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Residential Mortgage Litigation Risk Update: CFPB Servicing Rules, HAMP Litigation and Lender-Placed Insurance

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Tweeting about this conference?

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CFPB's Servicing Rules

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CFPB's Servicing Rules

- Still no right to a modification
 - *Cataldi v. N.Y. Community Bank*, 2014 WL 359954 (N.D.Ga. Feb. 3, 2014)
 - New version of Regulation X at 12 C.F.R. § 1024.41 still does not impose a duty on servicers to provide a borrower with a specific loss mitigation option
 - Thus, a borrower offered a mod she does not like does not have a claim



CFPB's Servicing Rules

- Anti-steering rules

- *Fowler v. U.S. Bank*, 2 F.Supp.3d 965 (S.D. Tex. Mar. 4, 2014)
 - 15 U.S.C. § 1639b's prohibition on incentive steering in loan origination do not apply to a loan that was originated in 2006
 - There is no authority to suggest that this regulation was intended to apply retroactively



CFPB's Servicing Rules

- Notices of Errors and Requests for Information
 - *Christenson v. Citimortgage, Inc.*, 2014 WL 4637119 (D. Colo. Sept. 16, 2014)
 - New 12 C.F.R. § 1024.35 requests can apply to foreclosure-related activities



CFPB's Servicing Rules

- Notices of Errors and Requests for Information
 - *Wilson v. Bank of America*, 2014 WL 4744555 (E.D.Pa. Sept. 14, 2014)
 - Plaintiff stated a 12 C.F.R. § 1024.35 claim when she produced two letters from her servicer giving contradictory information as to why she was denied a loan modification
 - Plaintiff stated a 12 C.F.R. 1024.36 claim by showing servicer did not not conduct a reasonable search for requested information



HAMP Litigation

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HAMP Litigation

- **Origins**

- *Miller v. Chase Home Financial*, 677 F.3d 1113 (11th Cir. 2012): no private right of action under HAMP, no breach of duty, no promissory estoppel
- *Wigod v. Wells Fargo Bank*, 673 F.3d 547 (7th Cir. 2012): refusal to offer mod post compliance with TPP could state claim for breach of contract, promissory estoppel



HAMP Litigation

- Theory of Wigod claim
 - Based on HAMP
 - Step one: borrower supplies information
 - Step two: potentially eligible borrowers are put on TPP
 - Step three: servicer either (a) informs borrower they do not qualify for HAMP, or (B) offers them a modification
 - State causes of action: breach of contract, fraud, UDAP, etc.



HAMP Litigation

- Post-Wigod

- *Spaulding v. Wells Fargo Bank*, 714 F.3d 769 (4th Cir. 2013)

- No breach of contract: “Wells Fargo's agreement with the U.S. Treasury was an agreement between the bank and the Treasury, an agreement to which Appellants were not a party and which they have no authority to enforce. Nothing about that agreement could be considered to extend legal rights to Appellants.”
- No breach of duty: “the unilateral act of submitting [an] application” does not “gives rise to a duty on the part of the recipient to act upon it without delay.”



HAMP Litigation

- Post-Wigod

- *Young v. Wells Fargo Bank*, 717 F.3d 224 (1st Cir. 2013)
 - Breach of contract split: ambiguity in contract allows breach of contract claim to proceed past pleadings stage, but offer of mod with payments greater than TPP does not give rise to breach of contract
 - No emotional distress: “anxiety, loss of sleep and strained family relationships” are not sufficient



HAMP Litigation

- Post-Wigod

- *Pennington v. HSBC*, 493 Fed.Appx. 548, (5th Cir. 2012)
 - HAMP claims failed
 - No breach of contract: “The Penningtons' claim for breach of the TPP fails for an even more basic reason: Their TPP did not form a contract, because the bank never expressed an intent to be bound.”
 - No fraud: “The bank would not expect that a borrower in the program would have enough cash on hand to begin spending it on home renovations. Nor do the TPP payments constitute detrimental reliance because they were just applied to the loan.”



HAMP Litigation

- Post-Wigod

- *Freitas v. WFHM*, 703 F.3d 436 (8th Cir. 2013)
 - HAMP fraud claims failed
 - “[T]he complaint states that appellants were never able ‘to receive a consistent and candid answer from [Wells Fargo's] representatives regarding a loan modification.’ Missouri law requires that a promise be ‘definite and delineated as an offer under contract law.’”



HAMP Litigation

- Post-Wigod

- *Topchian v. JPMorgan Chase Bank*, 760 F.3d 843 (8th Cir. 2014)
 - Breach of contract claim survived pleading stage
 - No false representation for fraud
 - No unjust enrichment: “Topchian has failed to allege that he provided a benefit to Chase to which Chase was not entitled. ... The only benefit that Topchian conferred on Chase that Topchian has alleged is the value of the mortgage payments under the TPP ... These payments were conferred in exchange for his property, which he retained for the months that he made the payments.”



Lender-Placed Insurance

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Lender-Placed Insurance

- Theory of claim
 - Commissions paid to LPI brokers
 - Fannie/Freddie Guidelines
 - Agency positions



Lender-Placed Insurance

- **Class Certification Denied:**

- *Kunzelmann v. Wells Fargo Bank*, 2013 WL 139913
 - Unjust enrichment and implied covenant claims are inherently individual, turning on facts such as “the state of mind of each borrower, including awareness, expectations, and conduct.”
 - The laws governing such causes of action also varies from State to State



Lender-Placed Insurance

- Defense on the merits:
 - *Feaz v. Wells Fargo*, 745 F.3d 1098 (11th Cir. 2014)
 - Lender charging higher costs/commissions is not a kickback and does not violate the implied covenant or breach any fiduciary duty
 - “The allegations that Wells Fargo violated its fiduciary duty and committed fraud by charging Feaz a commission, a ‘kickback,’ or ‘other compensation’—any amount above the net cost to Wells Fargo of obtaining the [force-placed] lender-placed flood insurance ... fails ... because Wells Fargo disclosed that Feaz would incur higher costs if it [force-placed] lender-placed the insurance for her. ... simply calling a commission a kickback doesn't make it one.”



Lender-Placed Insurance

- Settlement:

- *Saccoccio v. JP Morgan Chase*, Case 1:13-cv-21107
 - Claims-made, partial credit or refund
 - Approved, objections up on appeal



Thank you

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