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ARTICLE

DID SOMEONE SAY ESTOPPEL?—COURTS SHOW GREATER ACCEPTANCE OF APPLYING EQUITABLE PRINCIPLES TO ENFORCE ORAL FORBEARANCE AGREEMENTS

By Bradley D. Scheick*

I. INTRODUCTION

With the national economy remaining on the edge of recession, unemployment stubbornly staying above 9%, and median home prices well below their 2007 peak, California courts have seen a significant uptick in challenges to residential foreclosure sales in recent years. In many of these cases, the plaintiff homeowners believed that they had entered into enforceable agreements with their lender, either in writing or orally, for forbearance or postponement of foreclosure and, after their homes were sold in apparent contravention of those agreements, filed suit to recover under claims of breach of contract and/or promissory estoppel.

This article summarizes several of the more notable cases of recent years addressing these claims. These cases, which include one from before the financial crisis, one from the 2008 height of the crisis, and two from the years since the recession technically ended, demonstrate that, while the outcomes in all such cases remain very fact-specific, there is a subtle trend within the appellate courts toward a more borrower friendly, equity-oriented approach as the foreclosure crisis persists.

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II. LOAN MODIFICATIONS GENERALLY

The statute of frauds requires that any agreement for the sale of an interest in real property must be set forth in writing and subscribed by the party to be charged under that agreement.[1] Section 2922 of the Civil Code extends this requirement to the creation, extension or modification of any mortgage.[2] As a result of these two statutes, agreements to extend or modify a mortgage or deed of trust[3] that are either oral or written but unsigned by the lender are generally u*nenforceable* for failure to comply with the statute of frauds.[4]

There are exceptions to this general rule, however, and a borrower sometimes can overcome failure to comply with the statute of frauds in some cases and have his or her otherwise unenforceable agreement upheld. The most straightforward and least controversial of these exceptions is expressly stated in Civil Code, §1698, subd. (b), which allows for enforcement of an oral modification agreement that would otherwise fall within the scope of the statute of frauds where that oral agreement has been "executed".[5] This exception is available whether or not the borrower provides independent consideration for the subject promise,[6] but its application is limited to cases where the oral contract in question has been fully performed (i.e., by a full payoff of the loan or the location of a suitable buyer for the property).[7]

Additionally, where a borrower partially performs under an oral modification agreement, the lender may be estopped from raising the statute of frauds as a defense if invoking it would cause unconscionable injury to the borrower.[8] To constitute partial performance for purposes of such equitable estoppel, the borrower's acts must clearly refer to the oral agreement or relate to its terms.[9] The borrower must also show that his or her reliance on the oral agreement resulted in a change in the borrower's position to such an extent that application of the statute of frauds would produce an unconscionable injury; as the California Supreme Court has stated,

> "in addition to having partially performed, the party seeking to enforce the contract must have changed position in reliance on the oral contract to such an extent that application of the statute of frauds would result in an unjust or unconscionable loss, amounting in effect to a fraud."[10]

Because this doctrine serves to recognize the oral contract as binding and provides the borrower with remedies at law (as opposed to equitable remedies), a borrower arguing for estoppel must also have provided independent consideration for the oral agreement.[11] Where these

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requirements are deemed satisfied, a court can enforce the agreement as a valid legally binding contract and the borrower may be entitled to pursue damages on a breach of contract theory.[12]

In addition, however, in the absence of independent consideration, a borrower who relies to its detriment on an oral promise made by its lender may be able to assert a cause of action for promissory estoppel. This equitable doctrine, which is closely related to, but distinct from, the concept of estoppel to assert the statute of frauds discussed above, provides a substitute for consideration and allows enforcement of an otherwise unenforceable promise where the promisor should "reasonably expect [the promise] to induce action or forbearance of a definite and substantial character on the promissee, and [the promise] does induce that action or forbearance."[13] To successfully plead a claim for promissory estoppel, a borrower must demonstrate that (i) the lender made a clear and unambiguous promise, (ii) the borrower reasonably and forseeably relied upon such promise, (iii) the borrower's reliance was not bargained for or requested by the lender at the time the lender's promise was made, and (iv) the borrower was injured as a result of his or her reliance.[14]

