

HAMP LITIGATION IN NEW YORK

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TWO MAJOR PRONGS

- CLAIMS SEEKING TO ENFORCE HAMP OR BASED ON HAMP MODIFICATION AGREEMENTS
 - TPP AGREEMENTS
 - PERMANENT MODIFICATIONS
- HAMP VIOLATIONS/ISSUES IN SETTLEMENT CONFERENCE ADVOCACY AS INDICIA OF FAILURE TO NEGOTIATE IN GOOD FAITH

Action Stayed for HAMP Mod Consideration

- ***Aames Funding v. Houston***, 85 AD3d 1070 (2d Dep't 2011): Reversed denial of motion to stay foreclosure sale pending determination of homeowner's pending HAMP modification application. Court applied Version 2.0 of MHA Handbook prohibition on referrals to foreclosure or scheduling of sales "unless and until" borrower is evaluated for HAMP and is determined ineligible, and held that trial court should have stayed sale.

New York Claims Based on Loan Modification Applications

- ***Harte v. Ocwen Financial Corp.***, 2014 WL 4677120 (E.D.N.Y. 2014)
Finding failure to state breach of contract and implied covenant of good faith and fair dealing claims against Ocwen based on mortgage or modification applications, but plaintiff adequately alleged promissory estoppel claim based on directive from Ocwen to cease making mortgage payments and promise not to initiate foreclosure until loan modification application was decided. Court also rejected negligent misrepresentation claims, but GBL 349 claims survived motion to dismiss.
Not specifically a HAMP case

**New York Claims Based on Loan Modification
Applications /Direct Claims Under HAMP**

- ***Stern-Obstfeld v. Bank of America***, 30 Misc. 3d 901 (N.Y. Cty. 2011)
Decision in coop foreclosure granting motion to stay sale pending service of required Notice of Sale pursuant to UCC Article 9, Section 61, where bank's initial Notice of Sale was defective, but denying motion to compel determination on HAMP loan modification application, citing decisions holding that HAMP provides no private right of action and absence of authority authorizing court to order a loan modification.

**New York Claims Based on Loan Modification
Applications/Direct Claims Under HAMP (cont.)**

- ***Wells Fargo Bank v. Small*** (Queens Cty. 2010) (Index No. 8887/08)(unpublished decision)
Servicer's breach of SPA by failing to consider homeowner's HAMP modification application did not supply meritorious defense to foreclosure supporting vacatur of summary judgment granted to plaintiff, reciting without analysis that homeowner was not intended beneficiary of SPA

Affirmative Claims Under HAMP in NY: Permanent Modifications

- Several Complaints Brought in Federal and State Court.
Claims Asserted Include:
- Breach of Contract/Breach of Implied Covenant of Good Faith and Fair Dealing
- Fraud/Misrepresentation
- Promissory Estoppel/Equitable Estoppel
- RESPA (Real Estate Settlement Procedures Act) (set claim up with QWR)
- FDCPA (Fair Debt Collection Practices Act)
- FCRA (Fair Credit Reporting Act)
- Deceptive Practices Act (NY GBL 349)
- ECOA (Equal Credit Opportunity Act) (available if not in default when applying for modification)

Contract Claims

- Is a Loan Modification Supported by Consideration?

N.Y. General Obligations Law § 5-1103. Written agreement for modification or discharge:

An agreement, promise or undertaking to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, ***shall not be invalid because of the absence of consideration, provided that the agreement, promise or undertaking changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest, shall be in writing and signed*** by the party against whom it is sought to enforce the change, modification or discharge, or by his agent.

Breached Permanent Modification Cases in New York

- Have mostly settled, and have not generated reported decisions
- Sample Complaints:
 - ***Areizaga v. Homeward Residential*** (E.D.N.Y. Index. No. 1:13-CV-00188)
 - ***Simpson v. American Home Mortgage Servicing, Inc.*** (E.D.N.Y. Index No. CV 11-1284)

New York Claims Based on HAMP Trial Payment Plans

- ***Davis v. Citibank***, 116 AD3d 819 (2d Dep't 2014)
Affirming dismissal of action brought by homeowner for breach of HAMP TPP asserting breach of contract, fraud, promissory estoppel and GBL 349. Although claims were not barred by judicial estoppel for failure to schedule modified mortgage in prior bankruptcy action, as trial court ruled, court rejected outright all of plaintiff's claims because HAMP does not support third party beneficiary claims for homeowners, even though plaintiff did not assert third party beneficiary theory, holding that plaintiff's claims were "intertwined" with HAMP.

