

HAMPered Hopes for Homeowners: An Analysis of How Litigation Trends Have Exposed the Home Affordable Modification Program’s Weaknesses

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I. A PORTRAIT OF HAMP “HELL”

In his 1931 book, *The Epic of America*, James Truslow Adams describes the American Dream as:

[t]hat dream of a land in which life should be better and richer and fuller for everyone. . . . It is not a dream of motor cars and high wages merely, but a dream of social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable[.]¹

To the De La Torres family, home ownership and two beautiful children were the epitome of the American Dream.² However, this dream became a dream deferred: “[W]hen mom Angelica lost her house-keeping job and dad Angel’s hours at a granite company were cut, the family could no longer afford their mortgage at [6.5%] interest.”³ Foreclosure seemed like the only option. The Home Affordable Modification

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1. JAMES TRUSLOW ADAMS, THE EPIC OF AMERICA 214–15 (1931).
2. Bill Whitaker, *Homeowners Not Receiving Promised Help*, CBS EVENING NEWS (Sept. 9, 2009, 5:51 PM), <http://www.cbsnews.com/stories/2009/06/14/eveningnews/main5088036.shtml>.
3. *Id.*

Program (“HAMP”) provided the De La Torres family with an alternative: loan modification.⁴ But when Angel asked the bank to modify his loan, he was told he could not apply without defaulting on his mortgage first—a blatant lie.⁵ HAMP is designed to apply to any homeowner, even without a default, if the homeowner is in danger of falling behind on mortgage payments.⁶ The De La Torres family’s mortgage payments already consumed fifty-four percent of the family’s monthly income.⁷

Unfortunately, the De La Torres family’s story is not unique. Troy Taliancich faced the same bank stonewalling when he attempted to modify the loan on his New Orleans home.⁸ After the economic downturn in 2008, Taliancich’s business as a computer technician slowed down and he consequently missed a monthly payment on his home. He called Bank of America, explained his situation, and was informed of HAMP. “He sent an application, which contained tax returns, pay stubs and a hardship letter and was told to expect an official confirmation in 10 days.”⁹ In the meantime, Taliancich was told to make reduced payments. Instead of any confirmation, Taliancich received only mixed signals. He would call the bank multiple times, each time speaking to a new person; and each time he was reassured that everything was fine. The next day, he would receive foreclosure threats in the mail. While the bank continued to move forward with foreclosing on Taliancich’s home, he was at a standstill. The bank continued to reassure him that making the payments was “the right thing,” but his account showed that he was behind on four mortgage payments and was not on a trial payment plan.¹⁰

While Taliancich’s woes occurred in 2008, evidence of the banks’ deceptive tactics has only recently surfaced. As part of a multi-state class action suit brought on behalf of Bank of America homeowners who sought a loan modification through HAMP, Bank of America employees have attested to regularly lying to homeowners seeking loan modifications, denying their applications for made-up reasons, and being rewarded for sending homeowners to foreclosure.¹¹ According to Wil-

4. *Id.*

5. *Id.*

6. *Home Affordable Modification Program Eligibility*, MAKING HOME AFFORDABLE.GOV, <http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx> (last updated June 4, 2012) [hereinafter *HAMP Eligibility*].

7. Whitaker, *supra* note 2.

8. Arthur Delaney, *One Man’s HAMP HELL: ‘Just Wait This Thing Out’*, HUFF POST BUSINESS (Oct. 14, 2010 12:53PM), http://www.huffingtonpost.com/2010/10/14/post_547_n_757979.html.

9. *Id.*

10. *Id.*

11. Paul Kiel, *Bank of America Lied to Homeowners and Rewarded Foreclosures, Former Employees Say*, PROPUBLICA (June 14, 2013, 5:44 PM), <http://www.propublica.org/article/bank-of-america-lied-to-homeowners-and-rewarded-foreclosures>.

liam Wilson, Jr., a former Bank of America underwriter and manager, some homeowners were simply denied en masse in a procedure called a “blitz”: “During a blitz, a single team would decline between 600 and 1,500 modification files at a time.”¹²

These stories are snippets of the struggles homeowners face when attempting to attain a loan modification under the Home Affordable Modification Program. But what is a homeowner to do? As the bank continues to move forward with the foreclosure, the homeowner must turn to the legal system. Through a discussion of influential cases, this article analyzes whether the fight for fairness in the HAMP arena has been fruitful for homeowners.¹³ This article argues that litigation trends have only further exposed HAMP’s purported “toothlessness,” leaving homeowners with few, if any, options.¹⁴ First, however, this article will attempt to shed some much-needed light on the Home Affordable Modification Program.

II. UNDERSTANDING HAMP

In February 2009, the Obama Administration introduced the Making Home Affordable (“MHA”) Program.¹⁵ This program was meant to stabilize the deteriorating housing market and help homeowners avoid foreclosure.¹⁶ It was projected to help seven to nine million families refinance or restructure their mortgages.¹⁷ While the MHA provides a variety of solutions to mitigate the housing crisis, the cornerstone of the MHA is the Home Affordable Modification Program. HAMP was designed to “modify[] loans to a level that is affordable for borrowers now and sustainable over the long term.”¹⁸ Under HAMP, banks enter into contracts, known as Service Participation Agreements, with the United States Treasury and agree to modify mortgages in a particular

12. *Id.*

13. *See infra* Part III.

14. “Next came Obama’s ‘Home Affordable Modification Program’ farce. Another toothless ‘voluntary’ program, HAMP asked banks to do the same things they’ve just agreed to under the robo-signing settlement: allow homeowners who are struggling to refinance and possibly reduce their principals to reflect the collapse of housing prices in most markets. Voluntary = worthless.” Ted Rall, *Another Obama Sellout*, YAHOO! NEWS (Feb 23, 2012), <http://news.yahoo.com/another-obama-sellout-203011832.html>.

15. MAKING HOME AFFORDABLE PROGRAM, HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES 13 (Version 4.1 2012), available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_41.pdf [hereinafter MHA HANDBOOK].

16. *Id.*

17. President Barack Obama, Remarks by the President on the Home Mortgage Crisis (Feb. 18, 2009), in Archive of President Obama’s Speeches & Remarks, THE WHITE HOUSE, <http://www.whitehouse.gov/the-press-office/remarks-president-mortgage-crisis>.

18. Fannie Mae, *Home Affordable Modification Program: Overview*, MAKING HOME AFFORDABLE, <https://www.hmpadmin.com/portal/programs/hamp.jsp#1> (last visited Feb. 2, 2013).

and uniform fashion.¹⁹ In return, the Federal Government gives the banks incentive payments.²⁰ To date, there are over one hundred participating servicers, including all major banks.²¹

HAMP applies to homeowners who (1) received their mortgage on or before January 1, 2009; (2) owe up to \$729,750 on their primary residence; (3) acknowledge that the property is not condemned; (4) experience financial hardship and are either delinquent or in danger of falling behind on mortgage payments; (5) have evidence of income to support a modified payment; and (6) have not been convicted within the last ten years of specific crimes generally connected to mortgage or real estate transactions.²² The program also applies to those who own rental property and owe up to a specific monetary amount.²³ The homeowner must meet all criteria in order to be considered for a HAMP loan modification.²⁴

The beauty of HAMP is that it forces banks to calculate loan modifications uniformly.²⁵ HAMP's goal is to reduce the borrower's monthly mortgage payment to below thirty-one percent of the borrower's income.²⁶ The uniform criteria, also referred to as the "waterfall" calcu-

19. MHA HANDBOOK, *supra* note 15, at 21; *see also* *Purchase Financial Instrument and Servicer Participation Agreement*, MAKING HOME AFFORDABLE https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/servicerparticipationagreement.pdf (last visited Feb. 2, 2013) [hereinafter *Service Participation Agreement*].

20. [T]he lien-holder will receive a \$1500 payment for modifying current borrowers who are at imminent risk of default and may receive a home price decline protection payment. Servicers receive \$1000 when a loan modification completes its trial plan, fulfills its documentation requirements, and becomes permanent; if the modification continues to perform, the servicer is eligible for an additional \$1000 on each of the first three anniversaries of the modification as well as additional incentives for modifying imminent default borrowers. Homeowners are eligible for up to five one-time payments toward principal reduction equal to \$1000 each year if they make their payments on time.

Steven Holden et al., *The HAMP NPV Model: Development and Early Performance* 4–5 (Fed. Hous. Fin. Agency, Working Paper No. 11-1, 2011) *available at* http://www.fhfa.gov/webfiles/21680/REE_HAMP_07-22-11_FINAL.pdf; *see also* MHA HANDBOOK, *supra* note 15, at 134–39 for specific criteria as to how loan servicers, investors, and mortgagees receive incentives from the federal government through HAMP.

21. *See* *Contact Your Mortgage Company*, MAKING HOME AFFORDABLE.GOV <http://www.makinghomeaffordable.gov/get-assistance/contact-mortgage/Pages/default.aspx> (last updated Aug. 4, 2011 3:19 PM) (providing a list of mortgage companies that participate in HAMP).

22. *See* *HAMP Eligibility*, *supra* note 6.

23. Specifically, rental property is eligible for HAMP loan modification if the homeowner owes up to \$729,750 on a single unit rental property; \$934,200 on a 2-unit rental property; \$1,129,250 on a 3-unit rental property; or \$1,403,400 on a 4-unit rental property. *Id.*

24. *See* MHA HANDBOOK, *supra* note 15, at 68–75.

25. *See* MHA HANDBOOK, *supra* note 15, at 100–13.

