

MAR 03 2015

ORDERED PUBLISHED

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-14-1346-TaDPa
)
 WILLIAM DAVID GOLDSTEIN and) Bk. No. 2:10-bk-43720-DS
 MOLLY K. GOLDSTEIN,)
)
 Debtors.)
)
 _____)
)
 WILLIAM DAVID GOLDSTEIN and)
 MOLLY K. GOLDSTEIN,)
)
 Appellants,)
)
 v.) **O P I N I O N**
)
 ALBERTA P. STAHL, Chapter 7)
 Trustee; WELLS FARGO BANK,)
 N.A.; BANK OF AMERICA, N.A.,)
)
 Appellees.)
 _____)

Argued and Submitted on January 22, 2015
at Pasadena, California

Filed - March 3, 2015

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Deborah J. Saltzman, Bankruptcy Judge, Presiding

Appearances: William David Goldstein of the Law Offices of
 William D. Goldstein argued for appellants
 William David Goldstein and Molly K. Goldstein;
 Bernard Kornberg of Severson & Werson argued for
 appellees Wells Fargo Bank, N.A. and Bank of
 America, N.A.; and Timothy J. Yoo of Levene,
 Neale, Bender, Yoo & Brill LLP argued for
 appellee Alberta P. Stahl.

Before: TAYLOR, DUNN, and PAPPAS, Bankruptcy Judges.

1 TAYLOR, Bankruptcy Judge:
2

3 **INTRODUCTION**

4 Appellants, chapter 7¹ debtors William David Goldstein and
5 Molly K. Goldstein, appeal the bankruptcy court's order
6 authorizing the chapter 7 trustee to compromise and sell, as
7 property of the chapter 7 estate, four state court claims filed
8 by the Goldsteins in postpetition litigation. We conclude that
9 the bankruptcy court did not err when it held that the claims at
10 issue were property of the estate that could be compromised or
11 sold, and we AFFIRM.

12 **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

13 **A. Events preceding the Goldsteins' bankruptcy filing**

14 Like many similarly situated homeowners impacted by the bad
15 economy, the Goldsteins applied in 2009 for modification of the
16 mortgage² against their home in Culver City, California. In
17 October 2009, Wells Fargo Bank, N.A. ("Wells Fargo"), as the
18 loan servicer, granted the Goldsteins a three-month trial period
19 plan ("TPP") under the Home Affordable Modification Program
20
21

22 ¹ Unless specified otherwise, all chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,
24 and all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

25 ² The mortgage was originated by American Mortgage
26 Network, Inc. The beneficial interest in the mortgage was
27 purchased by Bank of America, N.A. as Successor by Merger to
28 LaSalle Bank National Association, as Trustee for Morgan Stanley
Loan Trust 2006-3AR; Wells Fargo Bank, N.A. serviced the loan,
albeit at least initially under the name of America's Servicing
Company.

1 ("HAMP").³ The TPP required the Goldsteins to make the first of
2 three payments by November 1, 2009, and to provide executed
3 copies of the TPP and certain other required documentation. The
4 second and third payments were due December 1, 2009 and
5 January 1, 2010, respectively. The TPP provided⁴:

6 If I am in compliance with this Loan Trial Period and
7 my representations in Section 1 continue to be true in
8 all material respects, then the Lender will provide me
9 with a Loan Modification Agreement, as set forth in
10 Section 3, that would amend and supplement (1) the
11 Mortgage on the Property, and (2) the Note secured by
12 the Mortgage.

13 Request for Judicial Notice, ECF Dkt. #41 at 47 of 254.

14 The Goldsteins made the three trial payments required under
15 the TPP. Wells Fargo, however, did not provide a permanent loan
16 modification nor did it send the Goldsteins a notice of denial
17 of a permanent modification, as required under the TPP and
18 HAMP.⁵ Thereafter, the Goldsteins made four more monthly

19 ³ Pursuant to Congress' Troubled Asset Relief Program, the
20 U.S. Department of the Treasury launched HAMP in 2009 to help
21 distressed homeowners with delinquent mortgages. See Corvello
22 v. Wells Fargo Bank, N.A., 728 F.3d 878, 880 (9th Cir. 2013)
23 (per curiam).

