

Citi Borrowers Take Mortgage Modification Fight To 9th Circ.

By **Bonnie Eslinger**

Law360, Los Angeles (February 4, 2016, 11:22 PM ET) -- Homeowners alleging a Citigroup Inc. unit breached loan modification agreements told the Ninth Circuit on Thursday that a California judge wrongfully denied class certification over concerns that their claims were too individualized, saying they shared a common question regarding the deadline for the lender to approve revisions.

David Azar of Milberg LLP, representing the homeowners, told the three-judge appellate panel on Thursday that Citi Mortgage Inc. failed to provide timely decisions to homeowners seeking mortgage modifications under the federal Home Affordable Modification Program, leaving borrowers with fewer options and time to head off possible mortgage defaults.

Thus, U.S. District Judge Dale S. Fisher erred in rejecting the plaintiffs' motion for class certification in October 2013, Azar said.

"We do not care if someone actually qualified for a modification or not. Our case on the class side is about whether or not Citi made timely decisions to either deny or to offer modification by the modification effective date," Azar said. "It doesn't matter if some qualified, it doesn't matter if they didn't qualify."

Judge Consuelo Callahan inquired how class certification could be appropriate since even if there was a common question, the answer could still yield individual concerns. She asked if Citi had the "exact timeline" in which it needed to respond to all homeowners seeking loan modifications and how that might be affected by such variables as whether the borrowers submitted their documents timely or had qualifying income.

"You're saying they didn't give the answer in time, right?" she said. "So does the same time apply to everyone? I don't know how that could be."

Azar said a "trial period plan," or TPP, which is part of the federal government program, has a set end date noted on the agreement. That was enough to establish class certification, he said.

"It is not varied by a changing in terms of the things you were talking about," Azar said. "That's a set hard-and-fast date."

But Citi's attorney, Michele Odorizzi of Mayer Brown LLP, disagreed. She told the Ninth Circuit that while a common question might exist, the district court focused in on the predominance requirement for class

certification and found that the individual circumstances of the members predominated.

“That was game over at that point,” Odorizzi said.

Citi’s attorney also refuted the idea that the TPP’s so-called “modification effective date” was a deadline for the lender to make a decision.

“It doesn’t read like a deadline,” she said. “What the contract says is if by the [modification effective date] the lender has not given you both a countersigned TPP and a loan modification agreement, or you haven’t made all your payments, or the lender has decided that your representations were not true, then the TPP will expire.”

Additionally, the fact that Citi is able to extend the trial period timeline, something the plaintiffs have acknowledged, shows that “there are still a myriad of facts to answer the question of when is Citi’s deadline,” Odorizzi said.

In his October 2013 ruling, Judge Fischer found that the plaintiffs' claims suffered from “heterogeneity problems” that could not be solved using the class action process.

The plaintiffs allege Citi failed to follow through on agreements to lower homeowners’ monthly mortgage payments under U.S. Treasury’s Home Affordable Modification Program, a voluntary program backed with federal bailout money designed to help mortgage servicers make payments more affordable.

Citi broke promises to make their loan modifications permanent if they made reduced payments on time during a roughly three-month trial period, states their complaint, which accuses Citi of breach of contract and breach of good faith and fair dealing.

They sought certification for thousands of homeowners who complied with the agreements during the trial period and didn’t receive permanent modifications.

The U.S. Judicial Panel on Multidistrict Litigation in October 2011 consolidated several purported Citi Mortgage HAMP class actions into one MDL under Judge Fischer’s supervision, including proposed cases from Illinois, Massachusetts, New Jersey, Pennsylvania and elsewhere in California.

U.S. Circuit Judges Consuelo Callahan and N.R. Smith, as well as Senior New York Southern District Judge Jed F. Rakoff, sat on the panel for the Ninth Circuit.

The plaintiffs are represented by David E. Azar of Millberg LLP and Gary Klein of Klein Kavanagh Costello LLP.

Citi is represented by Michele Odorizzi, Stephen J. Kane, Lucia Nale and Steven E. Rich of Mayer Brown LLP.

The case is *Hanna Bernard v. CitiMortgage Inc.*, case number 13-57158, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Evan Weinberger. Editing by Philip Shea.