26. "The program strives to create a more affordable first lien housing payment of principal, interest, taxes, insurance, homeowner/condo association fees, and escrow shortages that is as close as possible, but no less than, [thirty-one] percent of the borrower's gross monthly household

lation dictate the refinancing terms of the loan modification.²⁷ By placing strict criteria on the way banks provide loan modifications, this goal is fulfilled.²⁸ If the homeowner's mortgage payment is already below thirty-one percent, he is not eligible for the traditional Tier 1 HAMP, but can apply for the more stringent requirements of Tier 2.²⁹

Homeowners can be denied eligibility if the mortgage investor would make more money by allowing the subject property to go into foreclosure than by approving a loan modification.³⁰ This decision is made through the use of a mathematical formula called the Net Present Value ("NPV") test.³¹ The "NPV formula takes into account various foreclosure factors such as the current property value, foreclosure costs, and the expected resale time, and compares them with various modification factors such as the value of the modified monthly payment and the risk of a repeat default."³² May 2010 data from the U.S. Department of the Treasury show that an estimated 300,000 loans are eliminated each month from HAMP eligibility based on the NPV calculation.³³

Once the mortgagor has decided that a loan modification would be more beneficial, the homeowner is placed on a Trial Period Plan ("TPP"). The TPP mirrors an estimate of what the mortgage payments would be if the loan were approved based on the calculated modification

income." FREDDIE MAC, HOME AFFORDABLE MODIFICATION PROGRAM, PUB. No. 800 1 (2012) available at http://www.freddiemac.com/service/factsheets/pdf/mha_modification.pdf.

27. *Id.*

28. The borrower's mortgage payment is reduced to thirty-one percent of his "income through a uniform sequence of three steps (hereafter referred to as the modification 'waterfall'). The waterfall consists of: (1) a rate reduction to as low as two percent; (2) if necessary, a term extension up to forty years; and (3) as necessary, principal forbearance . . ." This rate continues for five years. After five years, the interest rate increases one percentage point per year until it reaches a fixed cap set forth in Freddie Mac Primary Mortgage Market Survey (PMMS). See Steven Holden et al., *The HAMP NPV Model: Development and Early Performance* 4–5 (Fed. Hous. Fin. Agency, Working Paper No. 11-1, 2011) available at http://www.fhfa.gov/webfiles/21680/REE_HAMP_07-22-11_FINAL.pdf.

29. See MHA HANDBOOK, *supra* note 15, at 101. A more in-depth discussion of the differences in eligibility for Tier 1 and Tier 2 can be found in the MHA HANDBOOK, *supra* note 15, at 68–71.

30. See John R. Chiles & Matthew T. Mitchell, *HAMP: An Overview of the Program and Recent Litigation Trends*, 65 CONSUMER FIN. L.Q. REP. 194, 196 (2011).

31. *Id.*

32. *Id.*; see MHA HANDBOOK, *supra* note 15, at 113–17 for a more comprehensive understanding of the NPV test.

33. See MAKING HOME AFFORDABLE PROGRAM, U.S. DEP'T DEPARTMENT OF THE TREASURY, SERVICER PARTICIPATION REPORT THROUGH MAY 2010, at 7 (2012), available at <http://www.treasury.gov/initiatives/financial-stability/reports/Documents/November%202012%20MHA%20Report%20Final.pdf>. Data after this date do not show the amount of homeowners eliminated from HAMP eligibility based on the NPV test. See U.S. DEPARTMENT OF THE TREASURY, *Making Home Affordable Performance Report*, available at <http://www.treasury.gov/initiatives/financial-stability/reports/Pages/Making-Home-Affordable-Program-Performance-Report.aspx> (last updated July 13, 2012, 4:41 PM).

in the “waterfall” stage.³⁴ The trial period is generally three months.³⁵ According to the MHA handbook, “[b]orrowers who make all trial period payments timely and who satisfy all other trial period requirements *will* be offered a permanent modification.”³⁶

III. LESSONS FROM HAMP: WHERE DID THINGS GO WRONG?

The road to attain a HAMP loan modification appears straightforward; however, this road does not parallel the real life experiences of many homeowners frustrated with their attempts to attain HAMP help. Perhaps an erroneous foreclosure on one house is not a significant blunder in comparison to the estimated 1.1 million homeowners who have received a permanent loan modification in HAMP’s three-year stint.³⁷ But to families like the De La Torres’, the loss of their home is not a mere blunder.³⁸ Many homeowners attempt to fight the battle for their home in the courtroom—only to find themselves with a hefty legal bill and without any legal remedies. Various creative causes of action for HAMP violations have been brought in front of courts nationwide; these causes of action include due process violations, private right of actions, contractual remedies, consumer protection actions, and class actions. Other than an anomaly out of the Seventh Circuit Court of Appeals,³⁹ each posited legal remedy has largely failed. The court’s inability to find a way for homeowners to redress the bank’s errors further demonstrates that HAMP is no more than a federal handout to banks.

A. Homeowners Have No Due Process Rights Under HAMP

Johnson Sendolo purchased his home in 2005. Three years later he was laid off and could not make his mortgage payments.⁴⁰ Sendolo sought a loan modification under HAMP through his loan servicer. His request was denied. Subsequently, his house was foreclosed upon and

34. See MHA HANDBOOK, *supra* note 15, at 118.

35. *Id.*

36. *Id.* (emphasis added).

37. See U.S. DEPARTMENT OF THE TREASURY MAKING HOME AFFORDABLE PROGRAM, U.S. DEP’T OF THE TREASURY, PROGRAM PERFORMANCE REPORT THROUGH NOVEMBER 2012 at 1 (2012), available at <http://www.treasury.gov/initiatives/financial-stability/reports/Documents/November%202012%20MHA%20Report%20Final.pdf>.

38. Whitaker, *supra* note 2.

39. See *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012) (finding that a borrower’s causes of action under state law remedies were valid). The implications of the *Wigod* decision are discussed later in the article.

40. *Williams v. Geithner*, CIV.09-1959 ADM/JJG, 2009 WL 3757380 (D. Minn. Nov. 9, 2009). In addition to Sendolo, Williams was also a plaintiff in this case. *Id.* at *4. Both “purport[] to represent a class of people who are delinquent on their mortgage payments, have applied for and been denied a loan modification, and whose homes have been sold at a foreclosure sale and whose statutory right of redemption period has not yet expired.” *Id.*

sold at a sheriff's sale. He was informed that he had six months to pay the loan balance in full; otherwise, he would lose the property forever. With few options left, Sendolo pursued an injunction. He alleged that the denial of his loan modification was a violation of his constitutional right to procedural due process: According to Sendolo, the bank's "failure to provide written notification of an adverse decision and an opportunity for appeal deprive[d] [Sendolo] of due process"⁴¹ Sendolo's due process claim is not a rare case; multiple federal district courts have considered this issue as well.⁴²

Unfortunately, no court has found a due process entitlement for eligible HAMP borrowers.⁴³ The Due Process Clause of the Fifth Amendment forbids the Federal Government from depriving persons of "life, liberty, or property, without due process of law."⁴⁴ Sendolo contended that he had a protected property interest in attaining a HAMP loan modification.⁴⁵ A protected property interest exists when a person has "more than an abstract need or desire for [a benefit]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."⁴⁶ Thus, "[t]he question is not simply whether there is an expectation of certain government treatment, but whether the individual has an enforceable right to that treatment."⁴⁷

Courts have found that eligible homeowners do not have a property interest in attaining a HAMP modification for two reasons: First, there is no absolute duty placed on the Federal Government or loan services by the congressional statute that establishes HAMP, the Treasury Guidelines, or the Service Participation Agreements.⁴⁸ To the contrary, all of

41. *Id.* at *4.

42. *See, e.g.*, *Edwards v. Aurora Loan Servs., LLC*, 791 F. Supp. 2d 144 (D.C. Cir. 2011) (holding that a loan modification does not establish a constitutionally protected property interest pursuant to the EESA and HAMP); *McInroy v. BAC Home Loan Servicing, LP*, No. CIV. 10-4342 DSD/SER, 2011 WL 1770947 (D. Minn. May 9, 2011) (same); *Steffens v. Am. Home Mortg. Servicing, Inc.*, No. 6:10-1788-JMC, 2011 WL 901812 (D.S.C. Jan. 5, 2011) *report and recommendation adopted sub nom.*, C.A. 6:10-cv-01788-JMC, 2011 WL 901179 (D.S.C. Mar. 15, 2011) (same); *Orcilla v. Bank of Am., N.A.*, No. C10-03931 HRL, 2010 WL 5211507 (N.D. Cal. Dec. 16, 2010) (same); *Nguyen v. BAC Home Loan Services, L.P.*, No. C-10-01712 RMW, 2010 WL 3894986 (N.D. Cal. Oct. 1, 2010) (same).

43. As of this article's publication, no court has found a due process violation under HAMP. *See supra*, note 42. However, some courts, like the court in *Bosque v. Wells Fargo Bank, N.A.*, have decided not to address the issue because the breach of contract action is independent of any purported property interest. *See* 762 F. Supp. 2d 342, 350–51 (D. Mass. 2011).

44. U.S. CONST. amend. V.

45. *Williams*, 2009 WL 3757380, at *5.

46. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

47. *Edwards*, 791 F. Supp. 2d at 153 (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757 (2005)).

48. *Williams*, 2009 WL 3757380, at *5.

these documents are fraught with discretionary powers.⁴⁹ The statute establishing HAMP, the Emergency Economic Stabilization Act (“EESA”), does not require loans to be modified; instead, it states that a loan may be modified “where appropriate.”⁵⁰ The United States District Court for the District of Minnesota in *Williams v. Geithner* found that the phrase—“where appropriate”—“limits the Secretary’s obligation and evinces a [c]ongressional intent to afford discretion in the decision whether to modify loans in certain circumstances.”⁵¹ The Treasury guidelines grant additional discretion to the loan servicers: “While . . . the NPV calculation is merely an objective mathematical formula, assigning values to certain variables within the formula are largely within each servicer’s discretion”⁵² Furthermore, the Service Participation Agreements grant loan servicers considerable discretion over which loans to modify.⁵³ The lack of any “language of an unmistakably mandatory character” in the EESA, the guidelines, or the SPAs undermines a claim of due process entitlement.⁵⁴

Secondly, even if the HAMP Treasury guidelines were compulsory, compulsion would not create a protected property interest.⁵⁵ In *Edwards v. Aurora Loan Services*, the court followed the Circuit Court for the District of Columbia’s holding that only statutes and regulations, and not guidelines, could create a constitutionally protected entitlement.⁵⁶ Because “HAMP eligibility requirements are neither codified by Congress nor promulgated by [the] Treasury through notice-and-comment rulemaking,” the guidelines are not a protected property interest.⁵⁷ The near-universal finding that eligible borrowers do not have a property interest in the loan modification leaves homeowners, like Sendolo, clawing for other options.⁵⁸

49. *Id.*

50. Emergency Economic Stabilization Act, 12 U.S.C. § 5219 (2012).

51. *Williams*, 2009 WL 3757380, at *6.

