

TENTH CIRCUIT OPINION CLARIFIES COLORADO LENDER LIABILITY LAWS

The U.S. Court of Appeals for the Tenth Circuit ruled on Jan. 22, 2021, in *Mayotte v. U.S. Bank et al.* that a mortgage borrower was barred under Colorado law from tort claims for economic damages against two banks, providing clarity on lender liability in the state.

The plaintiff, Mayotte, obtained a mortgage from one bank, which was serviced by another bank. Mayotte sought a loan modification and alleged that the servicer had agreed to modify the loan if Mayotte withheld from making three payments. Mayotte withheld making three payments, but the servicer denied agreeing to modify the loan. The loan was ultimately foreclosed, which spurred Mayotte to sue both banks, asserting statutory claims under the Colorado Consumer Protection Act, tort claims for negligence, negligent supervision and negligent hiring, and a claim for declaratory judgment.

The lower district court granted summary judgment in favor of the banks relying in part on the economic-loss rule, which prevents the use of tort remedies for a lender's failure to carry out its promises. Mayotte then appealed the ruling to the Tenth Circuit Court of Appeals.

In affirming the lower court's judgment, the Tenth Circuit held that under Colorado law, a plaintiff alleging an economic loss from a breach of contract ordinarily lacks a cause of action for a tort, such as Mayotte's negligence claims. A tort would only exist if the wrongful action violated a duty existing independently of the contract. The Tenth Circuit clarified that a duty exists independently of a contract only if it arises outside the scope of the contractual duties or arises from a special relationship. For example, although Mayotte attempted to argue that an independent duty existed because the servicer promised to modify the loan, the promise did not constitute a duty arising independently of the contract. While contracts give rise to an implied duty of good faith and fair dealing to carry out obligations in a commercially reasonable manner, this implied duty does not exist independently of the contract between lenders and borrowers. Furthermore, no special relationship existed because Colorado law does not recognize a special relationship between lenders and borrowers.

This decision makes clear that borrowers are barred from bringing tort claims

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for economic damages against lenders arising from a contract, absent a duty existing independently of the contract—a duty to operate in a commercially reasonable manner is a duty that is not independent of a contract.

While *Mayotte v. U.S. Bank et al.* provides clarity on lender liability under Colorado law, it is always recommended to seek the advice of legal counsel to evaluate liability risk involving specific contracts with borrowers.