New York Claims Based on HAMP Trial Payment Plans (cont.)

- ***Gahfi v. Wells Fargo Bank, N.A.***, 2013 WL 6052420 (Kings Cty. 2013)
 Failure to convert TPP claims dismissed, relying on *Meyers*: HAMP TPP not a binding agreement; *Meyers* precluded plaintiff's claims for breach of contract, fraudulent/negligent misrepresentation, fraudulent inducement, Deceptive Practices Act violations (GBL 349), quiet title and breach of fiduciary duty.
 Plaintiffs could not state cognizable damages from failure to convert TPP to permanent modification because accrual of interest under the mortgage is not recoverable damages. Court viewed case as initiated because plaintiffs were displeased with outcome of prior foreclosure action, and as attempt to re-litigate good faith motion not adjudicated because of Wells Fargo's failure to appear for hearing).

New York Claims Based on HAMP Trial Payment Plans (cont.)

- ***Seller v. Citimortgage, Inc.***, 2013 WL 6162982 (NY Cty. 2013), *aff'd* 118 AD3d 511 (1st Dep't 2014)
 Breach of contract claim based on TPP dismissed where not signed by defendant and where it contained language acknowledging that it was not a loan modification until all conditions were met.
 Covenant of Good Faith and Fair Dealing Claim failed for lack of enforceable contract. Promissory estoppel claim failed for lack of a clear and unambiguous promise, and Citi's obligations here were conditioned on full execution of the document. GBL 349 claim not preempted by federal law, to extent based on misrepresentations, but failed because of ostensible promise to withhold negative credit reporting information was not alleged in complaint or supported by papers in opposition to motion to dismiss.

New York Claims Based on HAMP Trial Payment Plans (cont.): GBL 349 Claims

- ***Seller v. Citimortgage, Inc.***, 118 AD 3d 511 (1st Dep't 2014)
Allegations that defendant told plaintiffs that to qualify for loan mod they had to be delinquent lacked no broader impact on consumers at large for GBL 349 Claims. Also, no showing that telling plaintiffs they had to be in default for loan mod was false; and no showing that defendant reported credit delinquency contrary to representation that it would block negative credit reporting. Allegations of GBL 349 violations based on processing of HAMP mod application were waived at oral argument below by arguing that basis for claim was alleged misrepresentations about defaulting on loan and negative credit reporting. *In any event, GBL 349 claim based on alleged violations of HAMP rules and directives "would constitute an impermissible 'end run' around the absence of a private right of action under HAMP."*

New York Claims Based on HAMP Trial Payment Plans (cont.)

- ***Aurora Loan Serv. LLC v. Serrano***, 40 Misc. 3d 1240(A) (Queens Cty. 2013)
Denying motion to enforce TPP, to dismiss or to schedule 3408(f) hearing: TPP was not signed by Plaintiff and, relying on *Meyers*, imposing terms of TPP would violate plaintiff's due process and constitutional contract clause rights.

New York Claims Based on HAMP Trial Payment Plans (cont.)

- ***Pandit v. Saxon Mortgage Services, Inc.***, 2012 WL 4174888 (E.D.N.Y. 2012)
 No intended beneficiary theory under SPA or contract claims based on failure to convert TPP, which was merely a stage of modification process--not enforceable contractual right. Promissory estoppel failed for lack of injury based on alleged reliance on promise to modify, with leave to re-plead. GBL 349 claim survived motion to dismiss--plaintiff adequately alleged consumer oriented practice and materially misleading practice by alleging that defendant routinely asks homeowners to resubmit documents on pretextual grounds, misleads homeowners, violates TPP duties, and delays decisions on permanent modifications, lulling plaintiff into not pursuing other home-saving solutions. Equal Credit Opportunity Act claim dismissed--denial of HAMP modification did not trigger ECOA's adverse action explanation requirement.

New York Claims Based on HAMP Trial Payment Plans (cont.)

