaction or conduct at issue; second, if the plaintiff is a sophisticated party able to "control and adjust the relevant risks" of the transaction through contractual bargaining; and third, if placing the risk on the defendant would not effectively deter negligent conduct or would result in other undesirable outcomes. (See also *Beacon*, *supra*, 59 Cal.4th at pp. 579-581 [discussing *Bily* factors].)[10]

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[10] Likewise, the draft Restatement Third of Torts considers whether recognizing a duty in cases of solely economic loss would "expose the defendant to indeterminate or disproportionate liability," and whether "parties in the plaintiff's position can reasonably be expected to protect

(continued…)

Turning to the first factor, recognizing a duty of care would not subject a mortgage servicer to "liability far out of proportion to its fault," *Bily*, *supra*, 3 Cal.4th at p. 398, when it fails to act with reasonable care in handling a mortgage modification request. The universe of potential plaintiffs is not comprised of strangers to the servicer, but is limited to individuals whose loans it services. Communicating with these homeowners and managing their accounts, on behalf of those entities that own the beneficial interest in the mortgage, is the core function servicers provide. (See Weiss & Jones, *supra*, at p. 4 & fn. 15.) Servicers thus have sole control over the manner in which they handle modification requests and the accuracy of their communications with homeowners about such requests, and this remains true even if third parties (such as trustees or holders of securitized interests in the property) have a say in determining whether and on what terms modification should be offered.[11]

Second, homeowners are not able to "control and adjust the relevant risks," *Bily*, *supra*, 3 Cal.4th at p. 398, posed by a mortgage servicer's careless handling of modification requests. As discussed more fully in Section III.A *infra*, homeowners do not have the information needed to evaluate and account for mortgage-servicing risks at the time of taking out

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(…continued)
themselves against the loss by contract." (Rest.3d Torts Liability for Economic Harm. (Tent. Draft No. 1, *supra*) § 1 com. e.)

[11] See Thompson, Nat. Consumer Law Center, *Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior* (2009), at pp. 4, 6-7, available at <https://www.nclc.org/images/pdf/pr-reports/report-servicers-modify.pdf> (as of Sep. 15, 2020) (discussing Pooling and Servicing Agreements ("PSAs"), which include provisions about the servicing of securitized loans); Levitin & Twomey, *Mortgage Servicing* (2011) 28 Yale J. Reg. 1, 33-37 (same, and noting that most PSAs permit at least some types of loan modifications); see also *infra*, at Section III.A.2 (discussing PSAs).

a loan. Furthermore, homeowners today usually do not contract directly with their mortgage servicer; rather, they contract with their mortgage lender, which often then transfers the servicing rights to a third party. (See Fed. Trade Com., *Making Payments*, *supra* [explaining that homeowners may expect their lender to keep and service their mortgage loan, but "[t]hat's often not the case" because "[i]n today's market, loans and the rights to service them often are bought and sold"]; see also Weiss & Jones, *supra*, at p. 4 & fn. 15.) The difference between the lending role and the servicing role is significant, because it means that although homeowners can select a mortgage lender and bargain over the terms of their loan—just as Plaintiff presumably did—homeowners usually have no corresponding opportunity to select a servicer and bargain over how the servicing functions will be handled.[12]

Finally, Wells Fargo fails to make a persuasive argument that recognizing a duty here would be ineffectual or counter-productive. (See *Bily*, 3 Cal.4th at pp. 404-405.) Although Wells Fargo argues that additional tort liability could "make mortgages more expensive" or cause servicers to stop considering modification altogether, Ans. Br. at p. 44, the Court rejected similar arguments in *Connor*, *supra*, 69 Cal.2d at pp. 867-868. There, it observed that "there is no enduring social utility in fostering the construction of seriously defective homes," and that imposing a duty

