The "Widows & Orphans" Problem: The Improper Exclusion of Successors-in-Interest from the Loss Mitigation Process

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I. INTRODUCTION: THE PROBLEM

We are witnessing the first stirrings of a hidden foreclosure crisis that will steadfastly worsen as the baby boom generation ages.[1] Surviving spouses and children are inheriting mortgaged homes, where they often resided with the now-deceased borrower. Mortgage servicers, however, are preventing these heirs from accessing loan information, becoming borrowers themselves, and modifying mortgages.[2] Eighty-year-old Aurora MacDula encountered these difficulties after her husband passed away, leaving her title to their home in Vallejo, California.[3] Her husband had mortgaged the home in his name only, so Wells Fargo representatives refused to answer Ms. MacDula's questions about resuming loan payments, as she was not a borrower on the note. Only the advocacy of her local legal aid office allowed her to ultimately negotiate a trial period plan, the first step toward a permanent loan modification.[4]

Grieving homeowners are not the only non-borrowers facing significant hurdles to avoiding foreclosure after a major life event. Bank representatives also stonewall non-borrowing ex-spouses who receive title to the family home in a divorce, citing the same reasoning: Since the ex-spouse is not on the note, the servicer cannot speak to them, much less allow them to modify the mortgage.[5] Ironically, the death or divorce that a servicer cites as the reason it cannot work with a successor-in-interest also creates the successor's desperate need to modify: Death or divorce can shatter the successor's finances, making a mortgage modification crucial to keeping the property.[6]

Even if a non-borrower successor-in-interest convinces the mortgage servicer to communicate, the servicer often refuses to allow that homeowner to take over, or "assume" the mortgage, making a mortgage modification impossible.[7] Other servicers have taken a different approach: Laura Biggs of Rialto, California was initially offered a trial period plan by her deceased husband's loan servicer, only to be told that because her husband, the borrower, no longer resided in the home as his principal residence, she could not qualify for a modification.[8] And, as in Ms. Biggs's case, if the homeowner cannot continue to make full payments on the original, unmodified loan, or cure any arrearage left by the ex-spouse or deceased relative, foreclosure can soon follow.

This article traces the history of assumptions and loan acceleration clauses and summarizes current industry guidance that addresses the "widows and orphans" issue. Throughout, this article also notes possible legal arguments and strategies advocates can employ on behalf of non-borrowing successors-in-interest, focusing on the Garn-St. Germain Act and existing regulatory guidance.

II. HISTORICAL BACKGROUND

A. Loan Assumptions

"'Assumption of liability' means a promise by the transferee of mortgaged real estate, whether made to the transferor or to the mortgagee, to perform the obligation secured by the mortgage."[9] By assuming a mortgage, a non-borrower successor-in-interest agrees to accept personal liability on the note, promising to pay the loan. The assumption basically transforms the non-borrower into a borrower, creating a borrower-creditor relationship with the investor lender and enabling the new borrower to apply for a loan modification. While assuming the loan carries the risk of being held liable for the debt, not assuming can be catastrophic if the successor-in-interest cannot afford the mortgage payments and needs to modify the mortgage to keep the home because modifications are usually impossible without assumptions.

As a general rule of contract law, mortgages are freely assumable,[10] and the successor-in-interest may decide to assume regardless of the wishes of the servicer or the investor.[11] Further, a successor-in-interest need only notify the borrower's servicer of the assumption by sending a written notice of assumption.[12] In fact, investors should welcome assumptions. An assumption does not absolve the original borrower of liability unless the investor agrees to a release. Rather, it gives the investor an additional party to hold liable for the loan.[13]

Too often, however, servicers will instruct successors-in-interest that a delinquent mortgage is not assumable. Usually, the very reason the successor needs to assume and modify the delinquent mortgage is to make the mortgage more affordable—the successor just lost a spouse or parent or went through a divorce, significantly impacting the successor's ability to make mortgage payments. Servicers will also instruct successors-in-interest that to assume a mortgage, they must individually qualify for the loan according to its original terms, without considering the financial resources of the ex-spouse or deceased relative. Conversely, modifications are only available to borrowers who cannot afford their original mortgages.

To miraculously qualify for an assumption and modification, then, these successors-in-interest must *simultaneously* demonstrate: (1) that the loan is current, to assume; (2) that the loan is delinquent, to modify; (3) that they are capable of qualifying for the original loan, to assume; and (4) that they are incapable of affording the original loan, to modify. Not surprisingly, successors-in-interest usually fail this impossible standard. As described in Section III, a simultaneous assumption and modification is the most reasonable avenue for successors-in-interest to take over and modify mortgages.

B. The Rise and Fall (and Rise) of Due-on-Sale Clauses

One of the few exceptions to the general rule that mortgages are freely assumable is a contractual restriction on assumability.[14] Usually, assumability is restricted with a "due-on-sale" clause in a mortgage contract, which allows the servicer to accelerate the mortgage if the borrower transfers the property. A brief history sheds light on the relationship between assumability and due-on-sale clauses in California.

