

The Supreme Court of South Carolina

Re: Rescission of Administrative Orders Governing
Mortgage Foreclosure Actions

ORDER

In 2009, former Chief Justice Toal issued an Administrative Order to ensure compliance with the Home Affordable Modification Program (HAMP), which was part of the Making Home Affordable Program (MHAP) of the United States Department of the Treasury.¹ S.C. Sup. Ct. Admin. Order dated May 22, 2009.² At the time, HAMP required the temporary suspension of certain foreclosure proceedings, and the order stated it was intended to ensure eligible homeowners were afforded the benefits available under HAMP, procedures for handling issues

¹ MHAP was designed to stabilize the housing market and assist struggling homeowners in owner-occupied homes avoid mortgage foreclosure during the financial crisis that began in 2008. HAMP was funded through the Troubled Asset Relief Program (TARP), and financial incentives were offered to certain borrowers who participated in HAMP and other programs to offer modifications of mortgages and avoid foreclosures.

² This order is available at:
<https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-05-22-01>.

related to HAMP were uniform throughout the state, and foreclosure actions were not unnecessarily dismissed or delayed while HAMP issues were resolved.

A revised order was issued on May 2, 2011. *In re Mortg. Foreclosure Actions*, 396 S.C. 209, 720 S.E.2d 908 (2011). The 2011 Order includes additional obligations that were intended to ensure foreclosure intervention occurs in cases where it is required. Among other things, the 2011 Order requires that Mortgagees serve a notice of the right to foreclosure intervention together with the summons and complaint, and also certify that loss mitigation efforts have been unsuccessful before a final hearing or sale could occur. *Id.* at 211, 720 S.E.2d at 909. Counsel for Mortgagees in mortgage foreclosure actions are obligated to receive mitigation information from Mortgagors throughout the intervention process. *Id.* at 213, 720 S.E.2d at 909-10.

Congress ended the Making Home Affordable Program at the end of 2016. *See* <https://www.makinghomeaffordable.gov/need-help> ("As of December 30, 2016, no new applications or new requests for assistance under any MHA program will be accepted."). Section 709(b), Title VII, Consolidated Appropriations Act, 2016, P.L. 114-113, states:

(b) TERMINATION. --

(1) IN GENERAL. -- The Making Home Affordable initiative of the Secretary of the Treasury, as authorized under the

Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5201 et seq.), shall terminate on December 31, 2016.

(2) APPLICABILITY. -- Paragraph (1) shall not apply to any loan modification application made under the Home Affordable Modification Program under the Making Home Affordable initiative of the Secretary of the Treasury, as authorized under the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5201 et seq.), before December 31, 2016.

HAMP is inapplicable in new foreclosure actions, unless the borrower sought a modification prior to December 31, 2016. The Treasury Department issued guidance to implement termination of the Program prior to termination. *See* March 3, 2016 Supplemental Directive 16-02; and May 2, 2016 Supplemental Directive 16-03, U.S. Dept. of the Treasury.³

Because HAMP has ended, we find that the 2009 Order and 2011 Order must be rescinded. While HAMP has ended, we recognize various loss mitigation programs apply to mortgage loans secured by property that is a borrower's principal residence. *See* 12 C.F.R. § 1024.30(c)(2). A number of federal regulations govern the conduct of lenders and servicers when they choose to offer specific forms of loss mitigation, which may include forbearance, refinancing, and modification, among others. *See* 12 C.F.R. §§ 1024.39-1024.41. For example,

³ These directives are available at: https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1602.pdf, and https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1603.pdf.

current regulations prohibit lenders or servicers from making a first filing in a foreclosure matter or seeking a judgment or order of sale when a borrower is performing pursuant to the terms of an offered payment forbearance program or repayment plan. 12 C.F.R. § 1024.41(c)(2)(iii). Various other temporary loss mitigation programs exist or may be offered following emergencies, such as hurricanes or COVID-19. *See, e.g.*, 12 C.F.R. § 1024.19(e) (setting forth requirements for temporary COVID-19-related live contact).

Accordingly, notwithstanding the rescission of the 2009 and 2011 Orders, nothing in this order should be read to imply that Mortgagee-plaintiffs in foreclosure actions are not required to comply with applicable federal regulations with respect to loss mitigation in foreclosure actions in South Carolina. Further, nothing in this order prohibits the circuit court, the master-in-equity, or a special referee from inquiring about the status of loss mitigation or requiring that counsel for a Mortgagor confirm or certify that there are no ongoing loss mitigation efforts underway, that a Mortgagor has failed to qualify for a program, or a Mortgagor defaulted under a loss mitigation agreement prior to scheduling a final hearing, entering a final order of foreclosure, or conducting a sale.

Finally, although the 2011 Order has been rescinded, counsel for Mortgagees in foreclosure actions shall continue to serve as the point of contact

between their clients and Mortgagors with respect to loss intervention. This includes, without limitation, submission of all required information, negotiations, and consummation of any loan modification or other loss mitigation agreement, and providing reliable information to the court about the status of any loss mitigation.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
May 17, 2023