

SEVENTH CIRCUIT IGNORES FEDERAL COURTS AND GRANTS BORROWERS PRIVATE RIGHT OF ACTION UNDER HAMP

In an opinion that will likely embolden borrowers to file frivolous counterclaims solely to delay foreclosure, the Seventh Circuit Court of Appeals has [held](#) that borrowers have a private right of action to bring certain state-law claims based on a mortgage servicer's refusal to modify a loan pursuant to the federal Home Affordable Mortgage Program (“HAMP”). In *Wigod v. Wells Fargo Bank, N.A.* No. 11-1423 (7th Cir. Mar. 7, 2012), the Court reversed the [dismissal](#) of a putative class action complaint holding that the borrower had sufficiently alleged claims for breach of contract, fraud, and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act based on the mortgage servicer's purported agreement, and subsequent refusal, to modify a home loan under a HAMP Trial Period Plan (TPP) Agreement. In reaching its ruling, the Court also specifically rejected arguments that state-law claims are preempted by HAMP.

The ruling in *Wigod* is premised on the Court’s opinion that the TPP Agreement is not pre-empted by federal law because it constitutes an enforceable contract between the parties apart from HAMP and, therefore, subject to state-law claims for breach of contract, fraud and violations of consumer protection statutes. In reaching this opinion, the Court analyzed, even though the issue was not raised before the lower court, whether the TPP promised a permanent loan modification. It concluded the TPP promises that a permanent modification will be offered if the borrower (1) makes the trial payments and otherwise is "in compliance" with the TPP, and (2) the borrower's "representations . . . continued to be true in all material respects." The Seventh Circuit also went out of its way to find a borrower's promises to submit documentation, undergo credit counseling, and to change the terms of her escrow account were adequate consideration to support a breach of contract claim. .

The Court itself, however, acknowledges that this reasoning has been rejected by a majority of federal district courts addressing this issue. In *Vida v. OneWest Bank, F.S.B.*, No. 10-987-AC, (D. Or. Dec. 13, 2010), for example, the District of Oregon, citing opinions from numerous federal district courts, [highlighted](#) the fundamental flaw in the Seventh Circuit’s reasoning explaining that “the alleged offer to modify came about and was made wholly under the rubric of HAMP” and, therefore, the borrower failed

“to state a cause of action independent of HAMP, for which there is no private right of action.” Regardless of the spilt among the district courts, the *Wigod* ruling is significant because it is the first federal appellate court to directly address this issue and will undoubtedly give borrowers and their counsel new ammunition in attempting to delay the foreclosure process.

The *Wigod* opinion was authored Judge David Hamilton, an Obama nominee, and joined by Judge Kenneth Ripple, a Reagan nominee, and Judge Sue E. Myerscough of the Central District of Illinois, sitting by designation, also an Obama nominee. Wells Fargo has not yet indicated whether it will seek an en banc review of the ruling.