24 ⁴ The TPP also provided that it would "not take effect
25 unless and until both [the Goldsteins] and the Lender sign it
26 and Lender provides [the Goldsteins] with a copy of [the TPP]
27 with the Lender's signature." Request for Judicial Notice, ECF
28 Dkt. #41 at 47 of 254. No fully signed copy of the TPP was ever
returned to the Goldsteins.

⁵ HAMP, like the TPP here, required Wells Fargo either to
provide the Goldsteins a permanent loan modification, if the
Goldsteins made the three trial payments and otherwise complied
with the TPP or to notify them that they did not qualify for a
permanent loan modification. See Corvello, 728 F.3d at 880-81
(discussing background and provisions of HAMP); and West v.
JPMorgan Chase Bank, N.A., 214 Cal. App. 4th 780, 797-98 (2013)
(interpreting the United States Department of the Treasury
(continued...))

1 payments in the amount required under the TPP. Wells Fargo
2 still did not send them either notice of denial or a permanent
3 loan modification agreement. The Goldsteins stopped their
4 payments after May 2010, and in August 2010, filed for
5 protection under chapter 7 to stop foreclosure proceedings.
6 They received their discharges in December 2010, and the
7 bankruptcy case was closed as a no asset case.

8 **B. The State Court Action**

9 In October 2012, nearly two full years after they received
10 their chapter 7 discharges, the Goldsteins filed an action
11 against Wells Fargo and Bank of America, among others, in Los
12 Angeles, California Superior Court (the "State Court Action").
13 They subsequently filed a verified second amended complaint (the
14 "SAC"). The first, second, third, and fifth causes of action in
15 the SAC relate to the TPP (the "TPP Claims").⁶

16 In the first cause of action, for fraud in the inducement,
17 the Goldsteins alleged that when Wells Fargo offered them the
18 TPP in 2009, Wells Fargo never intended to grant them a
19 permanent loan modification, as required under HAMP; yet, to
20 their detriment, the Goldsteins made seven payments totaling
21 \$22,201.83 in reliance thereon. The Goldsteins alleged in the
22

23 ⁵ (...continued)
24 Directive 09-01 and HAMP guidelines as imposing the proviso that
25 if the borrower complies with a HAMP trial plan agreement, the
lender must offer a permanent loan modification).

26 ⁶ The remaining 9 of the 13 causes of action contained in
27 the SAC related to postpetition events and transactions between
28 the Goldsteins and Wells Fargo (and others) in connection with
subsequent loan modifications and foreclosure proceedings, none
of which pertain to the matters addressed in this appeal.

1 second cause of action, based on promissory estoppel, that they
2 reasonably relied to their detriment on Wells Fargo's promise to
3 provide them with a permanent loan modification following the
4 Goldsteins' compliance with the TPP and that Wells Fargo should
5 be required to make good on its promise. In the third cause of
6 action, the Goldsteins asserted that Wells Fargo's actions with
7 respect to the TPP constituted fraud and were done maliciously
8 and with oppression, entitling the Goldsteins to an award of
9 punitive and exemplary damages. The Goldsteins based their
10 fifth cause of action on breach of contract and the assertions
11 that they complied with their obligations under the TPP, Wells
12 Fargo did not, and the Goldsteins were damaged as a result.

13 Wells Fargo and Bank of America demurred to the SAC. As to
14 the TPP Claims, they based their demurrer on the grounds that
15 the Goldsteins lacked standing to raise them because the TPP
16 Claims arose prepetition, the Goldsteins did not schedule them
17 in their bankruptcy, and, therefore, they remained assets of the
18 chapter 7 case. The state court issued a tentative ruling in
19 advance of the hearing sustaining the demurrer as to the TPP
20 Claims, but continued the hearing to allow the Goldsteins to
21 reopen the bankruptcy case.