52. *Id.*

53. See *Edwards v. Aurora Loan Servs., LLC*, 791 F. Supp. 2d 144, 151 (D.D.C. 2011).

54. *Williams*, 2009 WL 3757380, at *6 (citing *Hill v. Group Three Housing Development Corp.*, 799 F.2d 385, 392 (8th Cir. 1986) (describing rules or understandings that may create a protected property interest if there is clear mandatory language) (citation omitted)).

55. See *Edwards*, 791 F. Supp. 2d at 154.

56. See *id.* (citing *Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32 (D.C. Cir. 1997)). The D.C. Circuit pointed out that although employment contracts may create a property entitlement, “we have found no decision of the Supreme Court or this Circuit holding that administrative rules or understandings existing wholly apart from legislation or regulations may create a property interest.” *Wash. Legal Clinic for the Homeless*, 107 F.3d at 38.

57. See *Edwards*, 791 F. Supp. 2d at 154.

58. Nicholas Maxwell provides an interesting critique of the *Williams* decision. See Nicholas T. Maxwell, Note, *The 75 Billion Dollar Question: Why is HAMP Not An Entitlement Program?*, 97 IOWA L. R. 1305 (2012).

B. *Homeowners Are Not Third-Party Beneficiaries to the Service Participation Agreement*

Disgruntled homeowners who fail to attain HAMP modifications have argued that they are entitled to a permanent loan modification because they are third-party beneficiaries of the Service Participation Agreement (“SPA”).⁵⁹ The SPA is a contract executed between a loan servicer and the Federal Government in order to give teeth to HAMP.⁶⁰ It spells out the actions that the loan servicers must take, such as the use of the waterfall calculation or the NPV formula, in order to receive the monetary incentive from the U.S. Treasury.⁶¹ At least three notable cases have found success under this litigation theory;⁶² however, a vast majority of courts have rejected it.⁶³

To establish that homeowners are third-party beneficiaries of the SPAs, homeowners must prove, either by the intent of the contracting parties or by the SPA’s language, that the banks intended to make them beneficiaries.⁶⁴ The requirement of establishing clear intent derives from the fear that third parties, who may be only incidental beneficiaries, will unnecessarily bring lawsuits: “Government contracts by their nature benefit the public, but only in rare circumstances will courts deem indi-

59. *See, e.g.*, *Speleos v. BAC Home Loans Servicing, L.P.*, 755 F. Supp. 2d 304 (D. Mass. Dec. 14, 2010).

60. *See Service Participation Agreement, supra* note 19.

61. *Id.*

62. *See* *Sampson v. Wells Fargo Home Mortg., Inc.*, No. CV 10-08836 DDP (SSx), 2010 WL 5397236 (C.D. Cal. Nov. 19, 2010); *Marques v. Wells Fargo Home Mortg., Inc.*, 09-CV-1985-L(RBB), 2010 WL 3212131 (S.D. Cal. Aug. 12, 2010); *Reyes v. Saxon Mortg. Servs., Inc.*, No. 09cv1366 DMS (WMC), 2009 WL 3738177 (S.D. Cal. Nov. 5, 2009).

63. *See, e.g.*, *Gale v. Aurora Loan Servs.*, No. 1:11-CV-47 TS, 2011 WL 1897671 (D. Utah May 18, 2011); *Nafso v. Wells Fargo Bank, NA*, No. 11-10478, 2011 WL 1575372 (E.D. Mich. April 26, 2011); *Grill v. BAC Home Loans Servicing, LP*, CIV No. 10-CV-03057-FCD/GGH, 2011 WL 127891 (E.D. Cal. Jan. 13, 2011); *Orcilla v. Bank of Am., N.A.*, No. C10-03931 HRL, 2010 WL 5211507 (N.D. Cal. Dec. 16, 2010); *Martinez v. Bank of Am. Nat’l Ass’n.*, No. 3:10-cv-00287-RCJ-RAM, 2010 WL 4290921 (D. Nev. Oct. 20, 2010); *Zoher v. Chase Home Fin.*, No. 10-14135-CIV, 2010 WL 4064798 (S.D. Fla. Oct. 15, 2010); *Phu Van Nguyen v. BAC Home Loan Servs., LP*, No. C-10-01712 RMW, 2010 WL 3894986 (N.D. Cal. Oct. 1, 2010); *Hammonds v. Aurora Loan Servs., LLC*, No. EDCV 10-1025 AG (OPx), 2010 WL 3859069 (C.D. Cal. Sept. 27, 2010); *McKensi v. Bank of Am., N.A.*, No. 09-11940-JGD, 2010 WL 3781841 (D. Mass. Sept. 22, 2010); *Vazquez v. Bank of Am. Home Loans*, No. 2:10-CV-00116-PMP-RJJ, 2010 WL 3385350 (D. Nev. Aug. 23, 2010); *Zeller v. Aurora Loan Servs., LLC*, No. 3:10cv00044, 2010 WL 3219134 (W.D. Va. Aug. 10, 2010); *Wright v. Bank of Am., N.A.*, No. CV 10-01723 JF (HRL), 2010 WL 2889117 (N.D. Cal. July 22, 2010); *Hoffman v. Bank of Am. N.A.*, No. C 10-2171 SI, 2010 WL 2635773 (N.D. Cal. June 30, 2010); *Zendejas v. GMAC Wholesale Mortg. Corp.*, No. 1:10-CV-00184 OWW GSA, 2010 WL 2490975 (E.D. Cal. June 16, 2010); *Benito v. Indymac Mortg. Servs.*, No. 2:09-CV-001218-PMP-PAL, 2010 WL 2130648 (D. Nev. May 21, 2010); *Escobedo v. Countrywide Home Loans, Inc.*, No. 09cv1557 BTM(BLM), 2009 WL 4981618 (S.D. Cal. Dec. 15, 2009).

64. *See Marques*, 2010 WL 3212131, at *3 (citing *Cnty. of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1244 (9th Cir. 2009) *rev’d on other grounds*, 131 S. Ct. 1342 (2011)).

vidual members of the public to be intended beneficiaries empowered to enforce those contracts in court.”⁶⁵

Courts have viewed the issue of intent differently.⁶⁶ At least three courts, like the United States District Court for the Southern District of California in *Marques v. Wells Fargo Home Mortgage*, found clear intent that eligible homeowners were the intended beneficiaries of the SPAs.⁶⁷ By examining the SPA as a whole, the *Marques* Court stated that the requirements placed on the banks demonstrated no other discernable purpose for the SPA except to provide loan modifications for the benefit of eligible HAMP borrowers.⁶⁸ Moreover, the SPA’s purpose coincides with the U.S. Treasury’s descriptions of the program: HAMP “will help up to 3 to 4 million at-risk homeowners avoid foreclosure by reducing monthly mortgage payments.”⁶⁹ The *Marques* Court’s holistic view of the SPA allowed for the homeowner to have standing to sue as a third-party beneficiary.⁷⁰

However, an overwhelming majority of district courts have found that SPAs lack clear intent to make eligible homeowners third-party beneficiaries.⁷¹ In *Edwards v. Aurora Loan Services*, the United States District Court for the District of Columbia focused on the wording of the Service Participation Agreement: The SPA “shall inure⁷² to the benefit of the parties to the Agreement and their permitted successors-in-interest.”⁷³ Eligible homeowners of HAMP were not expressly included as contemplated successors.⁷⁴ Because the SPA specifically identified who was entitled to benefit from the agreement, such borrowers were not third-party beneficiaries.⁷⁵ Additionally, as other courts have emphasized, the fact that the SPAs would undoubtedly benefit the borrowers

65. *Edwards*, 791 F. Supp. 2d at 151 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 313(2) cmt. a (“Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested.”) (1981)).

66. Compare *Speleos v. BAC Home Loans Servicing, L.P.*, 755 F. Supp. 2d 304, 304 (D. Mass. Dec. 14, 2010) and *Marques*, 2010 WL 3212131, at *1 with *Edwards*, 791 F. Supp. 2d at 141.

67. See *Marques*, 2010 WL 3212131, at *4.

68. *Id.* at *5.

69. *Id.* at *6.

70. *Id.* at *7. However, the Motion to Dismiss was ultimately granted in favor of Wells Fargo because *Marques* “ha[d] alleged insufficient facts to state a claim for breach of the Agreement.” *Id.*

71. See *supra* note 63.

72. The language of the SPA and the Trial Period Plan is often times complex legal jargon that only sophisticated attorneys can comprehend.

