

November 18, 2013

Hon. Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, California 94102



Re: *Aspiras v. Wells Fargo Bank, N.A.*
Appellate Case Nos. S214297 and D061449
REQUEST TO DEPUBLISH

Dear Honorable Justices:

Pursuant to Rule of Court 8.1125, we write on behalf of National Housing Law Project and Housing and Economic Rights Advocates¹ to request depublication of the Court of Appeal’s opinion in *Aspiras v. Wells Fargo Bank, N.A.* (2013) 219 Cal.App.4th 948 (Case Nos. S214297 and D061449). A copy of the opinion is enclosed.

The Court of Appeal’s opinion should be depublished because it ignored binding authority when it summarily found no duty of care. *Nymark*, the case that the court relied on for the proposition, itself followed established Supreme Court precedent by applying an in-depth, six-factor analysis to determine whether a duty exists. The *Aspiras* court erred by refusing to analyze whether a duty exists under the analysis required by *Nymark* and other authorities.

Moreover, the *Aspiras* court’s mechanical citation to *Nymark* for the proposition that a “lender” owes no duty of care to a borrower improperly extended *Nymark* far beyond the lender-borrower interaction during loan origination that the case addressed, and applied it, without justification, to the enormously different mortgage servicer-borrower relationship during the loan modification process.

I. The *Aspiras* Court’s Reliance On *Nymark*, Without Analyzing Whether A Duty Applies In The Radically Different Mortgage Modification Context, Violates Binding Supreme Court Precedent

A. California Law Imposes a Presumption of a Duty of Care, Unless an Exception Applies

¹ The organizations requesting depublication are all non-profit organizations with a commitment to protecting consumers and promoting homeownership. Each of these organizations understands the importance of loan modifications in preserving homeownership in vulnerable communities.

The basic principle of tort liability is that a person is responsible for injuries as a result of his lack of care. This Court stated that “[w]hile the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct...” (*Weirum v. RKO Gen., Inc.* (1975) 15 Cal.3d 40, 46). This holding is consistent with section 1714 of the Civil Code, which provides: “[e]very one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person. . . .” Civ. Code § 1714. Section 1714 “...does not distinguish among injuries to one’s person, one’s property or one’s financial interests.” (*J’Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 806).

Further, “[a]lthough it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.” (*Rowland v. Christian* (1968) 69 Cal.2d 108, 111-113; *see also Christensen v. Superior Court* (1991) 54 Cal.3d 868, 885 (“[i]n determining liability for negligence, we begin always with the command of Civil Code section 1714 ...”; exceptions “are recognized only when clearly supported by public policy”).)

B. California Precedent Prescribes a Six-Factor Analysis of the Facts of a Particular Case Rather than a Mechanical Rejection of a Duty of Care for Financial Institutions Toward their Customers.

The *Aspiras* court cited *Nymark* for the proposition that “as a general rule, a financial institution owes no duty of care to a borrower when the institution’s involvement does not exceed the scope of its conventional role as a mere lender of money.” (*Aspiras, supra*, 219 Cal.App.4th at 963.) It then declined to apply the in-depth analysis required by Supreme Court precedent to see if the general rule was appropriate to the specific facts before it, and instead simply distinguished the *Jolley* court’s analysis and finding of a duty of care on the ground that the loan at issue there was a construction loan. The Court’s narrow focus on the nature of loan, rather than on defendant’s conduct and the six factors set out above, is erroneous.

In contrast, the recent opinion in *Jolley* correctly applied this Court’s precedents to reject blind reliance on the general rule stated in *Nymark* to reject negligence claims in the mortgage servicing context, particularly in light of the changing relationship between modern mortgage servicers and their customers and a spate of state and federal actions to ensure borrowers have procedural protections and mortgage servicers take care to avoid

unnecessary foreclosures. (See *Jolley v. Chase Home Fin. LLC* (2013) 213 Cal.App.4th 872, 903-06.)

As this Court's precedents explained:

In California, the test for determining whether a financial institution owes a duty of care to a borrower-client 'involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm.' (*Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 865, quoting *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650; *Fox & Carskadon Financial Corp. v. San Francisco Fed. Sav. & Loan Assn.*, *supra*, 52 Cal.App.3d at pp. 488-489; cf. *Gay v. Broder*, *supra*, 109 Cal.App.3d at pp. 73-74.)

(*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1098 (*internal quotations and parallel citations omitted*)). Accordingly, this Court's precedents require courts to decide on a case-by-case basis whether an exception, supported by public policy, provides grounds to depart from the basic principle of a duty of ordinary care. Courts must use the *Biakanja* factors to guide their determination.

