DAMNED IF YOU DO, DAMNED IF YOU DON'T:
NEW JERSEY APPELLATE DIVISION HINTS CONTRACT AND CONSUMER FRAUD CLAIMS MAY ARISE FROM DENIAL OF LOAN MODS AFTER BORROWERS COMPLETE TRIAL PERIODS

February 6, 2015 By Ryan P. Mulvaney

On January 23, 2015, the New Jersey Appellate Division issued an Opinion in Arias v. Elite Mortgage Group, Inc., in which it hinted that causes of action for breach of contract and, worse, violations of the New Jersey Consumer Fraud Act ("CFA") may exist for New Jersey borrowers who have been denied loan modifications after completing, successfully, loan modification trial periods under the federal Home Affordable Modification Program. The Opinion has been approved for publication.

Briefly, the borrowers in Arias alleged that they had a contractual right to a loan modification pursuant to the terms of their trial period agreement, and asserted that the bank breached that agreement. In granting summary judgment to the bank, the trial court held, among other things, that the trial period agreement was not a ***binding*** contract to modify the mortgage loan but 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 [Agreement.]" Opinion, at pp. 3, 9. Those obligations included making all timely payments and providing documentation to establish that the representations the borrowers made when applying for the trial period agreement remained accurate.

Looking to non-precedential federal authority from the Circuit Court of Appeals for the Seventh Circuit, the Appellate Division recognized that breach of contract claims may exist for borrowers who are denied loan modifications after successfully completing trial period agreements. Opinion, at pp. 3-6 (citing Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547 (7th Cir. 2012)). Worse, the court noted that, in New Jersey, a factually dissimilar case in which the borrower asserted violations of the New Jersey CFA with respect to a lender's activities post-foreclosure-judgment – specifically, entering into a forbearance agreement with the borrower to avoid a sheriff's sale – "strongly signaled its disapproval of post-foreclosure financing deals that essentially turned debtors into 'cash cows' without ever restoring their mortgages to current status." Opinion, at p. 6 (citing Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 570, 582-83 (2011)). In its Opinion, the Appellate Division viewed Gonzalez as a "suggest[ion] that an agreement that purports to bind a debtor to make payments while leaving the mortgage company free to give her nothing in return might violate the New Jersey Consumer Fraud Act[.]" Opinion, at p. 6.

The silver lining here is that borrowers must still comply with the terms of trial period agreements. Indeed, in Arias, the trial court held, and the Appellate Division affirmed, that summary judgment for the bank was proper because the borrowers failed to make timely payments in accordance with the trial period agreement. Opinion, at p. 10.

Based on Arias, servicers and lenders should review the language of their trial period "unilateral offers" to ensure that, among other things, the language indeed qualifies as an offer rather than a binding contract; contains conditions for acceptance, which will be deemed upon full and timely completion of the conditions; and contains a clause allowing revocation at any time before completion.

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