Pull Quote: Thus, the West ruling has no application to HAMP trial plans offered by a servicer prior to June 2010 where the borrower's eligibility was not determined beforehand.

HAMP Modification a Must if Trial Plan Compliance: Following the 7th Circuit, the California Court of Appeal rules that a Servicer must offer a Borrower who makes all of their HAMP trial modification payments, a permanent modification. But, wait …

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With the enactment of bills such as the California Homeowner Bill of Rights ("HOBR"), the tide has officially begun to turn in favor of the California borrower and the days of routine dismissals of a foreclosure action are nearing an end. On March 18, 2013, in keeping up with the pro-borrower movement, the California Court of Appeal provided homeowners with yet another avenue of recourse in an area largely invalidated by the federal circuit - a sustainable claim for breach of a "trial period plan" under the Home Affordable Mortgage Program ("HAMP").

According to the holding in *West v. JPMorgan Chase Bank*[1], a loan servicer is obligated under HAMP guidelines to offer a permanent modification when a borrower complies with the terms of a trial plan and his/her representations remain true and correct. Therefore, because the servicer had a duty to modify upon the successful completion of the trial plan, the court held that plaintiff had stated valid causes of action for damages and breach of contract where defendant foreclosed rather than offer a permanent loan modification. At first glance, *West* can easily be misinterpreted (and undoubtedly will be misinterpreted by borrowers and counsel alike) as a blanket ruling that all completed trial plan's under HAMP must result in the offering of a permanent modification. However, this is not always the case. In fact, upon closer examination, the *West* decision failed to address certain crucial distinctions which must be considered before applying this seemingly all-encompassing rule. In doing so, the court in *West* appears to have over-stepped its bounds.

As readily admitted by the court, the opinion in *West* was based almost exclusively on the Seventh Circuit's decision in *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547.[2] As in *Wigod*, *West* applied the United States Department of the Treasury, HAMP Supplemental Directive 09–01 (Apr. 6, 2009) ("Directive 09–01") as a means to create a duty upon a lender/servicer to provide a permanent modification upon the successful completion of a trial period plan. Citing to Directive 09-01, the court reasoned that under HAMP guidelines "[i]f the borrower complies with the terms and conditions of the [TPP], the loan modification will become effective on the first day of the month following the trial period…." As a result, *West* interpreted this as an affirmative directive mandating a permanent modification when a borrower "complies with the terms and conditions" of a trial plan.

Yet, what the *West* court fails to address is that both the timing of the trial period plan and the circumstances surrounding its issuance to the borrower is key in determining whether the HAMP guidelines mandated a permanent modification. Contrary to the ruling in *West*, Directive 09–01 does not automatically mandate that a borrower must be granted a permanent modification if they simply comply with the terms of a trial period plan. Rather, in the alternative to determining a borrower's eligibility up front, Directive 09-01 expressly authorized a loan servicer to provide a borrower with a trial plan prior to any actual evaluation of their eligibility.[3] Subsequently, after the trial plan's acceptance, if the borrower did not meet the

[1] *West v. JPMorgan Chase Bank* (March 18, 2013) --- Cal.Rptr.3d ----, 2013 WL 1104739 (Cal.App. 4 Dist.).

[2] *West*, supra, 2013 WL 1104739 at *1 ("[c]ore to our decision is the courts conclusion in *Wigod*…").

[3] See Supplemental Directive 09-01, page 5 and 15 ("Servicers may use recent ***verbal financial information***… to prepare and send… an offer of a Trial Period Plan. When the borrower returns the Trial Period Plan and

eligibility standards upon a review of their financials, the servicer was obligated to "promptly" notify them of the denial.[4]

Therefore, under Directive 09–01, a servicer was expressly authorized to deny a permanent modification *after the issuance and acceptance of a trial plan* if a borrower did not meet the HAMP underwriting and eligibility standards upon later review, regardless of whether they made the required trial payments. Effective June 1, 2010 though, in order to alleviate borrower confusion and promote a higher trial plan-to-permanent modification conversion rate, the Treasury changed this policy allowing servicers to offer trial plans ***only after*** reviewing a borrower's documented financial information up front to determine eligibility beforehand.[5]

In *West*, the court found an obligation to modify reasoning that "[w]hen Chase Bank received public tax dollars under the Troubled Asset Relief Program, it agreed to offer TPP's and loan modifications under HAMP according to guidelines, procedures, instructions, and directives issued by the Department of the Treasury. Under … HAMP Supplemental Directive 09-01…, if the lender approves a TPP, and the borrower complies with all the terms of the TPP and all of the borrower's representations remain true and correct, the lender ***must offer*** a permanent loan modification."[6] However, *West* dealt with a Trial Period Plan that was offered in July of 2009. Thus, at that time, Chase Bank was fully authorized by Directive 09-01 to offer the plaintiff a trial plan prior to the receipt of any financial documentation and prior to evaluating her eligibility. It was not until June 2010 that the Treasury required a complete verification of a borrower's eligibility before offering a trial plan under HAMP.