22 **C. Case reopening and subsequent events**

23 The Goldsteins promptly filed a motion to reopen the
24 bankruptcy case, "for the limited purpose of allowing [the
25 Goldsteins] to file an Amended Schedule B (personal property) to
26 schedule certain claims against Wells Fargo Bank." Order
27 Granting Motion to Reopen, ECF Dkt. #23 at 2. The bankruptcy
28 court granted the motion. It also ordered that a trustee be

1 reappointed to administer the estate and that the case was to be
2 re-closed 30 days after the Goldsteins filed their Amended
3 Schedule B, "**provided that**, neither the chapter 7 trustee nor
4 any party in interest opposes such re-closing of the case prior
5 to expiration of the 30-day period." Id. (emphasis in
6 original).

7 The Goldsteins filed their Amended Schedule B disclosing
8 the TPP Claims as other contingent and unliquidated claims in
9 the amount of \$22,000; they included, however, the following
10 disclaimer:

11 Debtors believe all causes of action are
12 post-petition causes of action, but Wells
13 Fargo's Demurrer in Superior Court alleges
14 that causes of action 1, 2, 3 and 5 are pre-
15 petition causes of action, which debtors
16 lack standing to prosecute, because not
17 scheduled. Approx. \$22,000 plus argument
18 for punitive damages.

19 ECF Dkt. #24 at 4.

20 Before 30 days passed, Wells Fargo and Bank of America
21 together filed a Motion to Extend Deadline Before Closing of
22 Case ("Motion to Extend") for the stated purpose of allowing
23 settlement negotiations with the Trustee to continue with
24 respect to the TPP Claims - with the potential for payout to the
25 Goldsteins' unsecured creditors. The Goldsteins promptly filed
26 opposition. In their opposition, the Goldsteins argued that the
27 case should not be allowed to remain open unless the Trustee
28 filed a motion to sell and that no offer to purchase the TPP
Claims then existed. They also argued that determining whether
the TPP Claims constituted prepetition or postpetition claims
might be problematic, because although events on which the TPP

1 Claims were based "started pre-petition," the law "allowing"
2 suit on such events "did not exist" until two years
3 postpetition. ECF Dkt. #28 at 4.

4 At the hearing on the Motion to Extend, the Goldsteins took
5 a firmer position and asserted that the TPP Claims were
6 postpetition claims.⁷ The bankruptcy court continued the
7 hearing to coincide with a hearing it then scheduled on a motion
8 to be filed by the Trustee, either to compromise under Rule 9019
9 or to sell under § 363.

10 **D. The Trustee's agreement with Wells Fargo and motion to**
11 **compromise controversy, or alternatively, for order authorizing**
12 **sale**

13 The Trustee subsequently entered into a written agreement
14 with Wells Fargo ("Agreement") and filed it as an exhibit to her
15 motion to compromise or sell the TPP Claims ("Motion").

16 **1. The terms of the Agreement**

17 Pursuant to the Agreement, which was expressly made subject
18 to bankruptcy court approval pursuant to a motion under Rule
19 9019, Wells Fargo⁸ agreed to pay the Trustee \$60,000 in full
20 settlement of the TPP Claims. As an essential term of the
21

22 ⁷ The Goldsteins did not provide in their excerpts of
23 record a copy of the transcript of the hearing on the Motion to
24 Extend, apparently because it was not available for download.
25 We have exercised our discretion to review independently the
26 hearing transcript electronically filed on the bankruptcy case
27 docket. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,
28 Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989).

⁸ Notwithstanding that Bank of America was not party to
the Agreement, as an essential term of the Agreement, the
Trustee agreed that all releases provided therein also released
Bank of America.

1 Agreement, Wells Fargo's obligation to pay the \$60,000 was made
2 subject to entry of a final order specifically finding that the
3 TPP Claims were property of the bankruptcy estate and not
4 property of the Goldsteins as individuals.⁹ In addition, the
5 parties to the Agreement agreed that to the extent the
6 bankruptcy court ruled that sale of the TPP Claims under § 363
7 was the proper procedure, approval under § 363 also satisfied
8 the Trustee's obligation to obtain court approval.

9 **2. The Motion**

10 The Trustee moved for approval of the Agreement as a
11 compromise of controversy under Rule 9019, or alternatively, as
12 a sale of estate assets, subject to overbid procedures, under
13 § 363(b) and (m) and Rule 6004. Under both legal theories, the
14 Trustee requested that the bankruptcy court make the specific
15 finding that the TPP Claims were prepetition assets.

