Home Affordable Modification Program Enforcement Through the Courts*

The Home Affordable Modification Program (HAMP), announced in March 2009 as part of President Obama's Making Home Affordable Initiative, was intended to modify 3 to 4 million mortgages by the end of 2012. As of March 2010, fewer than 230,000 final HAMP loan modifications were in place.[1] The program's failure to provide homeowners with sorely needed assistance has been well documented.[2] Increasingly, advocates have turned to the courts to interpret and apply the program's governing directives to revive its goal of providing "help for the hardest hit."[3]

This article discusses both defensive and affirmative litigation around the country. The increase in litigation seeking to enforce HAMP is a reflection of the program's disappointing performance, with both servicer compliance and government oversight halfhearted at best.[4] Given the program's aspirations and its importance to our communities and our national economic wellbeing, it is alarming to consider that the cases discussed herein represent the last resort for most homeowners.

Program History and Structure

To understand the litigation currently underway around the country, a brief overview of the program's structure is in order.[5] Homeowners may be eligible for a HAMP modification in one of two situations: if a Government Sponsored Entity (GSE)[6] owns the mortgage, or if the mortgage servicer has signed a Servicer Participation Agreement (SPA) with Fannie Mae, acting as fiscal agent for the U.S. Department of the Treasury.[7] By signing an SPA contract, servicers agree to evaluate all eligible homeowners for a modification pursuant to Treasury-issued HAMP directives, and to grant modifications to all eligible homeowners who pass a "net present value" test,[8] in exchange for incentive payments from Treasury. Homeowners who qualify are to be offered a three-month "trial period" at the modified payment level and, if payments are made successfully, a permanent loan modification.

Because the foreclosure process differs by state, the arenas in which advocates raise HAMP compliance issues vary greatly. In some states, foreclosure is a judicial process; in others, it is carried out by a private sale without

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[1] *See* Making Home Affordable Program—Servicer Performance Report through March 2010 at 1, http://www.makinghomeaffordable.gov/docs/Mar%20MHA%20Public%20041410%20TO% 20CLEAR.PDF.

[2] Government oversight panels agree that the program has been hobbled by constant revisions and a lack of meaningful enforcement mechanisms. *See, e.g.*, Office of the Special Inspector General for the Troubled Asset Relief Program, Factors Affecting Implementation of the Home Affordable Modification Program 22-29 (Mar. 25, 2010) [hereinafter SIGTARP Report], http://www.sigtarp.gov/reports/audit/2010/Factors_Affecting_Implementation_of_the_Home_Affordable_Modification_Program.pdf (identifying "changing documentation requirements," "repeated changes and clarifications in net present value models," "[lack of] guidance on other HAMP implementation issues," "servicer capacity and training issues" and "issues related to HAMP marketing efforts" as the major causes of the program's slow start); Congressional Oversight Panel, An Assessment of Foreclosure Mitigation Efforts After Six Months at 111-12 (Oct. 9, 2009) [hereinafter "Warren Report"], http://cop.senate.gov/documents/cop-100909-report.pdf (recommending improvements to the transparency of the program and the accountability of participating servicers). Because of these handicaps or deeper structural reasons, there have been substantial delays in finalizing modifications. *See* SIGTARP Report at 8-14; Warren Report at 48-55. Even more troubling, recent congressional testimony supports the strong anecdotal sense among advocates that erroneous denials have been widespread. *See* Warren Report at 62.

[3] Making Home Affordable, http://www.makinghomeaffordable.gov/.

[4] *See* note 1, *supra*.