To avoid the high interest rates prevalent in the 1970s, many new homebuyers at the time assumed existing mortgages with low interest rates. These arms-length transactions between unrelated people prevented banks from collecting loan origination and mortgage prepayment fees.[15] California and several other states facilitated this wave of assumptions by making due-on-sale clauses unenforceable, both statutorily[16] and through case law.[17] In response to the high rate of assumptions and effective ban on due-on-sale clauses in several states, the banking industry lobbied Congress to mandate due-on-sale clause enforceability and to federally preempt contradictory state laws. Congress obliged, passing the Garn-St. Germain Depository Institutions Act in 1982 (the "Act" or the "Garn-St. Germain Act").[18] The Act allows banks to enforce due-on-sale clauses in mortgage contracts,[19] but it also protects property transfers between specific parties, exempting those transfers from due-on-sale clause enforcement. Specifically, the Act protects transfers from one joint tenant to another upon death, to a spouse or child of a borrower, and to a spouse in the context of a divorce settlement.[20] Banks, then, cannot enforce due-on-sale clauses against successors-in-interest who take title to property via these protected transfers.

C. The Garn-St. Germain Act Does Not Prohibit Loan Assumptions in Connection with Protected Transfers

Widow and orphan advocates can marshal several arguments to demonstrate that the Garn-St. Germain Act not only protects certain transfers from loan acceleration clauses, but that it implicitly allows successors-in-interests of protected transfers to assume the subject loans. First, Congress would have explicitly prohibited assumptions if that was its intent, and the Act does not forbid assumptions.[21] Following, if a successor-in-interest assumes a loan, the Act does not allow a servicer to undo the assumption.[22] At most, the Act allows the servicer to accelerate the loan, but *only* if the transfer is not a protected transfer.

Second, the legislative history of the Act reveals that it was passed specifically to prevent arm's-length assumptions of loans, even though the Act's language specifically talks about due-on-sale clauses.[23] The exempted transfers in the Act, then, are protected against both acceleration clauses and from assumption restrictions. Protection from the former but exposure to the latter would be inequitable.[24]

Third, prohibiting assumptions involving protected transfers is contrary to the spirit of the Act and renders a successor-in-interest's legal ownership of the property meaningless.

Finally, because the Act prevents lenders from enforcing due-on-sale clauses for protected transfers, these contractual restrictions do not control the situation. Rather, state contract law, which allows free assumability, steps into this void. Servicers, in other words, cannot restrict assumptions in protected transfers because the *only* contractual restriction (the due-on-sale clause) was rendered unenforceable under the Act.[25] The bottom line is: a successor-in-interest can decide whether to assume a loan, irrespective of the wishes or instructions of the servicer or loan investor. This is true, and the above arguments apply, even where the loan is in default or the servicer has already accelerated the loan.[26]

III. CURRENT REGULATIONS AND GUIDANCE

Despite the safeguards in the Garn-St. Germain Act, mortgage servicers frequently prevent or inhibit assumptions of property inherited or received through protected transfers, as the stories of Aurora MacDula and Laura Biggs illustrate. California advocacy groups, especially Housing and Economic Rights Advocates and the California Reinvestment Coalition, led efforts to encourage mortgage industry leaders to adopt policies that would protect these financially vulnerable homeowners by facilitating simultaneous assumptions and modifications.[27] Overall, the resulting guidance and regulations instruct mortgage servicers to treat successors-in-interest as borrowers, both in terms of communicating about the loan and in applying for loss mitigation programs. None of these provisions or rules, however, includes a private right of action for successors-in-interest. Advocates should determine which guidance applies to a successor's situation by identifying the owner, insurer, and servicer of the subject loan.

A. Fannie Mae Guidance

In February 2013, Fannie Mae issued a Lender Letter that would eventually set the industry standard on the widows and orphans issue (the "Fannie Mae Lender Letter").[28] The Fannie Mae Lender Letter applies to successors-in-interest of Garn-St. Germain Act-protected property transfers, including transfers resulting from death or divorce,[29] instructing servicers to "promptly identify and communicate with the new property owner" and to "allow the new owner to continue making mortgage payments and pursue an assumption of the mortgage loan as well as a foreclosure prevention alternative."[30] The Fannie Mae Lender Letter specifically addresses delinquent loans:

> [If the] new property owner is unable to bring the mortgage loan current but may be able to resolve the delinquency with a foreclosure prevention alternative … and assume the mortgage loan, the servicer must collect a Borrower Response Package from the new property owner and evaluate the request as if they were a borrower.[31]

Among advocates, this language is widely considered the most useful to successors-in-interest because of its simplicity and inclusion all Garn-St. Germain Act-protected property transfers.[32]

B. Freddie Mac Guidance

Freddie Mac's approach to the widows and orphans issue has been more piecemeal and ambiguous than Fannie Mae's and has thus far failed to explicitly protect property obtained through

divorce. In February 2013, Freddie Mac issued a servicing Bulletin (the "Freddie Mac 2013 Bulletin") highlighting the plight of surviving spouses and children of deceased borrowers, but also mentioning "other transfers of property where Servicers are required to accelerate the Note."[33] The Freddie Mac 2013 Bulletin instructed servicers, upon receiving notice that the borrower is deceased, "or upon receiving notice of a transfer requiring acceleration of the Note," to verify that the successor-in-interest has a legal interest in the property, and then to provide them loan information.[34] Under the Freddie Mac guidance, servicers must first consider whether a successor-in-interest can simply continue paying the mortgage and allow the assumption in that instance. If the loan is delinquent, the servicer should evaluate whether a quick fix, like a forbearance, could bring the loan current and then allow an assumption. Third, if the loan is delinquent and no quick "relief" option is available, the servicer must evaluate the successor-in-interest for a simultaneous assumption and modification as if they were a borrower.[35] This Freddie Mac guidance is markedly less helpful than Fannie Mae's instruction to servicers to simply communicate with successors and allow them to continue paying the mortgage or to pursue an assumption and modification.