III. PRE-RECESSION/FORECLOSURE JUDICIAL APPROACH

During the boom years of the early 2000s before the housing bubble burst and housing prices collapsed, and even through the early stages of the crisis before residential foreclosures came into the national spotlight, the courts tended toward a rather strict approach with respect to loan modification agreements. Many courts decided such cases almost exclusively based on the rigid application of contract law principles, including the requirements of the statute of frauds, and adopted narrow interpretations of the equitable exceptions and remedies mentioned above. These leanings are illustrated by the 2003 decision in *Nguyen v. Calhoun*,[15] where the Court of Appeal for the Sixth District held that a trustee's sale could not be set aside based on the lender's breach of an oral agreement to delay foreclosure where the plaintiff failed to perform under the new agreement[16], and the 2008 decision in *Secrest v. Security Nat. Mortg. Loan Trust 2002-2*,[17] where the Court of Appeal for the Fourth District refused to enforce a written agreement to forbear from foreclosing that was prepared by the lender but signed only by the borrower. These two cases are analyzed in greater detail below.

Nguyen v. Calhoun:

In this case, Josephina Sabedra and Tony David Chavez, homeowners who had ceased payments on a loan secured by a deed of trust on their property, contracted with the appellant, Lo Nguyen, to sell their prop-

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erty. Prior to closing the sale, however, the beneficiary under the deed of trust, Harbor Financial Mortgage Corporation, recorded a notice of trustee's sale.[18] On the day before the scheduled trustee's sale, the homeowners' agent contacted Harbor Financial to request a postponement of the sale in order to allow Nguyen's purchase to close and, in a reply voicemail, the lender's representative, Linda Kubricht, agreed to postpone upon receipt of proof that Nguyen's purchase loan funded.[19]

Nguyen's purchase of the subject property closed the following morning and later that same day, July 10, 1998, the escrow holder sent Harbor Financial both a pay-off check in the amount of $141,664 via Federal Express, and, at the agent's request, a facsimile copy of the final escrow settlement statement. Kubricht, however, did not receive the facsimile (which had apparently been sent to a different number than the one shown on Harbor Financial's payoff statement), and she allowed the trustee's sale to proceed as scheduled at noon on July 10, 1998. Respondent Calhoun purchased the property at the trustee's sale and received from the crier a sworn declaration of trustee's sale.[20]

In Nguyen's subsequent suit to quiet title and obtain declaratory relief, the trial court concluded that the matter was a question of escrow law and ruled that, because the escrow complied with all required conditions, title to the property passed to Nguyen through the escrow and the trustee's deed was null and void.[21]

In reversing the trial court, the Court of Appeal first dispensed with the trial court's reliance on escrow law; ruling that, because the mere depositing of a check in the mail was insufficient to extinguish the existing lien,[22] Nguyen took title subject to Harbor Financial's existing loan.[23]

The court then turned to Nguyen's claim that the foreclosure sale was conducted in violation of an oral agreement by the lender to forbear. According to Nguyen, "there was a 'simple,' 'explicit' agreement that the trustee's sale would be postponed upon 'written confirmation' that plaintiff's loan had funded," and, accordingly, the occurrence of the sale in violation of that promise is "wrongful and [the sale] can be set aside."[24] Nguyen supported this argument by citing, *Raedeke v. Gibraltar Sav. & Loan Assn.*,[25] where the California Supreme Court held that a borrower's procurement of a responsible, prospective purchaser at the lender's request would constitute good consideration for an oral promise to forbear.[26] The Court of Appeal, however, distinguished Nguyen's case from *Raedeke* and held the contract unenforceable based on (i) the fact that Nguyen sued in equity rather than at law for breach of contract, and (ii) the conclusion that no one involved in the sale of the property to Nguyen actually tendered performance of the oral contract.[27]