16 In support of her argument that the TPP Claims were
17 prepetition assets,¹⁰ the Trustee argued that: (1) the TPP Claims
18

19 ⁹ The Agreement also provided that the order would not be
20 final for purposes of the Agreement until it was no longer
21 subject to appeal. In light of this provision of the Agreement,
the appeal is not moot.

22 ¹⁰ Because the Goldsteins appeal only from the bankruptcy
23 court's finding that the TPP Claims are prepetition assets of
24 the estate, and do not argue that the bankruptcy court otherwise
25 erred in its Rule 9019 or § 363 holdings, we do not review the
26 Trustee's legal and factual support for the Rule 9019 and § 363
27 rulings here. The Goldsteins based their opposition to the
28 Motion solely on the ground that the Trustee lacked authority to
sell or compromise the TPP Claims because they were not property
of the estate. We note, however, that the Trustee cited the
appropriate legal authority under both provisions and the
bankruptcy court found that the Trustee otherwise presented a
sufficient record for the ultimate holdings.

1 were based solely on prepetition facts and thus accrued
2 prepetition; and (2) contrary to the Goldsteins' argument, the
3 discovery rule, which is applicable for purposes of statutes of
4 limitations analysis, did not postpone accrual for ownership
5 purposes under the bankruptcy analysis.¹¹ The Trustee also
6 argued that the decision in West v. JPMorgan Chase Bank, N.A.,
7 214 Cal. App. 4th 780 (2013), which the Goldsteins argued
8 constituted a postpetition change of law that gave rise to their
9 TPP Claims postpetition, merely strengthened the Goldsteins'
10 claims - it did not create them. Trustee asserted that no
11 binding case law existed prepetition that prohibited the
12 Goldsteins from bringing the TPP Claims before they filed
13 bankruptcy and, thus, that they were prepetition assets of the
14 estate.

15 **3. The Goldsteins' Opposition**

16 The Goldsteins opposed the Motion based on two primary
17 arguments. First, they argued that factually none of the TPP
18 Claims were "complete" until Wells Fargo put into writing its
19 denial of a permanent HAMP modification two weeks after the
20 Goldsteins filed for bankruptcy. Because Wells Fargo never gave
21 the Goldsteins notice that it was denying their HAMP loan
22 modification application, they argue, the TPP Claims could not
23 have arisen any earlier - and thus they were postpetition
24

25
26 ¹¹ Trustee also argued that the Goldsteins admitted in the
27 SAC that they were aware of Wells Fargo's breach in May 2010,
28 three months before they filed bankruptcy, and that they filed
bankruptcy to stop foreclosure, which would not have been
necessary but for the denial of the modification.

1 claims.¹²

2 Second, the Goldsteins asserted that at the time they filed
3 for bankruptcy, neither federal nor state case law "allowed
4 borrowers to sue their lenders for refusing to give the borrower
5 a HAMP loan modification, despite the borrower having fully
6 performed a HAMP TPP." Opposition to Motion, ECF Dkt. #50
7 at 23. The Goldsteins cited two decisions¹³ in which the
8 respective courts, when presented with similar factual scenarios
9 and causes of action, determined that no contracts or executed
10 agreements existed between the subject borrowers and lenders to
11 support the borrowers' actions. The Goldsteins argued that this
12 state of the law changed in 2012 and 2013, with three decisions.
13 First, the Seventh Circuit issued its opinion in Wigod v. Wells
14 Fargo Bank, N.A., 673 F.3d 547 (7th Cir. 2012), holding that a
15 HAMP TPP was an enforceable contract that "could give rise to

16
17 ¹² As part of the support for this factual argument, the
18 Goldsteins filed under seal with the bankruptcy court
19 transcriptions of certain telephone conversations between the
20 Goldsteins and representatives of Wells Fargo in which Wells
21 Fargo repeatedly told the Goldsteins that they should continue
22 making the TPP payments while their modification was under
23 consideration - not disclosing that, as later determined, Wells
24 Fargo denied the modification in February 2010 (six months prior
25 to the petition date). They also sought authority to file these
transcripts under seal as part of the record on appeal. This
panel denied the request to file under seal, without prejudice,
by order entered January 22, 2015. The parties thereafter
jointly filed a motion to allow substitution of redacted copies
of the transcripts (the "Motion to Substitute"). This panel
granted the Motion to Substitute by order entered February 25,
2015.