Following this test, the *Nymark* court determined that the defendant loan originator did not owe the borrower a duty of care because: the negligent actions complained of were undertaken to benefit the lender, not the borrower; it was not therefore foreseeable that the plaintiff would rely on these actions as if they were undertaken for his benefit; there was no moral blame because the plaintiff could have protected his own interests by getting his own appraisal; and public policy concerns discourage making money lenders responsible for the success of the investments that loans fund. 231 Cal.App.3d 1089, 1099-1100. Given that *Nymark* applies the six-factor test to a case involving money lending, there is no indication that it stands for a "general rule" eliminating a duty of care in the money lending context without an application of the precedential six factor test. Even less does it support a holding that a court can rely on this general rule to find no duty of care in the loan *servicing* context without an individual analysis of the facts.

In support of its "general rule" proposition, the *Aspiras* court also cited two federal district court cases holding that "...offering loan modifications is sufficiently entwined with money lending so as to be considered within the scope of typical money lending activities. If money lending institutions were held to a higher standard of care by offering a service that could benefit borrowers whose circumstances have changed, the money lender would be discouraged from leniency and would assert their rights to reclaim the property upon the

borrower's default. The conventional-money lender test shall be sufficient to determine that there is no duty of care owed in servicing Plaintiff's mortgage loan and loan modification. As the Plaintiff is unable to establish a duty, it is unnecessary to discuss the elements of breach, causation, and damages." *Id.* at 964.

This reasoning is erroneous for two reasons. First, there is no "sufficiently entwined" test. This Court's precedent states that Courts must decide on a case-by-case basis whether an exception, supported by public policy, provides grounds to depart from the basic principle of a duty of ordinary care. To make such a determination in cases involving a financial institution, courts must use the *Biakanja* factors to guide its determination.

Second, the *Aspiras* court's rationale that mortgage servicers would foreclose more often if held to a standard of reasonable care is unsupported by evidence. To the contrary, servicers have financial incentives to delay and foreclose rather than engage in loss mitigation.²

II. The Court's Extension Of *Nymark* from Loan Origination to Loan Modification and Loss Mitigation Is Based On The Mistaken Factual Premise That The Two Processes Are Similar.

Nymark and its progeny are based on the premise that loan origination is a fundamentally an arm's length, one-time transaction. Borrowers taking out loans are engaging in a business deal made at least partially transparent by disclosure requirements, and have a choice of lenders. Loan originators perform underwriting functions solely to protect their own interests; the appraisal at issue in *Nymark* itself, for instance, was "to protect [the lender's] interest by satisfying it that the property provided adequate security for the loan." (231 Cal.App.3d 1089, 1096.)

Loan servicing, on the other hand, is a lopsided relationship in which a borrower has no choice but to rely on a servicer—more often than not an entirely different entity from the lender—to competently handle their monthly payments, insurance and tax payments, and, in some cases, requests for assistance, in line with the basic standards of the industry.

² "For servicers, the true sweet spot lies in stretching out a delinquency without either a modification or a foreclosure. While financing advances is a large expense for servicers, one they will want to end as soon as possible, late fees and other default-related fees can add significantly to a servicers' bottom line, and the longer a homeowner is in default, the larger those fees can be. The nether-world status between a foreclosure and a modification also boosts the monthly servicing fee (because monthly payments are not reducing principal) and slows down servicers' largest non-cash expense: the amortization of mortgage servicing rights (because homeowners who are in default are unlikely to prepay via refinancing). Finally, foreclosure or modification, not delinquency by itself, usually triggers loss recognition in the pool under accounting rules. Waiting to foreclose or modify postpones the day of reckoning for a servicer." (Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications* (2011) 86 Wash L. Rev. 755, 777)

Homeowners seeking modification stand to lose everything. Borrowers can shop for a lender. Homeowners facing foreclosure and applying for modification or other loss mitigation (like short sale) are wholly dependent upon their mortgage servicer to process their request in an accurate fashion. There can be no other source of modification; a servicer's improper or erroneous denial of loan modification can end in unnecessary foreclosure. A botched loan modification carries an extreme risk of irreparable harm to the homeowner not present in loan origination.

Loan modification is a process, not a single transaction, and gives rise to a new type of relationship. When a homeowner applies for a loan modification to avoid foreclosure, a new and ongoing relationship starts between the mortgage servicer (and the investor) and the borrower.