73. See *Edwards v. Aurora Loan Servs., LLC*, 791 F. Supp. 2d 144, 151 (D.D.C. 2011).

74. *Id.*

75. *Id.*

only demonstrates the *incidental* purpose of the SPAs.⁷⁶ Without a clear demonstration to the contrary, the presumption that borrowers are incidental beneficiaries remains.⁷⁷ The final nail in the third-party beneficiary coffin was the borrower's unreasonable reliance on the SPA as a means to enforce his rights.⁷⁸ The *Edwards* Court found that the SPA gave loan servicers and the Federal Government significant discretion such as the Treasury's ability to define HAMP criteria and the banks broad decision-making in deciding which loans to modify.⁷⁹ Such expansive discretion meant that borrowers were unable to reasonably rely on the SPA to determine what constituted a violation of the agreement.⁸⁰

While the *Marques* and *Edwards* Courts provide two extreme views on the third-party beneficiary issue, the United States District Court for the District of Massachusetts took the middle road.⁸¹ In *Speleos v. BAC Home Loans Servicing*, the court attempted to reconcile the blatant purpose of HAMP—to help homeowners refinance their mortgage at reasonable rates—with the narrow limitations found in the Service Participation Agreement.⁸² The *Speleos* court found that HAMP-eligible borrowers are intended third-party beneficiaries because the primary purpose of the SPAs was to benefit this class of individuals. Like the passengers in an aircraft crash who successfully sued a municipality as third-party beneficiaries to the municipality's contract with the Federal Government, the SPAs were intended to benefit eligible homeowners.⁸³ However, this supposed intent of the SPA and HAMP guidelines is undermined by the clear terms of the contract.⁸⁴ Similar to the argument made in *Edwards*, the *Speleos* Court found that the SPA's language specifically limited who the beneficiaries were and did not include eligible homeowners.⁸⁵ Thus, “[t]he Plaintiffs’ third-party breach-of-contract claim against BAC is . . . precluded.”⁸⁶

The near-uniform consensus by district courts across the United

76. See *Hoffman v. Bank of Am. N.A.*, No. C 10-2171 SI, 2010 WL 2635773, at *4 (N.D. Cal. June 30, 2010).

77. *Id.*

78. *Id.*

79. See *Edwards*, 791 F. Supp. 2d at 151–52.

80. See *Hoffman*, 2010 WL 2635773, at *4.

81. See *Speleos v. BAC Home Loans Servicing, L.P.*, 755 F. Supp. 2d 304, 304 (D. Mass. Dec. 14, 2010).

82. *Id.* at 309–10.

83. *Id.* at 309 (quoting *Miree v. DeKalb Cnty.*, 433 U.S. 25, 28–29 (1977)).

84. *Id.* at 310.

85. “Section XIV, the ‘Severability and Enforcement’ clause of the [Service Participation Agreement] provides that: ‘These rights and remedies are for our benefit and that of our successors and assigns.’” *Id.* (internal citation omitted).

86. *Id.*

States has generally foreclosed the theory that eligible HAMP borrowers are third-party beneficiaries of the Service Participation Agreement. Without the ability to sue for HAMP violations as beneficiaries of the contract between the loan servicers and the banks, homeowners attempted to sue the banks for breaching the terms of the Trial Period Plan.

C. *HAMP Does Not Provide an Express or Implied Private Right of Action*

In *Miller v. Chase Home Finance, LLC*, the Eleventh Circuit Court of Appeals was asked to determine whether a private right of action existed under HAMP.⁸⁷ Miller, a homeowner from Hiawassee, Georgia, requested a loan modification after citing financial difficulties in paying his mortgage.⁸⁸ His bank, Chase Home Financing, agreed to place Miller on a trial payment plan.⁸⁹ Six months later, Miller was denied a permanent loan modification.⁹⁰ Miller sued, arguing that Chase failed to adhere to its obligations under HAMP when it denied him a permanent loan modification.⁹¹ The court found that HAMP provides for no private right of action, either implicitly or explicitly.⁹² Therefore, Miller did not have standing to bring his claims before the court.⁹³

The Eleventh Circuit solidified what a large majority of lower courts have also held: The lack of any express wording allowing borrowers to sue loan servicers in HAMP guidelines or statutes meant that borrowers were without any remedies.⁹⁴ Additionally, the court ruled that no implied private right of action existed.⁹⁵ The court analyzed Congress's intent when it created HAMP.⁹⁶ It determined that HAMP was designed to "restore liquidity and stability to the financial system of the United States," not to specially benefit struggling homeowners.⁹⁷ This view is bolstered by Congress's decision to place the power to initiate a

87. See *Miller v. Chase Home Fin., LLC*, 677 F.3d 1113, 1115 (11th Cir. 2012).

88. *Id.*

89. *Id.*

90. *Miller v. Chase Home Fin., LLC*, No. 2:10-CV-206-WCO, 2011 U.S. Dist. LEXIS 154800 (N.D. Ga. Oct. 6, 2011).

91. *Miller*, 677 F.3d at 1116.

92. *Id.*

93. *Id.*

94. *Id.*; accord *Wigod v. Wells Fargo Bank, N.A.*, No. 10 CV 2348, 2011 WL 250501, at *4 (N.D. Ill. Jan. 25, 2011); See, e.g., *Phipps v. Wells Fargo Bank, N.A.*, No. CV F 10-2025 LJO SKO, 2011 WL 302803, at *9 (E.D. Cal. Jan. 27, 2011) (finding no private right of action under HAMP); *Vida v. OneWest Bank, F.S.B.*, Civ. No. 10-987-AC, 2010 WL 5148473, at *5 (D. Or. Dec. 13, 2010) (same).

95. See *Miller*, 677 F.3d at 1116.

96. *Id.*

97. *Id.*

lawsuit against banks in the hands of the Secretary as well as the fact that allowing private citizens to sue mortgage servicers would likely stifle the purpose of HAMP.⁹⁸ Moreover, the court stated that in order for Miller to succeed in redressing his grievances, he would have to allege claims independent of Chase's obligations under HAMP.⁹⁹ The absence of any indication that Congress intended to allow for borrowers to sue banks over HAMP violations meant that Miller's grievances could not be heard in court.¹⁰⁰

D. *State-Law Claims May Exist Without a Private Right of Action*

Until April 2012, “[c]ourts have universally rejected . . . claims [like Miller’s] on the ground that HAMP does not create a private right of action for borrowers against lenders and servicers.”¹⁰¹ The Seventh Circuit Court of Appeals revolutionized the legal approach to HAMP. In its decision, *Wigod v. Wells Fargo Bank, N.A.*, the Seventh Circuit placed a new twist on whether state contract remedies could be applied to HAMP violations.¹⁰²

Lori Wigod filed a seven-count complaint against her mortgage servicer, Wells Fargo, after she was denied a permanent loan modification. Wigod entered into a HAMP Trial Period Plan with Wells Fargo in mid-May 2009. The TPP stated: “I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan if I qualify for the [permanent modification] Offer or will send me written notice that I do not qualify for the Offer.”¹⁰³ After Wigod carefully followed the TPP instructions and sent in the first of

98. *Id.*

99. *Id.* at 1117.

100. *Id.*

101. *Bourdelais v. JPMorgan Chase Bank, N.A.*, No. 2:10CV670-HEH, (E.D. Va. Apr. 1, 2011) (citing *Winn v. Chase Mortgage Servs.*, No. 2:10cv395, 2010 U.S. Dist. LEXIS 143041, at *10 (E.D. Va. Oct. 29, 2010) (“Plaintiff does not have a private right of action under HAMP”)); *see, e.g.*, *Pennington v. PNC Mortgage*, No. 2:10cv361, 2010 U.S. Dist. LEXIS 143157, at *11 (E.D. Va. Aug. 11, 2010) (recognizing that Congress did not intend to “create a private right of action against participating servicers” and holding that “Plaintiffs do not have a private right of action to enforce applicable HAMP regulations”); *Hoffman v. Bank of Am., N.A.*, No. C 10-2171 SI, 2010 U.S. Dist. LEXIS 70455, at *14–15 (N.D. Cal. June 30, 2010) (holding that HAMP does not provide a private right of action against lenders); *Simon v. Bank of Am., N.A.*, No. 10-cv-00300-GMN-LRL, 2010 U.S. Dist. LEXIS 63480, at *26–27 (D. Nev. June 23, 2010) (dismissing claim because HAMP “does not provide borrowers with a private cause of action against lenders for failing to consider their application for loan modification, or even to modify an eligible loan”); *Marks v. Bank of Am., N.A.*, No. 3:10-cv-08039-PHX-JAT, 2010 U.S. Dist. LEXIS 61489, at *16 (D. Ariz. June 21, 2010) (“Plaintiff is precluded from asserting a private cause of action under HAMP, even disguised as a breach of contract claim. . . .”); *Aleem v. Bank of Am., N.A.*, No. EDCV 09-01812-VAP (RZx), 2010 U.S. Dist. LEXIS 11944, at *9–10 (C.D. Cal. Feb. 9, 2010).

102. *See Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 547 (7th Cir. 2012).

103. *Id.* at 558.

four reduced mortgage payments, Wells Fargo executed the TPP Agreement in early June 2009. The TTP was effective from July 1, 2009 to November 1, 2009. The agreement provided that if Wigod complied with the trial period and if her representations were accurate, “the Lender will provide [her] with a [permanent] Loan Modification Agreement.”¹⁰⁴ After four months of timely mortgage payments, Wigod believed that a loan modification was in sight. However, Wigod was denied her modification without any reasonable explanation. Wigod continued to make the reduced payments even after the TPP had expired, as she continued to pursue a loan modification, but the monthly notices threatening foreclosure proved too much to bear.¹⁰⁵

Wigod sued Wells Fargo on seven counts: (1) breach of contract, (2) promissory estoppel, (3) breach of the Servicer Participation Agreement, (4) negligent hiring and supervision, (5) fraudulent misrepresentation or concealment, (6) negligent misrepresentation or concealment, and (7) Illinois’ Consumer Fraud and Deceptive Business Practice Act.¹⁰⁶ The United States District Court for the Northern District of Illinois dismissed Wigod’s complaint on premises similar to *Miller v. Chase Home Financing, LLC*: Because HAMP did not entitle borrowers to a private right of action, any claims against the mortgager that found its basis in HAMP terms or procedures were foreclosed.¹⁰⁷ Additionally, the court dismissed Wigod’s Illinois Consumer Fraud count because of her inability to establish Wells Fargo’s intent to deceive. The court reasoned that “if Wells Fargo did not want to permanently modify its borrowers’ mortgages, it would not have chosen to voluntarily participate in the government’s modification program[,]” and thus, it would be implausible to suggest that Wells Fargo intended to deceive Wigod.¹⁰⁸

The Seventh Circuit disagreed. In its seventy-five-page opinion by Judge Hamilton, the court thoroughly analyzed whether HAMP’s foundation in federal law displaces Wigod’s state-law claims.¹⁰⁹ The Seventh Circuit approached the question of whether a borrower can redress HAMP claims from a completely different angle than its Eleventh Cir-

104. *Id.*

105. *Id.*

106. *Id.* at 559.