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[12] Although here, Wells Fargo continued to service Plaintiff's loan at the time of the alleged misconduct, this would not be the case for many homeowners, especially for their first-lien loans. And even in this case, Wells Fargo transferred its servicing rights to Plaintiff's loan after he applied for modification, such that it was not Wells Fargo but an entirely separate entity that foreclosed on Plaintiff's home. (See Ans. Br. at p. 17.) And in any event, even where the lender retains servicing rights, homeowners do not typically have an opportunity to bargain for an optimal level of service from the lender in its capacity as mortgage *servicer*. (See *infra*, at Section III.A.)

would not negatively affect the market for construction financing "if reliable construction is the norm." (*Ibid.*) The same can be said for mortgage-servicing practices: there is no social utility in fostering incompetent loan servicing that results in needless foreclosures. Moreover, servicers are unlikely to stop offering modifications altogether. When determining whether modification is appropriate, servicers are often required to act in the best interest of the parties that hold the beneficial interest in the mortgage—not homeowners, but entities such as banks or investment trusts. (See, e.g., Weiss & Jones, *supra*, at p. 7 & fn. 23; see also *supra*, at fn. 11.) Servicers that cut costs by refusing to consider modification requests therefore risk liability or the loss of business if the practice is discovered.

To be clear, not all struggling homeowners are eligible for mortgage modification, and not all foreclosures can be avoided. Holding that mortgage servicers owe homeowners a duty of reasonable care—including to timely respond to modification requests; handle homeowners' paperwork in a responsible and organized manner; and communicate clearly, promptly, and accurately with homeowners—would *not* require servicers to grant modification requests, but it would remove unnecessary impediments to modification, as well as minimize the frustration, uncertainty, and costs homeowners bear when they have no choice but to deal with an unresponsive or sloppy servicer. It would also make it risker for servicers to save money by under-investing in modification and loss-mitigation operations, and level the playing field between those servicers that invest in adequate resources to help homeowners and those that do not.

B. The Existence of a Contract, or Contractual Privity, Does Not Preclude a Duty of Care

Turning to the second understanding of the economic-loss rule, Wells Fargo argues that the many cases pointing to a duty of care are irrelevant here because "[p]arties to a contract are generally barred from pursuing a tort action for economic loss related to the subject matter of the contract." (Ans. Br. at p. 20.) This contention is difficult to square with Wells Fargo's later assertion that a tort action for negligent misrepresentation is available and forecloses the need for a negligence action. (*Id.* at pp. 46-47.) But even as to the tort of negligence, Wells Fargo is incorrect: while *Biakanja*'s factors have been applied to recognize a duty of care to avoid economic injury "even though [the parties] were not in privity of contract," *supra*, 49 Cal.2d at p. 648, this Court has never suggested that there can be no tort-based duty of care as between parties in contractual relationships. To delineate contract law and tort law in such an "overly rigid" manner, *J'Aire*, *supra*, 24 Cal.3d at p. 805, would be inconsistent with this Court's policy-oriented approach to determining duty. (See *Beacon*, *supra*, 59 Cal.4th at p. 573.)

To start, Wells Fargo acknowledges that its contract with Plaintiff does not address how it will handle, and communicate with borrowers about, mortgage modification requests. (Ans. Br. at pp. 24-25; see also Reply Br. at pp. 21-22.) There can be little debate that the mere existence of contractual privity does not bar negligence claims arising from conduct that was not addressed in the parties' agreement. *Connor v. Great Western Savings and Loan Association* (1968) 69 Cal.2d 850, for example, involved a defendant bank that had issued mortgage loans to the plaintiff homeowners, and thus was in privity of contract with them. The bank also had lent money to the developer of the plaintiffs' homes and took other steps to promote the construction and sale of the homes. (*Id.* at pp. 859-

862.) When the homes turned out to be structurally unsound, the plaintiffs sued the bank for negligence, not in its capacity as a mortgage lender, but for its role in promoting and financing the construction project. As the Court concluded, "the fact that [the defendant bank] was not in privity of contract with any of the plaintiffs *except as a lender* does not absolve it of liability for its own negligence in creating an unreasonable risk of harm to them." (*Id.* at p. 865, italics added.) Applying the *Biakanja* factors, the Court recognized a duty of care. (*Id.* at pp. 866-868.)

