

FOURTH'S A CHARM: ANOTHER NAIL IN THE HAMP LITIGATION COFFIN, AND OTHER LESSONS

If you're counting (we are), [*Spaulding v. Wells Fargo*](#) marks the fourth Circuit-level HAMP decision. Fittingly, it comes from the Fourth Circuit. The borrower's claims for breach of contract, fraud, negligence, and unfair and deceptive practices were all dismissed on the pleadings. The borrower in *Spaulding* never received a Trial Period Plan ("TPP"), so the major headline from the opinion is that the court held, absent a TPP, borrowers cannot state claims for alleged violation of HAMP guidelines.

Let's briefly set the table. In [*Wigod v. Wells Fargo*](#), the Seventh Circuit reversed the district court, concluding that a borrower stated claims for breach of contract for failure to provide a permanent HAMP modification. The decision was based largely on the court's interpretation of the TPP, and also held that the breach of the TPP could generate plausible promissory estoppel and consumer fraud claims. In [*Miller v. Chase Home Finance, LLC*](#), the Eleventh Circuit upheld the trial court's complete dismissal of similar claims on the grounds that the borrower, whose pleadings were far from sophisticated, lacked standing to pursue HAMP-based claims. In [*Pennington v. HSBC Bank*](#), the Fifth Circuit upheld dismissal where the servicer never signed the TPP, and where the borrower's own allegations pled him out of HAMP eligibility. Click [here](#) for a more complete analysis of the *Pennington* decision.

Several comments on *Spaulding*:

First, with courts almost universally dismissing claims that a borrower is entitled to a HAMP modification, borrowers have turned to arguing that their servicer failed to "process" their HAMP application; whether they qualified or not, then, plaintiffs argue they were still harmed by the process due to the delays. The Fourth Circuit has now provided some ammunition to argue against such claims, noting that the servicer "did in fact process the application" as shown by letters to the borrower requesting additional financial documentation. Most HAMP cases have a long paper trail of correspondence between servicer and borrower that buttress this argument, at least for summary judgment purposes.

Second, the Fourth Circuit has now rejected the theory that general "bungling" of a HAMP modification process, e.g., requesting documents

multiple times, or making mistakes in processing the application, are somehow actionable under a negligence theory. The general rule of law is that mortgage servicers have contractual relationship with borrowers, not fiduciary ones, and thus they owe no duty of care, absent special circumstances. In Maryland, where *Spaulding* arose, the case law suggested that a negligence claim might succeed only if (a) the servicer commits to offering a particular loan, (b) the borrower pays consideration to hold open that offer, then (c) the servicer reneges. That is one of the lower “special circumstances” thresholds we have seen in state case law. The *Spaulding* borrower wanted to analogize that servicers committed to making HAMP modifications but failed to do so. The Fourth Circuit rejected the borrower’s filing of an application as “consideration” – a split from *Wigod* – and otherwise distinguished the comparison.

Third, while servicers will likely cite *Wigod* and any number of lower court opinions for the proposition that claims based on alleged failures to comply with HAMP to state a claim even absent a TPP, that is far from clear. *Spaulding* is much more direct, upholding the trial court’s ruling that “absent a [TPP], which creates privity of contract, a suit that seeks the general enforcement of the HAMP guidelines must fail.”

Fourth, this latest circuit opinion isolates *Wigod* as the only circuit-level decision to favor borrowers. But the cases are substantively different. *Miller* holds no TPP claims are permissible because HAMP does not allow a private right of action, with perhaps some exceptions for state law claims, but the borrower waived them. *Wigod* held a signed TPP granted based on verified income creates a contract for a permanent modification if the borrower fulfills the conditions of the TPP. *Pennington* holds no TPP is formed until the servicer signs it. *Spaulding* holds no HAMP claims survive dismissal absent a TPP (and all four of the cases reaffirm this principle to one extent or another).

Still unanswered at the circuit level, though, is whether a TPP based on stated income would create a contract, and whether UDAP-type claims, with or without a TPP, based on alleged violations of HAMP guidelines can survive dismissal. *Wigod* and *Spaulding* imply the answer to both questions is no, but neither dealt with the question directly. We expect a future circuit case will.