- **Ongoing information disclosure:** The servicer demands, and the borrower discloses, sensitive financial and personal information, from hardship letters personal budget forms to checking account statements, often on a rolling basis over the course of months.
- **Information asymmetry:** Over the course of the modification process, which can take months or even years, the homeowner may be falling further and further behind on the mortgage (or, alternately, using up their savings on a home they know they can no longer afford). During that time, the homeowner has to rely entirely on information from the servicer – both about whether the loan is likely to be modified, and on the status of the modification – to make life-changing decisions such as whether to file for bankruptcy, sell their homes, or give up the home through foreclosure or deed in lieu of foreclosure.
- **The homeowner and servicer are acting in a rule-bound arena without market controls or means of specific enforcement:** Many homeowners, such as those with Fannie, Freddie, or FHA-insured loans, or whose servicers participate in the federal Home Affordable Modification Program (“HAMP”), have loans subject to external modification guidelines that the homeowner may reasonably believe are being followed.
- **Multiple interests are at stake,** not just those of the servicer. The servicer is presumably evaluating mortgage on behalf of the investor of the loan, and in most cases, servicers modify only where the loan is “NPV positive” – that is, that modifying is likely to be more beneficial for the investor than proceeding with foreclosure. The servicer may also have an obligation to government entities (like HUD or Treasury) to process loans in a certain fashion, and may even be directly compensated for doing so.³ The California

³ For example, servicers get incentive payments for HAMP modifications or short sales under the program. See MHA Compensation Matrix, <https://www.hmpadmin.com/portal/programs/docs/>

legislature has recognized that avoiding foreclosure through loan modification has far-reaching effects on communities and the economy as a whole.⁴

Over the past five years, since the start of the foreclosure crisis, agencies overseeing mortgage modifications have come to recognize not only the complexity of the modification process, but the degree to which homeowners are vulnerable to abusive, careless, or shoddy practices that can lead to wrongful denials and unnecessary foreclosure. They have created evolving and increasingly more detailed substantive rules governing modification, and parallel appeal and procedural rights allowing borrowers to challenge servicers' incorrect determinations. These protections signal the regulators' fundamental understanding that mortgage servicers cannot act arbitrarily, irrationally, or unfairly to borrowers who stand to lose homes – in other words, that mortgage servicers have a duty of care to homeowners when they make the determination of whether loan terms should be modified or foreclosure activity should go forward. These protections constitute a means of articulating and standardizing servicers' duty of care to borrowers.

Unlike loan origination, where either party can walk away, loan servicing is governed not by the negotiated interests of borrower and lender but by rules, standards, and regulation intended to protect a captive borrower—and also that of institutional or passive investors whose interests are often aligned with that of the borrower but who lack the information and control necessary to reign in servicer negligence even when it damages their own interest. Indeed, not just regulators but also investors (such as Fannie Mae and Freddie Mac) have greatly increased the specificity of published mortgage servicing rules as a result of the industry's widespread, well-documented, and ongoing failures.

HAMP has evolved dramatically over the four years since its inception. The first set of program rules, issued as “Supplemental Directive 09-01,”⁵ set out the entirety of the modification program in 38 pages. As the Treasury Department encountered increasing problems with servicers' implementation of the program, the guidelines became increasingly detailed. The initial rules provided that servicers should review borrowers' applications “promptly.” Now, the 223-page handbook of rules provides discrete deadlines for acknowledgment, review of an application (within 30 days of receipt), and other responses, and has an entire chapter devoted to a borrower's right to internal appeal and external “escalation.”⁶

HAMP itself does not give homeowners a way to enforce its rules when servicers break them. However, Congress explicitly intended that HAMP rules promulgated by

[hamp_servicer/mhacompensationmatrix08222013.pdf](#). They can also make claims for their modifications on FHA insured loans to HUD. 24 C.F.R. § 203.371.

⁴ http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB278 (last viewed October 15, 2013).

⁵ Available at <https://www.hmpadmin.com/portal/programs/guidance.jsp>, under “Archives,” “2009 MHA SDs.”

⁶ The Making Home Affordable Handbook v. 4.3 is available online at <https://www.hmpadmin.com/portal/programs/guidance.jsp>.

Treasury would be enforced under state common law and general consumer protection statutes as an industry-wide standard of care: 15 U.S.C. § 1639a(c), provided that “[t]he qualified loss mitigation plan guidelines issued by the Secretary of the Treasury.... shall constitute standard industry practice for purposes of all Federal and State laws.”