Moreover, cases applying *Biakanja* recognize that an agreement between parties may serve as the basis for such a duty of care. (See *J'Aire*, *supra*, 24 Cal.3d at p. 803 ["A duty of care may arise through statute or by contract [or] be premised upon the general character of the activity in which the defendant engaged, [or] the relationship between the parties . . . ."]; see also *Beacon*, *supra*, 59 Cal.4th at p. 574 [noting that "liability for the supply of goods and services historically required privity of contract between" the parties]; *Barrera*, *supra*, 71 Cal.2d at pp. 668-669, 673-674 [both existence of insurance contract, and implications of contract for public welfare, warrant duty of care].) Even when a negligence claim arises out of conduct contemplated by the parties' contract, a duty of care may still exist independent of the contract, as the specialized-expertise cases and *Barrera* illustrate. (See *Burgess*, *supra*, 2 Cal.4th at pp. 1075; *Barrera*, *supra*, 71 Cal.2d 659 at p. 668-670; see also *Erlich v. Menezes* (1999) 21 Cal.4th 543, 552, quoting *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 107 (conc. opn. of Mosk, J.) ["Courts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies."].)

Thus, the existence of a contract between the servicer and homeowner—when such a contract exists—should not prevent the Court

from recognizing the servicer's duty to act with reasonable care in handling a modification application from the homeowner.

III. NEGLIGENCE LAW IS NECESSARY TO PROTECT HOMEOWNERS AGAINST SERVICERS' MISHANDLING OF MORTGAGE MODIFICATION REQUESTS

In addition to arguing that the parties' contractual relationship bars this negligence action, Wells Fargo further claims that recognizing a duty of care is unnecessary because homeowners can turn to contract law, other tort causes of action, and statutory law to remedy or prevent substandard mortgage servicing. (See Ans. Br. 39-54.) None of these avenues is a substitute for negligence, however.

A. Homeowners Cannot Protect Their Interests Through Contract Law

As a practical matter, homeowners cannot use contract law to adequately protect themselves against substandard mortgage servicing practices. They cannot bargain for an optimal level of care in their servicers' modification operations at the time of taking out a mortgage loan, nor can they turn to contract law to supply a remedy if their servicer fails to act with reasonable care when they submit a modification request. In fact, many homeowners never enter into any contract at all with their mortgage servicer.

1. Homeowners Are Unable to Evaluate Servicing Risk Effectively and Account for Risk When Obtaining Mortgage Loans

As an initial matter, homeowners are not well situated to assess risk associated with the handling of a modification request. Research shows that people "systematically underestimate most risks, including low-probability risks of economic losses." (Eisenberg, *The Limits of Cognition and the Limits of Contract* (1995) 47 Stan. L.Rev. 211, 224.) Homeowners in the process of negotiating a new mortgage loan are unlikely to account

for the possibility that they may at some point have trouble paying their mortgage and need to seek help from their servicers to avoid foreclosure.

Moreover, even if a borrower were aware of the risk of delinquency, it is unclear how the borrower could use that information to their benefit. Servicers' operations are wholly opaque to homeowners, all the way from tangible details like the number of agents available to assist with modification requests, to the quality of those agents' training, to the complex and varying web of financial incentives that underlie company policies and procedures. The typical borrower has no means to know, for example, whether her servicer is paid a flat fee for all servicing activity or whether it receives additional compensation for completing modifications—considerations that may drive servicers to expend more or less resources on loan-modification operations. (See McCoy, *Barriers to Foreclosure Preventing During the Financial Crisis* (2013) 55 Ariz. L.Rev. 723, 757 [comparing compensation schemes for servicers of loans backed by Fannie Mae and Freddie Mac with those of loans serviced pursuant to private-label securitization agreements].)

