

# Saving the California Homeowner Bill of Rights from Federal Banking Preemption

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## Introduction

“WHY WOULD A BANK FORECLOSE when it was working with her on a short sale? . . . She assumed the bank’s foreclosure department would know what its short sale department was doing. That’s where she went wrong . . .”<sup>1</sup> Dual tracking occurs when a bank forecloses on a loan while an alternative to avoid it is pending<sup>2</sup> and is one of several foreclosure abuses addressed by the California Homeowner Bill of Rights.<sup>3</sup> This law, which became effective January 1, 2013,<sup>4</sup> is under attack by federally chartered banks asserting that federal bank-

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1. Hudson Sangree, *A Test for New State Homeowner Law*, SACRAMENTO BEE (June 21, 2013, 12:00 AM), <http://www.sacbee.com/2013/06/21/5513560/a-test-for-new-state-homeowner.html>.

2. See JOSEPH A. SMITH, JR., ONGOING IMPLEMENTATION: A REPORT FROM THE MONITOR OF THE NATIONAL MORTGAGE SETTLEMENT 7 (2013) [hereinafter NMS MONITOR REPORT], available at <https://www.mortgageoversight.com/wp-content/uploads/2013/02/Ongoing-Implementation.pdf>.

3. See A.B. 278, ch. 86, 2012 Cal. Legis. Serv. 2300–18 (West) (codified at CAL. CIV. CODE §§ 2920.5, 2923.4–.7, 2924, 2924.9–.12, 2924.15, 2924.17–.20); S.B. 900, ch. 87, 2012 Cal. Legis. Serv. 2318–36 (West) (codified at CAL. CIV. CODE §§ 2920.5, 2923.4–.7, 2924, 2924.9–.12, 2924.15, 2924.17–.20); Press Release, Cal. Att’y Gen., California Homeowner Bill of Rights Signed into Law (July 11, 2012), available at <http://oag.ca.gov/news/press-releases/california-homeowner-bill-rights-signed-law> (“The Homeowner Bill of Rights consists of a series of related bills, including two identical bills that were passed on July 2, by the state Senate and Assembly AB 278 . . . and SB 900 . . .”).

4. See A.B. 278; S.B. 900.

ing law preempts these state law protections.<sup>5</sup> Courts have predominately agreed with the banks, but only because courts and homeowners' counsel<sup>6</sup> have missed subtle but important changes in federal banking preemption statutes and case law.

From 2005 to 2007, during the housing boom leading up to the subprime mortgage crisis, twelve federal thrifts and national banks accounted for about 40% of the subprime loans made by all subprime lenders.<sup>7</sup> As the housing market began to collapse between 2006 and 2008, "loans made by federal thrifts had the highest delinquency rate, while loans made by national banks had the second highest delinquency rate. In contrast, loans made by state-chartered thrifts and state-chartered banks . . . had substantially lower delinquency rates . . . ."<sup>8</sup> Federal banking regulators placed some of the largest thrifts into receivership and sold them to national banks.<sup>9</sup>

In February 2012, a coalition of forty-nine state attorneys general and the federal government announced a national settlement with the country's five largest mortgage servicers<sup>10</sup> creating servicing standards to curb practices that have caused avoidable foreclosures.<sup>11</sup> While these servicers have been required to be in full compliance with these

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5. See, e.g., *Marquez v. Wells Fargo Bank*, No. C 13–2819 PJH, 2013 WL 5141689, at \*3 (N.D. Cal. Sept. 13, 2013) ("Principally, Wells Fargo asserts that all causes of action [including alleged violations of the recently enacted California Homeowner Bill of Rights] asserted in the complaint are preempted by the Homeowners Loan Act . . . ."); *Pratap v. Wells Fargo Bank*, No. C 12–06378 MEJ, 2013 WL 5487474, at \*3 (N.D. Cal. Oct. 1, 2013) ("Defendants contend that Plaintiffs' claims against Wells Fargo—all arising under California law [including CAL. CIV. CODE 2923.5]—are statutorily preempted under the federal Home Owners Loan Act . . . .").

6. See cases cited *infra* note 194 and accompanying text.

7. Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 918 (2011).

8. *Id.* at 919.

9. See, e.g., *id.* at 917; WILLIAM RUBERRY, OFFICE OF THRIFT SUPERVISION, OTS FACT SHEET ON WASHINGTON MUTUAL BANK 2–3 (2008), available at <http://files.ots.treas.gov/730021.pdf> (stating that Washington Mutual was the largest savings and loan association in the United States before being placed in receivership and later acquired by JPMorgan Chase).

10. *Joint State-Federal Mortgage Servicing Settlement FAQ*, NATIONAL MORTGAGE SETTLEMENT [hereinafter *Settlement FAQ*], <http://www.nationalmortgagesettlement.com/faq> (last visited July 13, 2013) ("The settlement will cost the nation's five largest mortgage services, which control about 60 percent of the mortgage servicing market, an estimated \$25 to \$32 billion.").

11. *About the Settlement*, NATIONAL MORTGAGE SETTLEMENT, <http://www.nationalmortgagesettlement.com/about> (last visited Oct. 21, 2013) (describing the settlements with Ally/GMAC, Bank of America, Citi, JPMorgan Chase, and Wells Fargo); see generally Consent Judgment at Ex. A 16–32, *United States v. Bank of Am. Corp.*, No. 12-0361 (D.D.C. Apr. 4, 2012) [hereinafter *Consent Judgment*], available at [https://d9klfgibkqcq.cloudfront.net/Consent\\_Judgment\\_BoA-4-11-12.pdf](https://d9klfgibkqcq.cloudfront.net/Consent_Judgment_BoA-4-11-12.pdf).

standards since October 2, 2012,<sup>12</sup> borrower complaints about the loan modification process and notice issues continue.<sup>13</sup> Even if these banks were to come into perfect compliance, settlement enforcement expires October 4, 2015, thereby depriving the courts of jurisdiction to order these servicers to address foreclosure abuses.<sup>14</sup> Additionally, the settlement is not enforceable as to servicers not party to the settlement.<sup>15</sup>

To extend many of the settlement's terms to larger mortgage servicers<sup>16</sup> operating in California, the California Legislature enacted A.B. 278,<sup>17</sup> the central legislation in a series of acts constituting the California Homeowner Bill of Rights<sup>18</sup> which became effective January 1, 2013.<sup>19</sup> One part of A.B. 278 makes permanent Civil Code section 2923.5, which requires servicers to contact delinquent borrowers regarding alternatives to foreclosure before recording a Notice of Default,<sup>20</sup> the first step in California's non-judicial foreclosure scheme.<sup>21</sup> Borrowers may request an injunctive remedy for section 2923.5 violations by enjoining servicers from proceeding with a foreclosure sale until the servicer complied.<sup>22</sup> When facing foreclosure, borrowers

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12. NMS MONITOR REPORT, *supra* note 4, at 5.

13. *Id.* at 6–7.

14. See Consent Judgment, *supra* note 8, at E-16 (“This Consent Judgment . . . shall retain full force and effect three and one-half years from the date it is entered . . .”). The Consent Judgment was entered into on April 4, 2012. *Id.*

15. See *Settlement FAQ*, *supra* note 7 (“This settlement involves the nation’s five largest mortgage servicers.”).

16. See A.B. 278, ch. 86, §§ 6, 7, 9, 12–14, 16, 2012 Cal. Legis. Serv. 2300, 2305–09, 2311–14 (West) (codified at CAL. CIV. CODE §§ 2323.55, 2923.6, 2923.7, 2924.9–.11, and 2924.12, respectively) (exempting servicers annually foreclosing on 175 or fewer homes from many of the requirements, such as the statutory loan modification review, denial, and appeal process).

17. A.B. 278; S.B. 900, ch. 87, 2012 Cal. Legis. Serv. 2318–36 (West) (codified at CAL. CIV. CODE §§ 2920.5, 2923.4–.7, 2924, 2924.9–.12, 2924.15, 2924.17–.20) (containing the exact text of A.B. 278).

18. See *California Homeowner Bill of Rights*, OFFICE OF THE ATTORNEY GENERAL, <http://www.oag.ca.gov/hbor> (last visited Oct. 21, 2013).

19. A.B. 278.

20. *Id.* §§ 4–6 (extending Cal. Civ. Code § 2923.5 to January 1, 2018, for servicers foreclosing on fewer than 175 homes; replacing § 2923.5 on January 1, 2018, with no expiration date; and creating § 2923.55 with a similar notice requirement for other servicers expiring January 1, 2018). See generally Cal. Civ. Code § 2923.5(j) (West 2012) (pre-A.B. 278 version expiring January 1, 2013).

21. See Cal. Civ. Code § 2924(a)(1)–(3) (West 2012 & Supp. 2013) (recording notice of default precedes notice of sale).

22. See *e.g.*, *Mabry v. Superior Court*, 110 Cal. Rptr. 3d 201, 207–11, 218–19, 222 (Cal. Ct. App. 2010) (concluding that section 2923.5 is enforceable by private right of action but only to postpone a foreclosure sale until compliance).

often make this request in conjunction with other causes of action alleging predatory lending and other wrongful foreclosure practices.<sup>23</sup>

Some of the largest mortgage servicers, however, claim that many of their loans are not subject to the section 2923.5 requirements because the loans were originated by federal savings banks or savings associations (collectively “thrifts”).<sup>24</sup> Before the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>25</sup> (“Dodd-Frank”) took effect in 2010, thrifts enjoyed express statutory field preemption of state laws under the Home Owners’ Loan Act (“HOLA”).<sup>26</sup> At the same time, national banks benefited from the narrower implied preemption of state laws that only conflict with national banking powers.<sup>27</sup> Once the Dodd-Frank preemption rule came into effect on July

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23. See e.g., *Nguyen v. Wells Fargo Bank*, 749 F. Supp. 2d 1022, 1024 (N.D. Cal. 2010) (“[A]lleging wrongful foreclosure, violation of . . . [sections] 2923.5 and 2924, fraudulent misrepresentation, . . . and injunctive relief,” and other claims); *Wienke v. Indymac Bank*, No. CV 10–4082 NJV, 2011 WL 871749, at \*2 (N.D. Cal. Mar. 14, 2011) (alleging violation of section 2923.5, the federal Truth in Lending Act (“TILA”), and other claims); *Wornum v. Aurora Loan Servs., Inc.*, No. C–11–02189 JCS, 2011 WL 3516055, at \*2–3 (N.D. Cal. Aug. 11, 2011) (alleging violation of section 2923.5, TILA, the federal Real Estate Settlement Procedures Act, and other claims).

