



Legislation and Litigation

Presented By

Jennifer M. Monty, Esq.

HAMP– One Year Later

- **Increased Loan Modifications**
- **Increased Visibility**
- **No Safe Harbor**
- **No Waiver of Defenses/Claims**



HAMP— One Year Later

- **Geitner case—dismissed in November 2009**
 - Sought injunction of HAMP program as there was no appeal process
 - Two classes— not in foreclosure; in foreclosure before right of redemption has expired
 - Court found that HAMP did not intend to create a property interest in loan modifications for mortgages in default
 - Looked to NPV analysis to show that modifications are to benefit taxpayers and are “not an entitlement”



Truth in Lending Act (TILA)

- Provide informed use of credit
- TILA mandates additional disclosures for loans secured by a consumer's home and provides for a cooling off/rescission period



TILA – Modification v. Refinance

- Federal case law looks to see if the loan modification replaces and satisfies the underlying obligation
- If the loan modification does not completely satisfy the existing Note and Mortgage, it will not be found to be a new loan under TILA



TILA – Modification v. Refinance

- 12 CFR 226.20(a)—A refinance occurs only when the old obligation (old note and mortgage) is **satisfied and replaced**



TILA – Modification v. Refinance

If the old obligation is satisfied and replaced—there are five specific exceptions:

1. Single payment renewal with payment change
2. Reduction in APR with a change in payment history
3. Agreement involving a court proceeding
4. **Change in payment/collateral unless—the rate increases or the new amount financed exceeds unpaid balance and earned finance charge**
5. Renewal of option insurance



Modification v. Refinancing Cases

- In re Hart (2000)
- In re Sheppard (2003)
- EMC/Bear Stearns (2008)



Loss Mitigation Cases—State Law Theories

- Fraud
- Breach of Contract
- Intentional Misrepresentation



Loss Mitigation Cases: *Pestana* Case

- *Richter v. BOA* (1991) – 5th Circuit
- *Pestana* (2008) – Now in Federal Court; Amended Complaint filed December 2009
- *Raymond* (2009) – New Hampshire