More than a year later, in 2014, Freddie Mac extended the options available to successors-in-interest, instructing servicers to consider them for Home Affordable Modification Program ("HAMP") modifications upon request.[36] Like the Freddie Mac 2013 Bulletin, this option only refers to successors who inherit property through the death of the borrower and ignores divorce-related transfers.

The most current Freddie Mac guidance, issued in a 2014 bulletin[37] and incorporated into Freddie Mac's Servicing Guide, instructs servicers to "consider an assumption … in situations where all Borrowers are deceased and a person with a legal or beneficial interest in the Mortgaged Premises, such as a surviving spouse, wishes to assume the Mortgage obligation."[38] The Servicing Guide incorporates the instructions from previous bulletins[39] and clarifies that successors-in-interest to protected transfers are not subject to loan acceleration.[40] Interestingly, while the assumption-specific guidance contemplates only death-related transfers, the Servicing Guide references divorce-related transfers in its "general" transfer section, forbidding servicers from accelerating loans involving protected transfers,[41] and referring to a list of protected transfers that includes divorce-related and other Garn-St. Germain Act-protected transfers.[42]

C. HAMP Guidance

If a successor-in-interest's mortgage loan is not owned by Fannie Mae or Freddie Mac, advocates should consult HAMP rules and guidance.[43] Created by the Troubled Asset Relief Program and managed by the Treasury Department, HAMP requires participating mortgage servicers (nearly all major servicers) to offer sustainable loan modifications to qualifying homeowners unable to make their mortgage payments under their current loan terms.[44] HAMP issues rules and guidance to servicers through its periodically updated Making Home Affordable Handbook ("MHA Handbook").

Prior to 2013, the MHA Handbook only addressed successors-in-interest who inherited or were awarded property in the midst of a trial period plan ("TPP") initiated by the borrower.[45] In August 2013, HAMP started allowing successors-in-interest to be considered for assumptions and modifications outside the TPP context, continuing to include successors who became homeowners through *either* death or divorce.[46] The current MHA Handbook instructs servicers to consider a non-borrower for a HAMP modification "as if he or she was the borrower,"[47] and to suspend any ongoing foreclosure while doing so.[48] "The servicer should process the assumption and loan modification contemporaneously if the titleholder is eligible for HAMP and investor guidelines and applicable law permit an assumption of the loan."[49] "Applicable law" refers to the Garn-St. Germain Act, which, as discussed above, protects certain property transfers from loan acceleration clauses and does not prohibit assumptions involving those transfers.[50]

If a servicer denies an assumption and modification citing "investor restrictions," advocates should obtain the pertinent pooling and servicing agreement (listing investor restrictions) to verify the servicer's claim. Critically, there is no private right of action to enforce provisions in the MHA Handbook for either successors-in-interest or original borrowers.[51]

D. Federal Housing Administration ("FHA") Regulations

Mortgages insured by the Department of Housing and Urban Development ("HUD"), including FHA loans, are completely ruled by HUD rules and regulations.[52] Specifically, FHA loans are governed by HUD-issued Mortgagee Letters and the HUD Handbook. HUD maintains a general policy that all HUD-insured loans are assumable.[53] The FHA requires, however, that successors-in-interest undergo a credit review to qualify for an assumption.[54] Successors-in-interest who take title "by devise or descent," are excepted from this credit review rule.[55]

Like the Freddie Mac guidance, then, FHA regulations treat transfers resulting from divorce ambiguously.[56] Advocates from the National Consumer Law Center ("NCLC") are pushing HUD to clearly state that all successors-in-interest of Garn-St. Germain Act-protected transfers, by death and divorce, should be allowed to freely assume the subject mortgages without a credit review.

E. Consumer Financial Protection Bureau ("CFPB") Guidance

1. *Current Law*

Created by the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB's new mortgage servicing rules[57] add to and amend the existing federal framework provided by both the Real Estate Settlement and Procedures Act ("RESPA") and the Truth in Lending Act ("TILA"),[58] and became effective January 10, 2014. In part due to the zealous advocacy of groups like the California Reinvestment Coalition ("CRC"),[59] Housing and Economic Rights Advocates ("HERA"),[60] and the NCLC, the CFPB included guidance specific to successors-in-interest in its new rules. Specifically, "upon notification of the death of a borrower, [servicers shall maintain policies and procedures that are reasonably designed to] promptly identify and facilitate communication

with the successor in interest of the deceased borrower with respect to the property secured by the deceased borrower's mortgage loan."[61] Aside from referring to death-related transfers exclusively, this provision addresses the difficulties successors-in-interest encounter in trying to communicate with servicers, but ignores the more substantive problems they face in securing assumptions and modifications. This provision is also one of the few new servicing rules that is *not* enforceable through a private right of action under RESPA.