[5] The HAMP program has been described in greater detail in past issues of the *Bulletin*. *See* Jane Bowman & Mark Ireland, *Home Affordable Modification Program: Help for Homeowners or Another Dead End?*, 39 Hous. L. Bull. 230, 230-31 (Sept. 2009); Holly E. Snow, *Hope for HAMP: One Step Back, But Two Steps Forward?*, 40 Hous. L. Bull. 12, 12-13 (Jan. 2010). Subsequent supplemental directives have changed some program terms. Most notably, starting on June 1, 2010, (1) oral offers of trial period plans based on verbal statements of homeowner financials are no longer permissible; (2) servicers may not deny program participation to homeowners in any stage of bankruptcy; (3) foreclosure actions (rather than merely foreclosure filings and sales) are frozen when homeowners are performing under trial period plans; and (4) clearer and stricter documentation requirements apply throughout the process, including as prerequisites to foreclosure. *See* Supplemental Directive 10-01, Home Affordable Modification Program – Program Update and Resolution of Active Trial Modifications (Jan. 28, 2010), https://www.hmpadmin.com/portal/docs/hamp_servicer/sd1001.pdf; Supplemental Directive 10-02, Home Affordable Modification Program – Borrower Outreach and Communication (Mar. 24, 2010), https://www.hmpadmin.com/portal/docs/hamp_servicer/sd1002.pdf.

[6] The GSEs are Federal Home Loan Mortgage Corporation (Freddie Mac) and Federal National Mortgage Association (Fannie Mae). Loans owned by these entities may be serviced by a wide variety of servicers who contract with them, including some who participate in HAMP independently and some who do not.

[7] Currently, 109 mortgage servicers, servicing roughly 89% of first-lien mortgages when combined with GSE-owned mortgages, have signed an SPA and agreed to participate in HAMP. Most of the largest mortgage servicers are program participants, with some exceptions, including HSBC/Beneficial and Suntrust. All program contracts may be viewed at http://financialstability.gov/impact/contracts_list.htm.

[8] The objective of this test is to determine whether foreclosure, or a modification under the terms of the program, will ultimately be more profitable to the investor that owns the mortgage debt. Several recent articles have chronicled the servicer's incentives to foreclose, given the great deal of discretion most servicers have under the pooling and servicing agreements setting forth their duties as servicers. For further discussion of this mismatched incentive structure, see Diane E. Thompson, *Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior*, Nat'l Consumer L. Ctr. (Oct. 2009), http://www.nclc.org/issues/mortgage_servicing/content/Servicer-Report1009.pdf.

court supervision.[9] Additionally, many states and localities have implemented mediation programs designed to help facilitate non-foreclosure resolutions to mortgage default.[10] As a result of this variety, advocates' approach and judicial response to HAMP enforcement have been wide ranging. (The most comprehensive response to date has occurred in South Carolina, where the state Supreme Court responded to an unusual ex parte motion filed by Fannie Mae by issuing an administrative order requiring an affidavit of HAMP applicability and compliance as a prerequisite to foreclosure.)[11] Finally, the program itself has changed a great deal since it was first launched.

HAMP Noncompliance as a Foreclosure Defense

Servicer failure to comply with HAMP has provided a successful defense to foreclosure in both judicial and non-judicial foreclosure states. These successes suggest strategies for advocates to postpone foreclosure where the HAMP directives have been violated, giving clients time to continue seeking a modification. HAMP violations may implicate traditional legal and equitable defenses such as waiver, estoppel and unclean hands. Courts may enforce HAMP without relying upon a specific state-law defense, instead relying loosely upon the equitable powers they retain in the foreclosure process.

Judicial Foreclosure States

The judicial foreclosure process presents a procedural opportunity to raise defenses and educate the court. Judges in these proceedings have shown a willingness to take noncompliance seriously and to employ their equitable powers in a commonsense fashion. In Iowa, for example, several judges have denied summary judgment to foreclosing lenders when borrowers had not been completely or correctly reviewed for a HAMP modification.[12] (Of course, where summary judgment is denied, a lender must then prove HAMP compliance as a factual matter before the sale process can go ahead.) Although the Iowa orders treat the necessity of HAMP compliance as self-evident, the underlying pleadings reveal a wide variety of arguments and include causes of action that could be raised affirmatively (such as the third-party beneficiary theory discussed below) and pure defenses (such as unclean hands).[13]

An Ohio court similarly held that summary judgment must be denied because the homeowner's mortgage was GSE-owned and the borrower was "entitled to be evaluated under the HAMP eligibility criteria" and "ha[d] clearly not been evaluated, provided a loan modification plan, or provided a trial period".[14] In Vermont, in the course of dismissing a foreclosure complaint for lack of standing, a judge held that upon refiling the action, "Plaintiff will be required to demonstrate its efforts to comply with its HAMP obligations."[15] Remarkably, the defendant in the Vermont case had not raised HAMP noncompliance, but the judge did so sua sponte, relying upon the equitable nature of foreclosure proceedings. This result, in particular, underscores the importance of educating the court about HAMP and its requirements.