24. E.g., *Nguyen*, 749 F. Supp. 2d at 1031 (“Wells Fargo contends that all of Plaintiff’s claims are completely preempted . . . because [the originator of the loan] . . . was a federally chartered savings bank regulated by the Office of Thrift Supervision under the Home Owners Loan Act . . . at the time the loan was made.”); *Pratap v. Wells Fargo Bank*, No. C 12–06378 MEJ, 2013 WL 5487474, at \*4 (N.D. Cal. Oct. 1, 2013) (“Because Plaintiffs’ loans originated with World Savings, a federal savings association, and Wells Fargo is the successor-in-interest to World Savings with respect to Plaintiffs’ loans, Wells Fargo argues that HOLA [preemption] applies.”); *Marquez v. Wells Fargo Bank*, No. C 13–2819 PJH, 2013 WL 5141689, at \*4 (N.D. Cal. Sept. 13, 2013) (“[T]his court has previously ruled that where a plaintiff’s loan originated with World Savings, which was a federal savings bank, claims subsequently asserted against Wells Fargo were subject to HOLA.”).

25. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

26. 12 U.S.C. §§ 1463(a), 1464(a) (2006) (authorizing the Director of the Office of Thrift Supervision to issue regulations that allow thrifts to exercise their banking powers) (current version at 12 U.S.C. §§ 1463(a), 1464(a) (2012)); 12 C.F.R. § 560.2(a) (2013) (“OTS hereby occupies the entire field of lending regulation for federal savings associations.”).

27. Compare 12 U.S.C. §§ 1463(a), 1464(a) (authorizing the Office of Thrift Supervision to issue regulations occupying the field of lending and preempting state law) with *Barnett Bank of Marion Cnty., v. Nelson*, 517 U.S. 25, 31 (1996) (finding that no express statute relating to preemption of state laws for benefit of national banks existed at that time and inquiring whether the general powers of national banks were in “irreconcilable conflict” with state statute). See also, e.g., OFFICE OF THE COMPTROLLER OF THE CURRENCY, INTERPRETIVE LETTER NO. 1080, (2007), available at <http://www.occ.gov/static/interpretations-and-precedents/may07/int1080.pdf> (concluding that, because a national bank had federal statutory authority to offer trust and fiduciary services in the state of Missouri, a Missouri statute imposing requirements before the bank could provide those services was in conflict with the NBA).

21, 2011, HOLA field preemption should have expired along with the Office of Thrift Supervision (“OTS”),<sup>28</sup> and all federally chartered banks<sup>29</sup> should only benefit from the more permissive conflict preemption.

California federal district courts, however, continue to hold that HOLA field preemption preempts section 2923.5.<sup>30</sup> Many have extended HOLA field preemption for state law violations solely because the loan originator was a thrift and the loan was originated before Dodd-Frank changed the preemption rule.<sup>31</sup> Courts are extending field preemption even to successor servicers, which are not thrifts.<sup>32</sup> This Comment argues that courts that continue field preemption for any entity on this basis are in error. If this error is not reversed, loans originated by thrifts before Dodd-Frank came into effect will be entirely exempt from A.B. 278. Courts should instead identify when and which entity was responsible for each state law claim to determine which preemption standard, if any, applies.

Part I will explain federal preemption standards for federally chartered banks both as they exist today and as they existed prior to Dodd-Frank’s implementation. Part II will explain how A.B. 278 envisions the ideal non-judicial foreclosure process and describes the penalties for non-compliance. Part III will discuss where the case law’s evolution on this question has gone astray and how some courts have recognized this error despite the foreclosure prevention bar’s failure to dispute the error. Part III additionally proposes that courts should determine whether pre-Dodd-Frank HOLA field preemption applies based on which entity holds the loan when the cause of action arises as opposed to which type of entity originated the loan. Part IV will then discuss why, contrary to what some federal district courts are concluding, today’s federal preemption standard should not preempt A.B. 278.

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28. *See infra* Part III.

29. Federally chartered banks are either national banks regulated under the National Bank Act, or thrifts regulated under HOLA. *See infra* notes 34–35 and accompanying text.

30. *E.g.*, DeLeon v. Wells Fargo Bank, 729 F. Supp. 2d 1119, 1127 (N.D. Cal. 2010) (“[Section] 2923.5 affects the servicing of mortgages, that implicates HOLA’s express preemption of state laws regulating the ‘processing’ and ‘servicing’ [of] mortgages.”) (footnote omitted).

31. *E.g.*, Guerrero v. Wells Fargo Bank, No. CV 10–5095–VBF(AJWx), 2010 WL 8971769, at \*3 (C.D. Cal. Sept. 14, 2010) (“Where a national association, such as Defendant, acquires the loan of a federal savings bank, it is proper to apply preemption under HOLA.”).

32. *E.g.*, *id.*

## I. Federal Preemption Regulations: The Home Owners' Loan Act and the National Bank Act

Banks in the United States are regulated under what's called the "dual-banking" system, where banks choose either a state or a federal entity as their primary regulator.<sup>33</sup> In California, banks and thrifts can be divided into three categories for purposes of this Comment: (1) national banks primarily regulated under the National Bank Act ("NBA"),<sup>34</sup> (2) federal thrifts primarily regulated under HOLA,<sup>35</sup> and (3) state banks and savings associations primarily regulated under the state's Financial Institutions Law.<sup>36</sup>

The federally chartered entities—national banks and thrifts—benefit from the preemption of state laws that affect their banking powers.<sup>37</sup> Such entities use federal preemption as a defense to state laws like A.B. 278.

### A. Preemption Before Dodd-Frank

Before Dodd-Frank, the preemption analysis for national banks and thrifts differed significantly. The Office of the Comptroller of Currency ("OCC") regulated national banks. National banks were, for the most part, subject to the same preemption analysis that applies today.<sup>38</sup> Thrifts, however, were regulated by the Office of Thrift Supervision ("OTS"),<sup>39</sup> which elected to occupy "the entire field of lending regulation for federal savings associations."<sup>40</sup> As illustrative examples,

33. See The Dual Banking System, Fed. Banking L. Rep. (CCH) ¶ 531 (2013).

34. See 12 U.S.C. § 24 (2012) (describing the powers of national banks); *Aguayo v. U.S. Bank (Aguayo II)*, 653 F.3d 912, 919 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 106 (2012) ("[NBA is] the ultimate statutory authority for national banks . . .").

35. 12 U.S.C. §§ 1461–1470 (2012); see also *Aguayo II*, 653 F.3d at 921 ("[Federal thrifts are] under the authority of the Home Owners' Loan Act . . .").

36. CAL. FIN. CODE §§ 1000–1910, (West 2013), §§ 5000–9001 (West 1999 & Supp. 2013) (relating to California banks and California thrifts, respectively).

37. See 10 AM. JUR. 2D *Banks and Financial Institutions* § 105 (2013) (providing that National banks remain generally subject to state laws that do not conflict with the letter or the general purposes of the National Bank Act); *id.* § 68 (describing the history of thrift preemption, including changes from the Dodd-Frank Act).

38. See Raymond Nutter & Katie Wechsler, *Dodd-Frank Act and National Bank Preemption: Much Ado About Nothing*, 7 VA. L. & BUS. REV. 301, 337 (2012) ("[Dodd-Frank] basically leaves intact the traditional rules for determining if a state law is preempted [by the NBA].").

39. See NANCY SAINT-PAUL, 2 WEST'S FED. ADMIN. PRAC. § 1849 (4th ed. 2012) ("Dodd-Frank . . . transferred the functions of the Office of Thrift Supervision to the Office of the Comptroller of the Currency, which will now supervise federal thrifts . . .").

40. 12 C.F.R. § 560.2 (2011); see also 12 U.S.C. § 1463(a)(2) (2006) ("The Director [of the Office of Thrift Supervision] may issue such regulations as the Director determines to

OTS preempted “without limitation, state laws purporting to impose requirements regarding . . . [p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages.”<sup>41</sup> However, state laws regarding contract and commercial law, real property law, and tort law that “only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of [field occupation]” were not preempted.<sup>42</sup>

## B. Current Law on Preemption

There is now one statutory standard for national banks and for thrifts under Dodd-Frank.<sup>43</sup> State laws are preempted if they have a discriminatory effect on national banks compared to those chartered by that state,<sup>44</sup> or “in accordance with the legal standard for preemption . . . in *Barnett Bank*.”<sup>45</sup>

The Office of Thrift Supervision was abolished and the new unified conflict preemption standard for national banks and thrifts took effect on July 21, 2011.<sup>46</sup> Both national banks and thrifts are now regulated by the OCC.<sup>47</sup> Both types of entities may make real estate loans<sup>48</sup> “without regard to state law limitations concerning . . . [p]rocessing, origination, servicing, sale or purchase of, or investment or participa-

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be appropriate to carry out the responsibilities of the Director or the Office [of Thrift Supervision].”).

41. 12 C.F.R. § 560.2(b).

42. *Id.* § 560.2(c).

43. *See* 12 U.S.C. §25b (2012) (“State law preemption standards for national banks and subsidiaries clarified.”); *Id.* § 1465 (“Any determination [on preemption of state law by a federal statute governing thrifts] shall be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law.”); 12 C.F.R. § 7.4010 (2012) (implementing 12 U.S.C. § 25b); *id.* § 160.2 (implementing 12 U.S.C. § 1465).

44. 12 U.S.C. § 25b(b)(1)(A).

45. *Id.* § 25b(b)(1)(B) (referring to *Barnett Bank*, which found preemption where the State consumer financial law prevents or significantly interferes with the national bank’s exercise of its powers).

46. Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43549–51 (July 21, 2011) (codified at 12 C.F.R. pts. 7.4010 and 34.2) (stating that the transfer of OTS powers under Dodd-Frank is July 21, 2011, and that provisions that affect the scope of preemption are “effective as of the transfer date”).

47. 12 U.S.C. §§ 1463(c), 1464(i)(5)(A), 1464(t)(9)(A)–(C), 1464(t)(10)(A).

48. 12 U.S.C. §§ 371(a), 1464(c)(1)(B) (“[A] [f]ederal savings association may invest in, sell, or otherwise deal in . . . [l]oans on the security of liens upon residential real property.”); 12 C.F.R. § 34.3 (“A national bank may make, arrange, purchase, or sell loans or extensions of credit, or interests therein, that are secured by liens on, or interests in, real estate . . .”). *See also* 12 U.S.C. § 24 (“[A] national banking association . . . shall have power . . . [t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking . . .”).

tion in, mortgages.”<sup>49</sup> However, state laws on the subject of contracts, torts, rights to collect debts, and the acquisition and transfer of real property are not inconsistent with the real estate lending powers of national banks to the extent consistent with *Barnett Bank*.<sup>50</sup> Yet, in implementing Dodd-Frank, the OCC rejected *Barnett Bank*’s explicit “prevent or significantly interfere with” standard,<sup>51</sup> which was not a “new, stand-alone standard” but rather “conflict preemption, as supported by the reasoning of [*Barnett Bank*], which includes, but is not bounded by, the ‘prevent or significantly interfere’ formulation.”<sup>52</sup> A summary of the resulting changes is in Table 1.