The CFPB issued a bulletin several months before these rules went into effect, clarifying its successors-in-interest guidance.[62] The CFPB bulletin lists examples of appropriate policies and procedures servicers should maintain to accomplish the goals of the above rule. First, servicers should promptly notify a successor of any documentation required to prove the death of the borrower and the successor's legal interest in the property. The CFPB bulletin at least suggests that servicers should not request unnecessary documentation, disapprovingly citing reports that servicers often request probate documents from successors who inherit through the right of survivorship and own the property automatically, without the need for probate. Servicers may request appropriate documents such as death certificates, executed wills, or a court order determining succession rights.[63]

Second, the servicer should determine the information required in "reviewing the rights and obligations of successors in interest with respect to the property," including documentation supporting the successor's eligibility for loss mitigation and eligibility "to assume the mortgage loan, with or without a simultaneous loan modification."[64] Additionally, servicers should alert the successor to any "prerequisites" to continue paying the mortgage, assuming the mortgage, and qualifying for a loan modification.[65] Expanding on the communication-specific guidance in the rule, this bulletin encourages servicers to evaluate successors-in-interest for an assumption and modification "where appropriate"[66] and to suspend foreclosure activities in those cases.[67]

Lastly, the CFPB bulletin requests that servicers comply with laws affecting a "servicer's obligations following the death of a borrower," referring servicers to Garn-St. Germain Act-protected death-related transfers, and then references both the Fannie Mae and Freddie Mac Servicing Guidelines (the former of which protects transfers by death *and* divorce). Overall, the CFPB guidance reads as suggestive rather than mandatory, and applies to successors-in-interest who inherit property but not to those who receive property though divorce.

Six months after the rules became effective, the CFPB issued an interpretative and clarifying rule related to TILA's mortgage servicing rules. Apparently, servicers were using TILA's "Ability to Repay" rule[68] to deny assumptions to successors-in-interest. Servicers, in other words, were assessing a successor's ability to repay the mortgage before approving assumptions. With its interpretive rule, the CFPB provided that "the addition of a successor as named obligor generally does not constitute an 'assumption' and subject the successor to TILA's Ability-to-Repay requirements."[69] Interestingly, this rule contemplates that a separation or divorce, not just a borrower's death, can produce this situation[70] and appears to protect successors who receive property through any Garn-St. Germain Act-protected transfer.[71]

2. Advocacy Strategies Under Current Law

Without an explicit private right of action in the new servicing rules, advocates for successors-in-interest can turn to other parts of RESPA to set up possible litigation if a servicer does not comply with existing guidance. Specifically, if a servicer refuses to communicate with a successor-in-interest or requests inappropriate documentation to verify the successor's property ownership, the advocate should send the servicer a Notice of Error ("NOE") detailing the servicer's mistake and citing the controlling guidance.[72] A servicer's failure to correct the error or to properly explain the absence of error can provide the basis for a RESPA cause of action.[73]

The drawback to this approach is that RESPA's current definition of "borrower" does not include successors-in-interest. Advocates, however, can still argue that the successor is a borrower under RESPA. First, if the successor-in-interest signed the deed of trust, they are arguably a "borrower" for RESPA purposes because the deed of trust usually refers to all signers as "borrowers."[74] Second, notifying the servicer in writing of an assumption renders the successor a borrower.[75] Finally, if the transfer occurred because of the borrower's death and the successor is appointed estate representative, this should allow the successor to assert a RESPA claim by stepping into the borrower's position.[76]

3. Proposed Rule

In November 2014, the CFPB announced it was proposing new successor-in-interest regulations. The proposed rule was issued on December 15, 2014, and included a ninety-day comment period that expired March 16, 2015. This article was written during and shortly after the comment period and therefore only summarizes the proposed (not enacted) rule, which may not go into effect until 2016.[77]

Broadly, the rule would accomplish three objectives. First, it would "expand the circumstances in which consumers would be considered successors under the rules [including] when a property is transferred after a divorce, legal separation, through a family trust, between spouses, from a parent to a child, or when a borrower who is a joint tenant dies."[78] This language intentionally tracks the language in the Garn-St. Germain Act, as noted in the CFPB's analysis of the proposed rule.[79] Second, the proposed rule would restrict how a servicer verifies a successor-in-interest's property ownership. Third, and most critically, the proposed rule would grant confirmed successors-in-interest the same protections under the rules that borrowers enjoy.[80] The CFPB

> believes that these changes are necessary to address the significant problems successors in interest continue to encounter with respect to the servicing of mortgage loans secured by their property. The Bureau has received information from consumers, consumer advocacy groups, and other stakeholders demonstrating that such problems remain pervasive, despite the Bureau's earlier guidance.[81]

Not only would the rule apply to divorce-related property transfers, but the commentary to the rule clarifies that assumption is not required for a successor-in-interest to be considered a "confirmed" successor and thereby protected as a "borrower" under the rules. "The proposed rule would … apply with respect to a successor in interest regardless of whether that person has assumed the mortgage loan obligation under State law."[82]

Currently, the CFPB bulletin summarized in Section III.E.1 above offers suggestive guidance on appropriate documents servicers may request to confirm property ownership. The proposed rule would mandate that a servicer provide a potential successor-in-interest a list of required documents once the successor notifies the servicer of their existence and situation.[83] Servicers would also have to "confirm [and notify the person] promptly, upon the receipt of [the requested] documents, the person's status as a successor in interest."[84]

A comment to the proposed rule "clarifies that the documents a servicer requires to confirm a potential successor in interest's identity and ownership interest in the property must be reasonable in light of the laws of the relevant jurisdiction, the successor in interest's specific situation, and the documents already in the servicer's possession."[85] The comments to the proposed rule also provide examples of appropriate documents a servicer may request specific to particular property transfers like death of a joint tenant, divorce or legal separation, etc.[86] In proposing this rule, the CFPB cited reports from advocates that servicers continue to request probate documents from successors-in-interest who inherit property without probate, despite the CFPB's bulletin guidance.