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[9]For a list of judicial and non-judicial foreclosure states, see John Rao and Geoff Walsh, *Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections*, Nat'l Consumer L. Ctr. (Feb. 2009), http://www.nclc.org/issues/foreclosure/content/FORE-Report0209.pdf.

[10]*See* Geoff Walsh, *State and Local Foreclosure Mediation Programs: Updates and New Developments*, Nat'l Consumer L. Ctr. (Jan. 2010), http://www.consumerlaw.org/issues/foreclosure_mediation/content/ReportS-UpdateJan10.pdf.

[11]RE: Mortgage Foreclosures and the Home Affordable Modification Program (HMP), Admin Order No. 2009-05-22-01 (S.C. Sup. Ct.) (May 22, 2009), http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=2009-05-22-01. Fannie Mae had sought an injunction only as to those mortgages owned by itself or Freddie Mac, but the court applied its resulting order to all mortgages.

[12]*See* U.S. Bank Nat'l Ass'n ND v. Peterman, No. EQCV067378 (Iowa Dist. Ct. Linn County Apr. 21, 2010) (denying summary judgment because "there is no information in the file regarding what steps Plaintiff took to determine Defendants' eligibility for the Making Home Affordable Program, and there is a genuine issue of material fact on this issue"); Deutsche Bank Nat'l Trust Co. v. Kane, No. EQCV067273 (Iowa Dist. Ct. Linn County Mar. 31, 2010) (denying summary judgment because plaintiff had "offered no information . . . showing what steps were taken, if any, to determine whether Mr. Kane is eligible for a loan modification" and thus, "there is a genuine issue of material fact as to whether Plaintiff complied with the HAMP requirements"); Waterfall Victoria Master Fund Ltd. v. Hansen, No. EQCV007412 (Iowa Dist Ct. Benton County Mar. 31, 2010) (denying summary judgment because of "the existence of fact issues concerning . . . Plaintiff's efforts to determine whether Defendants Hansen are eligible for HAMP" and noting that an affidavit generally asserting HAMP compliance was insufficient to resolve factual dispute); HSBC Bank, U.S.A. Nat'l Ass'n v. Garcia, No. EQCV027408 (Iowa Dist. Ct. Buena Vista County Nov. 12, 2009) (denying summary judgment because "the Defendants contend their loan is subject to the Home Affordable Modification Program [and] that [Plaintiff] is contractually bound to the United States Treasury to fulfill all requirements of the . . . Program[, which] may also be an issue of fact for trial"); Nat'l City Real Estate Servs., LLC v. Metzger, No. EQCV065878 (Iowa Dist. Ct. Linn County Oct. 9, 2009) (denying summary judgment because "there appears to be a dispute regarding the level of negotiations the parties have had with respect to loan modification and whether Plaintiff has complied with TARP directives regarding loss mitigation").

[13]It is worth noting that in every one of these cases, the defendant raised multiple foreclosure defenses and summary judgment was denied until several factual issues, including but not limited to HAMP compliance, could be resolved. This may be coincidental, or may suggest additional willingness to inquire into HAMP compliance when there are other flaws underlying a foreclosure.

[14]B.A.C. Home Loans Servicing, L.P. v. Bates, No. CV2009 06 2801 (Ohio Ct. of Common Pleas Butler County Mar. 8, 2010). Note that, where the basis for HAMP review is GSE ownership of the mortgage, a third-party beneficiary to contract claim (discussed below) is unavailable. This is because provisions in the contracts between Fannie Mae and Freddie Mac and their servicers explicitly disclaim any intended beneficiaries, and both GSEs have implemented HAMP through amendments to those contracts. *See, e.g.*, Fannie Mae 2010 Single Family Selling Guide A2-1-01 ("No borrower or other third party is intended to be a legal beneficiary of the MSSC or the Selling Guide or Servicing Guide or to obtain any rights or entitlements through Fannie Mae's lender communications or contracts."). Thus, framing HAMP noncompliance as a defense is particularly important in cases involving foreclosure on a GSE-owned loan.

