

## KEY LAW UPDATE ON HAMP MORTGAGE SERVICER LITIGATION & LEGAL CASES

### Borrower Rights to Sue for HAMP Violations in State Court Using HAMP

Interview of Attorney Richard Rydstrom by Phil Hall

Re Litigation Update: Do we have a new landmark decision that could open the flood gates to HAMP violation lawsuits? Case Review of *Wigod v. Wells Fargo Bank* (7th Circuit; No. 11-1423; Mar. 7 2012)

I spent several years, from its inception, working on HAMP and foreclosure policy with the industry, consumers and the U.S. Treasury. Many courts have simply denied borrowers redress for wrongful HAMP modifications by holding that HAMP did not create a private right of action; and distinguishing long standing laws, cases and canons of interpretation, along with a sprinkling of assumptions.

The *Wigod* case may open the flood gates to lawsuits using HAMP violations as elements of state torts, in state court actions. The Honorable HAMILTON penned a 75 page master analysis of the use of federal violations in state court claims. The court explains that ... HAMP violations of federal law are elements of state law claims, which are not pre-empted by federal law, effectively because HAMP did not supply a private right of action. This decision is a well-reasoned corollary of the now old winning defense argument that; you can't sue for HAMP violations because HAMP did not express create a private right of action. The court goes on to say that "There is no indication that Congress meant to foreclose suits against servicers for violating state laws that impose obligations parallel to those established in a federal program [page 60]. The court correctly notes that the Treasury HAMP program in Supplemental Directive 09-01 states that "...servicers must implement the program in compliance with state common law and statutes." [page 61]

The court pushed aside the defense "End-Run" theory. Banks/servicers have been arguing that plaintiffs may not proceed with "HAMP claims in disguise" [as] ... an "impermissible end-run around the lack of a private action in [the 2008 Act] and HAMP." [page 61] The court dispelled the end-run theory that was built on the idea that where Congress did not create a private right of action for a violation of federal law (HAMP), then no right of action may exist under state law. The court goes on to say: "The issue here, however, is not whether federal law itself provides private remedies, but whether it displaces remedies otherwise available under state law. The absence of a private right of action from a federal statute provides no reasons to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law." [page 63]

It has long been accepted that "the interpretation of" federal law issues (such as the notice statute in the federal tax law) was an "essential element of [plaintiff's] quiet title claim); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 805-07 (1986) (violation of federal labeling requirements in the Federal Food, Drug, and Cosmetic Act created a rebuttable presumption of negligence, and proximate cause under state tort law); *Moore v. Chesapeake & Ohio Ry.*, 291 U.S. 205, 214-15 (1934)..." The court goes on to point out that "In none of these [jurisdiction] cases has the Supreme Court even suggested that the absence of a private right of action under a federal statute would prevent state law from providing a cause of action based in whole or in part on violations of the

federal law.”[page 64] The court concludes that a violation of federal law (HAMP regulations, practices and procedures) are proper to support elements of state law claims. In fact, the court states that such violations can support negligence per se (Kentucky worker’s compensation statute provided that employer railroad’s violation of Federal Safety Appliance Acts would constitute negligence per se under state law).

Stay tuned, as best practices now will take on a whole new meaning.

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About Attorney Richard Ivar Rydstrom:

With more than 21 years of legal experience, Rydstrom is rated Superb, 10 out of 10 by Avvo – the world’s largest rating directory of lawyers. He has vast experience representing plaintiffs, defendants, homeowners and mortgage banking institutions. Richard is considered a national expert by the mortgage banking industry. When the U.S. Treasury was establishing national policy on mortgage modifications and foreclosures for President Obama’s Home Affordable Modification Program (HAMP), Rydstrom served on the official working groups with the American Legal & Financial Network (AFN), MBA, consumer groups and banking institutions. When the 110th Congress wanted a neutral analysis of the predictive mortgage finance meltdown, Rydstrom was chosen to give an official Statement to the House Ways & Means Committee. When the AFN wanted to educate its mortgage banking servicers on the U.S. Treasury’s first HAMP outline, they chose Rydstrom.

Some significant distinctions include:

- Published in a Statement to the 110th Congress, House Ways & Means Committee, Chairman Charles Rangel
- Considered a national expert in mortgage banking and related foreclosures

- Honorary member of the American Legal and Financial Network (AFN)
- Chairman of CMIS (Coalition for Mortgage Industry Solutions)
- Member of the HAMP Policy Working Groups (AFN, Treasury, etc.)
- CLE speaker and educator for attorneys, judges, banks, servicers, accountants and financial advisors for the National Business Institute (NBI)
- Frequent keynote speaker, panelists, and moderator at national conferences and webinars including the AFN, NBI, CMIS, CMBA
- Voluntary Settlement Officer (VSO) for all Los Angeles courts

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