**Table 1 – Comparison of Regulators and Preemption Before and After Dodd-Frank Adoption on July 21, 2011**

Bank Type	Primary Regulatory Law	Before July 21, 2011		On or After July 21, 2011	
		Primary Regulator	Preemption Level	Primary Regulator	Preemption Level
National Banks	National Bank Act (“NBA”)	OCC	Conflict and <i>Barnett Bank</i>	OCC	Conflict and <i>Barnett Bank</i>
Federal Thrifts	Home Owners’ Loan Act (“HOLA”)	OTS	Occupied the Field	OCC	Conflict and <i>Barnett Bank</i>
State Banks and Savings Associations	State financial institutions law	State bank regulator	N/A	State bank regulator	N/A

**II. A.B. 278 Requires Servicers to Disclose Alternatives to Foreclosure**

A.B. 278 was enacted to prevent the damage foreclosures cause to local economies by changing the foreclosure process to ensure borrowers have an opportunity to be informed of the possibility of alter-

49. 12 C.F.R. § 34.4(a)(10); *see also id.* § 7.4010 (“Federal savings associations . . . shall be subject to the same laws and legal standards, including regulations of the OCC, as are applicable to national banks and their subsidiaries, regarding the preemption of state law.”).

50. *Barnett Bank of Marion Cnty. v. Nelson*, 517 U.S. 25, 33 (1996) (“States [have] the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with [a] national bank’s exercise of its powers.”); 12 C.F.R. § 34.4(b).

51. Dodd-Frank Act Implementation, 76 Fed. Reg. at 43555 (July 21, 2011).

52. *Id.*



natives to foreclosure.<sup>53</sup> Part II.A discusses how A.B. 278 accomplishes this by adding steps to California's non-judicial foreclosure scheme. Part II.B discusses the penalties for failure to comply.

### A. The Envisioned California Non-Judicial Foreclosure Process

Borrowers may be unaware that many servicers participate in state and federal foreclosure prevention programs.<sup>54</sup> A.B. 278 mandates a process in which the servicer reaches out and makes a borrower aware of these options as the first step in the foreclosure process, even before recording any notices with a county recorder.<sup>55</sup> The steps as outlined in this Part assume a borrower defaults and remains in default through the entire foreclosure process, except where the context requires otherwise.

Prior to A.B. 278, a non-judicial foreclosure in California began when the servicer recorded a notice of default with the county recorder and served the homeowner with that notice.<sup>56</sup> Three months later, the servicer could record a Notice of Sale informing the borrower of the time and date for the foreclosure auction.<sup>57</sup> Finally, at least twenty days after that, the servicer was allowed to complete the trustee's sale.<sup>58</sup>

Now, A.B. 278 requires further steps from large servicers prior to recording a Notice of Default.<sup>59</sup> First, the servicer must inform the

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53. A.B. 278, ch. 86, § 1(b), 2012 Cal. Legis. Serv. 2300, 2302 (West) (enacting A.B. 278 to "mitigate the negative effects on the state and local economies and the housing market that are the result of continued foreclosures by modifying the foreclosure process to ensure that borrowers who may qualify for a foreclosure alternative are considered for, and have a meaningful opportunity to obtain, available loss mitigation options").

54. See generally *Programs*, KEEP YOUR HOME CALIFORNIA, <http://www.keepyourhomecalifornia.org/programs> (last visited Aug. 17, 2013) (describing state foreclosure prevention programs); Dep'ts of the Treasury & Hous. and Urban Dev., *Explore Programs*, MAKING HOME AFFORDABLE, <http://www.makinghomeaffordable.gov/programs/Pages/default.aspx> (last updated May 31, 2012, 1:05 PM) (describing federal foreclosure prevention programs).

55. See CAL. CIV. CODE § 2923.55(a) (West Supp. 2013) (preventing Notice of Default filings until contact requirements are satisfied).

56. CAL. CIV. CODE §§ 2924(a)(1), 2924b(b)(1), 2924b(d) (West 2012) (requiring recording; notice; publication, personal service, or posting the notice of default in a conspicuous place on the property, respectively).

57. *Id.* §§ 2924(a)(3), 2924(b)(1) (requiring servicer to give notice of sale, but not until after three months after notice of default, and requiring the time and place of sale in the notice, respectively).

58. *Id.* § 2924f(b)(1) (requiring notice of sale to be given at least twenty days before the sale will be held).

59. See CAL. CIV. CODE §§ 2923.55(g), 2923.6(i), 2923.7(g), 2924.9(b), 2924.10(c), 2924.11(i), 2924.12(j) (West Supp. 2013) (limiting most of the requirements to mortgage

borrower in writing that he may request various pieces of information relating to his loan.<sup>60</sup> At least thirty days prior to recording a Notice of Default,<sup>61</sup> the servicer must contact the borrower by telephone or in person,<sup>62</sup> or in lieu of contact satisfy a standard of duly diligent attempts at contact.<sup>63</sup> If, at that time, the borrower requests a foreclosure prevention alternative,<sup>64</sup> the servicer must establish forthwith a single point of contact<sup>65</sup> that the borrower can contact directly.<sup>66</sup> The single point of contact must have the ability to perform various responsibilities such as receiving documents needed to complete the loan modification application and informing the borrower of any deficiencies in the application.<sup>67</sup>

As part of the modification application process, within five business days of the receipt of any documentation submitted in connection with a modification application, the servicer must provide written acknowledgement and state which additional documents are required, if any.<sup>68</sup> If the borrower completes and submits the application, the servicer cannot record any further notices or conduct a trustee's sale until the application is decided upon.<sup>69</sup> This provision bars dual tracking, which is processing a modification in a way that makes the borrower believe the modification is being considered when in fact the lender is proceeding with the foreclosure.<sup>70</sup> When servicers engage in dual tracking, the modification is doomed for failure from the start. When the trustee's sale is completed, the application is left pending.<sup>71</sup>

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servicers that foreclosed on more than 175 residential real properties in the preceding annual reporting period).

60. *Id.* § 2923.55(b)(1)(B)(i-iv).

61. *Id.* § 2923.55(a)(2) (requiring thirty days between initial contact or due diligence satisfaction and recording notice of default).

62. *Id.* § 2923.55(b)(2) (requiring borrower contact).

63. *Id.* § 2923.55(f).

64. *Id.* § 2920.5 (defining "Foreclosure prevention alternative" as a "first lien loan modification or another available loss mitigation option").

65. *Id.* § 2923.7(e) (defining "single point of contact").

66. *Id.* § 2923.7(a).

67. *Id.* § 2923.7(b).

68. *See id.* § 2924.10(a).

69. *Id.* § 2923.6(c).

70. *See NMS MONITOR REPORT*, *supra* note 4, at 7.

71. *See id.*; Sangree, *supra* note 1 (providing an example of dual-tracking by Bank of America in violation of section 2923.55).

After evaluating the application, the servicer can (1) approve the application and offer modification or (2) reject the application.<sup>72</sup> If approved, so long as the borrower accepts the offer within fourteen days,<sup>73</sup> the lender cannot record any further notices or conduct a trustee's sale.<sup>74</sup> If the borrower completes the steps required for the modification to become permanent, the lender must record a rescindment of any notice of default or notice of sale.<sup>75</sup>

However, if the lender rejects the modification it must send a written notice to the borrower identifying with specificity the reasons for the denial.<sup>76</sup> The lender still cannot proceed with recording further notices until a thirty-day period to appeal the denial has elapsed.<sup>77</sup> If the borrower does appeal with new information, the lender can offer a modification as if it were offered in the first place.<sup>78</sup> If it denies the appeal, the lender may proceed with further notices or a sale fifteen days after denial.<sup>79</sup>

Nothing in A.B. 278 requires a lender to offer a modification.<sup>80</sup> Many large loan servicers, however, have signed on to the Home Affordable Modification Program<sup>81</sup> which requires all participating servicers "to consider all eligible mortgage loans for [loan modification] . . . ."<sup>82</sup>

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72. See CAL. CIV. CODE § 2923.6(c) (prohibiting servicer from recording additional notices to foreclose or conducting a sale, unless it has rejected modification and borrower right to appeal is extinguished, the borrower fails to accept modification, or the borrower defaults on his obligations under the modification).

73. *Id.* § 2923.6(c)(2).

74. *Id.* § 2923.6(c).

75. *Id.* § 2924.11(d).

76. *Id.* § 2923.6(f).

77. *Id.* §§ 2923.6(d), 2923.6(e)(1) (allowing borrower thirty days to appeal with new evidence and prohibiting servicer from recording foreclosure notice or conducting sale until thirty-one days after the borrower was notified in writing of the denial if the borrower does not appeal modification denial, respectively).

78. See *id.* § 2923.6(e)(2) (permitting servicer to record further foreclosure notices or to proceed with sale if borrower does not accept a servicer's offered loan modification after appeal within fourteen days, mirroring section 2923.6(c)(2)).

79. *Id.* § 2923.6(c)(2).

80. CAL. CIV. CODE § 2923.4(a) (West 2012 & Supp. 2013) ("Nothing in [A.B. 278] . . . shall be interpreted to require a particular result of [the non-judicial foreclosure process].").

81. See generally, e.g., Dep'ts of the Treasury & Hous. and Urban Dev., *Contact Your Mortgage Company*, MAKING HOME AFFORDABLE, <http://www.makinghomeaffordable.gov/get-started/contact-mortgage/Pages/default.aspx> (last updated July 12, 2013, 9:41 AM) (listing participating servicers as including Bank of America, CitiMortgage, J.P. Morgan Chase, and Wells Fargo).

82. DEP'TS OF THE TREASURY & HOUS. AND URBAN DEV., MAKING HOME AFFORDABLE PROGRAM, HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES, VERSION 4.1, at 21 (2012),

## B. Penalties for Non-Compliance

A.B. 278 creates a private right of action for failure to comply with any of its provisions.<sup>83</sup> If the foreclosure sale has not been completed, the borrower may ask a court for injunctive relief to prevent a material violation of the act, which shall remain in place until the servicer can show that the violation is corrected and remedied.<sup>84</sup>

If the foreclosure sale has been completed, the borrower may sue for actual economic damages for violations not remedied before the sale.<sup>85</sup> If the court finds that the violation was intentional or reckless, or resulted from willful misconduct, the court may award the greater of treble actual damages or statutory damages of \$50,000.<sup>86</sup> The court may also award a prevailing borrower's attorney's fees and costs.<sup>87</sup> Finally, if the violating servicer is licensed by the California Department of Business Oversight or the Department of Real Estate, a violation shall be deemed to be a violation of that entity's licensing law.<sup>88</sup>

## III. Courts Should Use the Date a State Cause of Action Arose to Determine Which Banking Entity is Responsible and Which Type of Preemption to Apply

Once the Dodd-Frank preemption rule came into effect on July 21, 2011, HOLA field preemption should have expired along with the OTS. Despite Dodd-Frank's passage, federal district courts in California continue to apply HOLA field preemption to thrifts accused of state law violations of A.B. 278 because the loan was originated before Dodd-Frank took effect.<sup>89</sup> Further, they still apply HOLA field pre-

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available at [http://www.makinghomeaffordable.gov/for-partners/understanding-guidelines/Documents/mhahandbook\\_41.pdf](http://www.makinghomeaffordable.gov/for-partners/understanding-guidelines/Documents/mhahandbook_41.pdf).

83. See CAL. CIV. CODE § 2924.12(a)–(b).

84. *Id.* § 2924.12(a).

85. *Id.* § 2924.12(b).