[15]GMAC Mortgage, LLC v. Riley, No. 500-09 Fc (Vermont Super. Ct. Franklin County Mar. 5, 2010).

During Mediation

Another opportunity to raise HAMP noncompliance as a defense to foreclosure may arise in states—both judicial and non-judicial—that have instituted a mandatory pre-foreclosure mediation process.[16] Some mediation statutes place a specific duty on lenders to negotiate in good faith with the borrower regarding a non-foreclosure resolution.[17] Where such a requirement exists, HAMP noncompliance can be raised as evidence of bad faith negotiations in support of a motion to dismiss the foreclosure action or, at the least, prolong negotiations. Advocates in New York have obtained orders requiring proof of HAMP compliance before a case could be positively reported out of mediation and back into the foreclosure process.[18] Indeed, the Kings' County Supreme Court rules now require a HAMP "status report" from plaintiff's counsel in all cases involving a HAMP participating servicer, including a "specific written justification with supporting details" if the homeowner is denied a HAMP modification.[19]

Non-Judicial Foreclosure States

In non-judicial foreclosure states without mediation programs, there may be no procedural opportunity for advocates to raise HAMP or other defenses. For advocates in those states, an affirmative suit may provide the only opportunity to prevent an improper foreclosure sale from going forward in violation of the HAMP directives.

In some non-judicial states, however, limited opportunities to raise noncompliance defenses prior to sale may exist. For example, in Colorado the foreclosure process includes a single hearing, limited by statute to the issue of whether the borrower has defaulted. If the court finds default has occurred, an order authorizing sale issues.[20] The Colorado Supreme Court has slightly expanded this hearing to allow homeowners to raise certain defenses to default.[21] Advocates have successfully argued that a servicer's participation in HAMP represents a waiver of the right to foreclose until HAMP directives have been complied with and/or that a borrower's request for a HAMP application and reliance thereon should result in estoppel. This argument has resulted in orders authorizing sale with the condition that HAMP must first be complied with.[22]

It is fitting that courts sitting in equity have proven themselves unwilling partners in the processing of avoidable foreclosures. As judges across the country confront the rampant noncompliance with HAMP directives, this trend is likely to gain momentum.

Affirmative Litigation Seeking HAMP Compliance

Servicers' failure to comply with the HAMP supplemental directives, coupled with inadequate government oversight, has led to a range of affirmative lawsuits. These suits highlight many of the troubling aspects of the program. HAMP itself provides no private right of action, as it exists in contracts rather than in statute or regulation.[23] Suits premised on HAMP violations must therefore begin by identifying a cause of action allowing for suit.[24] Complaints filed thus far assert a wide variety of causes of action, including:

- breach of the SPA contract, which borrowers may enforce as intended third-party beneficiaries;
- breach of a contract—such as a signed Trial Period Plan—between the borrower and servicer;

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[16]Some 26 states and localities currently have mediation programs in place. *See* Nat'l Consumer Law Ctr., Summary of Programs, http://www.consumerlaw.org/issues/foreclosure_mediation/content/SummaryOfPrograms.pdf.

[17]Jurisdictions with a good-faith requirement include Maine, the First Judicial District of New Mexico, New York, Oregon and Providence, Rhode Island. *See id.* Other mediation plans may not have specific good faith language, but may make evaluation for a modification a prerequisite of foreclosure, which would have much the same effect if meaningfully enforced.

[18]*See, e.g.*, Wells Fargo Bank, N.A. v. Lewis, No. 130421/2009 (Richmond County N.Y. Sup. Ct. Feb. 25, 2010) (in N.Y. Civ. Prac. L. & R. § 3408 pre-foreclosure mediation proceeding, ordering Wells Fargo to "produce to [borrower] documentation of efforts it has taken, pursuant to HAMP, to remove any restrictions or impediments to modification"); Wells Fargo Bank, N.A. v. Gonzalez, No. 100982/2008 (Richmond County N.Y. Sup. Ct. May 6, 2009) (in a Settlement Conference held pursuant to N.Y. Civ. Prac. L. & R. § 3408, ordering Wells Fargo "to delineate reasons why [borrowers] do not qualify for HAMP").

