

# Homeowner can sue lender under HAMP

## Bank allegedly obstructed bid for loan modification

Published: 5:12 pm Thu, December 29, 2011

By Eric T. Berkman



A homeowner whose lender attempted to foreclose on her property after allegedly delaying and obstructing her efforts to receive a loan modification under the federal Home Affordable Modification Program could sue the lender as a third-party beneficiary of its agreement with the government to participate in HAMP, a Superior Court judge has found.

The homeowner argued that borrowers such as herself were intended beneficiaries of HAMP “servicer participation agreements,” or SPAs, between lenders and the government even though the SPA only expressly identifies parties to the contract and their “successors-in-interest” as beneficiaries.

“Particularly when viewed against the backdrop of three decades that saw medium-sized banks acquiring small banks, only to be taken over by larger banks, which were then absorbed into megabanks, it is apparent that [the language in question] is just a straightforward successor clause, to be taken at face value and no more,” Judge Thomas P. Billings wrote in denying the lender’s motion to dismiss.

“Denial of third-party beneficiary status to persons aggrieved by violations such as are alleged here would be — borrowing the words of the [Supreme Judicial Court] when considering a different claim by beneficiaries of a federal government contract — to ‘mock the very goals of’ the program that the contract was intended to further, placing its ‘legitimacy ... in grave doubt,’” the judge said, quoting the SJC’s 1989 decision in *Ayala v. Boston Hous. Auth.*

The judge also left open the possibility that the lender’s alleged foot-dragging could result in Chapter 93A liability, recognizing the claim on its merits but dismissing it on procedural grounds.

The 24-page decision is *Parker v. Bank of America, NA, et al.*, Lawyers Weekly No. 12-268-11. [The full text of the ruling can be ordered by clicking here.](#)

### Encouraging compliance?

John F. Skinner III of Manchester, N.H., who represented the homeowner, said he was “elated, shocked, surprised and happy” by the ruling because several other Massachusetts courts had said homeowners did not have standing to bring third-party beneficiary claims under HAMP.

“The ruling sends a message to banks that if they don’t comply with federal guidelines [regarding the handling of HAMP modification requests], they’ll be held accountable,” he said.

“This encourages banks to comply and gives more potential help to homeowners and consumer advocates.”

Skinner said the decision also serves as a reminder that lawyers should not automatically reject cases that do not look like winners at first blush. The only other court to recognize the cause of action his client was asserting was a federal District Court in California, he pointed out.

“If you have a minority opinion and you believe in it, don’t be afraid to fight for it if you think it’s the right reasoning and a better reasoning for society,” he said. “Hopefully, this signals a change in tide and gives other state court judges across the country who might want to rule in this matter something else to hold onto. You have to take persuasive precedent where you can find it, and Massachusetts is certainly leading the way [regarding] foreclosure defense.”

Framingham lawyer Richard D. Vetstein, who has written extensively about the foreclosure crisis on his real estate blog, said the ruling in Parker breaks new ground.

“The vast majority of courts have shot down borrowers who try to bootstrap onto the HAMP program because it’s a federal program and the regulations are supposed to be enforced by the federal government, not by a state court judge,” he said. “But [Billings] basically said, ‘I just feel like [other judges] are wrong and I’m right.’”

Vetstein added that Billings’ reasoning has “some intrinsic appeal.”

“I hear these stories all the time — Bank of America, Wells Fargo and others losing paperwork, borrowers having to resubmit 10 times, and then the mortgage being shipped off to foreclosure, forcing the borrower to start from square one while interest and attorneys’ fees are ticking away,” said Vetstein, who was not involved in Parker. “It looks like the judge is finally throwing his hands up and siding with the little guy more and more.”

Vetstein also noted that a claim like the plaintiff’s is the last recourse borrowers have when nobody else is doing anything for them.