The most important aspect of the proposed rule would grant confirmed successors-in-interest all the protections of the CFPB mortgage servicing rules because these successors would be considered "borrowers." If a confirmed successor submitted a loan modification application to his or her servicer, for example, RESPA's dual tracking protections would prohibit the servicer from initiating or conducting a foreclosure sale while the application is pending (the precise prohibition would depend on the timing of the application).[87] This expanded definition of "borrower" would enable confirmed successors-in-interest to sue non-compliant servicers under RESPA.[88] Only "borrowers" defined under RESPA may bring RESPA claims, so the proposed rule includes an addition: "a successor in interest shall be considered a borrower for the purposes of [RESPA's] mortgage servicing rules once a servicer confirms the successor in interest's identity and ownership interest in the property."[89] The CFPB's analysis of the proposed rule reiterates that these protections and remedies will apply to confirmed successors regardless of whether they have assumed the subject loans.[90]

NCLC, CRC and its members—including HERA and the National Housing Law Project—and many other advocacy groups submitted comments to the CFPB's proposed rule, including the successors-in-interest rule. The rule has the potential to grant many thousands of widows, orphans, and divorcees the right to meaningful communication with mortgage servicers, which will increase their chances at loan modifications and foreclosure prevention.

4. *Advocacy Strategies Under the Proposed Rule*

The problem of successors-in-interest not being considered "borrowers" under RESPA is potentially solved under the proposed rule:

> The Bureau is aware that some courts have indicated that successors in interest would not ordinarily be considered borrowers under RESPA. Notwithstanding these cases, which were decided without the benefit of regulations such as those that the Bureau is now proposing, the Bureau believes that the term "borrower" may also be interpreted to include successors in interest and that it is reasonable to consider confirmed successors in interest borrowers for the purposes of the Mortgage Servicing Rules. As homeowners of a property securing a mortgage loan, successors in interest typically must satisfy the loan's payment obligations to avoid foreclosure. … [S]uccessors in interest therefore step into the shoes of the borrower for many legal purposes.[91]

F. California's Homeowner Bill of Rights

California's Homeowner Bill of Rights ("HBOR") went into effect in January 2013.[92] This landmark legislation was created to combat the foreclosure crisis and hold banks accountable for exacerbating it.[93] Broadly, HBOR requires servicers to engage in pre-notice of default contact with borrowers and assign borrowers a competent single point of contact; it also prohibits servicers from engaging in dual tracking.[94] Critically, HBOR gives borrowers a private right of action to enforce these protections.[95] Successors-in-interest, however, are not included in HBOR's definition of "borrower"[96] and therefore receive none of HBOR's protections and cannot sue servicers for HBOR violations.

On February 9, 2015, Assemblywoman Susan Talamantes Eggman introduced Assembly Bill 244 that seeks to include successors-in-interest in HBOR's "borrower" definition.[97] "The bill would define a successor in interest for these purposes as a natural person who provides the mortgage servicer with notification of the death of the mortgagor or trustor and reasonable documentation, as specified, showing that the person" is a: (1) personal representative of the deceased borrower's estate; (2) a surviving joint tenant; (3) a surviving spouse if the property is considered community property with the right of survivorship; or (4) the trustee of the property-owning trust.[98] The proposed definition also lists appropriate documents servicers may request in verifying this information. Like the proposed CFPB rule, the proposed HBOR rule would not require assumptions for a successor to be considered a "borrower."[99] Unlike the proposed CFPB rule, however, this proposed expansion of "borrowers" to include successors-in-interest does not include successors who receive property through divorces or legal separations. The proposal would only grant HBOR protections to successors who attain the property through a death-related transfer.

The California Assembly's Banking and Finance Committee was scheduled to hear Assembly Bill 244

on April 27, 2015. Due to stiff opposition by both the California Chamber of Commerce and the California Bankers Association, however, Assemblywoman Eggman decided she did not possess the necessary votes and pulled the bill two days before the hearing.[100] CRC, a co-sponsor of the bill, expects Assemblywoman Eggman to continue her sponsorship and re-introduce the bill in January 2016.