107. “[A]s was the case with Wigod’s breach of contract, promissory estoppel, and negligent hiring and supervision claims, her concealment claims are premised on Wells Fargo’s obligations as a HAMP servicer and, therefore, HAMP provides her with no private right of action to enforce those claims.” *Wigod v. Wells Fargo Bank, N.A.*, No. 10 CV 2348, 2011 U.S. Dist. LEXIS 7314, at 22 (N.D. Ill. Jan. 25, 2011), *vacated*, 673 F.3d 547 (7th Cir. 2012); *see also Miller v. Chase Home Fin., LLC*, 677 F.3d 1113, 1116 (11th Cir. 2012).

108. *See Wigod*, 2011 U.S. Dist. LEXIS 7314, at 24–25.

109. *See Wigod*, 673 F.3d at 559.

cuit counterpart. While it agreed that no private right of action exists,¹¹⁰ the court stated that the lack of a private right of action does not foreclose the possibility of state-law claims, even if such claims are rooted in federal law.¹¹¹

In response, Wells Fargo attempted to reinforce its “end-run theory” that “[i]f Congress had intended courts to be adjudicating whether a borrower qualified for a loan modification under [the 2008 Act] or HAMP, it would have [expressly] provided a private right of action.”¹¹² The Seventh Circuit stated that such a view incorrectly entangles two distinct lines of reasoning: one involving a federal private right of action and the other regarding federal preemption of state law.¹¹³ As Judge Hamilton perceptively stated:

The issue here, however, is not whether federal law itself provides private remedies, but whether it displaces remedies otherwise available under state law. The absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state-law just because it refers to or incorporates some element of the federal law.¹¹⁴

He then compared this statute to the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). Like HAMP, FIFRA does not provide a federal private right of action.¹¹⁵ The United States Supreme Court in *Bates v. Dow Agrosciences LLC* held that, although Congress did not provide a federal remedy to those affected by a manufacturer’s violation of FIFRA’s labeling requirements, it did not preclude states from providing remedies.¹¹⁶ To find otherwise would require the court to adopt the view that when Congress provides no remedies under federal law, the states are equally unable to assist their constituents—leaving those affected utterly helpless.

Wells Fargo contended that state-law remedies could not exist because they would conflict with federal law and would thus be preempted. Its argument was twofold: By entertaining Wigod’s state-law claims, the court would (1) “substantially interfere with Wells Fargo’s ability to service residential mortgage loans” in accordance with its regulations forcing Wells Fargo to create new customer service standards, and (2) “frustrate Congressional objectives in enacting [the 2008 Act]

110. *Id.* at 575.

111. *Id.*

112. *Id.* at 581 (internal quotations omitted).

113. *Id.*

114. *Id.*

115. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 448 (2005).

116. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 547 (7th Cir. 2012) (citing *Bates*, 544 U.S. at 448 (2005)).

. . . to stabilize the economy and provide a program to mitigate ‘avoidable’ foreclosures.”¹¹⁷ The Seventh Circuit found these arguments unpersuasive.¹¹⁸ The court rejected the possibility that hearing Wigod’s claims would conflict with Wells Fargo’s regulations especially where “the state-law duty allegedly breached is imported from and delimited by federal standards established in HAMP’s program guidelines.”¹¹⁹ Moreover, the court found it unlikely that Congress would simply undermine state sovereignty by eliminating state-law causes of action.¹²⁰ In the court’s opinion, such a view would oppose the Department of the Treasury’s HAMP directives, which require servicers to implement HAMP in compliance with state common law and statutes.¹²¹ The court concluded that “[f]ederal law does not displace Wigod’s state-law claims.”¹²²

What does *Wigod v. Wells Fargo* mean for the future of HAMP loan modifications? In less than one year, over a hundred cases have cited the *Wigod* decision.¹²³ Eighteen cases have followed the *Wigod* holding, allowing for state-law remedies to apply independently of a HAMP ban on private rights of action.¹²⁴ District courts in the Third, Sixth, Seventh, Ninth, and Tenth Circuits have approved of the *Wigod* decision.¹²⁵ Furthermore, three state courts have followed

117. *Id.* at 578.

118. *Id.*

119. *Id.* at 579.

120. *Id.* at 580.

121. *Id.* (citing HOME AFFORDABLE MODIFICATION PROGRAM, SUPPLEMENTAL DIRECTIVE 09-01, at 12 (2009) (“Each servicer . . . must be aware of, and in full compliance with, all federal, state, and local laws (including statutes, regulations, ordinances, administrative rules and orders that have the effect of law, and judicial rulings and opinions) . . . ”)).

122. *Id.* at 575. Wells Fargo also argued that Wigod’s state law claims were preempted because federal law entirely occupies the field of loan regulation through the passage of the Home Owners Loan Act of 1933. *Id.* The court discarded the field preemption argument as conflicting with the saving clause of 12 C.F.R. § 560.2(c) and previous court holdings. *Id.*

123. *See, e.g.*, *Casey v. Fed. Home Loan Mortg. Ass’n*, No. H-11-3830, 2012 WL 1425138 (S.D. Tex. Apr. 23, 2012); *Gomez v. Bank of Am., N.A.*, 3:11-CV-01253-SI, 2012 WL 929790 (D. Or. Mar. 19, 2012); *Velasquez v. Chase Home Fin. LLC*, CIV. S-12-0433 LKK/CKD PS, 2012 WL 913705 (E.D. Cal. Mar. 16, 2012).

124. *See infra*, notes 144–45.

125. *See, e.g.*, *Baginski v. JP Morgan Chase Bank N.A.*, No. 11 C 6999, 2012 U.S. Dist. LEXIS 169754 (N.D. Ill. Nov. 29, 2012); *Ne. Series of Lockton Cos., LLC v. Bachrach*, No. 12 C 1695, 2012 U.S. Dist. LEXIS 158090 (N.D. Ill. Nov. 5, 2012); *Fletcher v. OneWest Bank, FSB*, No. 10-cv-4682, 2012 U.S. Dist. LEXIS 151541 (N.D. Ill. Oct. 22, 2012), Second Amendment Arms v. City of Chicago, 10-cv-4257, 2012 U.S. Dist. LEXIS 136645 (N.D. Ill. Sept. 25, 2012); *Purepecha Enters. v. El Matador Spices & Dry Chiles*, No. 11 C 2569, 2012 U.S. Dist. LEXIS 120499 (N.D. Ill. Aug. 24, 2012); *Novogroder Cos., Inc. v. Hartford Fire Ins. Co.*, No. 2:10-CV-193 RM, U.S. Dist. LEXIS 118785 (N.D. Ind. Aug. 21, 2012); *Pool v. Wells Fargo Bank, N.A.*, No. 11-cv-01066-LTB-KLM, 2012 U.S. Dist. LEXIS 112549 (D. Col. Aug. 10, 2012); *Avevedo v. CitiMortgage, Inc.*, 11 C 4877, 2012 U.S. Dist. LEXIS 106461 (N.D. Ill. July 25, 2012); *Smith v. Boehringer Ingelheim Pharms., Inc.*, No. 3:12-cv-00616-DRH-SCW, 2012 U.S. Dist. LEXIS

Wigod.¹²⁶ This illustrates a pattern that more and more courts are slowly edging away from the rigid view in *Miller v. Chase Home Financing* in which homeowners must prove lending violations with complete autonomy from HAMP—a near impossible task.

E. *Is the Trial Period Plan a Contract?*

The Seventh Circuit's finding that alleged HAMP violations under state law could exist independently from any claims under federal statutory law opened Pandora's box. Courts now have to deal with even more complex legal issues, the most significant of which is whether the Trial Period Plan constitutes a contract.

1. THE SEVENTH CIRCUIT FINDS A CONTRACT

By finding Wigod's state-law claims as separate from the blanket ban on private rights of action, the court was able to confront its second issue: whether Wigod's complaint could survive a motion to dismiss.¹²⁷ Wigod adequately pled viable claims under Illinois law on four notable counts: (1) breach-of-contract, (2) promissory estoppel, (3) fraudulent representation, and (4) Illinois' Consumer Fraud and Deceptive Business Practice Act.¹²⁸

The Seventh Circuit examined whether Wigod's breach-of-contract cause of action could survive a motion to dismiss.¹²⁹ Notably, the court found that the Trial Period Plan constituted a contract.¹³⁰ The court read the TPP as a unilateral offer—Wells Fargo promised Wigod that it would give her a permanent loan modification as long as she performed.¹³¹ Her required performance consisted of the payments of the

103646 (S.D. Ill. July 25, 2012); *Martinek v. Diaz*, No. 11 C 7190, 2012 U.S. Dist. LEXIS 100275 (N.D. Ill. July 18, 2012); *Tubalinal v. BAC Home Loans Servicing, L.P.*, No. 11 C 04104, 2012 U.S. Dist. LEXIS 99593 (N.D. Ill. July 18, 2012); *Cave v. Saxon Mortg. Servs.*, No. 11-4586, 2012 U.S. Dist. LEXIS 75276 (E.D. Pa. May 30, 2012); *Brady v. Chase Home Fin., LLC*, No. 1:11-CV-838, 2012 U.S. Dist. LEXIS 72218 (W.D. Mich. May 24, 2012); *Sutcliffe v. Wells Fargo Bank, N.A.*, No. C-11-06595 JCS, 2012 U.S. Dist. LEXIS 65274 (N.D. Cal. May 9, 2012); *Soin v. Fannie Mae*, No. Civ. 2:12-634 WBS EFB, 2012 U.S. Dist. LEXIS 51824 (E.D. Cal. Apr. 12, 2012); *Gutierrez v. PNC Mortg.*, No. 10cv01770 AJB (RRR), 2012 U.S. Dist. LEXIS 41890 (S.D. Cal. Mar. 26, 2012).