“Federal regulators and banks aren’t doing anything, and the buck has to stop somewhere,” he said. “So it’s falling to ... state court judges putting their foot down and saying, ‘We’re not going to let banks roll over helpless borrowers.’ Maybe they’re trying to get them to do the right thing out of court and saying, ‘This is what can happen if you don’t treat the borrower fairly. You can be subjected to liability and even triple damages under Chapter 93A. So go out in the hall and work it out with the borrower or it will cost you a lot of money.’”

Lender’s counsel Neil D. Raphael of Boston declined to comment.

### **Obstruction and delay?**

Plaintiff Valerie Parker took out first and second mortgages on her Lowell home with defendant Bank of America in 2007.

For two years, Parker made her payments on time. But as the economy worsened, she anticipated difficulty making future payments and, in October 2009, called the bank for advice.

Bank of America allegedly told her that, because she was not in default, it could not help her and that she should stop making payments if she wanted its assistance.

After seeking advice from a community agency, Parker submitted materials to the bank in support of a loan modification.

By December 2009, she could no longer make her payments. The bank allegedly assured her that it would help, but later told her that no program to assist her existed.

However, in early 2010, Bank of America implemented a loan modification program under HAMP. That July, the bank apparently told the plaintiff she qualified for relief under the program, but it never sent her the appropriate forms and repeatedly lost her paperwork.

When Parker complied with the bank's demand for more paperwork, the bank reportedly lost it again. Meanwhile, according to Parker, the bank made false promises of relief and gave conflicting messages as to whether she should make loan payments in the interim and in what amount.

Ultimately, Bank of America commenced foreclosure proceedings against Parker's home.

Parker subsequently sued Bank of America in Superior Court, bringing allegations of fraud, negligence, breach of contract and violation of Chapter 93A, among other claims.

The bank filed a motion to dismiss.

### **Viable cause of action**

Billings found that Parker could indeed bring a third-party beneficiary claim stemming from Bank of America's alleged breach of its SPA with the federal government.

In doing so, Billings followed *Marques v. Wells Fargo Home Mortgage, Inc.*, a 2010 decision by the U.S. District Court for the Southern District of California, which deemed such a claim to be a viable cause of action.

"Since then ... every court in the District of Massachusetts (and as far as I now, elsewhere) to consider the issue has rejected the *Marques* holding," Billings said. "This has also been the consensus in the decisions of [other Superior Court judges] of which I am aware. With the utmost respect for those in the majority, I believe ... that the court in *Marques* had it right."

According to Billings, the question came down to whether a borrower like Parker was an "intended beneficiary" under Bank of America's SPA with the government. "It seems undeniable that the performance required of servicers who entered into SPAs was intended for the direct

benefit of borrowers struggling to pay first mortgages on their residences, with the hope of additional but incidental benefits accruing to the economy as a whole,” the judge said.

Billings also rejected the notion that paragraph 11(E) of the standard form SPA, which provides that the agreement “shall inure to the benefit of . . . the parties to the Agreement and their permitted successors-in-interest,” disqualifies a borrower as a third-party beneficiary.

Rather, he said, paragraph 11(E) is simply a successor clause to be taken at no more than face value.

Meanwhile, borrowers were intended to benefit from the contractual commitments made by lenders and servicers in exchange for receiving billions of dollars under the Troubled Asset Relief Program, the judge said, and nothing in the standard form SPA suggests that borrowers should not be allowed to enforce those commitments.

“They have no other forum in which their claims may be heard and adjudicated,” he said.

Having recognized the general viability of third-party beneficiary claims by borrowers, Billings also found that the plaintiff in Parker had adequately alleged a violation of the SPA.

Lenders are expected to respond to a HAMP application within a certain period of time and cease all foreclosure activity during the evaluation process, the judge said, denying the bank’s motion to dismiss. “Inertia is not an option.”

Finally, Billings found that the plaintiff stated a viable Chapter 93A claim, but dismissed the claim without prejudice based on her failure to serve the statutorily mandated demand letter.

For more information about the judge mentioned in this story, visit the Judge Center at [www.judgecenter.com](http://www.judgecenter.com).

Eric T. Berkman, an attorney and formerly a reporter for Massachusetts Lawyers Weekly, is a freelance writer.