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On the question of adequate performance, the court adopted a hard, all-or-nothing stance and ruled that the borrower's responsibility under the purported oral agreement was to "notify [Harbor Financial]—in a timely and accurate manner—that their prospective purchaser had funding to pay off the loan" and the borrower failed to fully satisfy this obligation.[28] Moreover, the court did not even discuss the doctrine of estoppel or raise the question of whether the borrower's conduct amounted to sufficient partial performance to render Harbor Financial's oral agreement enforceable notwithstanding the lack of complete performance by the borrowers.[29]

Secrest v. Security National Mortgage Loan Trust 2002-1:

Like the *Nguyen* court, the *Secrest* court adopted a narrow interpretation of equitable claims of foreclosed borrowers and showed a clear preference for deciding loan modification disputes through strict application of standard legal contract principles.

The dispute in this case focused on a partially executed written forbearance agreement that the Secrests, homeowners who had failed to make payments required under a prior written forbearance agreement, sought to enforce against their lender, Ocwen Federal Bank, FSB. The Secrests and Ocwen initially agreed to the terms for the new forbearance over the phone, with the understanding that Ocwen would then prepare a written agreement incorporating those terms. However, the new forbearance agreement provided by Ocwen contained certain discrepancies from the terms that had been discussed. When informed of these errors, Ocwen instructed the Secrests to correct the errors by hand, sign the agreement and fax it back. The Secrests executed the hand-corrected agreement as instructed, then sent it and a $13,422.51 down payment required thereunder to Ocwen in January of 2002.[30]

Ocwen sold the note evidencing the Secrests' loan to Security National Mortgage Loan Trust 2002-2, JP Morgan Chase Bank and SN Servicing Corporation without having provided the Secrests with a corrected, executed forbearance agreement.[31] In September 2004, Security National filed a notice of default and election to sell against the Secrests' property.

In their suit against Security National, Ocwen and others, the Secrests asserted that the January 2002 agreement was a valid and enforceable contract. [32]The lender's defense in this case rested primarily on the statute of frauds and the claim that the absence of a signature by Ocwen on the January 2002 agreement rendered it unenforceable. In applying the requirements of the statute of frauds and the related stat-

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utes discussed above to the *Secrest* facts, the court noted that, while the subject forbearance agreement did not technically create, renew or extend a deed of trust within the meaning of §2922, it did modify the existing deed of trust.[33] Accordingly, the court reasoned, that (i) the forbearance agreement constituted an agreement to modify a contract that is subject to the statute of frauds and (ii) the agreement is therefore itself subject to the statute of frauds under the "equal dignities" rule of Civil Code, §1698, subd. (a), which provides that "a contract in writing may be modified by a contract in writing."[34]

Based on its conclusion that a forbearance agreement is subject to the statute of frauds, the court ruled that the January 2002 forbearance agreement was unenforceable. According to the court, the parties to be charged with performance of the forbearance agreement, Ocwen and/or the respondent lenders, did not sign the agreement and therefore the requirements of Civil Code, §1624 were not met.[35]

The Secrests also argued that their delivery of the down payment required by the January 2002 forbearance agreement constituted part performance sufficient to estop the lenders from asserting the statue of frauds defense and to require enforcement of that agreement.

The Court of Appeal determined, however, that the mere payment of money does *not* constitute a sufficient partial performance or change in position to remove an oral agreement from the statute of frauds. In the court's view, a party paying money under a purported contract has an adequate remedy at law if the contract is found unenforceable (i.e. a lawsuit for recovery of the sum paid) and therefore enforcing the statute of frauds to invalidate such a contract does not result in an unjust or unconscionable loss to the payee.[36]

The holding on this point demonstrates the court's decidedly narrow approach in analyzing claims of estoppel based on partial performance. The court did not, for example, take into account the fact that the Secrests had no recourse liability under their purchase money debt pursuant to Section 580b of the California Code of Civil Procedure and that, by providing additional cash in lieu of simply allowing foreclosure to proceed, they gave the lender something it could not have otherwise obtained (i.e. because of the inability to obtain a deficiency judgment on a purchase money loan[37]) and thereby arguably changed their position.

