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Note – Fighting Foreclosure: Using Contract Law to Enforce the Home Affordable Modification Program (HAMP)

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Fighting Foreclosure: Using Contract Law to Enforce the Home Affordable Modification Program (HAMP)

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In 2009, the Secretary of the Treasury and the Obama Administration unveiled the Making Home Affordable Program ("MHA") to slow the foreclosure crisis and stabilize the economy. A key component of the MHA is the Home Affordable Modification Program ("HAMP"), a seventy-five billion dollar program designed to incentivize loan servicers to modify loans for certain qualified borrowers. The Treasury estimated that HAMP would permanently modify three to four million mortgages by the end of 2012; however, HAMP has failed to meet its objective.

Under HAMP, if a borrower meets certain criteria, she will be placed on a three-month trial period plan ("TPP") where she will pay a lowered mortgage payment equal to 31% of her gross monthly income. If the borrower makes this lowered payment for three months and meets other requirements, the servicer should extend a permanent modification with a reduced monthly payment. As written, however, the provision allows servicers to deny permanent modifications even if borrowers successfully meet their reduced mortgage payments.

Recently, borrowers began to bring common law breach of contract claims to enforce the TPP, arguing that the TPP is a binding contract that requires servicers to grant permanent loan modifications. Currently, there is controversy over the validity of the TPP-based breach of contract theory and a split amongst the federal courts. This Note provides an overview of the HAMP application process, examines the controversy and split amongst the federal courts, argues in favor of upholding the theory, and provides recommendations for national legislation.

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INTRODUCTION

The recent U.S. economic collapse triggered the worst recession since the Great Depression.[1] A significant contributor to the 2007 recession was the mortgage foreclosure crisis.[2] The numbers are staggering. From 2007 to

1. *See* Diana I. Gregg, *World Is in Recession in 2009 in Wake of Financial Sector Crisis*, BNA BANKING REP., Jan. 6, 2009, *available at* LEXIS, News Library, BNABNK File (citing the World Bank's assessment that the current financial crisis is the "most serious since the 1930s"); Ben S. Bernanke, Chairman, Fed. Reserve Bd., Speech at the Council on Foreign Relations (Mar. 10, 2009), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20090310a.htm ("The world is suffering through the worst financial crisis since the 1930s . . . .").

2. *See* KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE AND NEXT STEPS (2011) (providing a thorough overview of the foreclosure crisis and its effects on the U.S. economy); JOHN RAO & GEOFF WALSH, NAT'L CONSUMER LAW CTR., FORECLOSING A DREAM: STATE LAWS DEPRIVE HOMEOWNERS OF BASIC PROTECTIONS 8 (2009), *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/foreclosing-dream-report.pdf ("The consequences of this foreclosure crisis are enormous, ripping through both Wall Street and Main Street."); Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster*

2011, foreclosures were initiated on 11 million properties.[3] In an effort to slow the climbing foreclosure rates, President Bush signed into law H.R. 1424, the Emergency Economic Stabilization Act of 2008 ("the Act").[4] One goal of the Act was to restore market liquidity and stabilize the U.S. economy.[5] Section 109 of the Act authorizes the Secretary of the Treasury (the "Secretary") to create and implement a plan to decrease the rate of foreclosures. In the spring of 2009, the Secretary and the Obama Administration unveiled the Making Home Affordable Program ("MHA").[6]

A key component of the MHA is the Home Affordable Modification Program ("HAMP"), a program designed to encourage loan servicers[7] to modify loans for certain qualified borrowers.[8] One of the goals of HAMP is to reduce the rate of foreclosure by lowering borrowers' monthly mortgage payments to 31% of their monthly gross income.[9] HAMP

First Year of the Home Affordable Modification Program (HAMP), 52 ARIZ. L. REV. 727, 728–29 (2010) ("HAMP provides a compelling case study of the complex challenge of mitigating the effects of an economic crisis brought on by high-risk financial products.").

3. Lenders began foreclosure proceedings on nearly 1.3 million properties in 2007, 2.3 million in 2008, and 2.8 million in 2009. *RealtyTrac: Year-End Report Shows Record 2.8 Million U.S. Properties with Foreclosure Filings in 2009*, REALTYTRAC (Jan. 14, 2010), http://www.realtytrac.com/content/foreclosure-market-report/realtytrac-year-end-report-shows-record-28-million-us-properties-with-foreclosure-filings-in-2009-5489. In 2010, lenders began foreclosure proceedings on a record 2.9 million properties. *Record 2.9 Million U.S. Properties Receive Foreclosure Filings in 2010 Despite 30-Month Low in December*, REALTYTRAC (Jan. 13, 2011), http://www.realtytrac.com/content/press-releases/record-29-million-us-properties-receive-foreclosure-filings-in-2010-despite-30-month-low-in-december-6309. In 2011, 1.8 million properties faced foreclosure. *2011 Year-End Foreclosure Report: Foreclosures on the Retreat*, REALTYTRAC (Jan. 12, 2012), http://www.realtytrac.com/content/news-and-opinion/2011-year-end-foreclosure-market-report-6984?accnt=13562.

4. Pub. L. No. 110-343, 122 Stat. 3765 (2008).

5. 12 U.S.C. § 5201 (2008) ("The purposes of this chapter are (1) to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States; and (2) to ensure that such authority and such facilities are used in a manner that (A) protects home values, college funds, retirement accounts, and life savings; (B) preserves homeownership and promotes jobs and economic growth; (C) maximizes overall returns to the taxpayers of the United States; and (D) provides public accountability for the exercise of such authority.").

6. *See* HAMP SUPPLEMENTAL DIRECTIVE 09-01: INTRODUCTION OF THE HOME AFFORDABLE MODIFICATION PROGRAM 1 (2009) [hereinafter HAMP SUPPLEMENTAL DIRECTIVE].

7. A servicer is a financial institution that collects the borrower's monthly mortgage payments and has responsibility for the management and accounting of the loan. It is possible that the owner of a mortgage also services it; however, many loans are owned by groups of investors who hire loan servicers to interact with homeowners on their behalf. A servicer primarily profits from late fees associated with late mortgage payments. Additionally, servicers, "unlike investors, generally recover all their hard costs after a foreclosure, even if the home sells for less than the mortgage loan balance. Servicers may even make money from foreclosures through charging borrowers and investors fees that are ultimately recouped from the loan pool." *See infra* Part II; *see also* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 765–68 (2011).

8. *See* HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 6, at 1.

9. *Id.* at 6 ("The borrower will only qualify for the HAMP if the verified income documentation confirms that the monthly mortgage payment ratio prior to the modification is greater than 31 percent. The 'monthly mortgage payment ratio' is the ratio of the borrower's current monthly mortgage

allocated seventy-five billion dollars worth of incentives to encourage loan investors, servicers, and borrowers to work together to modify mortgages.[10] The Treasury estimated that HAMP would permanently modify three to four million mortgages by the end of 2012.[11] However, after its first year, HAMP's shortfalls came to light as data showed that HAMP produced only 230,801 permanent modifications.[12] It became apparent that at this rate, HAMP would not meet its projected goal.[13] According to a recent report, "approximately 2.8 million borrowers had their HAMP loan modification application denied or their trial [period plan] canceled."[14] While the intentions of the proposed legislation were noteworthy, loan servicers and financial institutions circumvented the program's provisions to protect their own interests. This resulted in a lackluster program that incentivized servicers to modify loans but did very little to make those modifications permanent.[15] As a result, a flurry of litigation ensued.[16]

The most controversial provision of HAMP is its three-month Trial Period Plan ("TPP").[17] Under HAMP, if a borrower meets certain requirements, she will be placed on a TPP where she will pay a lowered mortgage payment equal to 31% of her gross monthly income.[18] If the borrower makes this lowered payment for three months, the servicer should extend a permanent modification with a reduced monthly payment. As written, however, the provision allows servicers to deny permanent modifications even if borrowers successfully meet their reduced mortgage payments.[19] For example, during the TPP, the servicer may request

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payment to the borrower's monthly gross income (or the borrowers' combined monthly gross income in the case of co-borrowers).").

10. *See* Braucher, *supra* note 2, at 729 (stating the cost of the program to be $75 billion and examining the disappointing first year of the HAMP program).

11. *See* CONG. OVERSIGHT PANEL, OCTOBER OVERSIGHT REPORT: AN ASSESSMENT OF FORECLOSURE MITIGATION EFFORTS AFTER SIX MONTHS 38, 43 (2009) [hereinafter OCTOBER OVERSIGHT REPORT].

12. *See* MAKING HOME AFFORDABLE PROGRAM: SERVICER PERFORMANCE REPORT THROUGH MARCH 2010, at 2 (2010).

13. *See* OCTOBER OVERSIGHT REPORT, *supra* note 11, at 43–71 (discussing the shortfalls of HAMP after six months of its inception).

14. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-296, FORECLOSURE MITIGATION: AGENCIES COULD IMPROVE EFFECTIVENESS OF FEDERAL EFFORTS WITH ADDITIONAL DATA COLLECTION AND ANALYSIS 3 (2012) [hereinafter FORECLOSURE MITIGATION].