For the average borrower, just obtaining a mortgage loan is a complex transaction—let alone the servicing dimension. "The imperfectly rational borrower deals with complexity by ignoring it" and "simplif[ying] his decision problem." (Bar-Gill, *The Law, Economics, and Psychology of Subprime Mortgage Contracts* (2009) 94 Cornell L.Rev. 1073, 1122; see also Eisenberg, *supra*, at p. 244 [similar argument about form contracts].) Thus, the typical borrower will respond to the complexity and uncertainty of mortgage-servicing risks by focusing on the most concrete, immediate terms in their mortgage agreement, such as the down-payment amount and interest rate, not on terms that would become relevant only in the event that the borrower will one day seek to modify the loan.

2. Homeowners Typically Do Not Contract Directly With Their Mortgage Servicers

A second, and perhaps more fundamental, barrier prevents homeowners from negotiating with mortgage servicers to protect their interests through contract terms. Homeowners typically do not know, at the time of taking out a mortgage loan, who will ultimately own the mortgage or who their servicer will be. Both mortgage-servicing rights, and the underlying beneficial interests in a mortgage, are frequently bought and sold. A brief overview of the "secondary market" for mortgages and mortgage-servicing rights, Weiss & Jones, *supra*, at pp. 1, 7, makes clear why homeowners are unable to select their servicers or negotiate for favorable servicing terms.

After a mortgage loan is originated, the lender may keep it or transfer it to another entity. If the lender keeps the mortgage, it may service the mortgage itself, or it may transfer servicing rights to a third party. (See, e.g., Weiss & Jones, *supra*, at p. 4 & fn. 15; see also Shoemaker, *Trends in Mortgage Origination and Servicing: Nonbanks in the Post-Crisis Period* (2019) 13:4 FDIC Q. 51, 57.[13]) Mortgage origination and servicing business models vary, as some lenders "originate mortgages and retain the servicing," others "originate mortgages but do not retain the servicing," and still others "purchase MSRs [mortgage-servicing rights] and outsource the servicing to another firm, called a subservicer." (Shoemaker, *supra*, at p. 57.) The market for mortgage-servicing rights is enormous; for example, "[i]n 2013 alone, nonbank servicers purchased from banks in bulk sales the servicing rights to more than $500 billion in mortgages." (*Id.* at p. 56.)

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[13] Available at <https://www.fdic.gov/bank/analytical/quarterly/2019-vol13-4/fdic-v13n4-3q2019-article3.pdf> (as of Sep. 15, 2020).

In many cases—and especially for first-lien residential mortgages used for the initial purchase of a home—the lender does not keep the mortgage it originated. Rather, the lender sells the mortgage, or the beneficial interest in it, to another entity, which will then choose a servicer. The majority of first-lien residential mortgage loans are pooled into mortgage-backed securities, and the entities involved in the securitization process select a servicer for all of the mortgages in the investment pool. (See Urban Inst., *Housing Finance at a Glance: A Monthly Chartbook* (April 2020), at p. 8 [noting that 64% percent of the volume, by dollar amount, of first-lien mortgages issued in 2019 was securitized].[14]) Second-lien mortgages, like the loan at issue here, may also be also securitized, though the practice is far less common than it is for first-lien loans. (See Levitin & Twomey*, Mortgage Servicing* (2011) 28 Yale J. Reg. 1, 12 & fn. 29 [discussing rates of securitization before the Great Recession].)[15]

When a mortgage is securitized, a document known as the Pooling and Servicing Agreement (or "PSA") names one or more servicers for the pool of mortgages and sets forth the servicers' rights and obligations vis-à-vis the investment trust. (See, e.g., Weiss & Jones, *supra*, at p. 7 & fn. 23; Thompson, Nat. Consumer Law Center, *Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior* (2009), at p.

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[14] Available at <https://www.urban.org/research/publication/housing-finance-glance-monthly-chartbook-april-2020> (as of Sep. 15, 2020).