G. Other Advocacy Strategies

While this article focuses on industry guidance and Garn-St. Germain Act-related arguments, advocates should be aware of other litigation approaches and claims potentially helpful to successors-in-interest.[101] A fairly recent California case, *McGarvey v. JP Morgan Chase Bank*, includes extended discussions on promissory estoppel, unfair competition, and negligence claims arising from a servicer's failure to comply with HAMP successor-in-interest guidance pertaining to a TPP.[102] Negligence claims in particular have seen recent success in California as they relate to loan modifications. If a servicer engages in the loan modification process with a borrower and mishandles that process, courts are finding that the servicer breached a duty of care.[103] If a successor-in-interest can show that a servicer engaged them in the modification process and then failed to follow the pertinent industry guidance in that process, it could give rise to a viable negligence claim.[104]

IV. CONCLUSION

If a successor-in-interest is having difficulty communicating with a servicer or with assuming and/or modifying the mortgage, advocates should alert the servicer representative to the governing industry guidance. Many times, a representative simply does not know or understand the relevant guidance and a letter or escalation to a manager can resolve the situation. By now, every major industry player has issued guidance that should facilitate communication and simultaneous assumption and modifications for successors-in-interest. Some guidance is clearer than others and explicitly includes transfers by death *and* divorce, but advocates should argue that, taken as a whole, Fannie, Freddie, HAMP, FHA, and CFPB guidance set an industry standard that all servicers need to follow.

If citing industry guidance does not work, advocates should consider the other arguments outlined here, particularly that the Garn-St. Germain Act does not stand in the way of assumptions and successors-in-interest can bring RESPA claims as "borrowers" in certain situations. Additionally, advocates need to lodge complaints with the CFPB for every problematic widows and orphans case they handle. Complaints and client stories should also be submitted to CRC and HERA, co-sponsors of the pending HBOR bill. The strides made thus far—all the industry guidance already issued and the proposed CFPB and HBOR rules—have happened only because of the persistent advocacy of CRC, HERA, NCLC, and other advocacy groups. Advocates should stay tuned for further national and state developments on this timely issue.

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ENDNOTES

1 *See* Press Release, Cal. Reinvestment Coal., 41 California Organizations Urge CFPB to Increase HMDA Transparency (Oct. 29, 2014), *available at http://calreinvest.org/news/41-california-organizations-urge-cfpb-to-increase-hmda-transparency*.

2 In a 2013 study of California housing counselors and advocates, sixty-nine percent of respondents reported that servicers would "sometimes," "almost always," or "always" refuse to speak with widowed or orphaned successors-in-interest because the successors-in-interest are not listed on the note. Twenty-six percent of respondents reported that these successors-in-interest "always" or "almost always" received less favorable loss mitigation outcomes than borrowers, even with advocacy. Cal. Reinvestment Coal., Chasm Between Words and Deeds IX: Bank Violations Hurt Hardest Hit Communities 14 (2013), *available at* http://calreinvest.org/system/resources/W1siZiIsIjIwMTMvMDQvMDIvMjJfMTVfMzNfNjI3X0NoYXNtX0J3X1dvcmRzX2FuZF9EZWVkc19JWF9GaW5hbF9SZXBvcnQucGRmIl1d/Chasm%20Bw%20Words%20and%20Deeds%20IX%20Final%20Report.pdf [hereinafter CRC 2013 Study].
In a follow-up 2014 study, eighty-seven percent of respondents reported that the widows and orphans problem continued and industry guidance issued in 2013 had not adequately address the problem. *See* Cal. Reinvestment Coal., Chasm Between Words and Deeds X: How the Ongoing Mortgage Servicing Problems Hurt California Homeowners and Hardest-Hit Communities 20 (2014), *available at* http://calreinvest.org/system/resources/W1siZiIsIjIwMTQvMDUvMTkvMjJfMjFfMDhfOTc1X0NSQ19SZXBvcnRfQ2hhc21fQmV0d2Vlbl9Xb3Jkc19hbmRfRGVlZHMucGRmIl1d/CRC%20Report%20Chasm%20Between%20Words%20and%20Deeds.pdf [hereinafter CRC 2014 Study].

3 Jessica Silver-Greenberg, *Mortgage Catch Pushes Widows Into Foreclosure*, N.Y. Times, Dec. 2, 2012, at A1.

4 *Id.*

5 *See, e.g.*, CRC 2013 Study, *supra* note 2, at 15 (quoting an advocate with a divorced client who cannot speak with her ex-husband's mortgage servicer or work with the servicer to modify the mortgage).

6 "[I]ncreased risk of harm may arise because successors in interest are more likely than other homeowners to experience an income disruption due to death or divorce, and because successors in interest have more difficulty than other homeowners obtaining information about the status of the mortgage loan, options for modification, and payoff information." Amendments to the 2013 Mortgage Rules under the Real Estate Settlement and Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 74,176, 74,182 (Bureau of Consumer Fin. Prot. Dec. 15, 2014) [hereinafter Proposed Rule].

7 Bank of America told a seventy-year-old widow she could not obtain a modification "until her name [was] added to the mortgage note, but … she must be current on the payments before that can happen." Silver-Greenburg, *supra* note 3.

8 Kevin G. Hall, *Bank Might Foreclose on Home Because Late Husband Isn't Residing There*, McClatchy DC, Dec. 9, 2013, *available at* http://www.mcclatchydc.com/2013/12/09/210909/bank-might-foreclose-on-home-because.html; *see also* CRC 2014 Study, *supra* note 2, at 22.

9 Restatement (Third) of Prop.: Mortgages § 5.1(a) (1997).

10 *See* Sarah Mancini & Alys Cohen, *Surviving the Borrower: Assumption, Modification, and Access to Mortgage Information after a Death or Divorce*, 43 Pepp. L. Rev. (forthcoming 2015) (manuscript at 22–23, on file with the Social Science Research Network, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2498188).