86. *Id.*

87. *Id.* § 2924.12(i).

88. *Id.* § 2924.12(d) (“A violation of [specific provisions of A.B. 278] by a person licensed by the Department of Corporations, Department of Financial Institutions, or the Department of Real Estate shall be deemed a violation of that entity's licensing laws.”). Effective July 1, 2013, pursuant to the Governor's Reorganization Plan No. 2, the Department of Corporations and the Department of Financial Institutions became the Department of Business Oversight. A.B. 1317, Ch. 352, § 84(b)–(c), 2013 Cal. Legis. Serv. (West) (to be codified at CAL. FIN. CODE § 321(b)–(c)).

89. See *infra* Part III.A.

emption to loans that were originated by federal thrifts for entities that are not federal thrifts.<sup>90</sup>

The legal theory that supports continuing HOLA field preemption is an accident of imprecise opinions that came out in the confusion of bank mergers and changes in the law that took place between 2008 and July 21, 2011.<sup>91</sup>

Much of the California case law on HOLA field preemption concerning loans serviced by national banks name Wells Fargo as the defendant because of the history of mergers and seizures in the lead up to and wake of the subprime mortgage crisis.<sup>92</sup> Golden West Financial and its subsidiary federal thrift, World Savings Bank, was the nation's second largest federal thrift by the time it was sold to Wachovia Bank in 2006.<sup>93</sup> World Savings engaged heavily in subprime option adjustable-rate mortgages ("Option ARMs"), which it marketed as "Pick-A-Payment" loans.<sup>94</sup> Borrowers could choose whether to make a fully amortized payment, an interest only payment, or a less-than-interest payment with the excess added to principal (so-called negative amortization).<sup>95</sup> One major cause of the subprime mortgage crisis was that many borrowers could only afford the negatively amortizing payment option.<sup>96</sup> If the borrower allows the principal balance to grow too high, the loan will recast, meaning the borrower is forced to make a fully-amortized payment.<sup>97</sup> Borrowers who could barely pay the minimum payment would find the increased payment impossible to

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90. See *infra* Part III.A.2–3.

91. See *infra* Part III.A.

92. See generally *World of Trouble*, CBS NEWS (Aug. 19, 2010, 11:41 AM) [hereinafter *World of Trouble*], [http://www.cbsnews.com/2102-18560\\_162-4801309.html](http://www.cbsnews.com/2102-18560_162-4801309.html) (providing the transcript of a *60 Minutes* story on the collapse of the World Savings subprime loan portfolio, which contributed to Wachovia National Bank's failure and subsequent sale to Wells Fargo).

93. See *id.*

94. See *id.*

95. See *id.*

96. See *id.*

97. See WELLS FARGO & CO., ANNUAL REPORT 60 (2012) [hereinafter WELLS FARGO ANNUAL REPORT], available at [https://www.wellsfargo.com/downloads/pdf/invest\\_relations/2012-annual-report.pdf](https://www.wellsfargo.com/downloads/pdf/invest_relations/2012-annual-report.pdf) (describing a recast as something that would cause a Pick-a-Pay loan borrower to lose the right to make the negatively amortizing payment specifically, "on the earlier of the date when the loan balance reaches its principal cap [of 125% of the original loan amount], or . . . the 10-year anniversary of the loan").

meet.<sup>98</sup> Even if there is no danger of reaching the loan-to-value cap, these loans also automatically recast after ten years.<sup>99</sup>

Wachovia could not survive the onslaught of loan failures from the World Savings portfolio.<sup>100</sup> When Wachovia became severely undercapitalized, the FDIC brokered a sale of Wachovia to Wells Fargo, which now has the task of winding down the enormous Option ARM portfolio acquired from World Savings.<sup>101</sup> For that reason, many of the following preemption cases involve Wells Fargo as the defendant.

Part III.A discusses the cases predominately used to support the argument that a determination of whether HOLA preempts California Civil Code section 2923.5—a law which has been extended by A.B. 278—depends on with whom the loan originated. Part III.B explains how the Ninth Circuit has reversed these cases and contends that courts should recognize that conflict preemption applies when an NBA-regulated bank holds the note at the moment a section 2923.5 or other A.B. 278 cause of action arises. Finally, Part III.C will compare cases that have not made this recognition with cases that have.

#### **A. Without Guidance from the Ninth Circuit, Federal District Courts in California Find State Law Claims Preempted Regardless of Preemption Standards**

Three cases are predominately cited to support the proposition that section 2923.5 is preempted using a HOLA analysis when a national bank forecloses on a home loan originated by a federal thrift prior to Dodd-Frank's implementation: (1) *Zlotnik v. U.S. Bancorp*,<sup>102</sup>

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98. *E.g.*, *World of Trouble*, *supra* note 87 (telling the story of borrower Betty Townes, an elderly woman on a fixed income who purchased one of these loans and now has a monthly mortgage payment greater than her income).

99. *See* WELLS FARGO ANNUAL REPORT, *supra* note 92, at 60 (“[W]e would expect the following balances of loans to start fully amortizing due to reaching their recast anniversary date: \$101 million in 2013, \$332 million in 2014 and \$951 million in 2015.”).

100. *See* News Release, Wells Fargo, Wells Fargo Reports Record Quarterly New Income 13 (Apr. 12, 2013), *available at* <https://www.wellsfargo.com/downloads/pdf/press/1q13pr.pdf> (demonstrating that the residential mortgage portfolio Wells Fargo acquired from Wachovia was \$40 billion and predominantly credit impaired); *World of Trouble*, *supra* note 87 (“The losses from the Pick-A-Payment portfolio are now estimated at \$36 billion. Wachovia was so badly wounded, it was acquired by Wells Fargo with the help of a taxpayer bailout.”).

101. *See* WELLS FARGO ANNUAL REPORT, *supra* note 92, at 61 (describing Wells Fargo's efforts to move Pick-a-Pay customers into other loan products to avoid foreclosure caused by recast).

102. *Zlotnik v. U.S. Bancorp*, No. C 09-3855 PJH, 2009 WL 5178030 (N.D. Cal. Dec. 22, 2009).

(2) *DeLeon v. Wells Fargo Bank*,<sup>103</sup> and (3) *Guerrero v. Wells Fargo Bank*.<sup>104</sup> In *Zlotnik* and *DeLeon*, the HOLA analysis applied because then-existing case law held that the NBA and HOLA analyses did not differ. In *Guerrero*, the court subtly and incorrectly changed the meanings of *Zlotnik* and *DeLeon* by holding that those cases asked the court to look to whether a HOLA-regulated bank originated the loan and not to what bank controlled the loan when the cause of action arose. Finally, *Haggarty v. Wells Fargo Bank*<sup>105</sup> provides a great example of how this subtle change will have important consequences in determining whether state laws like A.B. 278, are preempted since Dodd-Frank's passage.

### 1. *Zlotnik v. U.S. Bank*

Hava and James Zlotnik refinanced, through a broker, a loan on their residence on June 30, 2005, with federal thrift Downey Savings and Loan.<sup>106</sup> The Zlotniks alleged that Downey committed an unlawful and unfair business practice under California's Unfair Competition Law ("UCL")<sup>107</sup> by misstating the interest rate on the loan application.<sup>108</sup> On November 21, 2008, the FDIC closed Downey Savings and sold it to U.S. Bank, a national bank.<sup>109</sup>

On U.S. Bank's motion to dismiss, the court conceded that the complaint stated a UCL claim under the unfair prong.<sup>110</sup> Nonetheless, the court held that the HOLA field preemption analysis applied in this case despite U.S. Bank's status as a national bank<sup>111</sup> regulated under the NBA;<sup>112</sup> therefore, the court found that the California UCL was preempted.<sup>113</sup>

However, the HOLA field preemption analysis was applied not because it was the proper analysis, but because at the time, case law

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103. *DeLeon v. Wells Fargo Bank*, 729 F. Supp. 2d 1119 (N.D. Cal. 2010).

104. *Guerrero v. Wells Fargo Bank*, No. CV 10-5095-VBF(AJWx), 2010 WL 8971769 (C.D. Cal. Sept. 14, 2010).

105. *Haggarty v. Wells Fargo Bank*, No. C 10-02416 CRB, 2011 WL 445183 (N.D. Cal. Feb. 2, 2011).

106. *Zlotnik*, 2009 WL 5178030, at \*1, \*6.

107. CAL. BUS. & PROF. CODE § 17200 (West 2008).

108. *See Zlotnik*, 2009 WL 5178030, at \*5.

109. *Bank Acquisition Information: Information for Downey Savings and Loan Association, F.A., Newport Beach, CA, FEDERAL DEPOSIT INSURANCE CORPORATION*, <http://www.fdic.gov/bank/individual/failed/downey.html> (last updated Jan. 4, 2013).

110. *Zlotnik*, 2009 WL 5178030, at \*5.

111. *See id.* at \*6.

112. *See id.*

113. *See id.* at \*8.

incorrectly held that an NBA preemption analysis was the same as a HOLA analysis.<sup>114</sup> The court never addressed whether to apply the NBA or HOLA because, either way, the HOLA field preemption standard applied.<sup>115</sup> In support, it relied on *Aguayo v. U.S. Bank (Aguayo I)*,<sup>116</sup> a decision then on appeal to the Ninth Circuit.<sup>117</sup>

The OCC interprets the preemptive scopes of the NBA and HOLA as having the same effect:

The extent of Federal regulation and supervision of Federal savings associations under the Home Owners' Loan Act is substantially the same as for national banks under the national banking laws, a fact that warrants similar conclusions about the applicability of state laws to the conduct of the Federally authorized [sic] activities of both types of entities . . . . If preemption is to be construed in the same way under the NBA as the HOLA, then the test for preemption should also be the same.<sup>118</sup>

The district court then proceeds into a HOLA analysis, but does so because “regardless of U.S. Bank’s status as a national association, the preemption analysis remains the same.”<sup>119</sup> Nothing here supports the assertion, “[w]here a national association . . . acquires the loan of a federal savings bank, it is proper to apply preemption under HOLA.”<sup>120</sup> Rather, the court erroneously held that NBA preemption is not conflict preemption but rather HOLA field preemption, so it is proper to use HOLA field preemption case law in support of preemption under the NBA.<sup>121</sup>

## 2. *DeLeon v. Wells Fargo Bank*

After purchasing a home in 2004, the DeLeons refinanced their home with World Savings Bank in 2007.<sup>122</sup> The refinancing was subject to a four-year adjustable-rate mortgage.<sup>123</sup> The DeLeons fell behind in the payments, and Wells Fargo, the successor to Wachovia, who was the successor to World Savings, recorded a notice of default

114. See *id.* at \*6.

115. See *id.* at \*6–8 (“[R]egardless of U.S. Bank’s status as a national association, the preemption analysis remains the same.”).

116. *Aguayo v. U.S. Bank (Aguayo I)*, 658 F. Supp. 2d 1226 (S.D. Cal. 2009), *rev’d*, 653 F.3d 912 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 106 (2012).

117. See *Zlotnik*, 2009 WL 5178030, at \*6 (citing *Aguayo I*, 658 F. Supp. 2d 1226).

118. *Id.* (quoting *Aguayo I*, 658 F. Supp. 2d at 1234).