15. *See generally* Thompson, *supra* note 7 (arguing that HAMP does not require servicers to modify loans but offers an incentive structure that is supposed to encourage loan modifications).

16. For an overview of HAMP-related lawsuits, see John R. Chiles & Matthew T. Mitchell, *HAMP: An Overview of the Program and Recent Litigation Trends*, 65 CONSUMER FIN. L. Q. REP. 194 (2011).

17. *See* MAKING HOME AFFORDABLE PROGRAM: HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES 106–10 (version 4.0 2012) (outlining the TPP) [hereinafter HAMP SERVICER HANDBOOK].

18. *Id.* at 93.

19. *Id.* at 110 ("A borrower in a TPP may receive a permanent modification as long as the servicer has received all required trial period payments timely and all other required documentation from the borrower, including a fully executed Modification Agreement. Servicers should not modify a mortgage loan if there is reasonable evidence indicating the borrower submitted information that is false or misleading or if the borrower otherwise engaged in fraud in connection with the modification.").

additional income documentation to ensure that the borrower is eligible for a permanent modification.[20] This tedious process and degree of discretion allows servicers to deny permanent modifications based on incomplete applications and insufficient income.[21] Unfortunately, evidence of servicer misconduct is well chronicled: Borrowers complain that servicers lose their paperwork, make oral and written misrepresentations, engage in delay tactics, and fail to follow HAMP standards.[22] To date, over 770,000 borrowers who entered TPPs were denied permanent modifications and had their TPPs cancelled.[23]

HAMP's failures have caused borrowers to seek relief through the courts. Nevertheless, many borrowers have trouble surviving the pleading stage.[24] Recently, borrowers began to bring common law breach of contract claims to enforce the TPP. They argue that the TPP is a binding contract that the servicer breaches when it refuses to grant a permanent loan modification despite borrower compliance.[25] Currently, there is controversy over the validity of the TPP-based breach of contract theory and a split among federal courts.[26] Cases are often dismissed on the theory that HAMP does not afford a private right of action,[27] meaning borrowers cannot simply sue to enforce a particular HAMP provision. They reason that TPPs do not constitute valid, independent contracts, but are instead

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20. *See infra* Part II.C.

21. *See infra* notes 22, 64, 106; *see also* TARP QUARTERLY REPORT, *infra* note 106.

22. OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, SIG-QR-11-01, QUARTERLY REPORT TO CONGRESS 12 (2011) [hereinafter TARP QUARTERLY REPORT].

23. According to the most recent HAMP performance report, 770,829 trial modifications have been cancelled. MAKING HOME AFFORDABLE: PROGRAM PERFORMANCE REPORT THROUGH AUGUST 2012, at 3 (2012) [hereinafter AUGUST 2012 PERFORMANCE REPORT].

24. *See infra* Part III.A.

25. *See, e.g.*, Picini v. Chase Home Fin. LLC, 854 F. Supp. 2d 266, 273 (E.D.N.Y 2012) ("Specifically, Plaintiffs claim that Defendants breached the TPP by accepting Plaintiffs' payments under the TPP and then failing to modify Plaintiffs' loan."); Bosque v. Wells Fargo Bank, N.A, 762 F. Supp. 2d 342, 351–52 (D. Mass. 2011) (discussing the plaintiffs' argument that the TPP is a formed contract and that the servicer breached it); Belyea v. Litton Loan Servicing, LLP, No. 10-10931-DJC, 2011 WL 2884964, at *1 (D. Mass. July 15, 2011) ("Plaintiffs contend that the TPP Agreements constitute binding contracts with Litton and that Litton failed to satisfy its contractual obligations."); Durmic v. J.P. Morgan Chase Bank, N.A., No. 10-CV-10380-RGS, 2010 WL 4825632, at *1 (D. Mass. Nov. 24, 2010) ("The TPP is a Fannie Mae/Freddie Mac 'Uniform Instrument' that has the appearances of a contract.").

26. *See infra* Part III.

27. *See, e.g.*, Vida v. OneWest Bank, F.S.B., No. 10-987-AC, 2010 WL 5148473, at *3–4 (D. Or. Dec. 13, 2010) (explaining that courts agree there is no private right of action under HAMP); Manabat v. Sierra Pac. Mortg. Co., No. CV F 10-1018 LJO JLT, 2010 WL 2574161, at *11 (E.D. Cal. June 25, 2010) ("Congress did not intend to create a private right of action for violation of HAMP against lenders that received HAMP funds." (internal quotation marks omitted)); Marks v. Bank of Am., N.A., No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988, at *6 (D. Ariz. June 22, 2010) ("Nowhere in the HAMP Guidelines, nor in the EESA, does it expressly provide for a private right of action.").

part of the rubric of HAMP.[28] This rationale is partly based on constitutional preemption principles.[29]

Conversely, other courts disagree with this rationale and allow borrowers to assert contract claims to enforce TPPs, reasoning that while HAMP does not afford a private right of action, it does not preempt state common law.[30] This approach is more consistent with American jurisprudence, because courts generally allow plaintiffs to assert common law claims to enforce federal programs. Thus far, the Seventh Circuit Court of Appeals is the only appellate court that has addressed the validity of the theory, dismissing the preemption arguments and upholding the theory.[31] As a result, lower courts are mixed in applying the theory, and the result is inconsistent decisions.[32]

Part I of this Note provides an overview of the HAMP application process, with specific emphasis on the TPP. Part II first discusses the recent controversy around the TPP-based breach of contract theory and the split among federal courts. Part II then looks to the judicial treatment of analogous federal statutes and suggests that courts uphold the validity of the breach of contract theory and allow borrowers to attain foreclosure relief through the courts. This Note concludes by recommending several ideas for national legislation that can help achieve HAMP's unmet goals.

I. The Mortgage Crisis

Several theories purport to explain the origins of the mortgage crisis. While there is disagreement among scholars, the general consensus is that subprime lending[33] and securitization of mortgages[34] were significant contributors to the mortgage crisis.[35] During the last forty years,

28. *See infra* Part III.A–B.

29. *See infra* Part III.A–B.

30. *See infra* Part III.C.

31. Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 575, 586 (7th Cir. 2012).

32. *See infra* Part III.

33. Generally, subprime lending refers to lending loans that are designed for persons with blemished or limited credit histories and that carry a higher rate of interest than prime loans to compensate for increased credit risk. *See Subprime Lending*, U.S. Dep't of Hous. & Urban Dev., http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/lending/subprime (last visited Mar. 15, 2013). Statistics show that minorities are overrepresented in the subprime lending market. *Id.*

34. *See* Thompson, *supra* note 7, at 763 ("In securitization, thousands of loans are pooled together in common ownership. Ownership of the loans is held by a trust. The expected income stream from the pooled loans together forms the basis for bonds that are sold to investors. Investors who purchase the bonds do not own the loans, but they do own the right to receive payment based on the loan payments. Bonds may be issued for different categories of payments, including: interest payments, principal payments, late payments, and prepayment penalties. Different groups of bond holders—or tranches—may get paid from different pots of money and in different order. The majority of all home loans in recent years were securitized." (footnotes omitted)).

35. *See generally* Engel & McCoy, *supra* note 2, at 15–19 (discussing how subprime lending, securitization, and weak government oversight led to the mortgage crisis); Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 Conn. L. Rev. 1257, 1276 (2009)

regulations on the mortgage market were loosened to encourage home ownership and fuel economic growth.[36] For example, Congress eliminated interest rate caps on first-lien home mortgages and permitted financial products other than fixed-rate loans.[37] These new products included adjustable rate mortgages[38] (loans that start off with a low interest rate but are adjustable for the life of the loan), balloon payment loans,[39] and reverse mortgages.[40] Additionally, the emergence of securitization, a process that allowed note holders to bundle loans with many others, divide them, and sell them to investors who would then sell them on the securities market, significantly changed the mortgage market.[41]

But increased home ownership came at a heavy price. Eventually, when interest rates increased and the U.S. economy faltered, borrowers could not afford inflated mortgage payments. Servicers began to issue foreclosure threats. At-risk borrowers were unable to refinance into more affordable loans and lost equity in their homes. In states that follow a judicial foreclosure model,[42] lenders sought foreclosures through the

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(arguing that securitization was a major cause of the subprime meltdown); Raymond C. Niles, *Eighty Years in the Making: How Housing Subsidies Caused the Financial Meltdown*, 6 J.L. ECON. & POL'Y 165 (2010) (arguing that housing subsidies significantly contributed to the mortgage crisis); William Poole, *Causes and Consequences of the Financial Crisis of 2007–2009*, 33 HARV. J.L. & PUB. POL'Y 421, 425 (2010) (stating that the government encouraged the growth of the subprime mortgage market by attempting to increase home ownership); Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1 (2009) (arguing that subprime lending was a contributor to the mortgage crisis).

36. *See* ENGEL & MCCOY, *supra* note 2, at 16.

37. *Id.*

38. *Id.*

39. A balloon payment is a mortgage that does not fully amortize over the term of the note, thus leaving a balance due at maturity. The final payment is called a balloon payment because of its large size. JOHN P. WIEDEMER, REAL ESTATE FINANCE 109–10 (8th ed. 2001).