[15] New securitization of second-lien loans effectively ceased following the Great Recession, but investment firms have recently shown renewed interest in this area. (See Eisen, *Mortgage Bond That Vanished During Financial Crisis Is Back*, Wall Street J. (Jun. 24, 2019) [discussing recent issuance of mortgage bond backed by pooled home-equity lines of credit, or HELOCs].)

4.[16]) Notably, homeowners *are not parties* to this agreement. (Thompson, *supra*, at p. 4.) Similarly, in the case of a loan that has not been securitized, its holder may transfer the beneficial interest, the servicing rights, or both, to a new entity without the homeowner's knowledge or input—as happened with Plaintiff's loan before the foreclosure sale of his home. (See Ans. Br. at p. 17; Op. Br. at pp. 23-24.)

Homeowners have absolutely no say whether and to whom the servicing rights to their mortgage are transferred; "free assignability is a standard term" in mortgage documentation. (Levitin & Twomey, *supra*, at p. 83.) The secondary market for mortgages and mortgage-servicing rights explains why agreements between borrowers and lenders typically do not contain any concrete terms relating to servicing: to include such terms would impede the mortgages' transferability.

Although in this case, Wells Fargo served as both lender and servicer of Plaintiff's loan, it makes no sense for the duty of care to turn on whether the servicer happens to have also been the lender. Homeowners whose loans are serviced by their lender do not have a greater capacity to control the servicers' behavior than homeowners whose loans are serviced by a non-lender. In either case, borrowers "cannot price adequately for servicing risk when they take out a mortgage loan" because they do not know the answers to questions fundamental to the contractual bargaining process—including who will own the beneficial interest in their mortgage; whether it will be securitized; who will service the mortgage, or even select the servicer; and what the terms of any future servicing agreement will be. (Levitin & Twomey, *supra*, p. 7.) It therefore makes no sense to conclude, as the Court of Appeal did, that contract law "protects the bargain the

[16] Available at <https://www.nclc.org/ images/pdf/pr-reports/report-servicers-modify.pdf> (as of Sep. 15, 2020).

parties have made" and "allows parties to make dependable allocations of financial risk without fear that tort law will be used to undo them later." (*Sheen v. Wells Fargo Bank* (2019) 38 Cal.App.5th 346, 356 (*Sheen*), citing Rest.3d Torts Liability for Economic Harm (Tent. Draft No. 1, *supra*), § 3, com. b.) Making "dependable allocations of financial risk," *Sheen*, *supra*, at p. 356, is exactly what homeowners are unable to do, given the structure of contemporary mortgage-servicing arrangements.

B. Other Common-Law Causes of Action Do Not Adequately Protect Homeowners Against Substandard Servicing

Wells Fargo acknowledges that a homeowner may sue their mortgage servicer for promissory estoppel or negligent misrepresentation—but to be answerable for negligence, it argues, is a bridge too far. (Ans. Br. at pp. 39-40, 46-52.) This position asks the Court to disregard the various ways that a loan servicer could harm a borrower without making express promises or false statements that would be actionable under these doctrines.

A cause of action for promissory estoppel exists when a party makes a promise that it "should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance." (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Authority* (2000) 23 Cal.4th 305, 310.) Similarly, a cause of action for negligent misrepresentation arises when a party makes a false statement upon which it intends another party to rely, and that party actually and justifiably relies on the statement. (*Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices* (1989) 207 Cal.App.3d 1277, 1285.)