119. *Id.*

120. *Guerrero v. Wells Fargo Bank*, No. CV 10–5095–VBF(AJWx), 2010 WL 8971769, at \*3 (C.D. Cal. Sept. 14, 2010) (citing *Zlotnik*, 2009 WL 5178030, at \*6–8).

121. See *Zlotnik*, 2009 WL 5178030, at \*6.

122. *DeLeon v. Wells Fargo Bank*, 729 F. Supp. 2d 1119, 1121 (N.D. Cal. 2010).

123. *Id.*



in or around September 2009.<sup>124</sup> Eventually, Wells Fargo completed the foreclosure by purchasing the property at the trustee's sale in January 2010.<sup>125</sup>

The DeLeons alleged causes of action for wrongful foreclosure, violation of the California UCL, failure to comply with the Civil Code section 2923.5 statutory notice requirements, and predatory lending.<sup>126</sup>

Wells Fargo moved to dismiss all of the DeLeons' claims as preempted by HOLA.<sup>127</sup> Wells Fargo based its motion on two theories: (1) NBA preemption was the same as HOLA field preemption, and (2) HOLA field preemption continued as a contract right it inherited when it acquired the loan from World Savings.<sup>128</sup>

The court found the claims preempted.<sup>129</sup> The court began its discussion with a single sentence citing to no authority:

Wells Fargo notes that at the time the loan was made to the DeLeons, "World Savings Bank, FSB was a federally chartered savings bank organized and operating under HOLA" and observes correctly that the same preemption analysis would apply to any alleged conduct after November 1, 2009, when the lender merged into a national banking association.<sup>130</sup>

The court did not say which of Wells Fargo's theories it was adopting in applying HOLA field preemption to the DeLeons' loan.

The bare claim that Wells Fargo "observes correctly" that it may assert HOLA field preemption in these circumstances has been the basis for future HOLA field preemption of section 2923.5 claims, even those claims arising after Dodd-Frank came into law.<sup>131</sup> The *DeLeon* court's failure to specify upon which theory it relied to apply HOLA field preemption to a claim arising after Wells Fargo acquired Wacho-

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124. *Id.*; First Amended Complaint at 3, *DeLeon v. Wells Fargo Bank*, 729 F. Supp. 2d 1119 (N.D. Cal. 2010) (No. 510-CV-01390 JF), 2010 WL 2844298; Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Wells Fargo Bank's Motion to Dismiss at 2, *DeLeon v. Wells Fargo Bank*, 729 F. Supp. 2d 1119 (N.D. Cal. 2010) (No. 510-CV-01390 JF), 2010 WL 2844293.

125. *See DeLeon*, 729 F. Supp. 2d at 1121.

126. *See id.*

127. *Id.* at 1124.

128. *See Reply in Support of Motion to Dismiss by Wells Fargo at 6-7, DeLeon*, 729 F. Supp. 2d 1119 (No. 5:10-cv-01390 JF), 2010 WL 2844296.

129. *DeLeon*, 729 F. Supp. 2d at 1126-28.

130. *Id.* at 1126.

131. *See, e.g., Joseph v. Wachovia Mortg. Corp.*, No. 5:11-cv-02395 EJD, 2011 WL 5827224, at \*3 n.3 (N.D. Cal. Nov. 18, 2011); *Mullins v. Wells Fargo Bank*, No. 2:13-cv-0453 JAM KJN PS, 2013 WL 5299181, at \*10 (E.D. Cal. Sept. 18, 2013).

via<sup>132</sup> was a crucial point at which courts began to misinterpret why a national bank could assert HOLA field preemption.<sup>133</sup> In using *DeLeon* to hold that the preemption standard relies entirely on who originated the loan,<sup>134</sup> courts have failed to dismiss the far more likely rationale that *DeLeon* is not applying HOLA field preemption, but NBA preemption. It just so happens that at that time, NBA preemption was erroneously held to be the same as HOLA field preemption, explaining the court's use of HOLA case law.<sup>135</sup>

As will be discussed later, the proper preemption standard to be applied depends on which regulation governed the financial institution at the time the cause of action arose.<sup>136</sup> If in *DeLeon*, Wachovia had violated section 2923.5 by improperly recording a notice of default<sup>137</sup> before its acquisition by Wells Fargo, Wells Fargo would have been able to assert the HOLA defense regardless of the transition because it may assert whatever defenses Wachovia could have asserted at the time of the violation.<sup>138</sup> But since the cause of action arose when Wells Fargo, a national bank, published the notice of default<sup>139</sup> the court should not have applied HOLA field preemption.<sup>140</sup>

### 3. *Guerrero v. Wells Fargo Bank*

The Guerreros obtained a home equity line of credit in May 2005 from World Savings.<sup>141</sup> They began to have difficulty making their

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132. See, e.g., *DeLeon*, 729 F. Supp. 2d at 1121, 1126 (stating that wrongful foreclosure claim arose when a sale was completed in January 2010, after merger with Wells Fargo, absent publication, posting, and recordation of notice of sale prior to sale).

133. See, e.g., *Guerrero v. Wells Fargo Bank*, No. CV 10-5095-VBF(AJWx), 2010 WL 8971769, at \*3 (C.D. Cal. Sept. 14, 2010) ("Where a national association, such as Defendant, acquires the loan of a federal savings bank, it is proper to apply preemption under HOLA.") (citing *DeLeon*, 729 F. Supp. 2d at 1126).

134. See *id.*

135. See *Zlotnik v. U.S. Bancorp*, No. C 09-3855 PJH, 2009 WL 5178030, at \*6 (N.D. Cal. Dec. 22, 2009) (citing *Aguayo I*, 658 F. Supp. 2d 1226, 1234 (S.D. Cal. 2009), *rev'd* 653 F.3d 912 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 106 (2012)).

136. See *infra* Part III.C.

137. CAL. CIV. CODE § 2923.5(a) (West 2012) (pre-A.B. 278 version).

138. See, e.g., *In re Ocwen Loan Servicing, L.L.C. Mortg. Servicing Litig.*, 491 F.3d 638, 642 (7th Cir. 2007) (allowing a loan servicer that gave up its federal thrift charter to assert HOLA field preemption because it committed the acts for which the plaintiffs were suing under state law when it was still a federal thrift).

139. First Amended Complaint at 3, *DeLeon v. Wells Fargo Bank*, 729 F. Supp. 2d 1119 (N.D. Cal. 2010) (No. 510-CV-01390 JF), 2010 WL 2844298; Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Wells Fargo Bank's Motion to Dismiss at 2, *DeLeon v. Wells Fargo Bank*, 729 F. Supp. 2d 1119 (N.D. Cal. 2010) (No. 510-CV-01390 JF), 2010 WL 2844293.

140. See *infra* Part III.C.

141. *Guerrero*, 2010 WL 8971769, at \*1.

payments in April 2009.<sup>142</sup> In January 2010, Wells Fargo recorded a Notice of Default and Election to Sell, with a sale date of May 13, 2010.<sup>143</sup> The foreclosure sale was completed on that day.<sup>144</sup> The Guerros filed a claim alleging various state causes of action.<sup>145</sup>

In determining whether a HOLA or NBA preemption analysis applied, the court erred in holding, “Where a national association, such as Defendant, acquires the loan of a federal savings bank, it is proper to apply preemption under HOLA.”<sup>146</sup> In citing to *DeLeon* and *Zlotnik*, the court confuses their holdings and performs a HOLA analysis for the wrong reason. The courts, in both *DeLeon* and *Zlotnik*, performed a HOLA analysis on the theory that the NBA and HOLA field preemption analyses were the same; therefore, deciding which causes should be subject to a HOLA analysis and which to an NBA analysis was not important.<sup>147</sup> The *Guerrero* court now applies HOLA under the theory that no matter which entity is responsible for each cause of action, HOLA applies because the loan originated with a HOLA-regulated institution.<sup>148</sup>

Recall in *DeLeon* that the section 2923.5 claim, filing a notice of default without satisfying the borrower contact requirements, arose before Wells Fargo acquired Wachovia, and thus is properly examined under HOLA field preemption. The wrongful foreclosure claim, arising out of the foreclosure sale, materialized after Wells Fargo acquired Wachovia, and so should be examined under NBA preemption. If it is true that an NBA analysis is the same as a HOLA analysis, as held in *Zlotnik*, then claims for which Wells Fargo is originally responsible are evaluated under the NBA, but it just happens to be the same as a HOLA analysis. But if the NBA analysis is not the same as a HOLA analysis, then the Wells Fargo claims are not evaluated using HOLA case law, but under a separate NBA analysis.

Under *Guerrero*, however, even if NBA preemption is not the same as HOLA field preemption, HOLA field preemption would apply if

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142. *Id.* at \*2.

143. *Id.* at \*1–2 (“In January 2008 World Savings Bank, FSB, changed its name to Wachovia Mortgage, FSB, which then merged into Defendant, Wells Fargo Bank, N.A., in November 2009.”).

144. *Id.* at \*2.

145. *Id.*

146. *Id.* at \*3 (citing *DeLeon v. Wells Fargo Bank*, 729 F. Supp. 2d 1119, 1126 (N.D. Cal. 2010)).

147. *See supra* Part III.A.1–2.

148. *See Guerrero*, 2010 WL 8971769, at \*3.

the loan note originated with a federal thrift, even if the cause of action arose when the note was held by a national bank.<sup>149</sup>

#### 4. *Haggarty v. Wells Fargo Bank*

Over a short period, U.S. District Courts in California have applied *Zlotnik*, *DeLeon*, and *Guerrero* over and over with little opposition by plaintiffs for actions related to thrift-originated loans.<sup>150</sup> A stark example can be found in *Haggarty v. Wells Fargo Bank*.<sup>151</sup>

Haggarty and others were former mortgage customers of Wachovia who had adjustable rate mortgages pegged to an index that relied in part on Wachovia's cost to borrow funds.<sup>152</sup> When Wachovia merged into Wells Fargo, the index shot up an incredible amount, and along with it those adjustable mortgage rates.<sup>153</sup> The plaintiffs sought to certify a class of such borrowers<sup>154</sup> and contended:

Wells Fargo violated various federal and state laws, breached its contracts, and committed fraud when it did not (1) inform its new customers that the [index] would (and did) rise as a result of its merger with Wachovia and/or (2) exercise its discretionary contractual power to peg their interest rates to another index unaffected by the merger.<sup>155</sup>

In determining whether their state law claims were preempted, the court resolved whether HOLA or the NBA applied by holding:

It appears that HOLA does apply because Plaintiffs' loan originator was a federal savings bank. "Where a national association, such as [Wells Fargo], acquires the loan of a federal savings bank, it is proper to apply preemption under HOLA." *Guerrero v. Wells Fargo Bank, N.A.* . . . This is true even though the conduct at issue occurred after Wells Fargo merged with Wachovia. *DeLeon v. Wells*

149. See *Guerrero*, 2010 WL 8971769, at \*3.

150. See, e.g., *Sato v. Wachovia Mortg.*, No. 5:11-cv-00810 EJD (PSG), 2011 WL 2784567, at \*5 (N.D. Cal. July 13, 2011) (applying all three cases while also noting that a HOLA analysis also applies under the NBA); *Joseph v. Wachovia Mortg. Corp.*, No. 5:11-cv-02395 EJD, 2011 WL 5827224, at \*3 n.3 (N.D. Cal. Nov. 18, 2011) (applying all three cases), *Gonzalez v. Wells Fargo Bank*, No. 5:12-cv-03842 EJD, 2012 WL 5350035, at \*2 n.3 (N.D. Cal. Oct. 29, 2012) (applying all three cases).