26 ¹³ The Goldsteins cited Nungaray v. Litton Loan Servicing,
27 LP, 200 Cal. App. 4th 1499 (2011), and Grill v. BAC Home Loans
28 Servicing, LP, 2011 WL 127891 (E.D. Cal. Jan. 14, 2011). We
note that both cited decisions post-date the petition date but
pre-date the Goldsteins' initiation of the State Court Action.

1 claims against banks, for breach of contract, misrepresentation
2 and fraud.” ECF Dkt. 50 at 25. Then the California court of
3 appeal in West v. JPMorgan Chase Bank and the Ninth Circuit in
4 Corvello v. Wells Fargo Bank, N.A. adopted the Wigod reasoning.

5 The Goldsteins argued that, as a matter of law, their right
6 to remedy under the TPP Claims was created by the postpetition
7 decisional authority in Wigod, West, and Corvello, and not
8 before. They contended, therefore, that the TPP Claims
9 necessarily constituted postpetition claims.

10 **4. The bankruptcy court’s ruling**

11 The bankruptcy court ruled orally after hearing argument on
12 the Motion and held that all of the TPP Claims arose prepetition
13 and were property of the estate. The bankruptcy court found
14 that:

15 to the extent there was any fraud, any inducement, any
16 breach of contract, any promissory estoppel claim,
17 that breach would have occurred after the debtors
18 performed and, as debtors['] counsel in her last
19 comments said, noted the full performance by the
20 debtors took place in early 2010 after the debtors had
21 made their three payments. Once the debtors made
22 those three payments and otherwise complied with their
23 obligations under the HAMP modification, the fact that
24 they were not granted a permanent modification, that
25 constitutes the breach. There’s no question that that
26 was before the bankruptcy case was filed.

22 Hr’g Tr. (June 26, 2014) at 53:25-54:11. The bankruptcy court
23 found that the facts giving rise to the fraud claim also arose
24 prepetition, as the Goldsteins themselves alleged in the SAC
25 that they learned that the denial was in February 2010 and they
26 filed bankruptcy in August 2010 because of the denial.

27 The bankruptcy court also stated that it was not persuaded
28 that “because there were recent cases with respect specifically

1 to a cause of action based on HAMP modifications that there was
2 no law or no legal right for debtors to have filed a cause of
3 action prior to the bankruptcy case." Hr'g Tr. (June 26, 2014)
4 at 55:10-14. The bankruptcy court reasoned that the lack of
5 published cases prepetition was in part due to the fact that
6 HAMP procedures were relatively new. Rather than focusing on
7 the existence of some conflicting legal precedent, which the
8 bankruptcy court noted had no "impact on the date that a claim
9 arises for purposes of when that claim accrues," Hr'g Tr. (June
10 26, 2014) at 56:12-13, the bankruptcy court relied on the fact
11 that prepetition there was "no controlling law saying that the
12 debtors had no right to file a cause of action." Hr'g Tr. (June
13 26, 2014) at 55:21-22. Thus, the bankruptcy court found that
14 the TPP Claims were "assets that the Trustee is entitled to, and
15 in fact obligated to administer." Hr'g Tr. (June 26, 2014) at
16 56:20-21.

17 The Goldsteins appealed from the bankruptcy court's
18 decision the same day the bankruptcy court entered its order.

19 JURISDICTION

20 The bankruptcy court had jurisdiction under 28 U.S.C.
21 §§ 1334 and 157(b) (2) (A) and (N). We have jurisdiction under
22 28 U.S.C. § 158.