40. *See* ENGEL & MCCOY, *supra* note 2, at 16.

41. *See* Eggert, *supra* note 35, at 1259 ("[Securitization allowed] subprime lenders [to] make loans and sell them on Wall Street, where investment houses marketed securities backed by pools of subprime loans . . . [allowing] subprime lenders [to] quickly unload much of the risk of the subprime loans as well as recoup the money lent and relend it to new subprime borrowers."). Additionally, securitization created potential conflicts among the various interests involved, including investors, note holders, and servicers. Braucher, *supra* note 2, at 745–46 ("Not only were servicers' interests not necessarily aligned with those of investors, but there were many potential conflicts among investors because of their different interests in securitized mortgage pools, a problem popularly referred to as the 'slicing and dicing' of home mortgages and potentially involving 'tranche warfare.'").

42. *See* John Carney, *A Primer on the Foreclosure Crisis*, CNBC.COM (Oct. 11, 2010), http://www.cnbc.com/id/39617381/A_Primer_On_The_Foreclosure_Crisis (stating that there are twenty-three "judicial states" that require banks to initiate foreclosures through the courts); *see also* CONG. OVERSIGHT PANEL, NOVEMBER OVERSIGHT REPORT: EXAMINING THE CONSEQUENCES OF MORTGAGE IRREGULARITIES FOR FINANCIAL STABILITY AND FORECLOSURE MITIGATION 12 n.17 (2010) ("Twenty-two states require judicial oversight of foreclosure proceedings."). *Cf.* RAO & WALSH, *supra* note 2, at 12 (stating that there are thirty-one non-judicial states, including the District of Columbia, leaving only twenty "judicial states"). According to Rao and Walsh, the non-judicial foreclosure states are: Alabama, Alaska, Arkansas, Arizona, California, Georgia, Hawaii, Idaho, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia,

courts. In states that do not follow a judicial model, lenders did not need to involve the courts and completed foreclosures more swiftly.[43] Borrowers in all states were often unable to attain foreclosure relief through the court system.[44] As a result, subprime lending, increased homeownership, and economic instability led to an unprecedented home foreclosure crisis, causing millions of Americans to lose their homes.[45] Lawmakers scrambled to reach effective solutions.[46]

II. The Government's Response: HAMP

Since 2009, the government has enacted various programs designed to help borrowers avoid foreclosure in response to the crisis—including the ambitious HAMP.[47] The Treasury estimated that HAMP would modify three to four million mortgages by the end of 2012.[48] To date, HAMP has only produced 1,076,747 permanent modifications,[49] and "approximately 2.8 million borrowers had their HAMP loan modification application denied or their [TPP] canceled."[50] Moreover, HAMP does not require servicers to grant permanent loan modifications that are optimal to the borrower. As a result, permanent loan modifications often leave borrowers with a high debt-to-income ratio, contain an adjustable interest rate, do not reduce the loan principal, and include a future balloon payment[51]—leaving

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Washington, West Virginia, Wyoming, and the District of Columbia. *Id.* By implication, the "judicial states" would be: Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, Vermont, and Wisconsin.

43. *See* Rao & Walsh, *supra* note 2, at 3 ("[In non-judicial states], mortgage holders who allege that homeowners have fallen behind in their payments can bypass the courts and move directly to take away and auction off homes. This denies homeowners due process protection comparable to that given many tenants. It also places upon homeowners the heavy burden to get a judge to review the mortgage holder's claims and stop the foreclosure.").

44. *See generally* Lauren E. Willis, *Introduction: Why Didn't the Courts Stop the Mortgage Crisis?*, 43 Loy. L.A. L. Rev. 1195 (2010) (providing an overview of unsuccessful mortgage-related lawsuits).

45. *See RealtyTrac: Year-End Report Shows Record 2.8 Million U.S. Properties*, *supra* note 3 (documenting the rate of foreclosures).

46. For an account of the government's response to the mortgage crisis, see generally David Wessel, In Fed We Trust (2009) (describing the government's attempt to prevent an economic crisis).

47. Other MHA programs include: Principal Reduction Alternative SM ("PRA"), Second Lien Modification Program ("2MP"), FHA Home Affordable Modification Program ("FHA-HAMP"), USDA's Special Loan Servicing, Veteran's Affairs Home Affordable Modification ("VA-HAMP"), Home Affordable Foreclosure Alternatives Program ("HAFA"), Second Lien Modification Program for Federal Housing Administration Loans ("FHA-2LP"), Home Affordable Refinance Program (HARP), FHA Refinance for Borrowers with Negative Equity ("FHA Short Refinance"), Home Affordable Unemployment Program ("UP"), and Housing Finance Agency Innovation Fund for the Hardest Hit Housing Markets ("HHF"). *See View All Programs*, Making Home Affordable, http://www.makinghomeaffordable.gov/programs/view-all-programs/Pages/default.aspx (last updated June 15, 2012). There are also a host of other *non*-MHA loan modification programs that may be available to borrowers.

48. October Oversight Report, *supra* note 11, at 38.

49. *See* August 2012 Performance Report, *supra* note 23, at 3.

50. *See* Foreclosure Mitigation, *supra* note 14, at 2.

51. *See* Braucher, *supra* note 2, at 764 (discussing the likelihood of a high re-default rate).

borrowers at risk for re-default and foreclosure. Even at the outset, the Treasury estimated that 40% of the borrowers who received permanent loan modifications would re-default within only five years.[52]

Part of HAMP's poor success rate is due to the fact that loan servicers, not lenders or investors, have vast discretion in modifying loans.[53] A servicer is neither a lender nor investor but is often a third-party financial institution that is hired by investors to manage and account for the loan.[54] In other words, a servicer is tasked with interacting with borrowers and collecting and managing the borrower's monthly mortgage payments.[55] Servicers primarily profit from a monthly servicing fee, which is a fixed percentage of the outstanding principal balance,[56] but when a loan becomes delinquent, the amount and nature of servicing changes.[57] A servicer can profit from assigning late fees to borrowers for making late mortgage payments,[58] and servicers can also make more money by making temporary, unsustainable payment agreements than they can by making long-term, sustainable modifications.[59] Consequently, servicers have a track record of extending TPPs but failing to extend permanent modifications.[60] Additionally, it is the servicer that decides whether to foreclose or modify a loan.[61] In some cases, a servicer can make a greater profit from initiating foreclosure than from granting a permanent loan modification.[62] As a result of this structure, servicers often do not modify, choose modifications that financially benefit themselves, or initiate foreclosure proceedings, harming both homeowners and investors.[63]

Legislators, consumer advocates, oversight bodies, and the Treasury agree that servicer negligence and misconduct exacerbate HAMP's poor success rate.[64] Common problems include loss of borrower paperwork,

52. *See* QUESTIONS FOR THE RECORD FOR U.S. DEPARTMENT OF THE TREASURY ASSISTANT SECRETARY HERBERT M. ALLISON, JR., CONG. OVERSIGHT PANEL 3 (2009), *available at* http://cybercemetery.unt.edu/archive/cop/20110402030313/http://cop.senate.gov/documents/testimony-102209-allison-qfr.pdf.

53. *See* Kurt Eggert, *Comment on Michael A. Stegman et al.'s "Preventive Servicing Is Good for Business* and *Affordable Homeownership Policy": What Prevents Loan Modifications?*, 18 HOUS. POL'Y DEBATE 279, 287 (2007); Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 22 (2010) (discussing the structure of the servicing industry); Thompson, *supra* note 7, at 770. *See generally* AM. SECURITIZATION FORUM, DISCUSSION PAPER ON THE IMPACT OF FORBORNE PRINCIPAL ON RMBS TRANSACTIONS 1 (2009), *available at* http://www.americansecuritization.com/uploadedFiles/ASF_Principal_Forbearance_Paper.pdf (explaining that servicers have vast discretion in determining what kinds of modifications to approve).

54. *See* Thompson, *supra* note 7, at 765.

55. *Id.*

56. *Id.* at 767.

57. *Id.* at 765.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 771–72 ("[S]ervicers can make more money from foreclosing than from modifying . . . .").

63. *Id.* at 772.

64. *See* TARP QUARTERLY REPORT, *supra* note 22, at 12.

failure to follow program standards, and unnecessary delays that harm borrowers while financially benefiting servicers.[65] Despite these abuses, the Treasury has yet to penalize or restrict funding to a single servicer for any failure other than to provide data.[66] According to the Office of the Special Inspector General for the Troubled Asset Relief Program, a congressionally created watchdog agency, the Treasury's lack of enforcement stems from a fear of alienating servicers from participating in HAMP.[67] The Treasury recently explained that because participation by the servicers is voluntary, "'our abilities to enforce specific performance are extremely limited' and 'aggressive enforcement [is] difficult.'"[68]

Despite calls by the Office of the Special Inspector General and other oversight bodies for the Treasury to get tough on servicers, the Treasury gives servicers vast discretion in the modification process and instead continues to devise new financial incentives for servicers to participate in HAMP.[69] The Treasury has issued dozens of revisions ("supplemental directives") to HAMP in an effort to encourage more loan modifications. Although these directives increased the rate of loan modifications, lenders granted only a total of 1,076,747 permanent modifications—as compared with the projected three to four million—while canceling 770,829 TPPs.[70] Thousands of other borrowers are in a state of limbo—making monthly payments in hope of attaining permanent loan modifications. The poor success rate, coupled with the high risk of re-default attributed to subprime loan modifications, indicates that HAMP has not met its objective of helping borrowers hold on to their homes. Unsurprisingly, borrowers have sought relief through the courts.