This key distinction in the timing of a trial plan is briefly addressed in *Wigod,* which also involved a pre-June 2010 trial period plan. As referenced by the *Wigod* court, the "Treasury modified its directives on the timing of the verification process in a way that affects this case. Under the original guidelines that were in effect when Wigod applied for a modification, a servicer could initiate a TPP based on a borrower's undocumented representations about her finances."[7] The court noted at the time of the plaintiff's trial plan that the "Treasury's original guidelines were still in force, so Wells Fargo could choose whether (A) to offer Wigod a trial modification based on unverified oral representations, or (B) to require her to provide documentary proof of her financial information before commencing the trial plan."[8]

Along these lines, *Wigod* recognized that the borrower in that case had "allege[d] … Wells Fargo took option (B)" and "[o]nly after Wigod provided all required financial documentation did Wells Fargo, in mid-May 2009, determine that [she] was eligible for HAMP and send her a TPP Agreement."[9] Because it was alleged that Wells Fargo had already determined Wigod's eligibility prior to offering the trial plan, the court reasoned that an obligation to modify under HAMP still existed, or at a minimum, Wells Fargo was "required to offer *some* sort of

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related documents, the servicer must review them to verify the borrower's financial information and eligibility"; "the servicer should instruct the borrower to return the signed Trial Period Plan, together with… ***income verification documents***…, and the first trial period payment...") (emphasis added).

[4] See Supplemental Directive 09-01, page 15 ("***If the servicer determines the borrower does not meet the underwriting and eligibility standards of the HAMP after the borrower has submitted a signed Trial Period Plan…, the servicer should promptly communicate that determination to the borrower*** in writing…")(emphasis added).

[5] See HAMP Supplemental Directive 10-1 (Jan. 28, 2010), page 3 ("[w[ithin 30 calendar days following receipt of an Initial Package or complete verification documents, ***the servicer must complete its verification and evaluate the borrower's eligibility for HAMP and, if the borrower is qualified, send the borrower a Trial Period Plan Notice***.")(*emphasis* added).

[6] *West*, supra, 2013 WL 1104739 at *8 (citations omitted).

[7] *Wigod, supra*, 673 F.3d at 557.

[8] *Id*. at 558.

[9] *Id*.

good-faith permanent modification to Wigod consistent with HAMP guidelines."[10] Based on this rationale, however, had Wells Fargo *not* verified Wigod's eligibility for a HAMP modification up front, there would have been no obligation under Directive 09-01 to offer a permanent modification if she was determined ineligible after a review of her financial documentation, even if she had accepted the plan and complied with its terms. Thus, the *West* ruling has no application to HAMP trial plans offered by a servicer prior to June 2010 where the borrower's eligibility was not determined beforehand.

Applying these same principles to the *West* opinion, before determining whether a permanent modification was required, the appellate court was obligated to first determine the circumstances of the trial plan's offering as in *Wigod* (namely, at the demurrer stage, the allegations made by plaintiff to support the theory that HAMP guidelines mandated a permanent modification). No such review or analysis took place. In fact, based on the plaintiff's allegations relied upon by the court, the *West* ruling may have been in error. In *West*, the trial period plan offered in July 2009 was accompanied by a letter stating "[s]ince you have told us you're committed to pursuing a stay-in-home option, you have been approved for a Trial Plan Agreement."[11] Plaintiff had also alleged that "in January 2010 and again in March 2010, Chase Bank confirmed receipt of documents that West had submitted in support of her request for a permanent loan modification under HAMP."[12] Shortly thereafter, in April 2010, it was alleged that Chase Bank notified West that she did not qualify for a modification through the HAMP modification program "based on a calculation of West's "Net Present Value" (NPV) under a formula developed by the Department of the Treasury."[13]

These allegations, taken in isolation, indicate that West was offered a trial plan under HAMP in July of 2009 ***without any prior verification of her assets, income or eligibility***. If so, per Directive 09-01, Chase Bank was thereby authorized to deny West a permanent modification based on her ineligibility determined after the fact regardless of whether or not she complied with the trial plan's terms. In the end, *Wigod* itself, the very case which was "core" to the court's ruling in *West*, does not support the conclusion reached by the Fourth District, Court of Appeal.

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[10] *Wigod, supra*, 673 F.3d at 565.
[11] *West*, supra, 2013 WL 1104739 at *3.
[12] *Id*.
[13] *Id*.