23 ISSUES

24 Did the bankruptcy court err when it determined that the
25 TPP Claims were property of the bankruptcy estate?

26 STANDARD OF REVIEW

27 Whether property is property of the estate is a question of
28 law reviewed de novo. Mwangi v. Wells Fargo Bank, N.A. (In re

1 Mwangi), 432 B.R. 812, 818 (9th Cir. BAP 2010) (citing White v.
2 Brown (In re White), 389 B.R. 693, 698 (9th Cir. BAP 2008)).

3 **DISCUSSION**

4 On appeal, the Goldsteins make the same primary arguments,
5 pro se,¹⁴ as their counsel argued to the bankruptcy court.¹⁵
6 First, they contend that none of the TPP Claims were complete,
7 for accrual purposes, until the Goldsteins learned postpetition
8 that Wells Fargo denied them a permanent loan modification -
9 thereby damaging them. Second, they assert that no published
10 decisional authority existed prepetition that supported
11 borrowers' actions against their lenders based on similar
12 factual scenarios and, thus, that their right to remedy did not
13 arise until postpetition. Both arguments are unavailing.

14 **A. Property of the estate**

15 Section 541(a)(1) of the Bankruptcy Code defines "property
16 of the estate" to include "all legal or equitable interests of
17 the debtor in property as of the commencement of the case."¹⁶
18 Legal causes of action are included within the broad scope of

19
20 ¹⁴ Mr. Goldstein, however, is himself an attorney.

21 ¹⁵ In their opening appeal brief, however, the Goldsteins
22 for the first time also attempt to argue that Wells Fargo had
23 unclean hands because of its alleged fraud and that Wells Fargo
24 should be judicially estopped from taking allegedly inconsistent
25 positions regarding whether a contract existed and whether Wells
26 Fargo breached it. We decline to consider either of these newly
27 raised arguments in this appeal. See Padgett v. Wright, 587
28 F.3d 983, 985 n.2 (9th Cir. 2009) (per curiam); and Scovis v.
Henrichsen (In re Scovis), 249 F.3d 975, 984 (9th Cir. 2001)
(refusing to consider issue raised for the first time on appeal
absent exceptional circumstances).

¹⁶ Section 541(b) lists exclusions from this broad
definition, none of which are asserted to be applicable here.

1 § 541. Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789
2 F.2d 705, 707 (9th Cir. 1986) (citing United States v. Whiting
3 Pools, Inc., 462 U.S. 198, 205 & n.9 (1983)). This includes
4 prepetition tort causes of action, id., as well as prepetition
5 causes of action based on contract, Rau v. Ryerson (In re
6 Ryerson), 739 F.2d 1423, 1425 (9th Cir. 1984). The question
7 presented in this appeal is whether the tort- and contract-based
8 causes of action comprising the TPP Claims accrued, for
9 bankruptcy purposes, prior to the Goldsteins' petition date and,
10 thus, constitute property of the estate. See Cusano v. Klein,
11 264 F.3d 936, 947 (9th Cir. 2001). The bankruptcy court
12 concluded they did; we agree.

13 **B. The TPP Claims accrued prepetition.**

14 "To determine when a cause of action accrues, and therefore
15 whether it accrued pre-bankruptcy and is an estate asset, the
16 Court looks to state law." Boland v. Crum (In re Brown), 363
17 B.R. 591, 605 (Bankr. D. Mont. 2007) (citing Cusano). "It is
18 important, however, to distinguish principles of accrual from
19 principles of discovery and tolling, which may cause the statute
20 of limitations to begin to run after accrual has occurred for
21 purposes of ownership in a bankruptcy proceeding." Cusano, 264
22 F.3d at 947.

23 In California, "generally, a cause of action accrues and
24 the statute of limitation begins to run when a suit may be
25 maintained. Ordinarily this is when the wrongful act is done
26 and the obligation or the liability arises, but it does not
27 accrue until the party owning it is entitled to begin and
28 prosecute an action thereon. In other words, a cause of action

1 accrues upon the occurrence of the last element essential to the
2 cause of action." Howard Jarvis Taxpayers Assn. v. City of La
3 Habra, 25 Cal. 4th 809, 815 (2001) (citations and internal
4 quotation marks omitted). Therefore, if a claim "could have
5 been brought," it has accrued. Cusano, 264 F.3d at 947. Here,
6 we determine, as did the bankruptcy court, that all of the TPP
7 Claims could have been brought prepetition.