IV. POST-RECESSION/FORECLOSURE CRISIS CASE DEVELOPMENTS

Following the widespread outbreak of the foreclosure crisis and the resulting public outcry, the tenor of judicial decisions addressing loan modification agreements changed noticeably. Several courts of appeal

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have relaxed the strict adherence to legal contract requirements and, in contrast to pre-crisis decisions, have shown a willingness to more broadly interpret and apply equitable principles in favor of borrowers.

Garcia v. World Savings, FSB:

The post-crisis shift in approach is well illustrated in *Garcia v. World Savings, FSB*,[38] a 2010 case dealing with very similar facts as in *Nguyen*. There, the Court of Appeal for the Second District found sufficient detrimental reliance to sustain a claim of promissory estoppel where the borrower, acting in reliance on an oral commitment by the lender's mortgage foreclosure department manager to postpone a pending trustee's sale, closed on a high-interest refinance loan.

After their lender, World Savings, FSB, declared a default under their loan and scheduled a trustee's sale of their home, the Garcias retained mortgage broker Cal Ravana to arrange a refinance of certain other property they owned so that the they could use the proceeds to pay down the loan from World Savings.[39] Ravana contacted Mike Lara, a manager of World Savings' mortgage foreclosure department, prior to the scheduled sale to inform him that the Garcias had received a conditional loan approval and to request a postponement of the scheduled sale. Lara agreed to reschedule the sale from August 20, 2007 to August 29, 2007.[40] Ravana contacted Lara again several days later to request a further extension of the trustee sale until the first week of September and, as summarized by the Court, the following exchange occurred on that call:

> According to Ravana, Lara stated that he would postpone the sale until August 20 and "see where [they] were at after that." When Ravana asked what would happen if appellants' new loan did not close by the 30th, Lara responded that the property "won't go to sale because I have the final say-so and as long as I know that you could close it in the first week of August [sic], I'll extend it.[41]

On August 29, 2007, Ravana called Lara several times and left messages informing him that the refinance loan would not close until the first week of September. Lara never returned any of those calls or otherwise responded to the messages left by Ravana. The Garcias closed their refinance loan on September 7, 2007 and sent a check in the amount of $26,596.37 to World Savings. However, the foreclosure sale had already occurred on August 30 and the check was returned uncashed.[42] The Garcias brought suit against World Savings for wrongful foreclosure, breach of contract, promissory estoppel and unfair business practices.[43]

On appeal, the court first addressed the Garcias' claim for breach of contract and whether they had provided evidence of consideration sufficient to support formation of a contract. The Garcias argued that, under *Raedek*e, "either a benefit to the promisor or a detriment to the promissee is sufficient to constitute consideration" to support a breach of contract claim and that, under that standard, their efforts to obtain financing secured by a separate property was adequate.[44] This broad interpretation, however, missed the point of the *Raedeke* case. As the court explained, *Raedeke* actually "stands for the proposition that where the evidence introduced by the plaintiff establishes the existence of true consideration, the issue presented is one of law."[45] The Garcias' purported consideration amounted to nothing more than a promise to provide what the lender was already due under the original loan agreement—payment of monthly payments, interest and late fees—and under California contract law doing or promising to do what one is already legally bound to do cannot constitute consideration for a new contract.[46]

Rather than stopping their analysis after dispensing with the breach of contract claim, as the court in *Nguyen* did, the court in *Garcia* went on to address whether the Garcias' actions satisfied the requirements for a promissory estoppel claim.