Federal regulations and guidelines from investors create a set of standards to which the industry is expected to adhere. The Court’s far-reaching extension of *Nymark* and blanket rejection of a duty of ordinary care in any conduct related to bank-issued loans undermines the contemplated enforcement of these rules and effectively leaves California borrowers unprotected from the abuses they were intended to prevent.

California’s own legislative response to the foreclosure crisis has similarly evolved in response to the explosive growth and complexity of the servicing industry’s loan modification operations, and is similarly rooted in the understanding that the servicer/borrower interaction in loan modification is not at all an arm’s length transaction between equals. California’s first statutes regulating modification required only that mortgage servicers make contact with borrowers to discuss the availability of alternatives to foreclosure. (Civ. Code § 2923.5.) After this legislation failed to address, in the legislature’s view, the avalanche of unnecessary foreclosures, the state enacted the Homeowner Bill of Rights. The Court noted the existence of the Homeowner Bill of Rights, but mistakenly concluded that it becomes effective in 2018 instead of 2013, the actual effective date. (*Aspiras, supra*, 219 Cal.App.4th at 962).

Particularly in its modern form, the servicing of money lent is a very different business from than of money lending itself, involving different actors, different rules, different incentives and different problems. The Court’s virtual elimination a duty of care in the loan servicing industry—an industry that has become notorious for its systemic errors and abuses—could leave consumers bereft of remedy and protection.

III. Application of the *Biakanja* Factors Here Shows There is No Basis to Depart from the General Presumption of a Duty

In the modification context, the factors weigh overwhelmingly in favor of a duty:

1. The Extent to which the Transaction was Intended to Affect the Plaintiff. The central goal of loan modification is to allow the homeowner to remain in his or her home with an affordable mortgage payment. The servicer’s modification analysis will likely determine whether foreclosure will take place, since the homeowner almost universally required to attest that she has defaulted on the loan (or will do so soon) and has insufficient funds to continue making payments and prove financial hardship. The *Garcia* court, *supra*, concluded that loan modification was “unquestionably” intended to affect the Plaintiff. *Garcia* at 9.

2. Foreseeability of Harm to the Homeowner. The harm that can come to a borrower from mishandling a loan modification is utterly predictable. Wrongful denial can result in unnecessary foreclosure. Even extended delay causes predictable harm: added interest from falling further behind and unnecessary default-related fees can eat up any remaining equity in the home, or make other means of resolving avoiding foreclosure (such as short sale or repayment through Chapter 13 bankruptcy) more difficult. Because servicers continue negative credit reporting even while they process modification applications, damage to credit during months of delay can make it harder for borrowers to recover financially even if their mortgages are ultimately modified. While the servicer may benefit from extending the time it can collect default-related fees that are immediately reimbursed by the investor,

3. The Degree of Certainty That the Plaintiff Suffered Injury. The types of injury that homeowners suffer are predictable and easy to measure: foreclosure, accumulated interest and fees. Even more amorphous harm, such as the loss of opportunity to save the home by other means, are susceptible to proof, as they all involve a practical, factual (and often financial) calculation of what would have happened had the modification application been processed according to the appropriate standard of care.

4. The Closeness of the Connection between the Defendant’s Conduct and the injury suffered. The connection in the modification context is close. A homeowner’s injury is strongly related “because, to the extent Plaintiff otherwise qualified and would have been granted a modification, Defendant’s conduct ... precluded the loan modification application from being timely processed.” *Garcia* at 9. Even a homeowner who would not have qualified for modification may be able to show he or she missed a different opportunity to save the home (for instance, through bankruptcy protection).

5. The Moral Blame Attached to the Defendant’s Conduct. This is a fact-specific inquiry; however, where a mortgage servicer fails to properly review a homeowner’s request for assistance, and that failure leads to predictable harm such as foreclosure and loss of the family home, the conduct is blameworthy.

6. The Policy of Preventing Future Harm. As the *Garcia* court found, recent state and federal legislation—including the Making Home Affordable Program—demonstrate a public policy of “preventing future harm to home loan borrowers” that favored allowing the claim to proceed. *Garcia* at 9, 10; See *Jolley v. Chase Home Finance, LLC*, *supra*, 213 Cal. App. 4th at 902-906. The Homeowner Bill of Rights, the national mortgage settlement by 49 state attorneys general, *see generally nationalmortgagesettlement.com*, and recent CFPB regulations of mortgage servicing are additional evidence of strong public policy in favor of preventing unnecessary foreclosures.

