

**HOMEOWNER ADVOCACY TRAINING AND CLE  
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**VIABLE CLAIMS CURRENTLY RECOGNIZED AGAINST  
FORECLOSING ENTITIES BY ARIZONA COURTS**

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The class of borrowers who:

1. were current on their mortgage/deed of trust installment re- payments;
2. contacted their servicer to seek a HAMP or similar modification;
3. were counseled by that servicer to default on three successive mortgage/deed of trust repayments in order to qualify for the “modification program”;
4. relied on the servicer’s advice and direction; and
5. subsequently defaulted and were then foreclosed upon by that servicer,

appear to have viable claims that are surviving the ubiquitous motions to dismiss relied upon by the foreclosure attorneys to quash homeowner Complaints prior to discovery.

The claims recognized at this point are:

- a. Breach of the Fair Debt Collection Act, Pub. L. 95109; 91 Stat. 874, codified as 15 U.S.C. § 1692 –1692. The Honorable Grace Silver, Chief Judge for the District Court has allowed such a claim to go forward against the Phoenix law firm of Tiffany & Bosco, who acting for a loan servicer were in fact acting as debt collectors;
- b. Truth and Lending Act, 15 USC §1641, et seq.;
- c. Arizona Consumer Fraud Act, title 44, article 7 (1521-34) including deceptive trade practices, A.R.S. §44-1376 and 1522;

- d. Common Law Fraud;
- e. Negligent Misrepresentation and negligent supervision; and
- f. Tortious Breach of the covenant of good faith and fair dealing - NOT breach of contract.

Basic claims are that when the client contacted the servicer and was encouraged and counseled by a party with superior knowledge, and upon whom the borrower relied, never told the borrower the servicer would seek to foreclose on them immediately after they defaulted for the required three months.

The servicer offered many borrowers a “temporary trial period” under which the borrower made good faith loan repayments with the understanding they would receive HAMP or similar modification. Based on these payments and detrimental reliance they were entitled to a permanent loan modification.

The number of cases filed by similarly situated borrowers against their servicers indicates this conduct is national in scope and demonstrates a pattern of fraudulent and deceitful practices.

The office of the Comptroller of the Currency, department of the United States Treasury, entered into Consent Orders against many of the major mortgage/deed of trust lenders and servicers highlighting these entities’ engagement in “questionable foreclosure practices”; in other words - foreclosure fraud. While these Consent Orders did not give borrowers a private right to remedy they do serve as actual notice to the servicing industry of widespread foreclosure fraud. Therefore, they should be attached to a Complaint to support an allegation of actual notice of widespread foreclosure fraud.

The major culprit in the widespread creation and filing of spurious assignments of the Deed of Trust and appointments of successor trustees and other foreclosure documents is/was DocX, a division of Lender Processing Service (LPS). The United States Attorney in Florida indicted DocX and its president, Ms. Brown, alleging widespread fraud and the creation of millions of forged documents that Ms. Brown knew would be used in foreclosures throughout the country. DocX pled guilty as did Ms. Brown. DocX paid a fine in the tens of millions of dollars and Ms. Brown accepted a sentence of 5 years in prison to settle a criminal charge. Attorneys General across the country, including in Arizona, filed suit against LPS/DocX, most if not all of these cases are or have been favorably settled. The Attorney General in Arizona has released a Consent Judgment wherein LPS agreed to pay \$35 million to the State of Arizona in recompense for the damage caused by creating forged documents and filing them with county recorders throughout Arizona. While the Consent Judgment does not give borrowers a private cause of action against LPS it does show a widespread pattern of fraudulent and deceptive practices against borrowers.

Once the servicer's agent offered the borrower a HAMP or similar modification application, that servicer made a written offer to amend the contract its lender had with the borrower. When the borrower accepted that offer and in good faith submitted all of the information requested to allow the servicer to evaluate the borrower as a HAMP candidate, the borrower accepted the servicer's offer to amend the contract. See, Restatement (Second) of Contracts (1981), particularly §24. So, the lender assumed a contractual duty to reasonably and fairly adhere to the regulations governing the HAMP and TARP programs as outlined in the servicer's contracts with the US government and the manuals provided the servicers by the related government entities. See *First Fed. Savings and Loan Association v. Caudle*, 425 So.2d 1050 (Ala. 1982). See also *Williamson v. Realty Champion*, 551 So.2d 1000 (Ala. 1989) and *Jacques v. First National Bank of Maryland*, 515 A.2d 756, 764 (MD. 1986) (Court imposed duty of care on bank making loans based on guidelines published by Federal Home Loan Mortgage Corporation and Federal National Mortgage Association).

Asserting a breach of contract claim could result in an award of attorney's fees, which may be substantial, against a borrower should he or she lose that breach of contract claim. However, implied in every contract in Arizona is the Covenant of Good Faith and Fair Dealing. See *Wagon Seller*. Care should be taken about alleging any third party beneficiary status under the Contract between the servicer and the US government's HAMP and TARP related entities. But, an allegation can be made that the servicer was receiving incentive payments for granting HAMP and TARP loan modifications and other alternatives to foreclosure to eligible borrowers that served as consideration for its contracts with the eligible borrower. See, *In re: Bank of America Home Affordable Modification Program Contract Litigation*. Pled as a tort, breach of this covenant could result in a borrower receiving a judgment for substantial punitive and other damages. An award of punitive damages may also result in an award of attorney's fees.

By making the modification offer and accepting the application the servicer promised the borrower it would follow the HAMP or similar requirements and in terms of their contract need not be expressly stated but can be inferred from the statements of the servicer's agent or from the parties conduct. See, *Wagon Seller v. Scottsdale Mem. Hosp.* 710 P.2d 1025, 1026 (1985); see also, *Biltmore v. First National Mortgage Sources, LLC* 2008 WL 564833 (D.Ariz., 2008).

The borrower may also have a related claim that the servicer waived its right to foreclose when it told the borrower to go into default in order qualify for a loan modification because once the borrower submitted the application the bank contracted away its right to foreclose because it demanded the default. See *Schaeffer v. Chapman*, 861 P.2d 611 (Ariz. 1993); see also *Bank of America v. La Jolla Group*, 129 Cal. App. 4<sup>th</sup> 706, 28 Cal. Rptr. 3d 825 (2005).

It should also be argued that it has long been black letter law in our United States that fraud vitiates everything. See: *Nudd v. Burrows*, 91 US 426 (1875), "Fraud destroys the validity of everything into which it enters" See also: *Boyce's Executors v. Grundy*, 3 Pet. (28 US) 210 (1830), ("Fraud vitiates everything"); *United States v. Throckmorton*, 98 US 61, 70 (1878) "Fraud vitiates the most solemn contracts, documents and even judgments." See also, *Ellett v*

*Ellett*, Virginia court of Appeals, 0824-00-2 (March 13, 2001) (where a property settlement is overturned and specifically cites *Throckmorton*). Therefore, when false representations are used to incent borrowers to default and/or false documents are used to underpin a foreclosure the process must be vitiated and can be given no weight. Also, Arizona courts strictly construe Deeds of Trust in favor of the borrower because the statutory Deed of Trust procedures “strip borrowers of many of the protections available under a mortgage,” such as the right of redemption after sale guaranteed under a mortgage foreclosure. *Patton v. First Fed. Sav. & Loan Ass’n*, *Supra*. “Therefore, lenders must strictly comply with the HAMP and TARP guidelines, and requirements.

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