A. WHO PARTICIPATES IN HAMP?

Initially, only servicers of loans that were owned or guaranteed by Fannie Mae or Freddie Mac were required to participate in HAMP; however, due to governmental pressure and incentives, most loan servicers currently participate in the program.[71] Currently, over one hundred servicers participate in HAMP.[72] To participate in HAMP, a servicer must execute a Servicer Participation Agreement with Fannie Mae, which acts

65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 13 (alteration in original).
69. *Id.*
70. *See* AUGUST 2012 PERFORMANCE REPORT, *supra* note 23, at 3.
71. *See* Chiles & Mitchell, *supra* note 16, at 195 ("Servicers of loans that are owned or guaranteed by Fannie Mae or Freddie Mac are required to participate in HAMP. For all other servicers, participation is voluntary. With monetary incentives and old fashioned arm-twisting, however, the Treasury Department has successfully coaxed many of these servicers to participate as well.").
72. For a complete list of participating servicers, see *Contact Your Mortgage Company*, MAKING HOME AFFORDABLE, http://www.makinghomeaffordable.gov/get-assistance/contact-mortgage/Pages/default.aspx (last updated Aug. 4, 2011).

as a financial agent for the U.S. government.[73] HAMP is an economic-based incentive program that encourages servicers to modify mortgages for certain qualified borrowers. For example, prior to HAMP, a loan modification was estimated to cost a servicer around $500–$600 in processing costs.[74] Through HAMP, a servicer may be paid up to $4600 in incentives over the course of three years for completing a permanent loan modification.[75] HAMP also provides additional incentives to borrowers and investors, depending on certain criteria.[76]

B. HAMP Eligibility Requirements

To become eligible for HAMP, a borrower must meet certain "pre-screen" criteria.[77] The most significant criteria require that (1) the mortgage loan is a first lien mortgage loan that was originated on or before January 1, 2009; (2) the mortgage loan is secured by a one-to-four-unit property, one unit of which is the mortgagor's principal residence; (3) the property securing the mortgage loan is not vacant or condemned; (4) the unpaid principal balance on the mortgage loan is less than $729,750 for a one-unit property, $934,200 for a two-unit property, $1,129,250 for a three-unit property, or $1,403,400 for a four-unit property; and (5) the mortgage loan has not been previously modified under HAMP.[78] Interestingly, most borrowers who apply to HAMP meet these criteria. According to the most

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73. HAMP Supplemental Directive, *supra* note 6, at 1.

74. Joseph R. Mason, *Mortgage Loan Modification: Promises and Pitfalls* 7 (Oct. 3, 2007), *available at* http://papers.ssrn.com/so13/papers.cfm?abstract_id=1027470 (citing $500–$600 as the cost per loan modification).

75. A servicer may receive the following financial incentives for completing a permanent loan modification: (1) a "Completed Modification Incentive" in the amount of $1600, $1200, or $400, depending on the number of days the borrower is delinquent at the TPP Effective Date. For example, if the borrower is 120 or fewer days delinquent (150 days from Last Paid Installment ("LPI")), the servicer will receive $1600. If the borrower is 121 to 210 days delinquent (151 to 240 days from LPI), the servicer will receive $1200. If the borrower is more than 210 days delinquent (more than 240 days from LPI), the servicer will receive $400; (2) an annual "Pay for Success" incentive in the amount of $1000 per year for a period of three years. The "pay for success" payment will be payable annually for each of the first three years after the anniversary of the month in which the TPP Effective Date occurred, as long as the loan is in good standing and has not been paid in full at the time the incentive is paid; (3) an annual "Pay for Performance" principal balance reduction. Certain borrowers whose monthly mortgage payment is reduced by 6% or more and who make timely monthly payments will earn this reduction equal to the lesser of $1000 ($83.33/month) or one-half of the reduction in the borrower's annualized monthly payment for each month a timely payment is made. The payment will be payable annually for each of the first five years after the anniversary of the month in which the TPP Effective Date occurred, as long as the loan is in good standing and has not been paid in full at the time the incentive is paid. "This payment will be paid to the mortgage servicer to be applied first towards reducing the interest bearing UPB on the mortgage loan and then to any principal forbearance amount (if applicable)." *See* HAMP Servicer Handbook, *supra* note 17, at 123–25.

76. For a description of additional investor and borrower incentives, see *id.* at 125–28.

77. For a complete list of criteria, see HAMP Supplemental Directive, *supra* note 6, at 2.

78. Chiles & Mitchell, *supra* note 16, at 195.

recent HAMP records, 1,912,439 HAMP borrowers met these criteria and were offered a TPP.[79]

Congress and the Treasury intended HAMP to be inclusive so that it could meet its target of modifying three to four million mortgages. Unfortunately, the most problematic area for borrowers occurs during an economic evaluation process after a TPP is initiated, but before a permanent loan modification is granted. As a result, of the 1,912,439 HAMP applicants who were offered a TPP, only 1,076,747 were granted a permanent modification.[80]

C. The Application Process

The HAMP application process consists of several components. If a loan is two or more payments delinquent and meets each of the "pre-screen" criteria listed above, the servicer should make a "reasonable effort" to "solicit" the borrower to complete a HAMP modification application.[81] This process requires servicers to send borrowers an "initial package," which is essentially a HAMP loan modification application.[82] Alternatively, if the borrower proactively contacts her servicer and requests a loan modification, the servicer should work with the borrower to determine whether she is at risk of imminent default and meets the HAMP criteria.[83] If the borrower meets the initial package criteria, she will be offered a TPP.[84] Finally, if the borrower makes all of the TPP payments, she should be offered a permanent loan modification.[85]

1. The Initial Criteria

The HAMP application consists of "initial package" documents. These documents include a Request for Modification Affidavit form,[86] a

79. *See* August 2012 Performance Report, *supra* note 23, at 3.

80. *Id.*

81. *See* Chiles & Mitchell, *supra* note 16, at 195 ("A servicer is deemed to have made a 'Reasonable Effort' to solicit a mortgagor under HAMP if over a period of thirty calendar days: (1) The servicer makes a minimum of four telephone calls to the mortgagor's last known telephone numbers of record, at different times of the day; and (2) the servicer sends two written notices to the mortgagor's last address of record, one letter via certified/express mail or via overnight delivery service with return receipt/delivery confirmation and one letter via regular mail. If the servicer has documented evidence that it satisfied this Reasonable Effort requirement without successfully communicating with the mortgagor, then continued solicitation is not necessary. Successful efforts by a servicer to communicate with a mortgagor are referred to as 'Right Party Contacts' under HAMP. If Right Party Contact is established and a mortgagor expresses an interest in HAMP, then the servicer must send a written communication to the mortgagor which contains and describes the documents a mortgagor is required to submit in order to be evaluated for a modification.").

82. *See infra* notes 86–87 and accompanying text.

83. HAMP Supplemental Directive, *supra* note 6, at 13.

84. *See infra* notes 86–88 and accompanying text.

85. *See infra* notes 100–104 and accompanying text.

86. *See* Chiles & Mitchell, *supra* note 16, at 195–96 ("The RMA is a standard form which seeks general information about the mortgagor, the mortgagor's finances, and the property secured by the mortgage loan. Included in the RMA is a Hardship Affidavit. Every borrower seeking a modification,

copy of the borrower's most recently filed federal income tax return, IRS Form 4506-T or 4506T-EZ, and copies of two recent pay stubs.[87] Once this information is submitted, the servicer has thirty days to evaluate the borrower's HAMP eligibility.[88]

During the evaluation process, HAMP requires servicers to reduce the borrowers' monthly mortgage payment to 31% of their monthly gross income.[89] To achieve this, HAMP requires capitalization of accrued interest,[90] interest rate reduction,[91] loan term extension,[92] and principal forbearance.[93] Servicers are not required to reduce or set aside loan principal but have discretion to do so.[94] Even if borrowers meet these criteria, they can be denied a modification based upon a net present value ("NPV") test.[95] The NPV test is a formula that determines whether it would be more profitable for servicers and the loan's investors to approve a modification or to foreclose on the property.[96] If the NPV result is higher for a modification than it is for a foreclosure, then the

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regardless of delinquency status, must sign a Hardship Affidavit attesting that he/she is unable to continue making full mortgage payments and describing one or more acceptable hardships as the reason therefore.").

87. *See* HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 6, at 7 (listing financial form requirements).

88. *See* Chiles & Mitchell, *supra* note 16, at 196.

89. *Id.*

90. *Id.* ("[T]he servicer must capitalize accrued interest, out-of-pocket escrow advances to third parties, and any required advances that will be paid to third parties by the servicer. In addition, the servicer must capitalize servicing advances that are made for costs and expenses incurred in performing servicing obligations, such as those related to preservation and protection of the security property and the enforcement of the mortgage.").

