

## Resources

### Seventh Circuit Clarifies ECOA and HOEPA Claims In Conjunction with Loan Modification Application

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In the context of a relatively benign case, the U.S. Court of Appeals for the Seventh Circuit, in *Estate of Davis v. Wells Fargo Bank*, 2011 WL 93030 (7th Cir. Jan. 12, 2011), has issued two rulings of note for lenders and servicers defending against a wide variety of common claims in the context of loan modifications.

In *Davis*, plaintiff brought suit under various federal and state statutes, including the Fair Housing Act (FHA), the Equal Credit Opportunity Act (ECOA) and the Home Ownership and Equity Protection Act (HOEPA) for credit discrimination and other alleged violations arising out of efforts to collect on a delinquent mortgage loan, including by loan modification.

Partially affirming and partially reversing the ruling below, the Seventh Circuit held that defendant's allegations of both state and federal law violations against the successor mortgagee and loan servicer were either time-barred by relevant statutes of limitations or properly dismissed in the lower court for the defendant's failure to state an actionable claim or to submit supportive evidence. Significantly, the court held that Wells Fargo's and the servicer's (Litton Loan Servicing) subsequent statutory violations and offer to modify the loan did not toll the various statutes' statute of limitations. The plaintiff had earlier won an uncollectible judgment for fraud against the original but now defunct lender.

Although technically *dictum*, the court concluded that plaintiff, as the recipient of the defendants' offer to modify her loan, was an "applicant" under the Equal Credit Opportunity Act (ECOA). In so doing, the Seventh Circuit rejected the lower court's conclusion to the contrary, ruling that the term "applicant" as defined by 12 C.F.R. § 202.2 includes one who "received an extension of credit" and the 2005 loan modification proposal qualified as such an extension of credit. This ruling is consistent with certain agency conclusions on the topic but is contrary to the view of any consumer financial services practitioners that a loan modification is not, in its precise form, an extension of credit.

Based on the "broad regulatory definition" of extension of credit under the ECOA, which includes "the refinancing or other renewal of credit", the court concluded that the plaintiff was an applicant for ECOA purposes. This position mirrors the Federal Reserve Board's position on this issue as set forth in an interpretive letter issued in December of 2009 (see link: <http://www.federalreserve.gov/boarddocs/caletters/2009/0913/caltr0913.htm>), expressing the same position. That said, it is far from clear that the conclusion is logical or correct. Nevertheless, the decision adds weight to the Federal Reserve Board position, and will likely be given dispositive treatment within the federal courts of the Seventh Circuit, *i.e.*, Illinois, Indiana and Wisconsin.

Notwithstanding this determination, the Seventh Circuit thereafter affirmed summary judgment against plaintiff on the race discrimination claims because plaintiff failed to produce any evidence thereof.

In connection with the claim under HOEPA, plaintiff argued that defendants violated the statute by failing to provide the HOEPA-required disclosures, and that the defendants' failure to notify her when they assumed their roles as holder and servicer of the mortgage, the loan modification proposals Litton sent on behalf of Wells Fargo and Wells Fargo's inability to adequately inform the plaintiff or the court of the actual loan terms in the foreclosure proceeding, triggered HOEPA's provisions and extended the statute of limitations. The court held that the events that occurred within HOEPA's statute of limitations one-year for monetary damages and three years for rescission did not amount to an actionable claim under HOEPA and that since the plaintiff did not allege that the terms of her loan were modified or that the defendants failed to send her a change in terms notification, the statute of limitations was not extended.

Should you have any questions about this case or need additional information, please contact **Richard E. Gottlieb**, Director of the Firm's Financial Industry Group, at 312-627-2196, or **Arthur B. Axelson** the author of this alert and Leader of the Firm's Regulatory and Compliance practice, at 202-906-8607.

## Seventh Circuit Clarifies ECOA and HOEPA Claims In Conjunction with Loan Modification Application (Cont.)

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