11 *See id.* at 30–31; Restatement (Second) of Contracts § 323 cmt. a (1981); Restatement (Third) of Prop.: Mortgages §§ 5.1, 5.2.

12 *See* Restatement (Third) of Prop.: Mortgages § 5.1 cmt. a.

13 *Id.* § 5.1(b); *see also* Mancini & Cohen, *supra* note 10, at 23–24.

14 Mancini & Cohen, *supra* note 10, at 22.

15 *See id.* at 24–25.

16 Cal. Civ. Code § 2924.6(a).

17 *Wellenkamp v. Bank of Am.*, 21 Cal. 3d 943 (1978). Refer to California Mortgages, Deeds of Trust, and Foreclosure Litigation § 8.13–14 (Cal. Continuing Educ. Bar, 4th ed. 2015) for a more detailed explanation of *Wellenkamp*.

18 Garn-St. Germain Depository Institutions Act of 1982, Pub. L. 97-320, 96 Stat. 1469 (codified as amended at 12 U.S.C. § 1701j-3 and scattered sections of 12 U.S.C.). The Garn-St. Germain Depository Institutions Act preempts Cal. Civ. Code § 2924.6.

19 12 U.S.C. § 1701j-3(b)(1) (1982).

20 *Id.* § 1701j-3(d) .

21 *See id.* § 1701j-3.

22 *See* Mancini & Cohen, *supra* note 10, at 28–29 ("There is no requirement that the new homeowner obtain the creditor or servicer's permission [to assume].").

23 *Id.* at 27 nn.116–17 (citing legislative history).

24 *Id.* at 28 n.121 (citing S. Rep. No. 97-536, at 25 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3054, 3079).

25 *See id.* at 29 nn.128–29; Sarah Mancini, *Helping Successor Homeowners Get Loan Modifications*, Homeowner Bill of Rights Collaborative Foreclosure Newsl., Feb. 2015, at 6, *available at* http://calhbor.org/wp-content/uploads/2015/03/HBOR-Nwsltr-Feb-2015-with-Rijhwani-1.pdf.

26 *See* Mancini & Cohen, *supra* note 10, at 30–32.

27 *See* Press Release, Cal. Reinvestment Coal., Recent Mortgage Developments Validate Homeowner and Housing Counselor Concerns (Oct. 3, 2013), *available at* http://www.calreinvest.org/news/recent-mortgage-developments-validate-homeowner-and-housing-counselor-concerns.

28 Fannie Mae, Lender Letter LL-2013-04 (Feb. 27, 2013), *available at* https://www.fanniemae.com/content/announcement/ll1304.pdf.

29 The Fannie Mae Lender Letter refers to "exempt transaction[s] in the Servicing Guide." *Id*. The Servicing Guide closely tracks the language of the Garn-St. Germain Act in describing protected transfers. *See* Fannie Mae, Single Family Servicing Guide, at D1-4.01-02 (2015), *available at* https://www.fanniemae.com/content/guide/svc011415.pdf. The Servicing Guide in effect when the Fannie Mae Lender Letter was published also identified Garn-St. Germain Act-like transfers as protected transfers. *See* Fannie Mae, Single Family 2012 Servicing Guide § 408.02 (2012) *available at* https://www.fanniemae.com/content/guide/svc031412.pdf.

30 Fannie Mae Lender Letter, *supra* note 28.

31 *Id.* Fannie Mae later simplified this instruction: "If the mortgage loan is delinquent and the new property owner is unable to bring the mortgage loan current, he or she must be evaluated for all available workout options." Fannie Mae, Servicing Guide Announcement SVC-2013-17 (Aug. 28, 2013), *available at* https://www.fanniemae.com/content/announcement/svc1317.pdf.

32 The guidance issued in the Fannie Mae Lender Letter and Servicing Guide Announcement is included in the most recent Fannie Mae Single Family Servicing Guide, *supra* note 29, at D1-4.01-02.

33 Freddie Mac, Servicing Bulletin 2013-3, at 2 (Feb. 15, 2013), *available at* http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1303.pdf.

34 *See id.*

35 *See id.*

36 Freddie Mac, Servicing Bulletin 2014-10 (June 3, 2014), *available at* http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1410.pdf.

37 Freddie Mac, Servicing Bulletin 2014-14 (July 14, 2014), *available at* http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1414.pdf.

38 Freddie Mac, Single Family Servicing Guide, at B65.28 (2014), *available at* http://www.freddiemac.com/singlefamily/guide.

39 *See id.*

40 *See id.* at 60.1, 60.5.

41 *Id.* at 60.1.

42 *Id.* at 60.1, 60.5.

43 HAMP is part of the Making Home Affordable Program and regulates non-Government Sponsored Entities ("non-GSE") mortgages of one-to-four unit, owner-occupied homes. Making Home Affordable Program, Handbook

for Servicers of Non-GSE Mortgages 14–15 (version 4.4, 2014), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_44.pdf [hereinafter MHA Handbook]. Non-GSE mortgages are not owned or guaranteed by Fannie Mae or Freddie Mac. *Id*.

44 *See id.* at 15.

45 *See* Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages § 8.9 (version 4.1, 2012).

46 These non-TPP provisions were added by MHA, Supplemental Directive 13-06 (Aug. 13, 2013), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1306.pdf.