151. *Haggarty v. Wells Fargo Bank*, No. C 10-02416 CRB, 2011 WL 445183 (N.D. Cal. Feb. 2, 2011).

152. *Id.* at \*1 ("Plaintiffs are former mortgage customers of Wachovia who held adjustable rate mortgages indexed to the 11th District Cost of Funds Index ('COFI'). The COFI represents the weighted average interest rate on deposits paid each month by 'Reporting Members.' Wachovia was one of the Reporting Members, but Wells Fargo was and is not.").

153. See *id.* ("When Wells Fargo merged with Wachovia, the COFI shot up 85 basis points because Wachovia's deposits were removed from the weighted average reflect in the COFI. This, in turn, caused Plaintiffs' mortgage loan rates to increase.").

154. *Id.* at \*2.

155. *Id.* at \*1.

*Fargo Bank, N.A.* . . . (“Wells Fargo notes that at the time the loan was made to the DeLeons, ‘World Savings Bank, FSB was a federally chartered savings bank organized and operating under HOLA’ and observes correctly that the same preemption analysis would apply to any alleged conduct after November 1, 2009, when the lender merged into a national banking association.”).<sup>156</sup>

*Haggarty* encapsulates what has gone wrong. *DeLeon* never asked the court to identify the origin of the loan—despite the *Guerrero court’s* apparent interpretation that it did.<sup>157</sup> Rather, *DeLeon* relied on case law that held that a HOLA analysis applies for causes of action arising both before and after Wachovia (a thrift) merged into Wells Fargo (a national bank) because there is no difference between a HOLA and NBA analysis.<sup>158</sup>

### **B. The Ninth Circuit Reverses *Aguayo*, and Lower Courts Should Have Recognized That *Zlotnik* and *DeLeon* Were No Longer Good Law**

Recall that *Aguayo* was the foundation upon which *Zlotnik*, *DeLeon*, *Guerrero*, and *Haggarty* relied.<sup>159</sup> In *Aguayo* the plaintiff executed a purchase money security agreement for a Ford Expedition from a dealership in California in August 2003.<sup>160</sup> The dealership shortly thereafter assigned the loan to U.S. Bank, a national bank.<sup>161</sup> When *Aguayo* defaulted on the loan, U.S. Bank repossessed the vehicle.<sup>162</sup> After repossessing the vehicle, U.S. Bank sent *Aguayo* a notice that it intended to sell the vehicle, and that if the vehicle sold for less than the amount *Aguayo* owed, U.S. Bank would attempt to collect the deficiency.<sup>163</sup> The notice, however, failed to meet the requirements of California’s Rees-Levering Automobile Sales Finance Act,<sup>164</sup> and the penalty for non-compliance is forfeiture of the deficiency.<sup>165</sup> *Aguayo* brought a Rees-Levering claim and a claim under the California UCL,

156. *Id.* at \*4 (citations omitted).

157. *See supra* Part III.A.3.

158. *See id.*

159. *See supra* Part III.A.

160. *Aguayo II*, 653 F.3d 912, 916 (9th Cir. 2011), *cert denied*, 133 S. Ct. 106 (2012).

161. *Id.*

162. *Id.*

163. *Id.*

164. CAL. CIV. CODE § 2981–2984.6 (West 2012 & Supp. 2013).

165. *See Aguayo II*, 653 F.3d at 919 (“[L]ender may not collect a deficiency judgment from the buyer if the disposition of the repossessed motor vehicle did not conform with the provisions of [Rees-Levering].”).

and sought to certify a class of himself and similarly situated California consumers.<sup>166</sup>

The district court held that the NBA and the OCC-implementing regulation preempted the Rees-Levering Act and the UCL by reading the regulation in the same manner that the OTS read its regulation governing HOLA field preemption:

[T]he OTS first considers whether the state law is covered by the list of expressly preempted areas. If the state law fits in the list of laws preempted, then the analysis is over. Courts need not consider whether the state law also fits under the areas listed in the savings clause.<sup>167</sup>

The district court reasoned that the Rees-Levering post-repossession notice requirement regulates “[d]isclosure” and was a law requiring “specific statements” in some “credit-related document” found in the OCC preemption regulation.<sup>168</sup> While noting that Aguayo had argued the savings clause should avoid preempting Rees-Levering as a state law governing contracts and the rights to collect debts, it declined to examine the savings clause.<sup>169</sup>

The Ninth Circuit reversed *Aguayo* by criticizing the district court’s reliance on an OTS interpretive letter<sup>170</sup> to justify refusing to apply the savings clause in the OCC regulations:

The OTS, unlike the OCC, has explicit full field preemption. . . .  
. . . [W]hile the OTS and the OCC regulations are similar in many ways, . . . the OCC has explicitly avoided full field preemption in its rulemaking and has not been granted full field preemption by Congress. . . . “The language employed by the OCC in its regulations and interpretive letters evidences that application of a more narrow preemption analysis is more appropriate than [the OTS preemption analysis] [that has been previously applied]”. . . .  
. . . .

We agree with courts that have refused to apply the OTS preemption analysis when analyzing OCC regulations.<sup>171</sup>

Since HOLA and NBA analyses are not the same, to apply HOLA case law to causes of actions arising when an OCC-regulated bank con-

166. *Id.* at 916.

167. *Aguayo I*, 658 F. Supp. 2d 1226, 1234 (S.D. Cal. 2009), *rev’d*, 653 F.3d 912 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 106 (2012) (citation omitted).

168. *Id.* at 1232 (citing 12 C.F.R. § 7.4008(d)(2)(viii) (2011), *amended by* Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43549, 43565 (July 21, 2011) (codified at C.F.R. § 7.4008(d)(8) (2012)).

169. *See id.* at 1234.

170. National Conference of Commissioners on Uniform State Laws & American Law Institute, OCC Interpretive Letter No. 1005, (2005–2006 Transfer Binder) Fed. Banking L. Rep. (CCH) ¶ 81-534 (June 10, 2004).

171. *Aguayo II*, 653 F.3d at 921–22 (citations omitted).

trols the loan is no longer appropriate.<sup>172</sup> Moreover, Dodd-Frank ended field preemption as of July 21, 2011, and field preemption is no longer applicable to any cause of action arising after that date.<sup>173</sup>

In *Zlotnik*, new meaning is given to the conclusion, “If preemption is to be construed in the same way under the NBA as the HOLA, then the test for preemption should also be the same.”<sup>174</sup> Now that courts should not construe preemption in the same way, they should not test preemption for state laws against national banks using HOLA field preemption case law.

In *DeLeon*, the conclusion that HOLA field preemption applied also cannot survive. Besides equating NBA preemption with HOLA field preemption, the only support for applying HOLA field preemption was a general statement of California law allowing the succeeding entity of a merger—here, Wells Fargo as the successor of Wachovia, which in turn was the successor of World Savings—to succeed to the contract rights, property, debts, and liabilities of its predecessor.<sup>175</sup> While this allows Wells Fargo to assert HOLA field preemption to state causes of action attributable to these predecessor entities, HOLA field preemption is not a contract right that is passed on as loan rights are assigned.<sup>176</sup>

### C. Courts Need to Recognize the Error in Accepting that the Originator of a Loan Determines the Preemption Standard for Post-Origination Conduct

While the courts should recognize that two preemption standards now exist, *Aguayo* still does not reverse the mistake of using loan origination as the exclusive method of determining which preemption standard to apply. In *Aguayo*, the installment payment contract for *Aguayo*’s vehicle was assigned to U.S. Bank from the dealer.<sup>177</sup> There was never a switch between one federal preemption standard to another. While not specifically raised, the court assumed an OCC pre-

172. See *id.* at 922 (“We agree with courts that have refused to apply the OTS preemption analysis when analyzing OCC regulations.”).

173. See *Tamburri v. Suntrust Mortg., Inc.*, 875 F. Supp. 2d 1009, 1020 (N.D. Cal. 2012) (“[N]ot only is HOLA preemption inapplicable to NBA cases, it is no longer applicable at all to any post-Dodd-Frank transactions.”).

174. *Zlotnik v. U.S. Bancorp*, No. C 09-3855 PJH, 2009 WL 5178030, at \*6 (citing *Aguayo I*, 658 F. Supp. 2d at 1234).

175. See Reply in Support of Motion to Dismiss by Wells Fargo at 6–7, *DeLeon v. Wells Fargo Bank*, 729 F. Supp. 2d 1119 (N.D. Cal. 2010) (No. 5:10-cv-01390 JF), 2010 WL 2844296.

176. See *infra* Part III.C.

177. *Aguayo II*, 653 F.3d at 916.

emption analysis applied because U.S. Bank, a national bank, was responsible for the Rees-Levering Act violation.<sup>178</sup>

Instead of relying solely on *Zlotnik* and *DeLeon*, *Guerrero* also relied on a general statement of California corporations law which states: “In a merger the surviving entity ‘succeeds to the rights, property, debts and liabilities, without other transfer.’”<sup>179</sup> Is HOLA field preemption a right that runs with a loan even after assignment to a non-thrift bank? Several cases suggest the answer is no.

*In re Ocwen Loan Servicing, L.L.C. Mortgage Servicing Litigation*<sup>180</sup> dealt with a class-action suit raising various state-law claims against a mortgage loan servicer that was, during the relevant period, a federal thrift subject to HOLA.<sup>181</sup> While much of Judge Posner’s opinion was devoted to his disgust with the “hideous sprawling mess” of the complaint,<sup>182</sup> he took care to emphasize, “Ocwen has given up its federal thrift charter; but this does not affect its defense that when it committed the acts for which the plaintiffs are suing any state-law claims based on those acts were preempted.”<sup>183</sup> This sentence lays the groundwork for establishing that field preemption does not run with the loan, and that the relevant preemption standard is based not on the loan’s originator but on what regulation applied when the cause of action arose.<sup>184</sup>

In *Valtierra v. Wells Fargo Bank*<sup>185</sup> the plaintiffs alleged that Wells Fargo engaged in various frauds ranging from the origination of the loan by World Savings Bank to their home’s eventual foreclosure sale by Wells Fargo.<sup>186</sup> The loan was originated and a notice of default was recorded before Wells Fargo acquired Wachovia Bank, but a notice of sale was recorded and the sale completed afterwards.<sup>187</sup>

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178. *See id.* at 919.

179. *Guerrero v. Wells Fargo Bank*, No. CV 10–5095–VBF(AJWx), 2010 WL 8971769, at \*3 (C.D. Cal. Sept. 14, 2010) (quoting 9 WITKIN, SUMMARY OF CALIFORNIA LAW, CORPORATIONS § 198 (10th ed. 2005)).