With regard to the first element for promissory estoppel, that a promise was made that was "clear and unambiguous in its terms"[47], the Garcias asserted that Lara's statement to the broker constituted such a sufficiently specific and unambiguous promise. The applicable test for such specificity, according to the court, is whether the subject promise is "definite enough that a court can determine the scope of the duty[,] and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages."[48] The court then concluded that Lara's statement that he would further postpone the trustee's sale if the Garcias needed additional time to close their refinance loan in the first week of September satisfied this test because it was clear as to the parties' obligations under that promise, and therefore adequate to support the claim of promissory estoppel.[49]

Additionally, the court found that the Garcias' action of obtaining a high-cost loan secured by a separate property they owned was sufficient to constitute detrimental reliance for purposes of promissory estoppel even though that action did not provide any specific benefit to World Savings.[50] In reaching this conclusion, the court was unmoved by World Savings' argument that the Garcias' action could not constitute detrimental reliance because they admittedly proceeded with the refinance

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loan in reliance upon two prior postponements of the foreclosure sale, not the third one that was the subject of Lara's oral promise. As the court stated, in an admittedly strained response, "the fact that appellants commenced the application process to obtain a loan on their separate property when they believed the foreclosure would take place in August does not establish that they would have completed the loan had they been aware that the foreclosure had not been further postponed."[51] This arguably less than persuasive handling of the lender's reliance argument suggests a desire by the Court to provide a remedy for the borrower.

Aceves v. U.S. Bank, N.A.:

A similarly broad view of promissory estoppel was applied in *Aceves v. U.S. Bank, N.A.*[52], where the Court of Appeal for the Second Appellate District found sufficient grounds to support a promissory estoppel claim where the lender failed to honor an oral promise to work with the appellant borrower on a loan modification in exchange for the borrower's agreement not to seek bankruptcy protection under chapter 13.

The appellant, Claudia Aceves, initially filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code after the servicer of the loan secured by her home recorded a "Notice of Default and Election to Sell Under Deed of Trust".[53] She planned to convert her case to Chapter 13 in order to reinstate the original loan payment, pay the arrearages over time, and retain her home.[54] After being told by a representative of the lender, U.S. Bank, that they would work with her to reinstate and modify the loan once it was out of bankruptcy, however, she opted not to convert to chapter 13 and did not oppose the lender's motion to have the automatic stay lifted. The bankruptcy court lifted the automatic stay on December 4, 2008 and on December 9, 2008 U.S. Bank scheduled Aceves' home for public sale on January 9, 2009.[55]

On the day before the scheduled sale of her property, a negotiator for U.S. Bank, with whom Aceves had had several prior conversations, called Aceves' bankruptcy attorney and conveyed an offer to reinstate the loan at a new balance of $965,926.22, with monthly payments in excess of $7,200 (as compared to the loan's initial payments of $4,857.09) and an immediate deposit of $6,500.[56] This was the first and only modification arrangement offered to Aceves after her bankruptcy filing and Aceves rejected it. Her home was subsequently sold at a trustee's sale and Aceves filed suit against U.S. Bank alleging a cause of action for promissory estoppel and several other equitable claims.

On appeal, the court found that, while Aceves' claims for quiet title, slander of title and declatory relief were properly dismissed, her com-

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plaint adequately satisfied all the elements for a *promissory estoppel* claim.[57] Specifically, the court concluded that:

> (1) [P]laintiff could have reasonably relied on the bank's promise to work on a loan reinstatement and modification if she did not seek relief under chapter 13, (2) the promise was sufficiently concrete to be enforceable, and (3) plaintiff's decision to forgo chapter 13 was detrimental because it allowed the bank to foreclose on the property[58]

In reaching this decision, the court found that the relevant promise was that U.S. Bank would negotiate with Aceves on a loan modification if she did not seek bankruptcy relief. This promise, according to the court, clearly and unambiguously indicated that U.S. Bank would not foreclose on Aceves' home without first engaging in negotiations with her.[59] Moreover, contrary to the lender's assertion, the loan modification offered by the lender on the eve of the foreclosure sale did not satisfy the promise made to Aceves. According to the court:

> Aceves' promissory estoppel claim is not based on a promise to make a *unilateral offer* but on a promise to *negotiate* in an attempt to reach a mutually agreeable loan modification. And, even assuming this case involved a mere promise to make a unilateral offer, we cannot say the bank's offer satisfied such a promise in light of the offer's terms and the circumstances under which it was made.[60]

Thus, when presented with a factual setting that could arguably be interpreted either narrowly in the lender's favor, or more broadly in a manner beneficial to the borrower, the *Aceves* court, like the *Garcia* court but in stark contrast to the *Nguyen* and *Secrest* courts, opted for the latter approach.