91. *Id.* ("If necessary, in the second step, the servicer must reduce the starting interest rate in increments of 0.125 percent to get as close as possible to the target monthly mortgage payment ratio. The interest rate floor under this step is 2.0 percent. If the mortgagor has an Adjustable Rate Mortgage (ARM) loan or interest-only mortgage, the existing interest rate will convert to a fixed interest rate, fully-amortizing loan.").

92. *Id.* ("If necessary, in the third step, the servicer must extend the term and re-amortize the mortgage loan by up to 480 months from the Modification Effective Date, which is the due date for the first payment under the permanent modification.").

93. *Id.* ("If necessary, in the fourth step, the servicer must provide for principal forbearance. The principal forbearance amount is non-interest bearing and non-amortizing. The principal forbearance amount will be fully due and payable in the form of a balloon payment upon the earliest of the mortgagor's transfer of the mortgage property, payoff of the interest-bearing Unpaid Principal Balance (UPB), or at maturity of the mortgage loan.").

94. HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 6, at 9 ("There is no requirement to forgive principal under the HMP. However, servicers may forgive principal to achieve the target monthly mortgage payment ratio on a standalone basis or before any step in the standard waterfall process set forth above. If principal is forgiven, subsequent steps in the standard waterfall may not be skipped. If principal is forgiven and the interest rate is not reduced, the existing rate will be fixed and treated as the modified rate for the purposes of the Interest Rate Cap.").

95. Chiles & Mitchell, *supra* note 16, at 196.

96. *Id.* ("This 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."); *see* HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 6, at 4–5 (describing the NPV test); HAMP SERVICER HANDBOOK, *supra* note 17, at 102–03.

servicer "must approve the qualifying mortgagor's modification as long as all other requirements are met."[97] However, if the NPV result is higher for a foreclosure than it is for a modification, then the servicer may deny modification.[98] If the borrower does not meet all of the eligibility criteria, the servicer should explore alternatives to foreclosure prior to initiating foreclosure proceedings.[99]

2. *The Trial Period Plan (TPP) and Permanent Loan Modification*

If a borrower meets the initial criteria discussed above, the servicer will offer the borrower a TPP,[100] where for three months the borrower must make monthly mortgage payments that are no greater than 31% of her gross monthly income.[101] The TPP is initiated once a borrower pays the first month's reduced mortgage payment.[102] The borrower must then pay the remaining monthly TPP payments on time to remain eligible for a permanent modification.[103] The HAMP guidelines provide that borrowers "who make all trial period payments timely and who satisfy all other trial period requirements will be offered permanent modification."[104]

Performance statistics indicate that this process is problematic. Of the 1,912,439 offered TPPs, over 770,000 were canceled and never became permanent modifications.[105] Servicers often claim that cancellations are due to insufficient income or documentation on the part of the borrower, while borrowers contend that servicers claim to lose their paperwork and make misrepresentations.[106] Consequently, many borrowers file breach of contract claims against their servicers to enforce the TPP agreements.

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97. Chiles & Mitchell, *supra* note 16, at 196.

98. HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 6, at 4.

99. *Id.* at 18.

100. *Id.* The TPP could be longer if necessary to comply with applicable contractual obligations. *Id.*

101. *Id.* at 8, 17–18.

102. Chiles & Mitchell, *supra* note 16, at 196–97.

103. HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 6, at 17.

104. HAMP SERVICER HANDBOOK, *supra* note 17, at 106.

105. *See* AUGUST 2012 PERFORMANCE REPORT, *supra* note 23, at 3.

106. *See* TARP QUARTERLY REPORT, *supra* note 22, at 12 ("One of the great frustrations with HAMP, as expressed by legislators, consumer advocates, oversight bodies, and even Treasury itself, has been the abysmal performance of loan servicers, which not only operate as the point of contact for distressed homeowners seeking to participate in the program but also administer the loans on behalf of investors. Anecdotal evidence of their failures has been well chronicled. From the repeated loss of borrower paperwork, to blatant failure to follow program standards, to unnecessary delays that severely harm borrowers while benefiting servicers themselves, stories of servicer negligence and misconduct are legion, and the servicers' conflicts of interest in administering HAMP—they too often have financial interests that don't align with those of either borrowers or investors—have been described both by SIGTARP and COP."); *see also* Arthur Delaney, *HAMP: Obama Administration Lets Banks out of Doghouse for Bad Mortgage Servicing*, HUFFINGTON POST (Mar. 2, 2012, 4:24 PM), http://www.huffingtonpost.com/2012/03/02/hamp-mortgage-barackobama_n_1316873.html?ref=business&ir=Business ("The most common reason for cancellations is insufficient documentation, according to Treasury. But homeowners say the real problem is banks losing paperwork.").

III. The TPP-Based Breach of Contract Theory

Most district courts hold that HAMP does not afford a private right of action.[107] Nonetheless, borrowers may be able to succeed by asserting common law claims on a TPP-based breach of contract theory. Under this theory, borrowers who had a TPP but did not receive a permanent loan modification argue that the TPP constitutes a formed contract between the borrower and the servicer. They contend that the servicer breached the contract by refusing to grant a permanent loan modification.[108] Borrowers propose that the initial TPP solicitation is an offer, the borrower's signature on the TPP contract indicates acceptance, and the trial payments and submission of other financial materials constitute consideration.[109] The number of TPP-based breach of contract claims continues to grow, and courts are divided as to the validity of the legal theory.[110] Most commonly, servicers are able to persuade courts that federal law either conflicts with or preempts state common law. To date, only one appellate decision—from the Seventh Circuit—has addressed this issue;[111] as such, the dearth of controlling case law has led to inconsistent decisions among lower courts as to the validity of the TPP-based breach of contract theory.

A. The *Vida* Rationale: Breach of Contract Claims Require Independence from HAMP

HAMP affords no private right of action, and courts are not in agreement on whether borrowers can assert common law claims to enforce HAMP provisions. In December 2010, a district court in Oregon rejected the TPP-based breach of contract theory in *Vida v. OneWest Bank, F.S.B.*[112] The *Vida* court explained that state common law claims cannot be used to enforce federal program provisions.[113] In *Vida*, a borrower argued that she formed a valid contract with her lender when her lender offered her a loan modification and she accepted the offer, entered a TPP, and performed all required conditions.[114] The borrower argued that the lender

107. *See* cases cited *supra* note 27.

108. *See, e.g.*, Picini v. Chase Home Fin. LLC, 854 F. Supp. 2d 266, 273 (E.D.N.Y. 2012) ("Specifically, Plaintiffs claim that Defendants breached the TPP by accepting Plaintiffs' payments under the TPP and then failing to modify Plaintiffs' loan."); Bosque v. Wells Fargo Bank, N.A, 762 F. Supp. 2d 342, 351–52 (D. Mass. 2011) (discussing the plaintiffs' argument that the TPP is a formed contract and that the servicer breached it).

109. *See, e.g.*, *Picini*, 854 F. Supp. 2d at 273 (holding that plaintiffs met the contract formation requirements); *Bosque*, 762 F. Supp. 2d at 351–52 (finding that plaintiffs met the offer, acceptance, and consideration requirements).

110. *See supra* notes 107–109. *Compare* cases discussed *infra* note 27 (dismissing the theory), *with* cases discussed *infra* note 112 (upholding the theory).

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

112. Civ. No. 10-987-AC, 2010 WL 5148473 (D. Or. Dec. 13, 2010).

113. *Id.* at *5.

114. *Id.* at *1.

breached the agreement by denying her a permanent modification and initiating foreclosure proceedings.[115] Under the TPP agreement, the borrower agreed: "If I am in compliance with [the TPP] and my representations . . . continue to be true in all material respects, then the Lender will provide me with a Home Affordable Modification Agreement . . . that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage."[116]

The lender moved to dismiss the case on the basis that the borrower could not bring a TPP-based breach of contract claim because HAMP does not provide a private cause of action and her claims were not independent of HAMP.[117] The borrower responded that, although her claim was premised on representations made during the course of the HAMP approval process, it was "not premised on an entitlement arising under HAMP and, thus, [did] not depend on a private right of action arising under HAMP."[118] Instead, the borrower argued that the claim was based on the common law of contract.[119] In other words, "representations made by [her servicer] . . . themselves amounted to an enforceable promise to modify her contract and refrain from initiating foreclosure."[120] The *Vida* court, relying on several district court decisions in the Ninth Circuit,[121] disagreed and held that the facts and allegations in the complaint were "premised chiefly on the terms and procedures set forth via HAMP and [were] not sufficiently independent to state a separate state law cause of action for breach of contract."[122]

Interestingly, the *Vida* court stated that servicers were not "wholly immunized for their conduct so long as the subject transaction is associated with HAMP."[123] This assertion implies that a common law breach of contract theory could succeed if it is properly pled as a separate cause of action. However, the *Vida* court did not articulate what is necessary to assert a contract claim that is sufficiently independent of HAMP. The implication of *Vida* is that borrowers are foreclosed from enforcing

115. *Id.* The borrower also asserted a fraud claim, alleging that she detrimentally relied on her servicer's oral and verbal statements that her "modification was underway" and "that no foreclosure sale would take place." *Id.*

116. *Id.* at *5.

