

NEW JERSEY APPELLATE DIVISION REAFFIRMS THAT HAMP DOES NOT PRECLUDE STATUTORY CONSUMER FRAUD AND CONTRACT CLAIMS BY BORROWERS WHO ARE DENIED LOAN MODS AFTER SUCCESSFULLY COMPLETING TRIAL PERIODS

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Last month, a panel of the New Jersey Appellate Division ruled, for the first time, in Arias v. Elite Mortgage Group, Inc., that causes of action for breach of contract and for violations of the New Jersey Consumer Fraud Act (“CFA”) may exist for New Jersey borrowers who have been denied loan mods after successfully completing loan mod trial period agreements (“loan mod TPAs”). Following Arias’s lead, another panel of the Appellate Division recently agreed in Miller v. Bank of America Home Loan Servicing, L.P., Docket No. A-0169-13T2, slip op. (Mar. 5, 2015) and, in doing so, recognized that HAMP “does not preempt pursuit of valid state law claims arising between the parties to a” loan mod TPA. Although the Miller court, like the Arias court, ultimately dismissed the borrowers’ claims because they could not prove that they complied with the loan mod TPA, now two panels of the New Jersey Appellate Division have opened the door for breach of contract claims related to loan mod TPAs. Like Arias, the Miller decision has been approved for publication.

In Miller, the borrowers applied for consideration of a loan mod with Countrywide, the former loan servicer. Id. at 3. The loan mod TPA advised that if the borrowers were “in compliance with this [TPP] and my representations in Section 1 continue to be true in all material respects, then the Lender will provide ... a Home Affordable Modification Agreement[.]” Id. at 5. The loan mod TPA also advised the borrowers that the lender was not “obligated or bound to make any modification ... if I fail to meet any one of the requirements under this [TPP].” Id. at 6. The loan mod TPA also required the borrowers to verify their income, prepare an affidavit explaining why they defaulted on their loan, and file documentation to determine their eligibility for a loan mod agreement. Id. During the trial period, the borrowers were required to remit three payments on May 1, June 1 and July 1, 2009. Id. at 6. The borrowers maintained that they timely made the first two payments to Countrywide, but sent a third payment to BAC Home Loan Servicing, L.P. (“BAC”) after it acquired Countrywide. Id. at 7. BAC’s records showed that the borrowers’ three payments were received on May 14, June 18, and August 18, 2009. Id. Ultimately, the borrowers were denied for a permanent modification because they failed to make timely payments as required by the loan mod TPA. Id.

Following discovery, BAC moved for summary judgment. The trial court examined, specifically, “whether there is a private cause of action under HAMP permitting plaintiff[s] to allege breach of contract, violation of the CFA, promissory estoppel, and violation of the covenant of good faith and fair dealing.” Id. at 8. The trial court answered that question in the negative, and dismissed the claims holding there was “no evidence showing how plaintiffs’ assertions were ‘sufficiently independent of HAMP as to be cognizable.’” Id.

Notably, after the trial court in Miller granted summary judgment, the Appellate Division issued its decision in Arias. In the wake of Arias, the Miller court rejected Stolba v. Wells Fargo & Co., 2011 WL 3444078 (D.N.J. Dec. 7, 2011), a case from New Jersey federal court that held HAMP precluded state contract claims, and agreed with Arias. In doing so, the Miller court concluded that “HAMP’s preclusion of a private right of action does not preempt pursuit of valid state law claims arising between the parties to a TPP[.]” id. at 12, and explained:

Although a borrower may not sue when a lender denies a loan modification

because the borrower failed to meet HAMP's guidelines, which include the lender's evaluation of the borrower's financial stability, we hold borrowers should not be denied the opportunity to assert claims alleging a lender failed to comply with its stated obligations under the TPP. Consequently, when the issuance of a loan modification agreement is explicitly made contingent upon the evaluation and satisfaction of all prescribed conditions precedent within a TPP, including the evaluation and timely satisfaction of all financial disclosures and obligations, the declination of a lender to present a loan modification agreement may be actionable.

[Id. (citing Arias, slip op. at 4, 9 (citing Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 562 (7th Cir. 2012); Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 234 (1st Cir. 2013))].

In dismissing the borrowers' claims, the Miller court found that the borrowers' "unsupported assertions[,] "conclusory allegations[,] and "self-serving assertions, unsupported by documentary proof" did not create a material dispute of fact. Id. at 13-18. The Miller court held that the borrowers' first two payments were several weeks late and the third was a month and a half late. In addition, the Miller court noted that BAC's evidence that the borrowers failed to submit timely payments pursuant to the loan mod TPA was refuted by only oral statements of the borrowers, and the borrowers failed to produce cancelled checks or certified mail receipts that reflected timely payments. Accordingly, the Miller court concluded that summary judgment was properly granted in favor of BAC.

What does Miller, and Arias, mean for servicers? First, the decisions make it extremely difficult for lenders and servicers to prevail on pre-answer motions to dismiss on statutory consumer fraud and contract claims in New Jersey state court. In that regard, the ultimate creation of state law causes of action related to loan mods by New Jersey appellate courts, irrespective of HAMP and persuasive and insightful authority from the New Jersey federal court, may now provide yet another stall tactic to borrowers facing foreclosure. That said, the silver lining is that Miller (and Arias) make it clear that summary judgment is still attainable where it can be shown that the borrowers failed to comply with the loan mod TPA such as by failing to submit timely TPA payments.

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