

Trial Period Plan Creates Mortgage Modification

by Timothy Dyer*

The Ninth Circuit Court of Appeals held that banks participating in the Home Affordable Modification Program (“HAMP”) can be contractually required to offer mortgagees permanent mortgage modifications when the mortgagees comply with the requirements indicated in their Trial Period Plans (“TPP”). In *Corvello v. Wells Fargo Bank, N.A.*, the Ninth Circuit Court of Appeals overturned the dismissal of the plaintiffs’ breach of contract claims, finding that the language in the plaintiffs’ TPP created a legally enforceable contract.¹ The language of the TPPs indicated if the borrower was in compliance with the TPP, “...the Lender will provide [borrower] with a Loan Modification Agreement.”² The Ninth Circuit found that such language constituted a requirement by the lender to provide a loan modification agreement if the borrower complied.

The Case

Plaintiffs Phillip R. Corvello and Karen Lucia (“Plaintiffs”) individually entered into mortgage agreements with Wells Fargo Bank, N.A. (“Wells Fargo”).³ Each of the Plaintiffs had defaulted on their mortgages. In 2009, the Plaintiffs applied with Wells Fargo for a loan modification. Wells Fargo, a bank participating in HAMP, following the steps of U.S. Department of the Treasury, Home Affordable Modification Program Supplemental Directive 09-01 (Apr. 6, 2009) (“SD 09-01”), began the process required for loan modification applications. The Plaintiffs appeared eligible for HAMP and Wells Fargo prepared TPPs for each plaintiff. A TPP requires borrowers to submit documentation to confirm the accuracy of their initial financial representations and to make trial payments to the lender.⁴ The amount of the trial payments is determined by HAMP. The documentation is to be used to determine the eligibility of the borrowers for permanent modification. Under HAMP, if a borrower is determined not to be eligible, the lender is required to alert the borrower and consider alternatives.

The TPPs entered into by Wells Fargo and the Plaintiffs contained language that indicated the lender would offer the borrower a Modified Loan Agreement if the borrower complied with all parts of the TPP.⁵ In the Plaintiffs complaints, they alleged that they had complied with their TPP and did not receive Modified Loan Agreements from Wells Fargo.⁶ Plaintiffs claim, that having completed all their obligations under the TPPs and relying upon the language of the TPPs, Wells Fargo had an obligation to offer Modified Loan Agreements upon the end of the TPP period and that Wells Fargo did not alert them to any ineligibility.⁷

The lower court granted Wells Fargo’s Rule 12(b)(6) Motions to dismiss both plaintiffs’ complaints indicating that at the time of the lower court’s finding, California law was that the language of the TPP could not modify a mortgage agreement.⁸

On appeal, the Ninth Circuit focused on the language of two areas of the TPP agreements to make the determination:

1. If borrower is in compliance with this Loan Trial Period and borrower’s representations in Section 1 continue to be true in all material respects, then the Lender will provide the borrower with a Loan Modification Agreement.⁹
2. The Loan Documents will not be modified unless and until the borrower receives a fully executed copy of a Modification Agreement.¹⁰

Wells Fargo contended that there was no contract, and could be no agreement, unless the servicer sent the borrower a signed Modification Agreement.¹¹ Wells Fargo also contended there could be no contract without consideration, and that payment of debts was not consideration on which an enforceable agreement could be created.¹² Wells Fargo did not notify or alert either plaintiff that they were ineligible for a loan modification. At the time of trial, Wells Fargo indicated that the plaintiffs were ineligible for such modification, and upon internal review, reaffirmed that they had come to the correct decision.

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The court also held that that such deliberate misleading could be determined to be fraud or deceptive business practices in violation of state code.

The Law

In 2009, the Treasury Department started the HAMP program to incentivize banks to refinance mortgages of distressed borrowers. Since the inception of HAMP the Treasury Department has set forth directives of the process by which banks participating in HAMP must handle the modification of mortgages for eligible borrowers. SD 09-01 was the directive controlling at the time of the initial filing of *Corvello*. SD 09-01 indicated that if a borrower was possibly eligible, the bank and the borrower could begin a TPP before the eligibility of the borrower was certain.¹³

The Ninth Circuit considered the Seventh Circuit's finding in *Wigod v. Wells Fargo Bank, N.A.*, to be the leading case on contractual obligations of banks under TPP agreements.¹⁴ In *Wigod*, the plaintiff entered into a four month trial loan modification, which had an agreement contained within to permanently modify the loan if the plaintiff qualified under HAMP guidelines.¹⁵ The plaintiff alleged that she qualified but Wells Fargo refused to grant a permanent modification.¹⁶ The trial court dismissed the claim due the analysis that HAMP did not confer a private federal right of action upon which a borrower could enforce its requirements.¹⁷

The Seventh Circuit, however, determined that the plaintiff had a viable cause of action.¹⁸ The court found that Wells Fargo had deliberately misled the plaintiff into believing that it would modify the loan and then refused to do so. Refusal to modify the loan gave rise to a breach of contract or promissory estoppel claim. The court also held that that such deliberate misleading could be determined to be fraud or deceptive business practices in violation of state code. Finally, the court held that such state law claims are not preempted or otherwise barred by federal law.