117. *Id.* at *3.

118. *Id.* at *5.

119. *Id.*

120. *Id.*

121. The court cited several district courts in the Ninth Circuit that dismissed the TPP-based breach of contract theory, *see id.* at *3–4: 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); Manabat v. Sierra Pac. Mortg. Co., No. CV F 10-1018 LJO JLT, 2010 WL 2574161 (E.D. Cal. June 25, 2010); Marks v. Bank of Am., N.A., No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988 (D. Ariz. June 22, 2010); Aleem v. Bank of Am., N.A., No. EDCV 09-01812-VAP (RZx), 2010 WL 532330 (C.D. Cal. Feb. 9, 2010).

122. *Vida*, 2010 WL 5148473, at *5.

123. *Id.*

HAMP provisions if their claims are at all based on HAMP. Courts continue to agree with *Vida* and prevent borrowers from asserting TPP-based breach of contract claims.[124]

Vida raises a question: Why can't a borrower assert a common law claim that relates to, or arises out of, HAMP or any other federal program? Does HAMP conflict with or preempt state law? While the court did not expressly rely on preemption principles, its dismissal of the suit for lack of standing implies that HAMP conflicts with or preempts state law. As the case law demonstrates, courts continue to wrestle with preemption principles in the HAMP context.[125] While some courts follow *Vida*, other courts reject *Vida* and uphold TPP-based breach of contract claims.[126]

B. Does HAMP Conflict with or Preempt State Law?

Courts are reluctant to allow borrowers to assert breach of contract claims to enforce HAMP because of constitutional preemption concerns. The Supremacy Clause states that "the Laws of the United States . . . shall be the supreme Law of the Land."[127] Thus, "state laws that interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution are invalid."[128] There are three forms of preemption: express preemption, field preemption, and conflict preemption. In all forms of preemption, it is presumed that federal law shall not supersede state law unless it is the "clear and manifest purpose of Congress."[129] This is referred to as the presumption against preemption.[130]

Express preemption occurs when a federal statute expressly states that it intends to override state or local law.[131] In such a case, the intent of Congress is explicit. Because there is no explicit statement of preemption in HAMP, no one argues that it expressly preempts state law.

When Congress does not express its preemptive intent, two situations might exist that can *imply* congressional intent of preemption: (1) field

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124. *See, e.g.*, Parks v. BAC Home Loan Servicing, LP, 825 F. Supp. 2d 713 (E.D. Va. 2011); Senter v. JPMorgan Chase Bank, N.A., 810 F. Supp. 2d 1339 (S.D. Fla. 2011); Cox v. Mortg. Elec. Registration Sys., Inc., 794 F. Supp. 2d 1060 (D. Minn. 2011); Wittkowski v. PNC Mortg., No. 11-1602, 2011 WL 5838517 (D. Minn. 2011); Herold v. U.S. Bank, N.A., No. CV 11-08108-PCT-FJM, 2011 WL 4072029 (D. Ariz. 2011).

125. *See infra* Part III.B–C.

126. *See, e.g.*, Picini v. Chase Home Fin. LLC, 854 F. Supp 2d. 266 (E.D.N.Y. 2012); Fletcher v. OneWest Bank FSB, 798 F. Supp. 2d 925, 930–31 (N.D. Ill. 2011); Bosque v. Wells Fargo Bank, N.A., 762 F. Supp. 2d 342 (D. Mass. 2011); Darcy v. CitiFinancial, Inc., No. 1:10-cv-848, 2011 WL 3758805 (W.D. Mich. Aug. 25, 2011); Belyea v. Litton Loan Servicing, LLP, No. 10-10931-DJC, 2011 WL 2884964 (D. Mass. July 15, 2011).

127. U.S. Const. art. VI, cl. 2.

128. Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991) (internal quotation marks omitted).

129. Wyeth v. Levine, 555 U.S. 555, 565 (2009).

130. *Id*. *See generally* Mary J. Davis, *The "New" Presumption Against Preemption*, 61 Hastings L.J. 1217 (2010) (discussing the presumption against preemption).

131. FMC Corp. v. Holliday, 498 U.S. 52, 56–57 (1990).

preemption and (2) conflict preemption.[132] Field preemption exists "if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it."[133] In several cases, servicers have argued that Congress or the Treasury intended to occupy the HAMP field by deciding not to afford borrowers with a private right of action—thereby displacing state common law suits.[134]

Conflict preemption exists if it would be "*impossible* for a private party to comply with both state and federal requirements *or* where state law stands as an *obstacle* to the accomplishment and execution of the full purposes and objectives of Congress."[135] Commentators argue that conflict preemption is problematic because it has the "potential to be broadly applied," since interpreting federal and state objectives can be a subjective process.[136] In *Wigod*, the Seventh Circuit rejected a conflict preemption argument in the HAMP context.[137]

Some observers have advanced a new rule that would function as a "true default rule" that creates a presumption against preemption.[138] Such a rule would automatically apply in the absence of clear and manifest congressional intent to preempt. This proposed rule is "less rigid" and "more forgiving in implied preemption cases," giving breathing room to the definition of actual conflict while maintaining focus on articulated congressional objectives.[139] While preemption law is well-defined in theory, courts are often inconsistent in applying preemption principles.[140]

C. A Better Approach: Upholding TPP-Based Contract Claims

Courts continue to wrestle with preemption concerns in the HAMP context. In February 2012, the Eastern District of New York rejected the *Vida* rationale in *Picini v. Chase Home Financing LLC*[141] and did not find that HAMP preempts state law.[142] The court could not identify a single rule that requires state common law claims to be wholly independent of federal

132. *See* Davis, *supra* note 130, at 1221.

133. Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (internal quotation marks omitted).

134. *See*, *e.g.*, Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 576–77 (7th Cir. 2012); Bosque v. Wells Fargo Bank, N.A., 762 F. Supp. 2d 342, 350 (D. Mass. 2011).

135. Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (emphasis added) (citations omitted) (internal quotation marks omitted).

136. Davis, *supra* note 130, at 1221; *see* Wyeth v. Levine, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in judgment) (arguing against obstacle preemption as contrary to federalism principles); Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 227–29 (2000) (arguing that obstacle preemption requires "imaginative reconstruction" of congressional intent).

137. *Wigod*, 673 F.3d at 578.

138. *See, e.g.*, Davis, *supra* note 130, at 1217–20 (arguing for courts to consistently apply the presumption against preemption).

139. *Id.* at 1217.

140. *Id.* (discussing the uncertain role of preemption doctrine in American jurisprudence).

141. 854 F. Supp. 2d 266 (E.D.N.Y. 2012).

142. *Id.* at 274.

law.[143] In *Picini*, borrowers sued their servicer under several breach of contract theories.[144] The plaintiffs argued that they made all of their TPP payments on time but were not offered a permanent modification because the servicer engaged in "deny and delay tactics."[145] Soon after, the defendant moved to dismiss the lawsuit using the *Vida* rationale, arguing that there is no private right of action under HAMP, that the claim was not sufficiently independent of HAMP, and that the plaintiffs' claim was "simply a HAMP claim in disguise."[146] The *Picini* court considered the argument but did not find it persuasive. Instead, the court found that the defendant failed to identify a source of law that provides "where a state common law theory provides for liability for conduct that is also violative of federal law, a suit under state common law is prohibited so long as the federal law does not provide for a private right of action."[147] In denying the defendant's motion to dismiss, the *Picini* court implied that HAMP would not preempt the TPP-based breach of contract theory.[148]

Likewise, in *Bosque v. Wells Fargo Bank, N.A.*,[149] the court suggested that the only justification for the *Vida* rationale would be federal preemption of state law.[150] In *Bosque*, borrowers brought a TPP-based breach of contract claim against their servicer.[151] Similarly, the defendant moved to dismiss the lawsuit on *Vida* grounds, arguing that the plaintiffs were trying to "use state law as an indirect means to enforce HAMP."[152] The court noted that the defendant did not prove that HAMP preempted a state law claim,[153] which implies that the only justification for the *Vida* rationale would be a federal preemption of state law. Ruling in favor of the plaintiffs, the court stated that the "fact that a TPP has a relationship to a federal statute and regulations does not require the dismissal of any state-law claims that arise under a TPP. Nor does the fact that the TPP is a form contract created by the government change that analysis."[154] The

143. *Id.*

144. *Id.* at 271.

145. *Id.* at 270 (internal quotation marks omitted). Plaintiffs alleged that their servicer gave them conflicting instructions: While Plaintiffs were on a TPP, they were told by a servicer representative that a permanent modification would be "pretty definite;" later, a servicer representative told them that the loan modification was backed up and advised them to continue making payments after the three-month period ended. *Id.* The Plaintiffs made payments for another seven months before they were contacted by their servicer and told that they were being dropped from the TPP and that the foreclosure action would resume. *Id.* at 270–71.

146. *Id.* at 273 (citation omitted).