8 Under the terms of the TPP, Wells Fargo agreed to provide
9 the Goldsteins with a permanent loan modification if the
10 Goldsteins complied with the TPP requirements or to notify them
11 if they did not qualify after making the three TPP payments.
12 The Goldsteins made the third payment on January 1, 2010. Wells
13 Fargo then was required to take one of two possible actions; it
14 did nothing. Thus, at that prepetition point in time, the
15 Goldsteins could have brought their TPP Claims. Wells Fargo did
16 not act in compliance with its alleged representations,
17 promises, or contractual agreements despite the Goldsteins' full
18 performance. The Goldsteins' four additional payments arguably
19 increased their damages claim, but did not delay the accrual of
20 the TPP Claims themselves.

21 Nor were the Goldsteins delayed in their ability to bring
22 the TPP Claims due to their lack of receipt of a written denial
23 of a permanent loan modification or because they may not have
24 learned until sometime postpetition that Wells Fargo denied the
25 permanent loan modification in February 2010.¹⁷ Instead, because

27 ¹⁷ The Goldsteins assign error to the bankruptcy court's
28 acceptance as fact of the Goldsteins' allegation contained in
(continued...)

1 Wells Fargo took neither of the HAMP-required alternative
2 actions - and there is no question that the Goldsteins
3 admittedly knew they did not do so - the Goldsteins could have
4 brought the TPP Claims before they filed bankruptcy. As of the
5 commencement of the case, if the TPP Claims could have been
6 brought, they accrued and became part of the bankruptcy estate.
7 See In re Brown, 363 B.R. at 605. We determine, as a matter of
8 law, that the TPP Claims accrued prepetition and therefore
9 conclude that the bankruptcy court did not err when it held that
10 the TPP Claims were property of the estate.

11 **C. The Goldsteins were not prohibited from bringing the TPP**
12 **Claims prepetition even if some contrary non-binding precedent**
13 **existed or supportive precedent was lacking at that time.**

14 The Goldsteins also argue that because they never received
15 a signed copy of the TPP, as required by its terms prior to it
16 taking effect, they had no agreement or contract with Wells
17 Fargo until such time as the Seventh Circuit's reasoning and
18 decision in Wigod was adopted in California (West) and by the
19 Ninth Circuit (Corvello).¹⁸ And the Goldsteins contend that the

21 ¹⁷(...continued)
22 their SAC that they learned in May 2010 of Wells Fargo's denial
23 of the permanent loan modification in February 2010. The
24 Goldsteins contend that their allegation was a mere misstatement
25 that they have since corrected. Because we determine that the
26 TPP Claims accrued prepetition when Wells Fargo did not give
notice of denial or provide the permanent loan modification,
which neither side disputes, we determine that even if the
bankruptcy court erred by relying on the SAC allegation, it
would be harmless error.

27 ¹⁸ In Corvello, the Ninth Circuit specifically found that
28 such a provision in a TPP, drafted by the bank, did not deprive
(continued...)

1 state of the law prepetition, before the Wigod, West, and
2 Corvello decisions, in effect, prevented them from bringing the
3 TPP Claims.

4 In their arguments, the Goldsteins appear to miss the point
5 that in all three of these decisions, the courts reached their
6 ultimate conclusions regarding the viability of the state common
7 law claims at issue through application of **existing** state law;
8 and their analysis of contractual obligations of banks under
9 HAMP was based on review of HAMP provisions and applicable
10 Treasury guidelines. See Corvello, 728 F.3d at 880 (finding
11 Treasury Supplemental Directive 09-01 to be the controlling
12 Treasury guideline for the process of applying for and receiving
13 a permanent modification); Bushell v. JPMorgan Chase Bank, N.A.,
14 220 Cal. App. 4th 915, 923 (2013) (lenders "must perform HAMP
15 loan modifications in accordance with Treasury regulations,"
16 such as Supplemental Directive 09-01, issued in April 2009,
17 delineating HAMP's eligibility requirements and modification
18 procedures).