In short, these measures indicate that courts should not rely mechanically on the “general rule” that lenders owe no duty of care to their borrowers” under a negligence theory. *Jolley* at 903.

In the loan modification context, the *Biankanja* factors weigh in favor of a duty of care. the *Aspiras* opinion should be depublished because it is incorrect; modern mortgage servicers should be held to a duty of ordinary care in processing loan modification applications. Most courts applying the *Biankanja* factors have found that the totality of the factors favor imposition of a duty under the test for mortgage servicers performing loss mitigation functions. (See e.g., *Jolley*, 213 Cal.App.4th at 903 (finding that legislative policy considerations support a duty of care); see also *Garcia v. Ocwen Loan Servicing, LLC* (N.D. Cal. May 6, 2010) 2010 U.S. Dist. LEXIS 45375 (finding a servicer owed a duty of care under HAMP based on the factors); *Ansanelli v. JPMorgan Chase Bank, N.A.* (N.D. Cal. Mar. 28, 2011) 2011 U.S. Dist. LEXIS 32350, 21-22 (finding sufficient active participation by the servicer to create a duty of care to plaintiffs to support a claim for negligence even in light of *Nymark* because the servicer went beyond its role as a silent lender and loan servicer to offer an opportunity to plaintiffs for loan modification and to engage with them concerning the trial period plan); *Kennedy v. Wells Fargo Bank, N.A.*, (C.D. Cal. Sept. 28, 2011) 2011 U.S. Dist. LEXIS 111013 (finding that the totality of the factors favors the imposition of a duty of care at the motion to dismiss stage); see also *Sencion v. Saxon Mortg. Servs., LLC*, (N.D. Cal. Apr. 11, 2011) 2011 U.S. Dist. LEXIS 41022 (granting temporary restraining order based on common law negligence cause of action for failure to follow HAMP guidelines); *McGarvey v. Chase* (E.D. Cal. Oct. 11, 2013), 2013 U.S. Dist. LEXIS 147542 (relying on *Biakanja* factors to find servicer could have a duty of care to daughter of deceased borrower, once it offered a modification and processed her application).)

IV. The Opinion Should also be Depublished Because It Misstates the Standard for Dual Tracking

Aspiras should also be depublished because its continued publication may perpetuate a misunderstanding of “dual tracking.” “Dual tracking” means the practice of reviewing a borrower for a modification on one track and simultaneously proceeding with a foreclosure on another track. To curb “dual tracking,” the Homeowner Bill of Rights prohibits mortgage servicers from moving forward with a foreclosure while a loan modification application is pending. (Civ. Code § 2923.6(c).) The same prohibition also appears in the National Mortgage Settlement and the new Mortgage Servicing Rules issued by the Consumer Financial Protection Bureau.

The borrowers in *Aspiras* were clearly dual tracked. As recounted in the opinion,

On March 18, 2010, Gordon told plaintiffs their loan modification was "under review." The next day, however, Wells Fargo sold plaintiffs' home at a

trustee's sale to third party investors. A trustee's deed upon sale was recorded on April 1, 2010. The investors sold the home about six weeks later for almost \$200,000 more than the purchase price.

Aspiras, supra, 219 Cal.App.4th at 953. Because Wells Fargo sold the Aspiras' home while their loan modification application was under review, these facts present a classic case of "dual tracking." (See *Cabrera v. Countrywide Fin.* (N.D. Cal. Oct. 30, 2012) 2012 WL 5372116 (upholding an UCL claim when foreclosure occurred while loan modification application was outstanding).)

Despite the consensus view that dual tracking is triggered upon the receipt of a loan modification application, *Aspiras* incorrectly states that dual tracking can only occur after a loan modification has been approved. *Aspiras*, 219 Cal. App. 4th at 962 ("These allegations and facts do not show Wells Fargo's process resulted in a "foreclosure[] even when a borrower has been *approved* for a loan modification."").

Sincerely yours,

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PROOF OF SERVICE

Aspiras v. Wells Fargo Bank, N.A.

Case No. S214297

I, Kent Qian, state:

I am over the age of eighteen and not a party to this action. My business address is 703 Market Street, Suite 2000, San Francisco, CA 94103. On the date set forth below, I served the foregoing document, **REQUEST FOR PUBLICATION**, by placing one copy of the document in an envelope addressed to the persons listed below, sealed the envelope, and placing first-class postage on the envelope.

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I declare under penalty of perjury under California law that the information above is true and correct.

Dated: November 18, 2013

By _____
Kent Qian