- ***JP Morgan Chase Bank, N.A. v. Ilardo***, 36 Misc. 3d 359 (Suffolk Cty. 2012) (Whelan, J.)
 Denying application for order directing plaintiff to permanently modify mortgage following borrower's compliance with TPP and for interest tolling: HAMP vests servicers with discretion over modifications and TPP language stating that any permanent modification was subject to servicer's subsequent approval precluded contract claim based on TPP. Rejected relief premised on theories of waiver and promissory and equitable estoppel, and declined relief based on principles of equity, bad faith and unconscionability, holding that "a determination not to modify a mortgage loan by a foreclosing bank that is under no legal obligation to modify such a loan is not unconscionable conduct and does not constitute bad faith."

New York Claims Based on HAMP Trial Payment Plans (cont.)

- ***Picini v. Chase Home Finance LLC***, 854 F.Supp.2d 266 (E.D.N.Y. 2012)
- Dismissing in part complaint based on failure to convert HAMP TPP to permanent modification agreement, dismissing third party beneficiary contract claim based on SPA and unjust enrichment claim; upholding TPP contract claims, promissory estoppel claim and negligent misrepresentation claim; and upholding fraud claim in part and dismissing in part with leave to re-plead.
- Sample TPP complaint: ***Lyo v. Bank of America*** (Richmond Cty. Index No. 150222/2013) (motion to dismiss pending)

NON-HAMP CLAIMS RESULTING FROM MODIFICATION SCENARIOS

- ***Malone v. Wells Fargo Bank, N.A.*** (E.D.N.Y. 1:14 –CV-05792): Sample Complaint
- Homeowner, not in default, induced to apply for HAMP mod, given 2 TPPs, when she was never qualified for HAMP mod, placing her in default and foreclosure, and servicer refused to consider for non-HAMP alternatives.
- Asserts claims under ECOA, GBL 349, fraud, negligent representation

HAMP AND SETTLEMENT CONFERENCE CASES

- ***US Bank, N.A. v. Sarmiento***, 2014 NY Slip Op 0553 (2d Dep't 2014) (finding failure to negotiate in good faith based in large measure on HAMP non-compliance, without explicitly addressing HAMP as standard for measuring good faith negotiation)

HAMP AND SETTLEMENT CONFERENCE CASES

- ***Flagstar Bank, FSB v. Walker***, 112 AD3d 885 (2d Dep't 2013)
Reversing order following good faith hearing *sua sponte* staying case and directing plaintiff to re-evaluate defendant for HAMP modification, and remanding for determination of settlement conference good faith. Invoked *Meyers* for proposition that CPLR 3408(f) cannot force parties to agree, and here, where plaintiff established through employee's [conclusory] testimony that defendant was HAMP-ineligible, court should have made a determination as to whether plaintiff satisfied its obligation to negotiate in good faith but should not have stayed with directive to consider for HAMP modification.

HAMP AND SETTLEMENT CONFERENCE CASES

- ***Wells Fargo Bank, N.A. v Meyers***, 108 AD3d 9 (2013)
- Affirming finding that Wells Fargo failed to negotiate in good but remanding, finding that court improperly directed Wells Fargo to execute a final loan modification based on the terms of HAMP TPP, holding that CPLR 3408 did not authorize imposing the terms of a modification on the parties, **treating TPP as non-binding** without analysis of the obligations undertaken under TPP to convert to permanent modification if complied with, and invoking sanctity of contract and the contract clause of the Constitution. Remedy imposed violated Wells Fargo's due process rights, as it was not on notice that court was considering such a remedy.
- Cited *ad nauseam* for non-enforceability of TPP agreements

HAMP AND SETTLEMENT CONFERENCE CASES

- ***US Bank v. Williams***, 2014 NY Slip Op 07349 (2d Dep't October 29, 2014)
Record supported referee finding of lack of good faith negotiation where over the course of 10 settlement conferences plaintiff's counsel represented that defendant might qualify for HAMP mod, repeatedly asked for submission of additional documentation for HAMP application, and then finally advised court that it denied review of HAMP application because of PSA restriction when it knew such restriction prevented HAMP modification all along.