In contrast to these causes of action, only negligence can provide a remedy when a homeowner is harmed not by particular, concrete false representations or promises, but instead by a pattern of unresponsive, confusing, or contradictory conduct in response to a request for a loan

modification. This is precisely the sort of conduct federal and state officials and agencies uncovered during their investigations of mortgage-servicing practices during the Great Recession. (See, e.g., Complaint, *United States, et al. v. Bank of America Corp., et al.* (D.D.C. Mar. 14, 2012, No. 1:12-cv-00361-RMC) Dkt. 4-1, at ¶¶ 51, 58 [alleging that servicers not only provided false and misleading information to borrowers, but also "fail[ed] to timely and accurately apply [borrowers'] payments"; "fail[ed] to properly oversee third party vendors involved in servicing activities"; "fail[ed] to maintain appropriate staffing, training, and quality control programs"; "fail[ed] to gather or los[t] loan modification application" documents; "fail[ed] to establish adequate processes for loan modifications"; and "miscalculate[ed] borrowers' eligibility for loan modification programs," among other misconduct].) Conditions are ripe today for a similar crisis, as many homeowners who have temporarily stopped making their monthly mortgage payments under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") will need longer-term assistance to keep their homes after the forbearance period ends. (See Pub.L. No. 116-136 (Mar. 27, 2020) 134 Stat. 281, 490-491 [allowing homeowners with federally-backed mortgages up to 360 days of forbearance]; see also Freddie Mac, *What Happens When COVID Forbearance Ends*? (Jun. 29, 2020).[17])

In contrast to negligence, promissory estoppel and negligent misrepresentation do little to promote incentives for responsible servicing conduct industry-wide. A clear statement by this Court that loan servicers

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[17] Available at <http://www.freddiemac.com/blog/homeownership/20200629_understanding_covid-19_forbearance_part_II.page> (as of Sep. 15, 2020).

owe a duty of care will promote incentives for responsible conduct and minimize unnecessary foreclosures.

C. The Homeowner Bill of Rights Does Not Fully Protect Homeowners Against Substandard Servicing

Finally, Wells Fargo points to California's Homeowner Bill of Rights ("HBOR") and federal regulations with similar provisions to HBOR's, to argue that a duty of care is unnecessary and could interfere with statutory and regulatory regimes. (See Ans. Br. at pp. 41-43.) While HBOR is certainly relevant to the Court's analysis, it does not undermine, but rather supports, the propriety of recognizing a duty of care.

In fact, when legislation prohibits or otherwise governs conduct similar to that underlying a negligence claim, the Court has considered that legislation as counseling in favor of a duty of care. For example, in *J'Aire, supra*, 24 Cal.3d at p. 805 & fn. 2, the Court pointed to a statute authorizing disciplinary action against construction contractor licensees as evidence that "public policy supports finding a duty of care" owed by contractors to complete construction projects in a reasonably timely manner (citing Bus. & Prof. Code § 7719). Similarly, in *Barrera*, *supra*, 71 Cal.2d at pp. 670-673, the Court assessed public-policy rationales underlying the Financial Responsibility Law in concluding that an insurer owes a duty of care to policy holders and to the public (citing Veh. Code, § 16000 et seq.). (See also *Jolley*, *supra*, 213 Cal.App.4th at p. 905 [finding that HBOR "sets forth policy considerations that should affect the assessment whether a duty of care was owed" to plaintiff borrower].)

HBOR does not require servicers to act with reasonable care when handling mortgage modifications or performing servicing functions generally. Rather, it imposes particular obligations on servicers and prescribes only limited remedies if these obligations are not met. (See, e.g., Civ. Code, §§ 2923.55, subd. (b)(2) [requiring servicer to contact borrower

and "explore options for the borrower to avoid foreclosure" before issuing a notice of default]; 2924.10, subd. (a) [requiring servicer to confirm receipt of modification paperwork and provide specified information about modification process]; 2923.6, subd. (c) [prohibiting a servicer from pursuing foreclosure while modification request remains pending].)[18]