126. See *Pfeifer v. Countrywide Home Loans, Inc.*, 150 Cal. Rptr. 3d 673 (Cal. Ct. App. 2012); *Wells Fargo Bank, N.A. v. Williford*, No. 09L-07-295 MJB, 2012 Del. Super. LEXIS 382 (Del. Super. Ct. Aug. 21, 2012); *Healey v. Wells Fargo, N.A.*, No. 11 CV 3340, 2012 Pa. Dist. & Cnty. Dec. LEXIS 165 (Pa. Cnty. Ct. 2012).

127. See *Wigod*, 673 F.3d at 559.

128. *Id.*

129. *Id.* at 566.

130. *Id.* at 560–66.

131. *Id.* at 562.

reduced mortgage amounts and the validity of her representations.¹³² By doing so, “[a] reasonable person in Wigod’s position would read the TPP as a definite offer to provide a permanent modification that she could accept so long as she satisfied the conditions.”¹³³

The court then contemplated whether there was consideration.¹³⁴ Sufficient consideration was found based on the TPP alone.¹³⁵ “By signing [the TPP], Wigod agreed to open new escrow accounts, to undergo credit counseling (if asked), and to provide and vouch for the truth of her financial information.”¹³⁶ These legal detriments were in addition to the monetary obligation she already owed the bank through her original mortgage.¹³⁷

Finally, Wells Fargo argued that without the exact terms of the permanent loan modification, the contract was unenforceable.¹³⁸ The court did not think this theory was meritorious: “a contract with open terms can be enforced . . . even though the determination is left to one of the contracting parties, if he is required to make it ‘in good faith’ in accordance with some existing standard or with facts capable of objective proof.”¹³⁹ Thus, Wells Fargo’s discretion to modify the permanent loan terms was limited by the HAMP guidelines and good faith.¹⁴⁰

The most interesting part of the court’s ruling on Wells Fargo’s motion to dismiss is that the court seemed to have already decided that an enforceable contract existed between Wigod and Wells Fargo.¹⁴¹ While a court can allow a “plaintiff the benefit of imagination, so long as the hypotheses are consistent with the complaint[,]”¹⁴² the Seventh Circuit seemed to go further than merely stating that Wigod had adequately pled a facially plausible claim under Illinois law.¹⁴³ The court seemed to acknowledge this dilemma when it said:

We must assume at the pleadings stage that Wigod met each of the TPP’s conditions, and it is undisputed that Wells Fargo offered no permanent modification at all. [However,] [t]he terms of the TPP are

132. *Id.*

133. *Id.*

134. *Id.* at 563–64.

135. *Id.* at 564.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 564–65 (citing 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 95, 402 (1960) (internal quotations omitted)).

140. *Id.* at 565.

141. “[Wells Fargo] was certainly required to offer *some* sort of good-faith permanent modification to Wigod consistent with HAMP guidelines.” *Id.*

142. See *Wigod*, 2011 U.S. Dist. LEXIS 7314, 24–25 (quoting *Bissessur v. Ind. Univ. Bd. of Trs.*, 581 F.3d 599, 603 (7th Cir. 2009)).

143. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007).

clear and definite enough to support Wigod's breach of contract theory Wigod's complaint sufficiently pled each element of a breach of contract claim under Illinois law.¹⁴⁴

2. WIGOD'S STRENGTH IS TESTED

While the Seventh Circuit has revolutionized the way in which courts approach HAMP cases, the facts of *Wigod* make it easy for courts to distinguish it. *Rummell v. Vantium Capital, Inc.* provides a good example.¹⁴⁵ In 2009, the Rummells attempted to attain a loan modification from CitiMortgage and were placed on a Trial Period Plan.¹⁴⁶ The wording of the TPP was much like the wording found in *Wigod*.¹⁴⁷ The fatal difference for the Rummells, as the United States District Court for the Eastern District of Michigan emphasized, was that the bank did not countersign the TPP as it had in *Wigod*.¹⁴⁸ “[B]ecause Defendant CitiMortgage did not countersign the 2009 TPP and did not return a signed copy to Plaintiffs, there was no offer, and there was no binding contract.”¹⁴⁹ Other federal district courts and state courts have also distinguished the strength of *Wigod* on similar grounds.¹⁵⁰ Thus, it appears

144. See *Wigod*, 673 F.3d at 565. Similarly, the Seventh Circuit found that Wigod had met pleading requirements for a cause of action under promissory estoppel through her assertions that she detrimentally relied on Wells Fargo's promise of a permanent loan modification. *Id.* at 566. The court also found her fraudulent misrepresentation claim actionable based on Wigod's allegations that “Wells Fargo made and broke promises of permanent modifications to her and to thousands of other potential class members as well.” *Id.* at 571. Wigod's last triumph was under the Illinois Consumer Fraud and Deceptive Business Practices Act—a state consumer action. *Id.* at 574–76.

145. No. 12-10952, 2012 U.S. Dist. LEXIS 91254 (E.D. Mich. June 27, 2012).

146. See *id.* at *1.

147. The TPP provides that: If I [Plaintiff] am in compliance with this Trial Period Plan (the “Plan”) and my representations in Section 1 continue to be true in all material respects, then the servicer will provide me with a Home Affordable Modification Agreement (“Modification Agreement”) as set forth in Section 3, that would amend and supplement (1) the Mortgage on the property, and (2) the Note secured by the Mortgage If I have not already done so, I am providing confirmation of the reasons I cannot afford my mortgage payment and documents to permit verification of all of my income . . . to determine whether I qualify for the offer described in this Plan (the “Offer”). *I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan if I qualify for the Offer or will send me written notice that I do not qualify for the Offer.* This Plan will not take effect unless and until both I and the Lender sign it and Lender provides me with a copy of this Plan with the Lender's signature.

Id. at *1–2. *But see Wigod*, 673 F.3d at 558 (“If I am in compliance with this Loan Trial Period and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a [permanent] Loan Modification Agreement.”) (internal citation omitted).

148. See *Rummell*, 2012 U.S. Dist. LEXIS 91254, at *7.

149. *Id.*

150. See *Trautman v. JPMorgan Chase Bank*, A12-0300, 2012 Minn. App. Unpub. LEXIS 777, at 10–11 (Minn. Ct. App. Aug. 13, 2012) (“*Wigod v. Wells Fargo Bank, N.A.*, upon which appellant relies, is distinguishable The question of whether Minnesota courts would render

that the *Wigod* decision only further incentivized banks to change their TPP practices in order to avoid any legal repercussions down the road.

Moreover, other circuit courts have disagreed with the Seventh Circuit's breach-of-contract finding.¹⁵¹ In *Gordon v. JPMorgan Chase Bank, N.A.*, the Fifth Circuit Court of Appeals found that Rochelle Gordon's breach-of-contract theory could not survive a motion to dismiss.¹⁵² Gordon signed a forbearance agreement with her bank, Chase, which resulted in a reduction of her monthly mortgage payments.¹⁵³ She claimed she did so with Chase's assurances that this would result in a HAMP permanent loan modification.¹⁵⁴ However, as the Fifth Circuit stated, a forbearance agreement is not related to HAMP; under Gordon's forbearance agreement she would pay reduced payments for four months and would then resume with her regular payments.¹⁵⁵ She later applied for a loan modification, but received inconsistent information regarding the status of her application.¹⁵⁶ Gordon sued for breach of contract, alleging that the "communications between herself and Chase 'ripened into a valid contract' when Chase offered to modify her loan provided that she supply certain documents, and she accepted Chase's offer by providing those documents."¹⁵⁷

The Fifth Circuit rejected this theory because of the Statute of Frauds. The Statute of Frauds is "designed to prevent fraud and perjury by requiring certain contracts be in writing and signed by the party to be

the same result as did *Wigod* in a case where the lender has executed the TPP is not before us."); *Clay v. First Horizon Home Loan Corp.*, No. E2011-01503-COA-R9-CV, 2012 Tenn. App. LEXIS 417, at 17 (Tenn. Ct. App. June 26, 2012) ("*Wigod's* finding that homeowners may have an actionable claim based on TPP agreements is inapplicable to this case, as there has never been any allegation that Mr. Clay ever entered into a TPP with First Horizon."); *Lazo v. Bank of Am., N.A.*, No. C 12-00762 LB, 2012 U.S. Dist. LEXIS 69979, at *1 (N.D. Cal. May 18, 2012) ("The court finds this reasoning persuasive in the HAMP context, but, at least on the record before it, it does not appear to apply to the context here. The TPP makes no reference to HAMP, and both Plaintiffs and BANA suggest that the TPP does not involve HAMP or its guidelines."); *Bohnhoff v. Wells Fargo Bank, N.A.*, No. 11-3408(DSD/JSM), 2012 U.S. Dist. LEXIS 55533, at 2 (D. Minn. Apr. 20, 2012) ("[E]ven if the court were to find *Wigod* persuasive, the cases are factually dissimilar. In *Wigod*, TPP payments were 'timely made' and '[o]n the pleadings, [the court] assume[d] that she complied with all other obligations under the TPP.' Bohnhoff, however, 'discontinued TPP payments' prior to Wells Fargo approving her for a loan modification.") (citation omitted).

151. See No. 12-20323, 2013 WL 49587 (5th Cir. Jan. 3, 2013).

152. *Id.* at *1.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at *2 ("One Chase representative told Gordon that Chase would send final papers for her to sign 'any day from now,' but Gordon was unable to get in touch with the representative following that conversation. Gordon alleges that she was alternately told that her home would be foreclosed on, but also that she would be considered for a loan modification.").