**Trial Level Courts Routinely Rely on HAMP Violations
as Indicia of Failure to Negotiate in Good Faith**

- ***US Bank National Association v. Young*** (Kings Cty. 2014) (Index No. 28686/2009) (unpublished decision) (failure to negotiate in good faith based on violation of HAMP requirements and non-compliance with special referee directives)
- ***US Bank National Association v. Rodriguez*** (Bronx Cty. 2014) (Index No. 380504/2011) (**most appropriate benchmark for good faith settlement negotiations under CPLR 3408(f) is the HAMP guidelines**) Previous decision in same case found lack of good faith based on strict adherence to internal guidelines instead of adherence to HAMP guidelines.

**Trial Level Courts Routinely Rely on HAMP Violations
as Indicia of Failure to Negotiate in Good Faith (cont.)**

- ***Deutsche Bank Natl. Trust Co. v. Izraelov***, 40 Misc. 3d 1238(A) (Kings Cty. 2013)
Confirming R&R finding failure to negotiate in good faith. Good faith obligation required plaintiff to seek waiver of investor restriction asserted as bar to HAMP modification in the particular action. Here, plaintiff had letter from investor waiving restriction with respect to this case, but asserted in conferences inability to obtain waiver based on language in waiver letter stating that restriction was not waived for other cases

Trial Level Courts Routinely Rely on HAMP Violations as Indicia of Failure to Negotiate in Good Faith (cont.)

- ***U.S. Bank, N.A. v Shinaba***, 40 Misc 3d 1239(A) (Bronx Cty. 2013)
Defendant attended 17 settlement conferences, submitted multiple applications for HAMP review, timely complied with every request for financial information, and successfully completed two TPPs, but was never properly evaluated for HAMP, while BofA, “ignored her application and failed to make an accurate NPV calculation as to her HAMP eligibility. More importantly, despite unambiguous rules designed to protect the integrity of the loan modification process, they egregiously failed to comply with the rules regarding timely review and notice.”

Trial Level Courts Routinely Rely on HAMP Violations as Indicia of Failure to Negotiate in Good Faith (cont.)

- ***Wells Fargo Bank, N.A. v. Ross*** (Ulster Cty. 2013) (Index No. 10-4506) (unpublished decision) (Plaintiff’s repeated failure to comply with HAMP requirements supported finding of settlement conference failure to negotiate in good faith)
- ***Bank of America v. Fusco*** (Niagara Cty. 2013) (Index No. 137972) (unpublished decision)(During settlement conferences defendant entered into TPP, and plaintiff then rejected defendant from HAMP plan and secured defendant's agreement to less favorable non-HAMP mod. Plaintiff's rejection of HAMP mod even though Defendant fully complied, based on assertion that liens on property precluded a HAMP mod, where Defendant's agreement made no mention of liens and where Plaintiff was fully aware of such liens when it commenced the foreclosure action, was failure to negotiate in good faith.

Trial Level Courts Routinely Rely on HAMP Violations as Indicia of Failure to Negotiate in Good Faith (cont.)

- ***Deutsche Bank National Trust Co. v. Soriano***
(Kings Cty. 2012) (Index No. 13873/10)
(Unpublished Decision)
Failure to negotiate in good faith based on plaintiff's failure to adopt adequate process to evaluate and act on HAMP applications-- "a willful disregard for the mandates of the federal program, the state statute, and the uniform rules of the courts."

Trial Level Courts Routinely Rely on HAMP Violations as Indicia of Failure to Negotiate in Good Faith (cont.)

- ***JP Morgan Chase National Bank Assn. v. Berrio***
(Queens Cty. 2011) (Index No. 31466/2009)
(Unpublished Decision)
Lender's failure to timely communicate to defendants any alleged deficiencies in financial submissions demanded in connection with conversion of HAMP TPP into permanent modification, and inability to confirm receipt of documents that defendant had indisputably sent to the lender supported finding of failure to negotiate in good faith

**Trial Level Courts Routinely Rely on HAMP Violations
as Indicia of Failure to Negotiate in Good Faith (cont.)**

- ***US Bank National Assn v. Mathon***, 29 Misc. 3d 1228(A) (Suffolk Cty. 2010) (Staying foreclosure for lack of good faith in connection with HAMP loan modification and failure to convert TPP to permanent mod)
- ***BAC Home Loans Servicing v. Westervelt***, 2010 WL 4702276 (Dutchess Cty.) (failure to negotiate in good faith found, ordering hearing to determine sanctions against plaintiff's law firm, barring collection of arrears from date of improper HAMP denial)