180. 491 F.3d 638 (7th Cir. 2007).

181. *Id.* at 641–42.

182. *Id.* at 641.

183. *Id.* at 642.

184. *See* *Taguinod v. World Savings Bank*, 755 F. Supp. 2d 1064, 1068–69 (C.D. Cal. 2010) (citing *In re Ocwen*, 491 F.3d at 642 (stating that the defendant could rely on its HOLA preemption defense, although it had given up its federal thrift charter, because it was a federal savings association at the time of the conduct at issue)).

185. *Valtierra v. Wells Fargo Bank*, No. CIV–F–10–0849 AWI GSA, 2011 WL 590596 (E.D. Cal. Feb. 10, 2011).

186. *See id.* at \*2.

187. *Id.* at \*1.



The district court engaged in a comprehensive discussion of whether to apply HOLA, concluding that those acts which clearly arose while World Savings or Wachovia controlled the loan were appropriately considered through the lens of HOLA field preemption.<sup>188</sup> However, once Wells Fargo took over on November 1, 2009, California state causes of action arising from activity that occurred past that point could no longer be analyzed under HOLA.<sup>189</sup>

One Arizona federal judge sums up the argument against applying HOLA field preemption by severely criticizing *Guerrero*:

Wells Fargo argues that HOLA preemption “sticks” to any loan originating with a federal savings bank.

The plain language of [12 C.F.R.] § 560.2 demonstrates that this argument is without merit. . . .

Wells Fargo has nonetheless cited several cases stating that Wells Fargo enjoys the HOLA preemption enjoyed by World Savings and Wachovia. But as authority for that proposition, these cases cite either (a) nothing, (b) each other, or (c) general statements of law about corporations succeeding to the right of the entities they acquire . . . . *But preemption is not some sort of asset that can be bargained, sold, or transferred.* HOLA preemption was created by the OTS for the benefit of *federal savings associations*, and § 560.2 plainly seeks to avoid burdening the operations of *federal savings associations*. . . . Wells Fargo is not a federal savings association, and its cited cases are therefore not persuasive. HOLA preemption does not apply to Wells Fargo.<sup>190</sup>

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188. *See id.* at \*5–6 (concluding that the California UCL and fraud claims based on origination practices of World Savings were barred by HOLA field preemption); *id.* at \*4 (“Causes of action arising on or after November 1, 2009 (date of conversion to national bank) will not be preempted . . . . Plaintiff alleges that Wells Fargo sent him a letter outlining a short sale program that would have avoided foreclosure and then foreclosed in violation of the program’s terms. There is no indication when the letter was sent and/or discussions about the short sale program took place. Thus, the court can not [sic] assume that these acts would be subject to HOLA preemption at this point.”).

189. *See id.* at \*4; *accord* *Scott v. Wells Fargo Bank*, Civil No. 10–3368 (MJD/SER), 2011 WL 3837077, at \*4 (D. Minn. Aug. 29, 2011) (“[T]he best supported rule is for courts to look ‘to see whether the alleged violations took place when the banking entity was covered by HOLA.’”) (citing *Valtierra*, 2011 WL 3837077, at \*3.); *Ramirez v. Wells Fargo Bank*, No. C 10–05874 WHA, 2011 WL 1585075, at \*7 (N.D. Cal. Apr. 27, 2011) (applying HOLA field preemption to dismiss causes of action clearly arising before Wachovia merged into Wells Fargo, but refusing to dismiss causes of action that may have arisen after the merger as governed under NBA preemption).

190. *Gerber v. Wells Fargo Bank*, No. CV 11–01083–PHX–NVW, 2012 WL 413997, at \*3–4 (D. Ariz. Feb. 9, 2012) (italicized emphasis in original) (underlined emphasis added) (citing *DeLeon v. Wells Fargo Bank*, 729 F. Supp. 2d 1119, 1126 (N.D. Cal. 2010) (applying HOLA after Wachovia merged into Wells Fargo, without citing authority); *Haggarty v. Wells Fargo Bank*, No. C 10–02416 CRB, 2011 WL 445183, at \*4 (N.D. Cal. Feb. 2, 2011) (applying *DeLeon*, 729 F. Supp. 2d 1119; *Guerrero v. Wells Fargo Bank*, No. CV 10–5095–VBF(AJWx), 2010 WL 8971769 (C.D. Cal. Sept. 14, 2010)); *Guerrero*, 2010 WL

These well-supported cases would seem to put a stop to decisions that continue to apply HOLA field preemption to state law claims attributable to national banks based solely on a federal thrift's origination of the loan. Unfortunately, foreclosure prevention counsel has apparently not picked up on these changes, resulting in numerous opinions that for the most part quickly skip over whether to apply HOLA or the NBA to post-merger activities.<sup>191</sup>

If federal courts in California were to recognize, as they should, that the date the cause of action arose determines the appropriate preemption standard, three areas exist where California homeowners will no longer face preemption of the procedural rights in foreclosure afforded by A.B. 278: (1) non-federal bank entities that acquire rights to loans originated by federal thrifts; (2) national banks that have succeeded to loans originated by federal thrifts; and (3) federal thrifts that have retained the loans they originated since the implementation of the Dodd-Frank preemption reforms. The first can be quickly dismissed because a state-regulated entity cannot assert preemption. As to the second and third, neither the NBA nor HOLA currently preempts laws relating to national banks or federal thrifts that have succeeded to the loans they own or service.

#### IV. Post Dodd-Frank Banking Preemption Does Not Preempt A.B. 278

Recall that in *Aguayo v. U.S. Bank*, the Ninth Circuit found that it was not appropriate to apply a HOLA analysis in determining whether a state statute is preempted by the NBA.<sup>192</sup> This raises the question, what analysis should be performed under the NBA?<sup>193</sup> The Ninth Circuit answered this question by first examining the rules the OCC

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8971769, at \*3 (citing 9 WITKIN, SUMMARY OF CALIFORNIA LAW, CORPORATIONS § 198 (10th ed. 2005))).

191. See, e.g., *Tuck v. Wells Fargo Home Mortg.*, No. C-12-01796 DMR, 2012 WL 2906738, at \*3 (N.D. Cal. July 13, 2012) (“Plaintiffs concede that their first two causes of action under Civil Code sections 2923.5 and 2924 [which arose post-merger] would likely be held preempted . . . .”); *Kim v. Wells Fargo Bank*, No. 5:12-cv-02066 EJD, 2012 WL 4845614, at \*2 (N.D. Cal. Oct. 10, 2012) (noting that “plaintiffs do not provide argument in opposition” to applying HOLA to causes of action arising post-merger); *Fernandez v. Wells Fargo Bank*, No. 12-cv-03941 NC, 2012 WL 5350256, at \*2 (N.D. Cal. Oct. 29, 2012) (illustrating a lack of opposition by the plaintiffs in applying HOLA in the first place, only that HOLA did not preempt).

192. See *Aguayo II*, 653 F.3d 912, 922 (9th Cir. 2011), cert denied, 133 S. Ct. 106 (2012) (“We agree with courts that have refused to apply the OTS preemption analysis when analyzing OCC regulations.”); *supra* Part III.B.

193. See generally *Aguayo II*, 653 F.3d at 922-28 (defining the NBA analysis).

promulgated “specifically directed toward identifying which state laws affecting national banks are preempted.”<sup>194</sup> The Ninth Circuit examined national banks’ authority to make loans not secured by real estate and the applicability of state law to such loans.<sup>195</sup> There were three portions of 12 C.F.R. § 7.4008 at issue: (1) State laws that “obstruct, impair, or condition” national bank powers to make non-real estate loans,<sup>196</sup> (2) express preemption of state laws concerning “disclosure and advertising” that may limit those powers,<sup>197</sup> and (3) a savings clause for laws that only incidentally affect the exercise of national banks’ non-real estate lending powers in contracts and rights to collect debts.<sup>198</sup>

**A. The NBA Preemption Standard Does Not Preempt A.B. 278 Based on the Ninth Circuit’s Interpretation in *Aguayo* of the Construction of the NBA’s Preemption Regulation**

The Ninth Circuit began its NBA preemption analysis by employing “the standard canon of construction that requires a reviewing court to read a statute or regulation in its entirety when performing a preemption analysis which, in this case, requires the court to consider both the express preemption and savings clauses together.”<sup>199</sup> The court gave further credence to the savings clause, noting that the subject of the litigation—collecting on a debt secured by the car—was a subject in the savings clause.<sup>200</sup>

In examining the savings clause, the *Aguayo* court examined how the OCC had chosen the language “right to collect debts” based on the Supreme Court’s decision in *National Bank v. Commonwealth*.<sup>201</sup> The court noted:

[N]ational banks “are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. . . . Their acquisition and transfer of prop-

194. *Id.* at 919.

195. *Id.* at 920 (examining 12 C.F.R. § 7.4008 (2011), amended by Office of Thrift Supervision Integration, Dodd-Frank Act Implementation, 76 Fed. Reg. 43549, 43565 (July 21, 2011)).

196. *Aguayo II*, 653 F.3d at 920; 12 C.F.R. § 7.4008(d)(1) (2013).

197. *Aguayo II*, 653 F.3d at 920; 12 C.F.R. § 7.4008(d)(2).

198. *Aguayo II*, 653 F.3d at 920; 12 C.F.R. § 7.4008(e).

199. *Aguayo II*, 653 F.3d at 922.

200. *Id.* at 923; 12 C.F.R. § 7.4008(e)(4).

201. 76 U.S. (9 Wall.) 353, 362 (1869).

erty, their right to collect their debts, and their liability to be sued for debts, are all based on State law.”<sup>202</sup>

The NBA’s real estate lending preemption regulation matches the non-real estate lending preemption regulation practically word for word.<sup>203</sup> The various steps required in A.B. 278,<sup>204</sup> such as contacting the borrower about alternatives to foreclosure,<sup>205</sup> are steps required before a qualifying entity may proceed in the notices required under California’s non-judicial foreclosure scheme.<sup>206</sup> Consequently, these requirements have everything to do with the right to collect a debt and the transfer of real property.<sup>207</sup>

### **B. Federally-Chartered Banks that Desire to Use State Law to Foreclose Without Judicial Intervention Cannot Pick and Choose Which Aspects of State Law to Follow**

The Ninth Circuit in *Aguayo II* then criticized U.S. Bank’s attempts to find preemption from the broad category of “rights to collect debts.”<sup>208</sup> The court asked, “[w]hat, if any, law would apply to U.S. Bank’s post-repossession actions in the state of California? It would not be bound by state law as enacted by the California legislature, nor would it be operating under any specific federal law because no fed-

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202. *Aguayo II*, 653 F.3d at 923 (quoting *Nat’l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869)).

203. *Compare* 12 C.F.R. § 34.4 (“State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent consistent with [*Barnett Bank*]: . . . Rights to collect debts; . . . [and] Acquisition and transfer of real property.”) *with* 12 C.F.R. § 7.4008 (“State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent consistent with [*Barnett Bank*]: . . . Rights to collect debts; . . . [and] Acquisition and transfer of real property.”).