147. *Id.* at 274.

148. *Id.*

149. 762 F. Supp. 2d 342, 351 (D. Mass. 2011) (dismissing the servicer's argument that a breach of contract claim must be independent of HAMP).

150. Fletcher v. OneWest Bank, FSB, 798 F. Supp. 2d 925, 931 (N.D. Ill. 2011) (agreeing with the *Bosque* rationale).

151. *Bosque*, 762 F. Supp. 2d at 349.

152. *Id.* at 350.

153. *Id.* at 351.

154. *Id.*

Bosque court went on to note that if a "TPP is properly construed as a contract between the parties in this case, then plaintiffs have standing to bring suit in order to recover for any breach of that contract."[155]

Wigod v. Wells Fargo Bank, N.A.[156] is the only appellate court decision that addresses the validity of the TPP-based breach of contract theory. In *Wigod*, the Seventh Circuit rejected a servicer's preemption arguments and reversed the district court's decision to dismiss a TPP-based breach of contract claim.[157] There, a borrower executed a TPP with her servicer that stated in part, "If I am in compliance with this Loan Trial Period and my representations . . . continue to be true in all material respects, then the [servicer] will provide me with a . . . Loan Modification Agreement."[158] The borrower made all four monthly TPP payments on time but was, nonetheless, denied a permanent modification.[159] The borrower brought a class action complaint against her servicer, alleging that the TPP was a formed contract between the parties and that the servicer breached the contract.[160] The servicer moved to dismiss the suit, and the district court, citing *Vida*, held that HAMP does not afford a private right of action and that common law claims must be independent of HAMP.[161]

On appeal, the servicer argued that, even though the common law claims were not expressly preempted, field preemption and conflict preemption precluded the plaintiff from bringing a common law claim.[162] The servicer made a field preemption argument that the Home Owners Loan Act ("HOLA") occupies the relevant mortgage field.[163] HOLA was enacted "to provide emergency relief from massive home loan defaults during the Great Depression."[164] It empowers the Office of Thrift Supervision ("OTS") in the Treasury Department to authorize and regulate federal savings and loan associations and to preempt conflicting state law by its regulations.[165] Indeed, in one of its regulations, the OTS declared that it "hereby occupies the entire field of lending regulation for federal savings associations."[166] The *Wigod* court noted, however, that a savings clause within the same regulation states that "tort, contract, and commercial laws are 'not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or

155. *Id.*
156. 673 F.3d 547 (7th Cir. 2012).
157. *Id.* at 575, 586.
158. *Id.* at 558.
159. *Id.*
160. *Id.* at 559.
161. *Id.*
162. *Id.* at 576.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 577 (quoting 12 C.F.R. § 560.2(a) (2011)).

are otherwise consistent with the purposes of paragraph (a) of this section.'"[167] The *Wigod* court dismissed the servicer's field preemption argument, stating that because "OTS 'has no power to adjudicate disputes between [savings and loan associations] and their customers,' and 'HOLA creates no private right to sue to enforce the provisions of the statute or the OTS's regulations,'" common law suits by "persons harmed by the wrongful act of savings and loan associations" are not preempted.[168] The *Wigod* case demonstrates that neither HOLA, nor OTS regulations, occupy the relevant field in HAMP cases.

In *Wigod*, the servicer also argued for conflict preemption.[169] Conflict preemption exists if it would be either *impossible* for a party to comply with both local and federal requirements or if local law stands as an *obstacle* to the accomplishment and execution of the full purposes and objectives of Congress.[170] The servicer conceded that it is possible for a party to comply with both state and federal law, but argued that common law "would 'substantially interfere with [its] ability to service residential mortgage loans' in accordance with HOLA and OTS regulations" and "would 'frustrate Congressional objectives in enacting [the 2008 Act] . . . to stabilize the economy and provide a program to mitigate 'avoidable' foreclosures.'"[171] The *Wigod* court rejected this argument, explaining that a breach of contract claim does not place additional duties or obstacles upon servicers in the HOLA context or in the HAMP context, but instead compliments those statutes by requiring servicers to honor agreements with borrowers.[172]

It is unlikely that allowing borrowers to assert breach of contract claims would prevent servicers from servicing residential loans. From the borrowers' perspective, contract law encourages servicers to enforce a TPP or a loan under HOLA; it does not conflict with their ability to service loans. Moreover, "a state cause of action that seeks to enforce a federal requirement does not impose a requirement that is different from, or in addition to, requirements under federal law."[173] This is particularly true in the context of a breach of contract claim—where the claim is premised on enforcing a formed TPP contract that was drafted by the servicer. The breach of contract claim does not obligate servicers to comply with additional, conflicting state laws, but merely acts as an enforcement mechanism to hold servicers accountable for their promises and formed TPP agreements. Coupled with HAMP's poor success rate and complaints of servicer misconduct, courts should be inclined to afford borrowers

167. *Id.* (quoting 12 C.F.R. § 560.2(c)).
168. *Id.* (alteration in original).
169. *Id.* at 576.
170. Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995).
171. *Wigod*, 673 F.3d at 578 (alterations in original).
172. *Id.* at 578–80.
173. Bates v. Dow Agrosciences LLC, 544 U.S. 431, 448 (2005) (internal quotation marks omitted).

access to state-based remedies and allow TPP-based breach of contract claims to move forward.

More importantly, TPP-based contract claims are consistent with congressional intent. The purpose of the Act that authorized HAMP was to "stabilize the economy and provide a program to mitigate 'avoidable' foreclosures."[174] Providing an enforcement mechanism aligns with congressional intent to modify loans and prevent foreclosures. While servicers may argue that they should have discretion to modify loans and not be obligated under contract law to modify loans for unqualified borrowers, whether the person qualifies for a loan should be a question of fact, not a question to be addressed at the pleading stage. The issue is whether a borrower may assert a TPP-based breach of contract claim and have such a claim survive the pleading stage. Courts should follow *Wigod* and answer in the affirmative.

D. Looking to Other Federal Law and Programs by Analogy

District courts should allow TPP-based breach of contract claims in the same way that courts allow plaintiffs to assert common law claims based on other federal laws and regulations. Such examples include HOLA and OTS regulations, as well as the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").[175] These statutes are similar to HAMP in that they are comprehensive federal statutes that neither provide a right of action to injured parties nor expressly preempt state law.[176] Nonetheless, courts allow plaintiffs to assert common law claims based on these statutes and regulations.[177]

1. Contract Claims Are Allowed Under HOLA and OTS

HOLA and OTS regulations are examples of federal statutory schemes that can be enforced through state common law. In *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation*, Judge Posner explained that, although HOLA gave OTS "exclusive authority to regulate the savings and loan industry . . . [by] prescribing certain terms in mortgages,"[178] it did not grant the OTS power to "adjudicate disputes between [savings and loans associations] and their customers."[179] Further, HOLA did not create a "private right to sue to enforce provisions of the statute or the OTS's regulations."[180] Judge Posner went on to explain that HOLA did not preempt common law remedies for people harmed by savings and loans associations because it "would be surprising for a

174. *Wigod*, 673 F.3d at 578.
175. *See infra* Part III.D.2.
176. *Id.*
177. *Id.*
178. 491 F.3d 638, 643 (7th Cir. 2007).
179. *Id.*
180. *Id.* at 643.

federal regulation to forbid the homeowner's state to give the homeowner a defense based on the mortgagee's breach of contract."[181] This same reasoning should apply to the HAMP context: Courts should allow borrowers to bring breach of contract claims to enforce TPP agreements and avoid foreclosure.

In *Fletcher v. OneWest Bank, FSB*,[182] the Northern District of Illinois adopted the *Ocwen* reasoning in the HAMP context and allowed a borrower to assert a TPP-based breach of contract claim.[183] Applying *Ocwen* by analogy, the *Fletcher* court stated that since OTS-based mortgages could be enforced by contract law, it would be "logical" that the TPP—which fits the definition of a contract—could provide a basis for a breach of contract suit "even if its terms are prescribed by the federal government."[184] In the HOLA and OTS context, Congress did not grant borrowers a private right of action[185] and did not grant OTS the power to adjudicate claims between savings and loans associations.[186] Nonetheless, borrowers are allowed to assert HOLA- and OTS-related breach of contract claims in federal court.[187] Likewise, HAMP does not afford a private right of action and does not offer any adjudicatory scheme for borrowers to bring suit.[188] Accordingly, courts should be consistent and allow borrowers to assert TPP-based breach of contract claims.

