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Tennessee Court of Appeals Agrees: No Private Right of Action under HAMP

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In our last newsletter, we noted the growing consensus among courts that the Home Affordable Modification Program (HAMP), which is designed to provide homeowners with assistance to avoid foreclosure, does not provide homeowners with a private right of action – meaning that borrowers who were either ineligible or unsuccessful in the modification program cannot sue their servicers and investors for failure to modify the borrowers' loans. In deciding *George Clay III v. First Horizon Home Loan Corporation*, the Tennessee Court of Appeals has joined the ranks of courts coming to this same conclusion.

The plaintiff, George Clay III (Clay) filed a lawsuit against First Horizon Home Loans (First Horizon) in the Chancery Court of Hamilton County, Tennessee, alleging that First Horizon wrongfully foreclosed on his real property. In his lawsuit, Clay alleged that he executed a Deed of Trust in favor of First Horizon on February 9, 2004. As a result of a drop in income, Clay was apparently unable to maintain the payments due on his home loan with First Horizon. Clay alleges that he contacted First Horizon to inquire about how to handle the drop in income and came to an agreement whereby he could make partial mortgage payments. After attempting to make partial payments which were rejected, Clay allegedly called First Horizon and was told that he needed to make a $3,700 payment to reinstate the loan and that a representative would be contacting him regarding payment options. Allegedly never receiving any contact from First Horizon, the next communication Clay received was that his property was ultimately foreclosed on and sold.

Clay further alleged in his lawsuit that First Horizon accepted $866,000,000 from the U.S. Department of the Treasury under the Troubled Asset Relief Program (TARP), and that in consideration for those funds, First Horizon allegedly entered into an agreement with the Treasury Department to participate in programs such as HAMP. First Horizon's agreement to participate in HAMP is governed by a Service Provider Agreement (SPA), and Clay alleged that because First Horizon received federal money it should have properly considered him for a home loan modification pursuant to HAMP prior to the foreclosure. Clay claimed that First Horizon breached the SPA with the Treasury Department, of which he claimed to be a beneficiary, by failing to fairly and accurately evaluate him for qualification under HAMP. Among other claims, Clay also asserted that First Horizon was liable to him for negligent implementation of HAMP and wrongful foreclosure.

As a matter of first impression, the Eastern Section of the Tennessee Court of Appeals found that there is no private right of action for borrowers to sue loan servicers under HAMP. In coming to this conclusion, the Court first looked to the history and creation of HAMP. On October 3, 2008, then-President Bush signed into law the Emergency Economic Stabilization Act of 2008 (EESA). Section 109 of the Act required the Secretary of the Treasury to take certain measures to encourage and facilitate loan modifications. The EESA authorized the creation of the Making Home Affordable Program, which consists of two components: 1) the Home Affordable Refinance Program, and 2) HAMP. As is well known by now, HAMP allows for financial assistance to homeowners who have defaulted on their mortgages or who are in imminent risk of default by reducing monthly payments to sustainable levels. The program works by providing financial incentives to participating mortgage servicers to modify the terms of eligible loans. HAMP guidelines require lenders to consider borrowers for loan modifications and suspend foreclosure activities while a given borrower is being evaluated for a modification.

Turning to federal law, which governs interpretation of the HAMP contract, the Tennessee Court of Appeals recognized that courts throughout the United States that have considered the issue have determined that a private right of action does not exist for borrowers to enforce the terms of the EESA or HAMP. These courts have reasoned that since congressional intent expressly indicates that Freddie Mac serves as compliance officer for HAMP, a private cause of action for borrowers was not permitted. Courts have also found that even though homeowners may benefit indirectly from HAMP's incentives to loan servicers, HAMP was designed to provide authority to the Secretary of the Treasury to restore liquidity and stability to the U.S. financial system. Finally, courts have recognized that providing a private right of action to borrowers against loan servicers would contravene the purpose of HAMP – to encourage servicers to modify loans – because it would likely chill servicer participation.

Based on the foregoing reasoning, the Tennessee Court of Appeals found that borrowers do not have a private right of action to sue loan servicers under the HAMP. Accordingly, the Court of Appeals found that Clay's third-party beneficiary claim for breach of the SPA, negligent implementation of HAMP claim, and wrongful foreclosure claim against First Horizon did not state a claim. This opinion mirrors other courts' findings, and is favorable to lenders and servicers in Tennessee by foreclosing borrowers' ability to sue based on HAMP.