Furthermore, the law does not apply to all mortgage loans, or even to all servicers. HBOR's key provisions apply only to first-lien residential mortgage loans and only to servicers who foreclose on more than 175 properties annually. (See, e.g., *id.* §§ 2923.55, subds. (g)–(h); 2924.10, subds. (c)–(d); 2923.6, subd. (i)–(j); 2924.15, subd. (a); 2924.18, subd. (b).) And although HBOR includes a private right of action, it does not permit the full range of remedies available at common law. Before foreclosure, a plaintiff suing under HBOR can seek only injunctive relief to prevent specified "material violation[s]" of the law, and no monetary damages are contemplated, even in the likely event that the homeowner has incurred economic losses due to the servicer's misinformation or delay. (*Id.* § 2924.12, subds. (a)-(b); see also *Shupe v. Nationstar Mortgage LLC* (E.D. Cal. 2017) 231 F.Supp.3d 597, 603 [denying requests for injunctive and monetary relief under HBOR where foreclosure sale had not been recorded and was not pending].)

While Wells Fargo argues that the "limited scope" of HBOR "was intentional," Ans. Br. at p. 42, nothing in the statute, or its legislative history, endorses leaving homeowners without a remedy if their servicer harms them in ways that are not remediable under the statute, or if their loan or servicer is not covered by the statute. To the contrary, HBOR's

[18] HBOR consists of Civil Code sections 2920.5, 2923.4 through 2923.7, 2924, and 2924.9 through 2924.19.

narrow scope is paired with a savings clause set forth in its provision governing injunctive relief and damages. The savings clause reads:

> The rights, remedies, and procedures provided by this section are in addition to and independent of any other rights, remedies, or procedures under any other law. Nothing in this section shall be construed to alter, limit, or negate any other rights, remedies, or procedures provided by law.

(Civ. Code, § 2924.12, subd. (g).)

By including a savings clause in HBOR, the Legislature signaled that it expected background common-law principles, including when servicers owe a tort-law duty of care, to continue to operate, even as applied to conduct that HBOR expressly addresses and for which it provides a remedy. It is illogical, then, to interpret HBOR as counseling against the application of tort law to junior-lien mortgage loans, like Plaintiff's, that are not even within HBOR's ambit.[19] Recognizing that servicers owe homeowners a duty to act with reasonable care complements the policies embodied in HBOR and is consistent with decades of precedent that should guide the Court's analysis.

CONCLUSION

For the reasons addressed above, the Attorney General urges the Court to hold that mortgage servicers have a duty to exercise reasonable care when handling a distressed homeowner's application for a loan modification.

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[19] HBOR's legislative history does not reflect any intent to limit negligence liability for either first- or junior-lien loans, and only briefly notes that the decision not to extend HBOR to junior loans "is consistent with the national mortgage settlement" and was made "[i]n response to concerns raised by industry stakeholders"—in other words, as a legislative compromise. (Sen. Rules Com., Off. of Sen. Floor Analyses, Conf. Report on Assem. Bill 278 [Sen. Bill 900], at p. 26.)

Dated: September 18, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Amicus Curiae In Support Of Plaintiff uses a 13 point Times New Roman font and contains 8,558 words.

Dated: September 18, 2020

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DECLARATION OF ELECTRONIC SERVICE

Case Name: KWANG K. SHEEN v. WELLS FARGO BANK, N.A, et al.
No.: S258019
I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On September 18, 2020, I electronically served the attached **BRIEF OF THE CALIFORNIA ATTORNEY GENERAL AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF** by transmitting a true copy via this Court's TrueFiling system addressed, or for recipients not registered with TrueFiling, placed a true copy thereof in a sealed envelope with postage fully prepaid in the United States Mail at Los Angeles, California, addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 18, 2020, at Los Angeles, California.

Carol Chow	/s/*Carol Chow*
Declarant	Signature

SERVICE LIST

Case Name: KWANG K. SHEEN v. WELLS FARGO BANK, N.A, et al.
No.: S258019

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Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 9/18/2020 by M. Chang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **SHEEN v. WELLS FARGO BANK**
Case Number: **S258019**
Lower Court Case Number: **B289003**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

9/18/2020

Date

/s/CAROL CHOW

Signature

Chmielewski, Amy (295352)

Last Name, First Name (PNum)

California Attorney General's Office

Law Firm