



Ninth Circuit opens door for protracted HAMP litigation

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Earlier this month, the Ninth Circuit reversed a lower court's dismissal of two consolidated class action complaints, holding that mortgage servicers participating in the Home Affordable Modification Program (HAMP) are contractually required to offer borrowers permanent loan modifications if they comply with standardized trial period plans. *Corvello v. Wells Fargo Bank, NA* and *Lucia v. Wells Fargo Bank, NA*.



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As background, loan servicers provide so-called trial period plans, or TPPs, to borrowers who appear eligible to participate in HAMP based on the financial information they supply, often informally and over the telephone. TPPs require borrowers to submit documentation, so servicers can verify the accuracy of the financial information they supplied, and also require borrowers to make trial payments in the meantime, which are typically less than the mortgage payments borrowers would otherwise be obligated to make under their promissory notes.



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The servicers are then required to report to borrowers the results and consider borrowers for alternatives if they are not HAMP eligible. The applicable TPP in *Corvello/Lucia* stated that “[i]f I am in compliance with this [TPP] and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a Loan Modification Agreement”

In *Corvello*, the borrower alleged to have signed and returned the TPP and complied with its terms. Yet, the borrower alleged that his lender never offered him a permanent modification, nor notified him that he did not qualify for one. The allegations in *Lucia* were the same, with the exception that the lender's TPP was supposedly verbal. In dismissing these two class action complaints, the Northern District of California held that the allegations could not support a contract or an enforceable promise to modify the plaintiffs' loans permanently. The District Court focused on other terms of the TPP, which stated that the loan could not be modified “unless and until” the lender sends the borrowers a “fully executed copy of a Modification Agreement.”

Aligning itself with the Seventh Circuit's decision in *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012), a unanimous three-judge panel of the Ninth Circuit reversed, because a contrary holding would leave the loan servicer with “unfettered discretion.” Thus, according to the Ninth Circuit, once the borrower submits the required documentation and makes the trial payments, the TPP imposes a contractual obligation upon the loan servicer to either offer a

permanent modification or promptly notify the borrower, in writing, that he or she does not qualify. Significantly, this contractual obligation arises regardless of whether the TPP is verbal or written.

The panel further observed that permitting the loan servicer to retain trial payments without fulfilling any obligations under the TPP in return would work an injustice. But the opinion did not address how retention of trial payments would be unjust when the borrowers received the benefit of foreclosure forbearance in exchange for them, and when the trial payments (at least for the Lucias) were less than what the borrowers were otherwise obligated to pay under their promissory notes. Nor did the opinion address how the TPPs were supported by a valid consideration when the borrowers had a preexisting contractual duty to make their mortgage payments.

Whether Corvello will ultimately result in the filing of more lawsuits by distressed borrowers is debatable, but it may cause borrowers and their attorneys to believe mistakenly that they can privately enforce through civil actions federal programs designed to promote voluntary loan modifications, such as HAMP. And, it will certainly result in protracted litigation for some lawsuits, because Corvello provides borrowers another liability theory that lenders will have difficulty dismissing at the early pleading stage before costly and time-consuming discovery and summary judgment motion practice become necessary.

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