47 MHA Handbook, *supra* note 43, § 8.8.

48 *Id*. § 8.9.2.

49 *Id*. § 8.8.

50 *See supra* Section II.C.

51 *See, e.g.*, *Sholiay v. Fed. Nat'l Mortg. Ass'n*, 2013 WL 3773896, at *3 (E.D. Cal. July 17, 2013) (no private right of action to enforce HAMP in the Ninth Circuit); *Slimm v. Bank of Am. Corp.*, 2013 WL 1867035, at *8 (D.N.J. May 2, 2013); *Reynoso v. IndyMac Mortg. Servs., FSB*, 2013 WL 388990, at *4 (D. Md. Jan. 30, 2013); *Pinto v. HSBC Bank, N.A.*, 2012 WL 6622493, at *4 (D. Mass. Dec. 18, 2012).

52 Loans insured by the U.S. Department of Agriculture as part of Rural Development housing programs fall outside the scope of this article.

53 HUD, Handbook 4330.1 REV-5 ¶ 6-1 (1994).

54 *Id.* ¶ 6-2.

55 *Id.* ¶ 6-3.

56 Like Freddie Mac guidance, FHA regulations add to this confusion and ambiguity by referring to "death or divorce" elsewhere in the guidance. The HUD Mortgagee Letter outlining the FHA-HAMP program describes HAMP-eligible mortgagors: "the current mortgagor(s) on the existing FHA-insured [property] must be identical to the mortgagor(s) on the HAMP mortgage, except as provided," and provides: "All changes in ownership due to death or divorce of the current owners must be supported by legal documentation." HUD, Mortgagee Letter 2009-23, Attachment (July 30, 2009), *available at* http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/2009ml.cfm.

57 The Dodd-Frank Act created both the CFPB itself, and the basis for most of the new rules. *See generally* Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

58 RESPA is codified as "Regulation X" at 12 C.F.R. § 1024; TILA as "Regulation Z" at 12 C.F.R. § 1026.

59 *See* http://www.calreinvest.org.

60 *See* http://www.heraca.org.

61 12 C.F.R. § 1038(b)(1)(vi) (2014).

62 CFPB, Bulletin 2013-12 (Oct. 15, 2013), *available at* http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf [hereinafter CFPB bulletin].

63 *Id.*

64 *Id.*

65 Notably, this guidance suggests that servicers *can* limit a successor's ability to continue paying an un-modified, current mortgage. Under the Garn-St. Germain Act, however, successors may continue to pay a mortgage without the servicer's acquiescence. *See supra* Section II.

66 CFPB bulletin, *supra* note 62.

67 The language discouraging foreclosure continuation is not as strong as it could be: "servicers should consider whether best practices with regard to their policies and procedures … would include … promptly evaluating whether to postpone or withdraw any pending or planned foreclosure proceeding to provide a successor in interest with reasonable time to establish ownership rights and pursue assumption and [modification]." *Id.*

68 12 C.F.R. § 1026.43 (2014).

69 Bureau of Consumer Financial Protection, Application of Regulation Z's Ability-to-Repay Rule to Certain Situations Involving Successors-in-Interest, 79 Fed. Reg. 41,631–33 (July 17, 2014).

70 *Id.*

71 *See* Press Release, Alys Cohen & Nat'l Consumer Law Ctr., NCLC Advocates Applaud Rule Clarifying Mortgage Rights of Heirs; Urge Further Action (July 8, 2014), *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/pr_cfpb_successorsrule7814.pdf

72 *See* 12 C.F.R. § 1024.35 (2014) (outlining NOE procedures).

73 For a full explanation of the NOE process and a servicer's duties to respond to an NOE, see John Rao, *New RESPA Rules Change Qualified Written Request Procedure*, Homeowner Bill of Rights Collaborative Foreclosure Newsl., Jan. 2014, *available at* http://calhbor.org/wp-content/uploads/2014/08/HBOR-Jan.-2014-Nwsltr.pdf.

74 *See* Mancini, *supra* note 25, at 12.

75 *Id.*

76 *Id.* at 13.

77 The CFPB has proposed that the rule take effect 280 days after final rule publication. Proposed Rule, *supra* note 6, at 74,180.

78 Press Release, CFPB, Consumer Financial Protection Bureau Proposes Expanded Foreclosure Protections (Nov. 20, 2014), *available at* http://www.consumerfinance.gov/newsroom/cfpb-proposes-expanded-foreclosure-protections.

79 *See, e.g.*, Proposed Rule, *supra* note 6, at 74,180–81.

80 "The Bureau has considered each section of [RESPA's] mortgage servicing rules and believes that each section should apply to confirmed successors in interest." *Id.* at 74,185.

81 *Id.* at 74,181.

82 *Id.*

83 *Id.* at 74,191 (describing proposed regulation 12 C.F.R. § 1024.36(i)).

84 *Id.* at 74,196 (describing proposed regulation 12 C.F.R. § 1024.38(b)(1)(vi)(C)).

85 *Id.* (describing proposed comment 38(b)(1)(vi)-1).

86 *Id.* (describing proposed comment 38(b)(1)(vi)-2).

87 *See* 12 C.F.R. § 1024.41(f)–(g) (2014).

88 Borrowers may recover actual damages directly caused by a servicer's RESPA violation and additional damages if there