204. *See supra* Part II.A (explaining the requirements for compliance with A.B. 278).

205. *See* CAL. CIV. CODE § 2923.55(b) (West Supp. 2013).

206. *See id.* § 2923.55(a) (prohibiting a mortgage servicer, mortgage trustee, beneficiary, or authorized agent from recording a notice of default until: (1) written notification has been sent, (2) thirty days after contact requirement or due diligence requirement has been satisfied, and (3) the appropriate entity has properly rejected an application for a loan modification).

207. *See* DENNIS L. GREENWALD ET AL., CALIFORNIA PRACTICE GUIDE: REAL PROPERTY TRANSACTIONS § 6:514.2 (2012).

The comprehensive statutory scheme governing nonjudicial foreclosures . . . has three purposes: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.

*Id.* (internal quotation marks omitted).

208. *Aguayo II*, 653 F.3d 912, 924 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 106 (2012).

eral law governs self-help repossession.”<sup>209</sup> The court further criticized U.S. Bank’s attempt to use California law that allows it to repossess the vehicle without judicial intervention, while exempting itself from the penalty for failing to provide the notice required by that same law.<sup>210</sup>

Servicers, banks, and other entities seeking preemption of A.B. 278 in their efforts to foreclose must be asked the same question: what, if any law, would apply to such entities in their efforts to repossess real property in California?<sup>211</sup> Other than two statutes for non-judicial foreclosure of residential mortgages held by the United States Department of Housing and Urban Development,<sup>212</sup> there is no federal law governing the foreclosure process.<sup>213</sup> These entities seek preemption of the very law that entitles them to foreclose without judicial intervention in the first place.<sup>214</sup> If these entities do not wish to abide by California’s non-judicial foreclosure scheme requirements, California law also provides for foreclosure with judicial oversight.<sup>215</sup> Every state provides for at least the choice of judicial foreclosure, and it “is the exclusive method of foreclosure in over one-third of the states.”<sup>216</sup>

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209. *Id.*

210. *Id.* at 924–25 (“Now that it has sold Aguayo’s car, U.S. Bank wishes to collect the remainder of the debt, yet now claims that while it could act under color of state law, . . . it no longer needs to comply with state law in collecting the remaining debt owed. We disagree.”).

211. See *Gerber v. Wells Fargo Bank*, No. CV 11–01083–PHX–NVW, 2012 WL 413997, at \*8 (D. Ariz. Feb. 9, 2012) (rejecting Wells Fargo’s argument that applying an Arizona consumer fraud law to foreclosure actually related to servicing, because such preemption would bring into doubt every state’s foreclosure laws, including basic notice requirements).

212. See Grant S. Nelson, *Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law*, 37 PEPP. L. REV. 583, 605 (2010) (“[T]he 1980s and 90s saw the enactment of two less sweeping federal foreclosure statutes. Each provides for nonjudicial foreclosure of residential mortgages held by the Housing and Urban Development Department . . .”).

213. *Id.* (discussing congressional considerations to enacting a comprehensive federal foreclosure scheme).

214. See *Aguayo II*, 653 F.3d at 925 (“[U.S. Bank] cannot now claim its use of the state law remedy of repossession to recover a debt is permissible but then claim the same regulation that gives the bank the power to use the remedy also affects the very core of its lending operations.”).

215. See CAL. CIV. PROC. CODE §§ 725a (West 2012 & Supp. 2013) (granting the right to bring suit to foreclose on real property).

216. Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 LOY. U. CHI. L.J. 53, 90–91 (2011).

### C. Courts Must Apply the NBA's Savings Clause to Preserve State Authority to Govern the Procedures for the Transfer of Real Property

The Ninth Circuit subsequently dismissed U.S. Bank's last attempt to avoid the NBA preemption savings clause by refusing the bank's argument that the Rees-Levering Act does more than "incidentally affect the exercise of [its] non-real estate lending powers."<sup>217</sup> The Ninth Circuit did not agree with U.S. Bank because the state statute did not "affect the bank's *lending* operations. . . . While U.S. Bank may argue that any law that affects its ability to recover a debt necessarily affects its lending operations, that type of rule would swallow all laws . . . ." <sup>218</sup> Thus, the Ninth Circuit applied the savings clause, immunizing the Rees-Levering Act from NBA preemption.

In the same way, the courts should reject attempts to refuse to apply the NBA's preemption savings clause to A.B. 278. Because A.B. 278 does not demand a particular result,<sup>219</sup> requiring such entities to make a phone call or give a borrower a single point of contact to discuss their alternatives to foreclosure does not affect a bank's lending operations. Recall also that nothing in A.B. 278 requires any entity to offer an alternative to foreclosure, but only to make the borrower aware generally, that alternatives exist. Such alternatives might not necessarily be renegotiation of loan terms but could be something like a deed in lieu of foreclosure or a short sale.<sup>220</sup>

### D. The NBA's Preemption of State Laws Governing Servicing Does Not Extend to State Laws Governing Foreclosure

Even given that the savings clause protecting state laws governing the "rights to collect debts" or the "transfer of real property" applies, it does not act independently but rather in conjunction with the NBA preemption regulation's express preemption clause.<sup>221</sup> In *Aguayo*, U.S.

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217. *Aguayo II*, 653 F.3d at 925; 12 C.F.R. § 7.4008(e) (2013).

218. *Aguayo II*, 653 F.3d at 925.

219. See CAL. CIV. CODE § 2923.4(a) (West 2012 & Supp. 2013) ("Nothing in the act that added this section, however, shall be interpreted to require a particular result of [the consideration for a loan modification or other alternative to foreclosure].").

220. See *id.*; 10 HARRY D. MILLER & MARVIN B. STARR, CALIFORNIA REAL ESTATE § 43 (3d ed. 2012) (defining a deed in lieu of foreclosure as a conveyance of the property to the beneficiary of a deed of trust in exchange for cancellation of the foreclosure sale and often cancellation of the secured debt); *id.* § 66.10 (defining short sale as a sale of property for a price less than the amount of debt on the property, in which, to cancel the debt, the borrower/seller must provide additional funds to pay off the loan unless the lender agrees to waive part of the debt or accept less than the full amount due).

221. See *Aguayo II*, 653 F.3d at 925.

Bank argued that “disclosure requirements” and “other credit-related documents” expressly preempted by the NBA regulation preempted debt collection notices like that found in Rees-Levering.<sup>222</sup> The Ninth Circuit again disagreed, engaging in a detailed discussion of what constituted a notice.<sup>223</sup>

California federal courts should undertake a similar analysis when presented with A.B. 278’s requirements. One requirement—to contact the borrower about alternatives to foreclosure—has already been presented in the Northern District of California and held not preempted under the NBA.<sup>224</sup> In *Tamburri v. Suntrust Mortgage*,<sup>225</sup> the court adopted the reasoning of *Gerber v. Wells Fargo Bank*,<sup>226</sup> finding that laws governing foreclosure were “not among the NBA’s expressly preempted state laws in 12 C.F.R. § 34.4(a).”<sup>227</sup> The court also dismissed the possibility raised by Suntrust Mortgage that the contact requirement was expressly preempted as a law related to “servicing,” agreeing with *Gerber* that “servicing” does not extend to state foreclosure laws because the preemption regulation explicitly mentions other phases of a loan’s existence, like “processing” or “origination,” but did not list “foreclosure.”<sup>228</sup> Foreclosure has been a longstanding state interest, such that the Supreme Court “has imposed a clear statement rule on any statutes that could potentially be construed to impinge on that interest.”<sup>229</sup>

Additionally, with regard to regulatory interpretation, “[t]he OCC itself has confirmed that state foreclosure laws are not generally

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222. *See id.* at 925–27.

223. *See id.* at 927 (differentiating a state’s regulation of “other credit-related documents” of an ongoing lending relationship—which would be preempted—with a Rees-Levering notification, which is sent after a borrower has elected to end the lending relationship and would thus not be preempted).

224. *See Tamburri v. Suntrust Mortg., Inc.*, 875 F. Supp. 2d 1009, 1016–22 (N.D. Cal. 2012) (applying NBA preemption and finding the pre-A.B. 278 version of section 2923.5 (later enacted as sections 2923.5 and 2923.55 by A.B. 278) not preempted).

225. *Id.* at 1009.

226. *Gerber v. Wells Fargo Bank*, No. CV 11–01083–PHX–NVW, 2012 WL 413997 (D. Ariz. Feb. 9, 2012).

227. *Tamburri*, 875 F. Supp. 2d at 1019 (citing *Gerber*, 2012 WL 413997, at \*8); *see also* 12 C.F.R. § 34.4(a)(10) (2013) (stating that the NBA preempts state law limitations concerning “processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages”).

228. *Tamburri*, 875 F. Supp. 2d at 1019.

229. *Id.* (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 541–44 (1994) (describing the long history of state regulation of the foreclosure process and declining to read a provision of the Bankruptcy Code as disrupting “the ancient harmony that foreclosure law and fraudulent conveyance law . . . have heretofore enjoyed”).

within the scope of NBA preemption.”<sup>230</sup> Therefore, the Ninth Circuit should find that the contact requirement and the other requirements affecting California’s non-judicial foreclosure process are not preempted under the NBA.

Finally, now that Dodd-Frank has rendered HOLA thrift preemption as equivalent to NBA preemption, HOLA field preemption cannot preempt A.B. 278 causes of action.<sup>231</sup> Dodd-Frank “changed the . . . HOLA preemption analysis and mandates that HOLA preemption would now follow the more lenient NBA conflict preemption standard. . . . Thus, not only is HOLA preemption inapplicable to NBA cases, it is no longer applicable at all to any post-Dodd-Frank transactions.”<sup>232</sup>

### Conclusion

This Comment contends that California district courts and foreclosure prevention counsel have predominately failed to recognize recent changes to the powers of federally chartered banks to preempt state foreclosure laws. Some courts have recognized that pre-Dodd-Frank HOLA field preemption standards should never have been applied to causes of action that arise when national banks hold the loan, and no longer apply to any causes of action arising after July 21, 2011. Others have not. And many courts have failed to notice that the proper preemption standard does not depend on with whom the loan originated, but rather on which standard applied to the entity responsible for violating California law when the violation occurred.

This point must be recognized to preserve important reforms California enacted in A.B. 278 to try to decrease foreclosures. Absent this recognition, A.B. 278 is unlikely to survive the express preemption of the entire field of banking for loans originated by federal thrifts prior to the effective date of Dodd-Frank’s preemption reforms. If the federal courts recognize that HOLA field preemption no longer exists, A.B. 278 will survive the NBA conflict preemption analysis that currently applies to national banks and federal thrifts. As a result, California homeowners will be afforded the process envisioned by the Homeowner Bill of Rights.

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230. *Id.* at 1019 (citing Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1912 & n.59 (Jan. 13, 2004)).

231. *See supra* Part I.B (discussing one federal preemption standard for national banks and thrifts).

232. *Tamburri*, 875 F. Supp. 2d at 1019–20 (citations omitted).