157. *Id.* at *3.

charged.”¹⁵⁸ Texas law governed Gordon’s alleged contract with Chase.¹⁵⁹ Under Texas law, a contract must be in writing and signed by the party that is to be bound in order for it to be enforceable.¹⁶⁰ Because Gordon was only verbally assured that she would receive a loan modification, her alleged contractual loan modification was unenforceable under the Statute of Frauds.¹⁶¹ Therefore, she did not plead sufficient facts to survive a motion to dismiss.¹⁶²

The facts presented in the *Gordon* decision allow for an easy analysis under the Statute of Frauds because Gordon did not have a written document acknowledging the loan modification or a signature on behalf of Chase.¹⁶³ But this analysis can also be applied to future TPP arguments: Even if the language of the TPP provides the purported terms of the contract, without a signature the alleged “contract” is unenforceable.¹⁶⁴ This occurred in another Fifth Circuit decision, *Pennington v. HSBC Bank USA, N.A.*¹⁶⁵ The *Pennington* Court held that the TPP did not constitute a contract because “[t]he lack of a signature from the bank indicates that it did not intend to be bound by the Modification Agreement.”¹⁶⁶

The courts’ ability to easily distinguish the *Wigod* decision as merely persuasive authority and as factually dissimilar leaves homeowners in the same position as before: HAMP hell. It also incentivizes mortgagors and servicers to avoid providing any concrete contractual language in the Trial Period Plan as a means to escape any legal repercussions down the road. Finally, the fate of the *Wigod* case is still unclear. The Seventh Circuit merely answered the question of whether her allegations could survive a motion to dismiss, not whether she could monetarily recover from the bank’s alleged breach of the TPP.¹⁶⁷ Only time and litigation will reveal the outcome of that decision.

158. BLACK’S LAW DICTIONARY 1450 (8th ed. 2004); *see also* U.C.C. § 2-201 (2012).

159. *See Gordon*, 2013 WL 49587, at *4.

160. TEX. BUS. & COM. CODE ANN. § 26.02(b) (West 2011).

161. *See Gordon*, 2013 WL 49587, at *4.

162. *Id.* at *5.

163. *Id.* at *4.

164. *See* BLACK’S LAW DICTIONARY, *supra* note 158.

165. 2012 U.S. App. LEXIS 20605 (5th Cir. Oct. 3, 2012).

166. *Id.* at *17.

167. *See Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 559 (7th Cir. 2012). A recent case from the Supreme Court of Nevada addressed what remedies a homeowner could receive after a finding of bad faith on behalf of the bank; in that case, the court found that the homeowner could receive only attorneys’ fees, and was not entitled to an automatic loan modification or his home. *See Jacinto v. PennyMac Corp.*, 300 P.3d 724, 726 (Nev. 2013). *Jacinto* reveals another issue which will likely reveal itself in future HAMP cases: even after a finding of bank duplicity, will homeowners even be entitled to their houses as an adequate remedy at law?

F. Consumer Protection Actions Show Mixed Success

A number of federal and state consumer protection actions have arisen over HAMP loan modification violations.¹⁶⁸ The results have been mixed.¹⁶⁹ Actions under the Federal Fair Debt Collection Practices Act (“FDCPA”) have generally been rejected by district courts across the United States.¹⁷⁰ Under the FDCPA, “[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.”¹⁷¹ Eligible HAMP borrowers have sued under the FDCPA, alleging false, deceptive, and misleading banking practices with regard to the borrowers’ foreclosure proceedings.¹⁷² District courts have almost uniformly rejected FDCPA claims¹⁷³ in the HAMP context for two reasons.

First, lenders and their employees¹⁷⁴ are not considered “debt collectors” under the definition of the FDCPA. “A ‘debt collector’ under

168. *See, e.g.*, *Cave v. Saxon Mortg. Servs., Inc.*, No. 11-4586, 2012 WL 1957588, at *9–11 (E.D. Pa. May 30, 2012). In *Cave*, the borrower filed a complaint against his mortgagor under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, Pennsylvania Fair Credit Extension Uniformity Act, and the Fair Debt Collection Practices Act because the mortgagor 1) “misrepresent[ed] to them the status of their loan modification application and inform[ed] them to continue to make modified payments despite having already determined that they did not qualify under HAMP; 2) charg[ed] late fees during the time period when Plaintiffs made the lower payments; and 3) fail[ed] to provide the Commonwealth with the information needed for Plaintiffs to get a HAMP loan.” *Id.*

169. *Compare* *Blackwood v. Wells Fargo Bank, N.A.*, No. 10-10483-JGD, 2011 WL 1561024 (D. Mass. Apr. 22, 2011) (allowing the borrower’s cause of action under Massachusetts’s Chapter 93A, which prohibits unfair or deceptive practices in trade or commerce, to survive a motion to dismiss) *with* *Kozaryn v. Ocwen Loan Servicing, LLC*, 784 F. Supp. 2d 100, 103 (D. Mass. 2011) (finding borrower’s allegations under Chapter 93A defective and thus unable to survive a motion to dismiss).

170. *See, e.g.*, *Brock v. Fed. Nat. Mortg. Ass’n*, No. 4:11-CV-211-A, 2012 WL 620550 (N.D. Tex. Feb. 24, 2012) (granting motion for summary judgment in favor of defendant-bank over plaintiff-borrower’s Federal Fair Debt Collection Practices Act claim); *Moore v. Mortgage Elec. Registration Sys., Inc.*, 848 F. Supp. 2d 107 (D.N.H. 2012) (granting defendant-bank’s motion to dismiss over plaintiff-borrower’s Federal Fair Debt Collection Practices Act claim); *Cave*, 2012 WL 1957588, at *9-11 (same); *Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059 (N.D. Cal. 2011) (same); *Thomas v. JPMorgan Chase & Co.*, 811 F. Supp. 2d 781 (S.D.N.Y. 2011) (same).

171. 15 U.S.C. § 1692(f) (2012).

172. *See, e.g.*, *Thomas v. JPMorgan Chase & Co.*, 811 F. Supp. 2d 781, 801–02 (S.D.N.Y. 2011).

173. *But see* *Patrick v. Teays Valley Trustees, LLC*, No. 3:12-CV-39, 2012 WL 5993163, at *12 (N.D. W. Va. Nov. 30, 2012) (finding that the borrowers had alleged sufficient facts for their FDCPA claim to survive a motion to dismiss because the bank’s purported attorney was not licensed to practice law in West Virginia).

174. Homeowners have also attempted to sue the bank’s lawyers through the FDCPA. *Compare* *Speleos v. BAC Home Loans Servicing, L.P.*, 755 F. Supp. 2d 304, 331–33 (D. Mass. Dec. 14, 2010) (finding FDCPA inapplicable to lender’s attorneys because the law firm was “not collecting a debt but rather enforcing a security interest”) *with* *Moore*, 848 F. Supp. 2d at 124–25 (holding that FDCPA may be applicable to the bank’s attorneys because “it is evident that the purpose of Harmon’s letter was not only to enforce a security interest, but also to attempt to collect the underlying loan debt.”).

the statute means anyone who collects debts owed [to] . . . another and excludes collecting a debt to the extent the collection ‘concerns a debt which *was not in default* at the time it was obtained by such person.’”¹⁷⁵ As applied in *Thomas v. JPMorgan Chase & Co.*, the plaintiff-borrower’s facts rendered his FDCPA claims irrelevant:

With regards to Thomas, Chase is attempting to collect the debt on its own behalf. Moreover, the [Complaint] does not allege that the loans of the named plaintiffs were in default at the time Chase “obtained” those loans. As a result, Chase is excluded from the definition of “debt collector” under the statute.¹⁷⁶

Thus, unless the bank was acting as a loan servicer on behalf of an investor *and* the debt was in default when the bank acquired the loan, FDCPA does not apply to the borrower.¹⁷⁷

The other reason district courts almost uniformly reject FDCPA with regard to HAMP transactions is that the borrower’s allegations do not constitute unfair or deceptive practices.¹⁷⁸ In *Lucia v. Wells Fargo Bank, N.A.*, the plaintiffs contended that Wells Fargo misled borrowers into believing that the borrowers would be entitled to a permanent loan modification if they successfully completed the Trial Period Plan.¹⁷⁹ The United States District Court for the Northern District of California rejected this claim because the wording in the TPP would not lead even the “least sophisticated debtor” to believe that successful completion of the trial period would result in a permanent loan modification.¹⁸⁰ Because the *Lucia* Court determined that Wells Fargo did not commit any violations of the FDCPA, Wells Fargo’s motion to dismiss was

175. *Thomas*, 811 F. Supp. 2d at 801. *See also* 15 U.S.C.A. § 1692(6)(F) (West 2012).

176. *Thomas*, 811 F. Supp. 2d at 801–02.

177. While this may seem atypical, selling loans and servicing rights are not uncommon. In 2012, the Federal Housing Association established a new program, known as the Distressed Asset Stabilization Program. This program is intended to sell defaulted loans to investors at a discounted price in order to avoid an excess of defaulted loans and mortgages. *See Asset Sales*, U.S. DEP’T OF HOUSING AND URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/comp/asset/hsgloan (last updated Feb. 5, 2013). *See also* Amy Tobik, *Major Mortgage Lender Begins Selling Loans in Default*, DEBT.ORG (Sept. 21, 2012), <http://www.debt.org/2012/09/21/major-mortgage-lender-begins-selling-loans-default/>. Additionally, Bank of America recently sold its servicing rights on loans worth about \$306 billion as part of a settlement with Fannie Mae over claims made on troubled mortgages, mainly associated with Countrywide Financial, the lending group that Bank of America purchased in 2008. *See* Bill Fay, *Bank of America to Pay \$10B to Fannie Mae to Settle Claims*, DEBT.ORG (Jan. 7, 2013), <http://www.debt.org/2013/01/07/bank-of-america-to-pay-10b-fannie-mae/>.

178. *See, e.g., Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059, 1071–72 (N.D. Cal. 2011).

179. *Id.*

180. “The TPP Contract operative at the time states that the TPP ‘is not a modification of the Loan Documents’ and that ‘the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan.’” *Id.* at 1072.

granted.¹⁸¹

While federal consumer protection actions have not had much success under HAMP, a number of state consumer protection actions have survived motions to dismiss.¹⁸² The pleading requirements vary under each state's consumer protection laws.¹⁸³ Thus, a discussion of each would be too numerous. However, the relative success of these actions has prompted two interesting lawsuits out of Nevada and Arizona—two states with extremely high foreclosure rates.¹⁸⁴ Nevada's Attorney General, Catherine Cortez Masto, filed a class action lawsuit against Bank of America for engaging in deceptive trade practices against Nevada homeowners in violation of the Nevada Deceptive Trade Practices Act.¹⁸⁵ That same day, Arizona's then Attorney General, Terry Goddard, filed a similar class action against Bank of America under the Arizona Consumer Fraud Statute.¹⁸⁶ With state actors stepping in to address homeowners' concerns about HAMP, the absence of a hefty legal bill at the end of the day may allow for more homeowners to step forward. Unfortunately, this may not mean anything in terms of redressing HAMP problems.