V. CONCLUSION

As noted above, loan modification disputes are always very fact sensitive, especially with regard to determinations of what constitutes adequate consideration, partial performance and/or detrimental reliance. Therefore, the application of the above discussed doctrines is very much a case-by-case question over which the courts have considerable discretion. Because of this, it cannot be said that that during any period there has ever been a true overriding or controlling approach to the courts' handling of these types of cases. It is possible, however, to discern certain tendencies or leanings developing as extra-legal views and pres-

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sures evolve, and, as the holdings in the foregoing cases seems to indicate, the current trend is in favor of borrowers.

This is not to say, of course, that all courts will proceed in the same manner as the *Garcia* and *Aceves* courts, or that all borrowers claiming they had an oral modification agreement will receive equally deferential treatment. In fact, the First District Court of Appeal has already set limits on pro-borrower leniency in *Fontenot v. Wells Fargo Bank, N.A.*, where a the borrower's claim for estoppel based on partial performance under an alleged amendment of an existing, written forbearance agreement was rejected, without leave to amend, because the borrower failed to provide the court with all the documentation purportedly creating the subject amendment.[61]

The above cases do, however, put practitioners—both on the lender side and on the borrower side—on notice that equitable claims against foreclosing lenders are, for the near future at least, more viable than they were before the foreclosure crisis took hold. As a result, lenders and borrowers, and their attorneys, should give these types of claims adequate consideration, both in the conduct and documentation of loan modification and forbearance agreements, and in the course of actual litigation.

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NOTES

1. Civ. Code, §1624.
2. Civ. Code, §1624, subd. (a)(3).
3. Although Civ. Code, §2922 refers only to a "mortgage," under California law, a deed of trust is synonymous with mortgage for purposes of this section. 4 Miller & Starr, Cal. Real Estate (3d ed. 2003, Supp. 2011-2012), §10:5.
4. California Mortgages, Deeds of Trust and Foreclosure Litigation, CEB, §10.21.
5. Civ. Code, §1698, subd. (b)
6. *Kroepsch v. Muma*, 272 Cal. App. 2d 467, 473, 77 Cal. Rptr. 348 (1st Dist. 1969).
7. *Fidler v. Schiller*, 212 Cal. App. 2d 569, 573, 28 Cal. Rptr. 48 (2d Dist. 1963). See also Raedeke v. Gibraltar Sav. & Loan Assn., 10 Cal. 3d 665, 673, 111 Cal. Rptr. 693, 517 P.2d 1157 (1974).
8. *In re Marriage of Benson*, 36 Cal. 4th 1096, 1108, 32 Cal. Rptr. 3d 471, 116 P.3d 1152 (2005). See also *Augustine v. Trucco*, 124 Cal. App. 2d 229, 268 P.2d 780 (2d Dist. 1954); *Anderson v. Stansbury*, 38 Cal. 2d 707, 242 P.2d 305 (1952).
9. *In re Marriage of Benson, supra*, 36 Cal. 4th at 1108.
10. *Anderson v. Stansbury, supra*, 38 Cal.2d at 715.
11. *Raedeke v. Gibraltar Savings and Loan Assn., supra*, 10 Cal.3d at 673.
12. See, generally, California Mortgages, Deeds of Trust and Foreclosure Litigation, CEB, §10.21.
13. Cal. Jur. 3d §22.
14. Cal. Jur. 3d §23. See also *Raedeke v. Gibraltar Sav. & Loan Assn., supra*, 10 Cal.3d at 672-673.
15. *Nguyen v. Calhoun*, 105 Cal. App. 4th 428, 129 Cal. Rptr. 2d 436 (6th Dist. 2003).
16. *Id.* at 444.