19 These courts did not create new legal rights. They
20 interpreted the respective borrowers' rights under state laws
21 then in effect to consider the impact of HAMP provisions and
22 related agreements. The plaintiffs in each case faced the same
23 state of the law that the Goldsteins complain they faced
24 prepetition, but they persevered and eventually persuaded the
25

26
27 ¹⁸(...continued)
28 borrowers of the benefits of their agreement. Corvello, 728
F.3d at 884-85.

1 reviewing courts to rule in their favor.¹⁹ The Goldsteins,
2 arguably, might have done the same.²⁰

3 The Goldsteins rely on Drewes v. Vote (In re Vote), 261
4 B.R. 439 (8th Cir. BAP 2001), and Sliney v. Battley (In re
5 Schmitz), 270 F.3d 1254 (9th Cir. 2001), to support their
6 arguments. Both decisions are factually and legally
7 distinguishable. In both cases, the rights under review, crop
8 disaster assistance and fishing rights, respectively, were
9 created postpetition by legislation enacted postpetition. In re
10 Vote, 261 B.R. at 442; In re Schmitz, 270 F.3d at 1255-56.
11 Here, the TPP Claims rely on California common law regarding
12 fraud, promissory estoppel, and contract as it existed
13 prepetition, interfacing with the HAMP provisions enacted in
14

15 ¹⁹ The eventually successful plaintiffs in Wigod first
16 filed their complaint in April, 2010 in district court; received
17 their unfavorable ruling in January 2011; but succeeded before
18 the Seventh Circuit in March 2012. See Wigod v. Wells Fargo
19 Bank, N.A., 2011 U.S. Dist. LEXIS 7314 (N.D. Ill., Jan. 25,
20 2011). The plaintiff in West was encountering problems with her
21 request for HAMP modification in late 2009 and early 2010, and
22 was foreclosed in May 2010. West v. JPMorgan Chase Bank, N.A.,
23 214 Cal. App. 4th at 789-90. She filed her initial complaint in
24 November 2010 and suffered an unfavorable judgment in January
25 2012, before prevailing on appeal in March 2013. Id. at 791.
26 Similarly, the plaintiff in Corvello first filed his complaint
27 in November 2010 to address claims related to a HAMP temporary
28 payment plan that started in the summer of 2009. Corvello, 728
F.3d at 881; Complaint, Corvello v. Wells Fargo Bank, N.A., No.
3:10-cv-05072-VC (N.D. Cal. Nov. 9, 2010), ECF Dkt. #1.

24 ²⁰ The court in Corvello acknowledged that many state and
25 federal courts had dealt with similar factual circumstances,
26 citing Sutcliffe v. Wells Fargo Bank, N.A., 283 F.R.D. 533, 549-
27 50 (N.D. Cal. 2012), for its collection of cases. We note that
28 in Sutcliffe, among the cases it collected, were a number of
cases where courts held in 2010 and 2011 that a TPP is an
enforceable agreement, at least for purposes of surviving a
Civil Rule 12(b)(6) motion. 283 F.R.D. at 549-50.

1 2009. The Goldsteins' ability to file the TPP Claims did not
2 require enactment of new legislation. The TPP Claims involved
3 interpretation of the legal significance of the facts as they
4 existed prepetition. The developing case law arguably assisted
5 the Goldsteins' likelihood of recovery on the TPP Claims as it
6 interpreted what HAMP required of the banks in a manner
7 favorable to the Goldsteins; it did not create a new right.²¹
8 The Goldsteins cite no legal authority to support their
9 contention that judicial interpretation of the HAMP provisions
10 resulted in new legal rights that the Goldsteins did not have as
11 of the commencement of the bankruptcy case, and we know of none.

12 **CONCLUSION**

13 Based on the foregoing, we AFFIRM.

24 ²¹ It bears mentioning here that if any of the statute of
25 limitations periods applicable to the causes of action
26 comprising the TPP Claims had run before the Wigod, West, and
27 Corvello favorable opinions were published, the subsequent
28 favorable decisions could not revive the time-barred causes of
action. See Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1116
(1988) (“[A] change in the law, either by statute or by case
law, does not revive claims otherwise barred by the statute of
limitations.”).