



New Jersey Appellate Court Rules That HAMP Does Not Bar State Breach of Contract Claims

By: Joseph N. Froehlich

In *Miller v. Bank of America Home Loan Servicing, L.P.*, A-0169-13T2, the New Jersey Appellate Division recently held that while HAMP precludes a private right of action, it “does not preempt pursuit of valid state law claims arising between the parties to a [Trial Period Plan]”. While the *Miller* Court eventually dismissed borrowers’ claims because the borrowers could not prove they complied with the Trial Period Plan (TPP), the New Jersey Appellate Division has opened the door for breach of contract claims arising from TPPs, making such claims very difficult to resolve on a motion to dismiss.

In *Miller*, the borrowers were denied for a permanent modification after they were offered a TPP. Under the TPP, the borrowers were to make three monthly payments and maintain the accuracy of the financial representations made in their application for a modification. The borrowers’ first two payments were several weeks late and the third was a month and a half late. While borrowers continued to make monthly payments of the TPP amount for another two years, the lender eventually denied the request for the permanent modification because the first three payments were not made timely. Borrowers sued the lender for breach of contract, violation of the New Jersey Consumer Fraud Act, promissory estoppel and breach of the covenant of good faith and fair dealing. The trial court dismissed borrowers’ claims, holding that there was no private right of action under HAMP.

The New Jersey Appellate Division took a different view: It concluded that “HAMP’s preclusion of private causes of action would not prevent a borrower from pursuing state law claims arising from the breach of an underlying temporal contractual arrangement pending the lender’s review under the HAMP guidelines.” The *Miller* Court rejected an earlier District of New Jersey case that found HAMP precluded state contract claims (*Stolba v. Wells Fargo & Co.*, No. 10-cv-6014(WJM)(MF), 2011 U.S. Dist. LEXIS 87355 (D.N.J. Aug. 8, 2011)), and instead adopted the Appellate Division’s earlier opinion in *Arias v. Elite Mortg. Grp., Inc.*, –N.J.Super. – (2015). Specifically, the Appellate Division stated that a TPP was “‘a unilateral offer,’ pursuant to which the bank promised to give plaintiffs a loan modification, if and only if plaintiffs complied fully and timely with their obligations under the TPP.” The Court did note that while a borrower may not sue a lender that denies a modification because the borrower failed to meet HAMP’s



guidelines, it held that “borrowers should not be denied the opportunity to assert claims alleging a lender failed to comply with its stated obligations under the TPP.”

In analyzing this particular case, however, the Court held that summary judgment in favor of the lender was proper because it was an undisputed fact that the borrowers’ failed to comply with the terms of the TPP because their payments were late. The Court noted that the lender’s evidence that the borrowers were late on their TPP payments was solely refuted by oral statements of the borrowers. The borrowers failed to produce cancelled checks or certified mail receipts that reflected timely payment, which the Court found fatal to their “self-serving” and “unsupported” assertions of compliance with the terms of the TPP. Accordingly, the Court found that summary judgment was properly granted in favor of the lender.

By recognizing a state contract claim for breach of a TPP, *Miller* will make it extremely difficult for lenders to win a motion to dismiss for any claim where the borrower was subject to a TPP. However, where the borrower was never granted a TPP and was denied for a modification, a motion to dismiss will still be viable. Likewise, *Miller* also makes it clear that summary judgment is still attainable where it can be shown that the borrowers did not timely make the TPP payments or otherwise comply with the terms of the TPP.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the author:

Joseph N. Froehlich | 212-812-8345 | jfroehlich@lockelord.com