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No Private Right of Action under HAMP: The Growing Consensus

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The Home Affordable Modification Program (HAMP) is designed to help homeowners avoid foreclosure by modifying qualifying loans to a level that is both affordable and sustainable. The program is intended to provide clear and consistent loan modification guidelines for the mortgage industry and to incentivize loan modifications for borrowers, servicers and investors. Qualifying borrowers are initially placed on a trial payment plan period during which they make lowered payments and submit documentation to their mortgage servicer so that the servicer may determine their eligibility for a modification under the program. If the borrower does not qualify for a modification or fails to provide the documentation necessary to make the determination, the trial payment plan ends and the borrower will likely either have to pay the amounts owed on the loan or will face foreclosure.

While HAMP does not mandate that any particular loan be modified (instead providing a framework for determining eligibility), the structure of the program has at least one undesirable side-effect: persuading borrowers who were either ineligible or unsuccessful in the program that their inalienable rights have been violated and that they should sue their servicer and investor for the failure to modify their loan.

Most of these lawsuits are subject to a motion to dismiss for failure to state a claim, because the vast majority of courts around the country have concluded that neither HAMP nor the Emergency Economic Stabilization Act of 2008 (EESA), under which the HAMP program was crafted, provide borrowers with a private right of action. According to a recent review, in 75 cases courts have found that there is no private right of action under HAMP. There have been two cases in which the opposite result was reached, both in the Southern District Court of California. A third trial court decision finding a private right of action is on appeal in Tennessee. These figures are not intended to be comprehensive, but to provide a broad view of the current status of this issue, and there may be other recently decided cases that were not included in the review.

The logic supporting the conclusion that there is no private right of action is clear. While Congress included provisions in the EESA providing the Secretary of the Treasury and the Comptroller General with power to oversee HAMP, there is no mention of a private right of action for borrowers. In a recent unpublished decision, the 11th Circuit Court of Appeals discussed the issue. "[N]othing express or implied in HAMP gives borrowers a private right of action." Nelson v. Bank of America, et al., No. 11-1091 (2011). "The intent of Congress remains the ultimate issue […] and unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." Id. (quoting Thompson v. Thompson, 484 U.S. 174, 179, 108 S.Ct. 513, 516 (1988). This is a straightforward application of the ancient legal doctrine: expressio unius est exclusio alterius.

In the two cases finding a private right of action, the courts focused on the Servicer Participation Agreement (SPA), a contract signed by each mortgage servicer formalizing their participation in the HAMP program. In both decisions, courts in the Southern District Court of California found that a borrower could be a third party beneficiary of the SPA entitled to sue to enforce its provisions. The court in one of the cases concluded that the SPA directs the servicer to modify loans under certain circumstances and identifies criteria to determine which loans are eligible for modification, "[u]pon a fair reading of the Agreement in its entirety and in the context of its enabling legislation, it is difficult to discern any substantial purpose other than to provide loan modification

services to eligible borrowers." Marques v. Wells Fargo Home Mortgage, Inc., 2010 WL 3212131 (S.D. Cal. Aug. 12, 2010).

This conclusion has hardly carried the day in California, however, as there have been 18 decisions in other California districts finding no private right of action. In one of these cases, the District Court for the Central District of California expressly held that a borrower is not a third party beneficiary of the SPA. See Warner v. Wells Fargo Bank, N.A., 2011 WL 2470923, at *3 (C.D. Cal. June 21, 2011). The Warner Court analogized the third party beneficiary argument under HAMP to a similar argument denied by the United States Supreme Court involving an attempt by a consumer to sue under a pharmaceutical pricing agreement to which they were not a named party. In that case, Astra USA, Inc. v. Santa Clara County, — S. Ct. —, 2011 WL 1119021 (March 29, 2011), the Supreme Court concluded that permitting a consumer to sue as a third party beneficiary was utterly incompatible with a statutory scheme that did not provide for a private right of action. Since the third party beneficiary argument, both in Astra USA, Inc. and under HAMP, would give individuals a means to sue in violation of the apparent intent of Congress in enacting the statutory scheme, the Warner court held that the third party beneficiary argument should fail and the intent of Congress should prevail.

See below for a representative sample of recent HAMP decisions:

Recent HAMP decisions

Arizona:

- Wright v. Chase Home Fin. LLC, 2011 WL 2173906, at *2 (D. Ariz. June 2, 2011);

California (finding a private right of action):

- Marques v. Wells Fargo Home Mortgage Inc., 2010 WL 3212131, at *7 (S.D. Cal. Aug. 12, 2010).

California (no private right of action)

- Warner v. Wells Fargo Bank, N.A., 2011 WL 2470923, at *3 (C.D. Cal. June 21, 2011);

Florida

- Ozoria v. Deutsche Bank Trust Co. Americas, 2011 WL 1303270, at *2 (S.D. Fla. Mar. 31, 2011);

Georgia

- Warren v. Bank of Am., 2011 WL 2116407, at *3 (S.D. Ga. May 24, 2011);

Maryland

- In re Lisier, 2010 WL 4941475, at *2 (Bankr. D. Md. Nov. 24, 2010);

Massachusetts

- Kozaryn v. Ocwen Loan Servicing, LLC, 2011 WL 1882370, at *2 (D. Mass. May 17, 2011);

Michigan

- Houston v. U.S. Bank Home Mortg. Wisconsin Servicing, 2011 WL 1641898, at *6 (E.D. Mich. May 2, 2011);

Minnesota

- McInroy v. BAC Home Loan Servicing, LP, 2011 WL 1770947, at *3 (D. Minn. May 9, 2011);

Missouri

- Dugger v. Bank of Am./Countrywide Loans, 2010 WL 3258383, at *2 (E.D. Mo. Aug. 16, 2010);

Nevada

- Corn v. Recontrust Co., N.A., 2011 WL 1135943, at *6 (D. Nev. Mar. 24, 2011);

New York

- Stern-Obstfeld v. Bank of Am., 915 N.Y.S.2d 456, 460 (N.Y. Sup. 2011);

Oregon

- Vida v. OneWest Bank, F.S.B., 2010 WL 5148473, at *5 (D. Or. Dec. 13, 2010);

Rhode Island

- Nash v. GMAC Mortg., LLC, 2011 WL 2470645, at *6 (D. R.I. May 18, 2011);

South Carolina

- Steffens v. American Home Mortg. Servicing, Inc., 2011 WL 901179, at *3 (D. S.C. Mar. 15, 2011);

Texas

- Akintunji v. Chase Home Fin., LLC, 2011 WL 2470709, at *4 (S.D. Tex. June 20, 2011);

Utah

- Andersen v. Homecomings Fin., LLC, 2011 WL 2470509, at *8 (D. Utah June 20, 2011).