2. *Common Law Claims Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)*[189]

Plaintiffs may assert common law claims related to other federal statutes, including FIFRA.[190] FIFRA provides for federal control over the distribution, sale, and use of pesticides.[191] It requires that all pesticides used in the United States be registered (licensed) by the Environmental Protection Agency and be properly labeled so that they do not cause unreasonable harm to the environment.[192] As in the HAMP context, FIFRA is a federal statute that does not afford plaintiffs a private right of action,[193] yet the Supreme Court has held that it does not preempt or preclude plaintiffs from asserting common law claims to enforce its

181. *Id.* at 643–44.
182. 798 F. Supp. 2d 925 (N.D. Ill. 2011).
183. *Id.* at 930–31 (allowing plaintiff to bring a TPP breach of contract claim under HAMP).
184. *Id.* at 931.
185. *In re Ocwen Loan Servicing*, 491 F.3d at 643.
186. *Id.* at 643–44.
187. *Id.*
188. *See* cases cited *supra* note 27.
189. 7 U.S.C. §§ 136–36y (2012).
190. *See* Bates v. Dow Agrosciences LLC, 544 U.S. 431, 452 (2005).
191. *See* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, ch. 6.
192. *Id.* § 136a.
193. *Bates*, 544 U.S. at 448.

provisions.[194] In *Bates v. Dow Agrosciences LLC*, a group of Texas peanut farmers alleged that a pesticide manufactured by the defendant severely damaged their crops, partly because the pesticide was mislabeled under FIFRA.[195] The plaintiffs brought claims of strict product liability, negligence, fraud, breach of warranty, and violation of the Texas Deceptive Trade Practices Act—essentially arguing that the pesticide's warning label violated of Texas common law.[196] The district court granted summary judgment for the defendant on preemption grounds, citing 7 U.S.C. § 136v(b), which provides that such "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."[197]

On review, the Supreme Court overturned the district court's decision, ruling that § 136v(b) only preempts "state-law labeling and packaging requirements that are *'in addition to or different from'* the labeling and packaging requirements under FIFRA."[198] The *Bates* Court held that plaintiffs' common law claims were not preempted because they were "equivalent to, and fully consistent with, FIFRA's misbranding provisions."[199] In other words, the common law claims did not provide for additional or different labeling requirements, but instead afforded plaintiffs with a method of enforcing FIFRA guidelines. The Court reasoned that, although FIFRA is a comprehensive regulatory statute that sets out labeling requirements, it "does not provide a federal remedy to [parties] who are injured as a result of a manufacturer's violation of FIFRA's labeling requirements, [and] nothing in [the statute] precludes States from providing such a remedy."[200] The Court also considered that the "long history of tort litigation against manufacturers of poisonous substances add[ed] force to the basic presumption against pre-emption."[201] The Court added, "If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."[202]

Here, as in *Bates*, HAMP is a comprehensive program that does not provide a federal remedy. Moreover, there is no legislative intent that explicitly or implicitly calls for preemption of state common law claims. Considering the rich history of civil litigation in contract, banking, lending, and property disputes, it is unlikely that Congress and the Treasury meant to preempt state common law. Absent any statutory language or legislative

194. *Id.* at 448–52.
195. *Id.* at 434.
196. *Id.* at 435–36.
197. *Id.* at 436.
198. *Id.* at 447.
199. *Id.*
200. *Id.* at 448.
201. *Id.* at 449.
202. *Id.* at 449–50.

intent, courts should apply the presumption against preemption and uphold the TPP-based breach of contract theory.

Critics of this Note may argue that common law claims are simply an attempt to enforce HAMP: Because Congress affords no private right of action, no right of action can exist under state law. However, this argument blends two principles into an unsupported rule. It is true that HAMP affords no private right of action: Had Congress and/or the Treasury intended to create a private right of action, it could have done so by drafting that language. But it is inconsistent to assume that, because Congress does not afford a federal remedy, borrowers are barred from asserting state law claims that relate to federal statutes or programs. This theory conflicts with several constitutional principles of preemption,[203] including the presumption against preemption. As demonstrated, *Ocwen* and *Bates* provide appropriate analogous examples of courts allowing plaintiffs to assert common law claims to enforce federal statutes and regulations that neither provide a right of action to injured parties nor preempt state law. Courts should be consistent, rely on these cases, and allow TPP-based breach of contract claims to enforce HAMP.

IV. LEGISLATION

Further legislation is necessary to help HAMP meet its objective of slowing the foreclosure crisis. HAMP has many shortfalls: It has failed to reach its objective of modifying three to four million loans, and the data indicate that a significant number of borrowers encounter problems at the TPP stage.[204] HAMP's shortfalls have led borrowers to seek relief through the courts.[205] While some borrowers have turned to the courts to enforce HAMP provisions, Congress and/or the Treasury should pass legislation to address the inconsistencies of court decisions.

The Treasury should start by amending the HAMP guidelines so that permanent loan modifications are optimal to the borrower. Currently, permanent loan modifications leave borrowers at risk for re-default because the loans are unstable—often containing an adjustable interest rate, not reducing loan principal, and including a future balloon payment.[206] These very terms were included in the sub-prime loans that contributed to the foreclosure crisis. Loans that include such terms are unstable in that a borrower's monthly mortgage payment amount may vary on a monthly basis. If Congress and the Treasury are serious about stabilizing the economy and the mortgage market, they should preclude servicers from drafting unstable loans. This process will reduce the risk of re-default and the possibility of another foreclosure crisis.

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203. *See supra* Part II.B.
204. *Id.*
205. *See supra* Part III.
206. *See supra* notes 2, 52 (discussing the risk of re-default).

The Treasury should amend the HAMP guidelines so that servicers are held accountable to TPP agreements. The Treasury can do this by *requiring* servicers to grant permanent loan modifications to borrowers who make all of the TPP payments. If a servicer has a legitimate reason for not offering a permanent modification, it should have to explain the specific reason for denial in writing. Servicers should not be allowed to deny modifications for reasons such as missing documentation or incomplete applications and should instead be required to provide the borrower with an opportunity to respond to or amend any mistakes. This process will limit servicers to denying borrowers for strictly legitimate reasons.

Furthermore, the government should take an active role in the modification process by providing oversight. Currently, the servicer and the borrower are involved in most of the HAMP modification process, with little intervention from the Treasury or other governmental agencies. Instead, the Treasury should serve as an intermediary to ensure that servicers only deny borrowers for legitimate reasons. If a borrower is denied a permanent modification, she should have the right to file a complaint and appeal to the Treasury or other governmental agency. While a complaint or appeal is pending, the Treasury should temporarily freeze the foreclosure process until a decision is reached. The Treasury should have the authority to overturn a servicer's decision and require a servicer to grant a permanent modification if the borrower meets the required HAMP criteria and terms of the TPP. Such a process would better ensure that servicers make a good faith effort in following HAMP guidelines and would allow borrowers to challenge servicer decisions. The Treasury has contemplated creating an appellate process,[207] but it has yet to implement such a process. An appellate process could be administered by the Treasury, governmental oversight agencies, or, perhaps, administrative law judges. The Treasury and Congress should consider all of these options and promptly implement a review process.

In cases where the borrower refuses to respond to or amend her application, or if the financial information is indeed insufficient, the servicer could end the HAMP application process but be required to provide the borrower with other alternatives to foreclosure; servicers, for example, could direct borrowers to all other MHA programs.[208] This approach is more consistent with the congressional intent of the Act—to stop foreclosures and stabilize the economy.

The legislation should also seek to prevent judicial inconsistencies and circuit splits. It should afford litigants with a private right of action to

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207. *See*, *e.g.*, Jon Prior, *Treasury, FHA to Let Borrowers Appeal Mortgage Servicer Actions*, HOUSINGWIRE (Feb. 1, 2012, 11:01 AM), http://www.housingwire.com/news/treasury-fha-let-borrowers-appeal-mortgage-servicer-actions (discussing the Treasury's plans to implement an appellate review process).

208. *See supra* note 47.

sue under HAMP. Alternatively, it could explicitly grant borrowers the right to bring breach of contract claims to enforce TPP agreements. Such rights offer borrowers an opportunity to challenge servicer misconduct and provide them with a remedy in the foreclosure process. Additionally, the legislation should clearly indicate that HAMP does not preempt common law claims or defenses. This legislation would buttress the *Bosque*, *Picini*, *Wigod*, and *Fletcher* decisions, which uphold the validity of TPP-based breach of contract claims and provide borrowers access to the courts. Critics may argue that enacting these policies would further limit the chances for borrowers to attain loan modifications by dissuading servicers from participating in HAMP, but Congress could solve that problem by making HAMP participation mandatory. Enacting this legislation would better ensure that HAMP meet its objective of slowing the foreclosure crisis, allow borrowers not only to avoid foreclosure, but also to access sustainable loans, encourage loan servicers to adequately follow HAMP guidelines, allow borrowers to appeal modification denials, and provide borrowers with a private right of action to sue under HAMP.

CONCLUSION

HAMP has not met its expected goal of modifying three to four million mortgages. This failure caused borrowers to seek relief through the judicial system in order to keep their homes. The TPP-based breach of contract theory provides borrowers with one possible strategy to avoid foreclosure and receive a loan modification. Unfortunately, courts are inconsistent in determining the validity of such claims. Courts that follow the *Vida* rationale continue to preclude borrowers from asserting common law claims to enforce HAMP. As this Note has demonstrated, this approach is unfounded. Courts should instead follow the Seventh Circuit's approach in upholding the validity of TPP-based breach of contract claims in the same way that courts allow common law claims that arise out of HOLA, OTS regulations, and FIFRA. To avoid future conflicts, Congress and the Treasury should enact legislation that amends the HAMP application process, requires more governmental oversight, and affords borrowers with a private right of action under HAMP.