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17. *Secrest v. Security Nat. Mortg. Loan Trust 2002-2*, 167 Cal. App. 4th 544, 84 Cal. Rptr. 3d 275 (4th Dist. 2008), as modified on denial of reh'g, (Nov. 3, 2008).
18. *Id.* at 433
19. *Id.* at 433-434.
20. *Id.* at 434.
21. *Id.* at 437.
22. *Id.* at 440.
23. *Id.*
24. *Id.* at 444.
25. *Raedeke v. Gibraltar Savings and Loan Assn., supra*, 10 Cal.3d 665.
26. *Id.* at 673.
27. *Nguyen v. Calhoun*, *supra*, 105 Cal.App.4th at 444.
28. *Id.* at 444-445.
29. *Id.*
30. *Secrest v. Security Nat'l Mortgage Loan Trust 2002-2, supra*, 167 Cal.App.4th at 549-550.
31. *Id.*
32. *Id.* at 550.
33. *Id*. at 553.
34. *Id.*, citing Civ. Code, §1698, subd. (a). For a further discussion of the equal dignities rule see 1 Miller & Starr (3d Ed. 2001) §1:81.
35. Surprisingly, the court of appeal's decision totally omits any reference to Civ. Code, §1624, subd. (a)(7), which is the only portion of the statute of frauds legislation that expressly deals with residential real estate loans. That section states that the statute of frauds applies to:

    > [a] contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than one hundred thousand dollars ($100,000), not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit.

    Section 1624, subd. (a)(7) goes on to clarify, however, that a promise or commitment to loan money secured solely by residential property consisting of four or less dwelling units is deemed to be for "personal, family or household purposes." Based on this definition, it seems clear that a loan secured by a single family home, such as the loan to the Secrests, falls outside the scope of §1624(a)(d). Accordingly, it could be argued that if a lender's initial promise to make such a residential loan is not subject to the statute of frauds under the one section that expressly addresses loans secured by residential property, then any subsequent modification of the lender's rights and obligations under that promise are likewise outside the statute of frauds.
36. *Id.*
37. Code Civ. Proc., §580b.
38. *Garcia v. World Sav., FSB*, 183 Cal. App. 4th 1031, 107 Cal. Rptr. 3d 683 (2d Dist. 2010), review denied, (June 23, 2010).
39. *Id.*
40. *Id.*
41. *Id.* at 1035.
42. *Id.* at 1036.
43. *Id.* at 1034.
44. *Id.* at 1040.
45. *Id.*
46. *Id.*, citing 1 Witkin, Summary of Calif. Law (10th ed. 2005) Contracts §218, p. 215.
47. *Id.* at 1044, citing *Division of Labor Law Enforcement v. Transpacific Transportation Co.*, 69 Cal. App. 3d 268, 277, 137 Cal. Rptr. 855 (1st Dist. 1977).
48. *Id.* at 1045, citing *Bustamante v. Intuit, Inc.*, 141 Cal. App. 4th 199, 209, 45 Cal. Rptr. 3d 692 (6th Dist. 2006), quoting *Ladas v. California State Auto. Assn.*, 19 Cal. App. 4th 761,

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770, 23 Cal. Rptr. 2d 810 (1st Dist. 1993).
49. *Id.*
50. *Id.*
51. *Id.* at 1042.
52. *Aceves v. U.S. Bank, N.A.*, 192 Cal. App. 4th 218, 120 Cal. Rptr. 3d 507 (2d Dist. 2011), as modified, (Feb. 9, 2011).
53. *Id.* at 223.
54. *Id.*
55. *Id.*
56. *Id.*
57. The court of appeal also found that *Aceves* adequately pled a claim for fraud, however a full discussion of the court's treatment of that claim is beyond the scope of this article.
58. *Id.* at 222.
59. *Id.*
60. *Id.* at 227 (italics in original).
61. *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (1st Dist. 2011).

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