To sustain a breach of contract, the court in *Wigod* tested the requirements of contract formation against the trial loan modification.¹⁹ The common law requirements of a breach of contract claim are: (1) offer and acceptance; (2) consideration; (3) definite and certain terms; (4) performance by the plaintiff of all required conditions; (5) breach; and (6) damages.²⁰ The Seventh Circuit found the language of the TPP and the surrounding circumstances sufficient to create an offer.²¹ By indicating the conditions precedent to permanent modification and having the opportunity to refuse to counter sign the TPP after the plaintiff had returned the document signed, Wells Fargo created an offer, accepted by the plaintiff.²²

The Seventh Circuit also found the consideration requirement was satisfied by the TPP "contain[ing] sufficient consideration" by the promisee incurring "cognizable legal detriments."²³ The court noted this included: "the creation of new escrow accounts, the requirement of undergoing credit counseling (if asked), and to provide and vouch the truth of [plaintiff's] financial information."²⁴

Finally, the court found the agreement contained clear and definite terms in the required process by which a borrower is determined for eligibility by HAMP.²⁵ Wells Fargo was obligated to use the standard set by the program, and while the terms were just an estimate of a permanent modification, the TPP implied that any change in the permanent offer would also be based upon HAMP guidelines.²⁶ Such guidelines followed by both parties in the TPP created terms which were clearly understood.²⁷

The Ninth Circuit recognized that the Seventh Circuit followed Illinois law, but determined that in regards to the law in question, there were no material differences between the law of California and that of Illinois.²⁸ The court cited *West v. JPMorgan*

Chase Bank, N.A., where the California Court of Appeal expressly adopted the reasoning of *Wigod* and concluded that trial plan agreements only to authorize banks, before offering a modification, to evaluate whether borrowers had complied with the agreement's terms and if the borrowers representations were true.²⁹

Conclusion

Corvello reflects a new trend in the courts to read natural language and understanding into mortgage documents. Specifically, with the rise of homeowners failing to maintain payments on mortgages due to the economic depression, courts have read the agreements as a homeowner might allowing actions to be brought using HAMP guidelines to establish contracts. The Ninth joins the current minority of jurisdictions enforcing the language of TPPs to the loan agreements.

Finally, it is important to note that while the TPP's language in *Corvello* could still exist in TPPs today, the question as to the eligibility of the borrower is no longer an issue, Treasury Supplemental Directives 10-01 now requires the borrower's eligibility to be fully determined before a TPP can be entered into.³⁰

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¹ *Corvello v. Wells Fargo Bank, NA*, ___ F.3d ___ (9th Cir. Aug. 8, 2013).

² *Id.* at 2.

³ *Id.* Their situations differ factually in that *Corvello*'s dealings with Wells Fargo were in writing, while the *Lucias* dealt with the bank by phone.

⁴ *Id.* at 1, citing *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012) (discussing the requirements of HAMP and SD 09-01).

⁵ *Id.* at 2-3.

⁶ *Id.* at 2.

⁷ *Id.* at 3.

⁸ *Lucia v. Wells Fargo Bank, N.A.*, 798 F.Supp.2d 1059 (N.D.Cal. 2011), *rev'd Corvello v. Wells Fargo Bank, NA*, ___ F.3d ___ (9th Cir. Aug. 8, 2013).

⁹ *Corvello v. Wells Fargo Bank, NA*, --- F.3d --- (9th Cir. Aug. 8, 2013) at 2, quoting Page 1 of *Corvello*'s TPP, "If I am in compliance with this Loan Trial Period and my representation in Section 1 continue to be true in all material respects, then the Lender will provide me with a Loan Modification Agreement, as set forth in Section 3, that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage.

¹⁰ *Id.* at 3, quoting Paragraph 2G of *Corvello*'s TPP Agreement, "I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed..."

¹¹ *Id.* at 4.

¹² *Lucia* at 1067.

¹³ U.S. Dep't of the Treasury, Home Affordable Modification Program Supplemental Directive 09-01 (Apr. 6, 2009).

¹⁴ *Corvello v. Wells Fargo Bank, NA*, ___ F.3d ___ (9th Cir. Aug. 8, 2013) at 4.

¹⁵ *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012).

¹⁶ *Id.* at 554-555.

¹⁷ *Id.* at 555.

¹⁸ *Id.* at 547.

¹⁹ *Id.* at 560.

²⁰ *Id.*

²¹ *Id.* at 561-562.

²² *Id.* at 562.

²³ *Id.* at 564.

²⁴ *Id.*

²⁵ *Id.* at 565.

²⁶ *Id.* at 565.

²⁷ *Id.*

²⁸ *Corvello v. Wells Fargo Bank, NA*, ___ F.3d ___ (9th Cir. Aug. 8, 2013) at 5.

²⁹ *West v. JPMorgan Chase Bank, N.A.*, 214 Cal.App.4th 780, 798-799.

³⁰ U.S. Dep't of the Treasury, Home Affordable Modification Program Supplemental Directive 10-01 (Jan. 28, 2010).