IV. THE FUTURE OF HAMP

The issue with HAMP grievances, as this article has discussed, is not the legal system *per se*, but HAMP itself. HAMP is inherently ambiguous. It provides no private right of action. The contracts between

181. *Id.*

182. *See, e.g.,* Patrick v. Teays Valley Trs., LLC, No. 3:12-CV-39, 2012 WL 5993163, at *15–19 (N.D.W. Va. Nov. 30, 2012) (finding sufficient facts alleged a claim under West Virginia Consumer Credit Protection Act); Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012) (same under Georgia Fair Lending Act); Stovall v. SunTrust Mortg., Inc., No. RDB-10-2836, 2011 WL 4402680 (D. Md. Sept. 20, 2011) (same under Maryland Consumer Protection Act); Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 547 (7th Cir. 2012) (same under the Illinois Consumer Fraud and Deceptive Business Practices Act); Cave v. Saxon Mortg. Servs., Inc., No. 11-4586, 2012 WL 1957588 at *9–11 (E.D. Pa. May 30, 2012) (same under Pennsylvania Unfair Trade Practices and Consumer Protection Law). *But see* Kiper v. BAC Home Loans Servicing, LP, Nos. H-11-3008, H-11-3363, 2012 WL 3185968 (S.D. Tex. Aug. 2, 2012) (holding that defendants were not “debt collectors” within meaning of Texas Debt Collection Practices Act); Costigan v. CitiMortgage, Inc., No. 10 Civ. 8776 (SAS), 2011 WL 3370397 (S.D.N.Y. Aug. 2, 2011) (dismissing Plaintiff's claims under New York Deceptive Practice Act and New Jersey Consumer Fraud Act).

183. *See supra* note 182.

184. Nevada and Arizona are second and sixth respectively for the highest number of foreclosures. They join Florida, California, Illinois, and Ohio. *See December 2012 Foreclosure Rate Heat Map*, REALTY TRAC, <http://www.realtytrac.com/trendcenter/trend.html> (last visited Feb. 7, 2013).

185. *See Nevada v. Bank of Am. Corp.*, 672 F.3d 661 (9th Cir. 2012).

186. *See Arizona ex rel. Horne v. Countrywide Fin. Corp.*, No. CV-11-131-PHX-FJM, 2011 WL 995963 (D. Ariz. Mar. 21, 2011).

loan servicers and the Federal Government provide too much discretion and leeway. The Trial Period Plan is nothing more than an agreement to agree. Regardless of what the homeowners are told by the banks, without this consideration in writing, no enforceable agreement exists.¹⁸⁷ The minute the courts find a way to give some teeth to HAMP, the banks easily adjust their practices to make it even harder to bring a maintainable lawsuit. And to make matters worse, the Federal Government has done little to redress these issues.¹⁸⁸

HAMP's biggest deficiency is that it fails to address the concerns of the individual homeowner. In the grand scheme of HAMP, one failed loan modification is not critical.¹⁸⁹ However, to one homeowner, the loss of his home is incredibly devastating. One way that HAMP can target individual homeowner concerns is by providing an avenue for homeowners to timely address their grievances. For example, the Service Participation Agreement should specifically state that homeowners are third-party beneficiaries under HAMP. This will avoid any discrepancies as to whether HAMP eligible borrowers have standing. Additionally, a uniform Trial Period Plan should be distributed by all servicers and should provide clear wording, with no contradictions, that fulfillment of the Trial Period Plan will ensure a permanent loan modification. Alternatively, a bank's failure to comply with HAMP guidelines may be a defense to a foreclosure. Providing a homeowner with the ability to "challenge the servicer's failure to consider a loan modification before foreclosure, as they do in court-supervised mediation programs, [will increase] rates of loan modifications []."¹⁹⁰

A non-judicial alternative may provide a more rigorous HAMP appeals process. The Federal Government has created the HAMP Solu-

187. See *Gordon v. JPMorgan Chase Bank, N.A.*, No. 12-20323, 2013 WL 49587, at *4 (5th Cir. Jan. 3, 2013) (rejecting borrower's claim under breach of contract because the representations from the bank were not in writing).

188. Almost every official evaluation of HAMP has noted a lack of enforcement by the Department of the Treasury and its agents. See, e.g., OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLED ASSET RELIEF PROGRAM, QUARTERLY REPORT TO CONGRESS: APRIL 25, 2012 (2012), available at http://www.sigtaip.gov/Quarterly%20Reports/April_25_2012_Report_to_Congress.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, MORTGAGE FORECLOSURES: DOCUMENTATION PROBLEMS REVEAL NEED FOR ONGOING REGULATOR OVERSIGHT, GAO-11-433 (2011), available at <http://www.gao.gov/assets/320/317923.pdf>; CONG. OVERSIGHT PANEL, MARCH OVERSIGHT REPORT: THE FINAL REPORT OF THE CONGRESSIONAL OVERSIGHT PANEL, 64-832 (2011), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg64832/pdf/CHRG-112shrg64832.pdf>.

189. Compare the 1,106,559 permanent HAMP loan modifications granted versus the 1,941,028 HAMP trial period plans that were started from the inception of HAMP in 2009 to October 2012. See COHEN ET AL., NATIONAL CONSUMER LAW CENTER, AT A CROSSROADS: LESSONS FROM THE HOME AFFORDABLE MODIFICATION PROGRAM 8 (2013), available at http://www.nclc.org/images/pdf/foreclosure_mortgage/loan_mod/hamp-report-2013.pdf.

190. *Id.* at 8.

tions Center to address homeowner grievances. However, data have shown that while the Solutions Center has been helpful in providing homeowners with a denial notice, it has never proven helpful in getting a borrower a permanent loan modification.¹⁹¹ Providing greater avenues to redress homeowner HAMP grievances may allow for greater rights for homeowners, but it may also create disincentives for loan servicers and investors to provide more HAMP loan modifications.¹⁹²

Thus, Congress should also consider creating greater incentives for loan servicers to entice servicers that give greater attention to individual cases. Modifications, like those under HAMP, require more staff, more time, and possibly a recognition of losses, either through a principal write down or an interest rate reduction.¹⁹³ Diane Thompson argues that the recognition of losses can reduce the monthly servicing fee or the loss of mortgage servicing rights.¹⁹⁴ Without adequate training, explicit mandates, and greater financial incentives, loan servicers will likely continue to favor foreclosures and refinancing.¹⁹⁵

Another route to improve HAMP is to create national loan modification servicing standards, which build upon the successes of HAMP, but also address HAMP's failures.¹⁹⁶ The National Consumer Law Center envisions such standards to "mandate robust disclosure and transparency throughout the loan modification process and rigorous compliance mechanisms"; to provide all eligible homeowners with permanent loan modifications; to require mandatory, not discretionary, loan modifications; to allow homeowners to exercise enforcement options; and to mandate governmental oversight.¹⁹⁷ Such a comprehensive reform would likely make great strides for the housing market. However, like non-judicial and judicial enforcement mechanisms, this proposed solu-

191. CONNECTICUT FAIR HOUSING CENTER, REPORT ON THE EFFICACY OF THE HAMP SOLUTION CENTER 1–2. (2012).

192. "The financial compensation and constraints imposed on and chosen by servicers generally lead servicers to prefer refinancing, foreclosures, and short-term repayment plans to modifications." Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 838 (2011).

193. *Id.* at 839.

194. *Id.*

195. *Id.* at 840.

196. *See, e.g.*, Regulation of Mortgage Servicing Act of 2011, S. 967, 112th Cong. (2011); Preserving Homes and Communities Act of 2011, H.R. 1477, 112th Cong. (2011); Preserving Homes and Communities Act of 2011, S. 489, 112th Cong. (2011); Foreclosure Fraud and Homeowner Abuse Prevention Act of 2011, H.R. 1783, 112th Cong. (2011); Foreclosure Fraud and Homeowner Abuse Prevention Act of 2011, S. 824, 112th Cong. (2011); Foreclosure Prevention and Sound Mortgage Servicing Act of 2011, H.R. 1567, 112th Cong. (2011); Regulation of Mortgage Servicing Act of 2012, H.R. 3789, 112th Cong. (2012); Mandatory Foreclosure Mediation Act, H.R. 3595, 112th Cong. (2011).

197. COHEN ET AL., *supra* note 190, at 8.

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tion may cause banks to refuse to participate in HAMP modifications entirely.

The future of HAMP will be up for debate in December 2015.¹⁹⁸ Whether it will continue, be reformed, or be completely scrapped will likely rest on the existing state of the housing market. Regardless of what happens to HAMP, the debate should rest not only on HAMP's progress and deficiencies, but on whom HAMP was intended to help: the homeowners. Lawmakers should think about the De La Torres family in California whose dream of homeownership made it turn to HAMP for help,¹⁹⁹ or Johnson Sendolo who lost his home because the bank inexplicably denied his loan modification request.²⁰⁰ As Reubin Askew once said, “[w]e must stop talking about the American dream and start listening to the dreams of Americans.”²⁰¹

198. HAMP will expire on December 31, 2015. The presence of an expiration date does not necessarily determine whether HAMP will end. HAMP was originally set to expire on December 31, 2013, but was instead reformed and extended an extra two years. See Press Release, *Obama Administration Extends Application Deadline for the Making Home Affordable Program*, U.S. DEPARTMENT OF TREASURY (May 30, 2013), <http://www.treasury.gov/press-center/press-releases/Pages/jl1959.aspx>.

199. See *supra* p. 2 and note 2.

200. See *supra* p. 8 and note 40.

201. Reubin O'D. Askew, *The Dreams of Americans*, VITAL SPEECHES OF THE DAY, Aug. 1, 1972, at 612, 614.