[19]*See* Kings County Sup. Ct. Civ. R G(6).

[20]*See* Colo. R. Civ. P. 120.

[21]Goodwin v. Dist. Ct. for the Sixteenth Jud. Dist., 779 P.2d 837, 843-44 (Colo. 1989).

[22]*See, e.g.*, In re Application of U.S. Bank Nat'l Ass'n for an Order Authorizing Sale, No. 2010CV-200944 (Colo. Dist. Ct. Arapahoe County Mar. 22, 2010). The court conditionally authorized the foreclosure sale but stated that "the sale is not to proceed until borrower has been evaluated for the HAMP and her eligibility determined." *Id.* The court cited Supplemental Directives 09-01, 09-08, and 10-01. *See also* In re Application of Wells Fargo Finan. Colo., Inc. for an Order Authorizing Sale, No. 2009CV10991 (Colo. Dist. Ct. Adams County Mar. 12, 2010). The court granted the motion authorizing sale but barred Wells Fargo from selling the property at a foreclosure sale unless the borrowers were determined to be ineligible for modification or other foreclosure alternative. Beyond referencing the supplemental directives themselves, these orders do not give a rationale for their conditional nature. Since no further order is needed before sale may proceed, these conditions may prove challenging to enforce—an inherent difficulty of an essentially non-judicial process. Enforcement options include motions for contempt of court should a sale proceed.

[23]Section 101 of the Emergency Economic Stabilization Act of 2009, which created the Troubled Asset Relief Program, granted Treasury the authority to promulgate programs to prevent foreclosure. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101, 122 Stat. 3765 (Oct. 3, 2008). No part of the Act includes a private cause of action, and no other legislation governs HAMP.

[24]One litigant in a very early case succeeded in persuading a judge to directly enforce HAMP without discussing what cause of action made this possible. Deutsche Bank Nat'l Trust Co. v. Hass, No. 2009-2627-AV, slip op. at 5-9 (Mich. Cir. Ct. Macomb County Sept. 30, 2009) (remanding for factual determination of whether Wells Fargo was the servicer of the foreclosed loan and, if so, set-aside of foreclosure sale was warranted due to breaches of Wells Fargo's HAMP Servicer Participation Agreement); *see also* Snow, *supra* note 5, at 13-14.

- breach of the contractual duty of good faith and fair dealing in either of these contracts or the original mortgage;
- a variety of other common law claims; and
- state statutory claims.[25]

The Third-Party Beneficiary Hurdle

Of these possible causes of action, third-party beneficiary challenges pose the most fundamental challenge to the program. Success on a third-party beneficiary claim would have the effect of making both the SPA and the supplemental directives (which are imported as binding contract terms by § 1(A) of each SPA) fully enforceable. Third-party beneficiary claims are particularly important in the early stages of the HAMP review process, before a servicer has interacted extensively with the borrower, because at this stage, common law tort and contract claims are less likely to arise. Thus, advocates have attempted to certify class actions raising third-party beneficiary claims to assist borrowers early on in the HAMP process and to effect systemic change to improve the process for all.

Edwards v. Aurora Loan Servs. LLC,[26] currently before the U.S. District Court for the District of Columbia, challenges the HAMP review process and seeks both preliminary and permanent injunctions designed to address both the servicer's failure to follow the HAMP directives and Treasury's lack of enforcement thereof. The *Edwards* case, filed six months into the program's rollout,[27] represents the first wave of HAMP litigation based on servicer failure to review homeowners for HAMP eligibility. It relies primarily on a third-party beneficiary theory.[28] Plaintiffs contend that Aurora Loan Services failed even to consider them for HAMP modifications, including sending some plaintiffs into foreclosure without HAMP analysis, thus violating the contractually required HAMP process at its earliest stages.[29]

Defendants' motions for dismissal and summary judgment are currently pending before the court. Since *Edwards* was filed, three motions for summary judgment in HAMP third-party beneficiary cases have been decided in the U.S. District Court for the Southern District of California. One was denied[30] and two were granted.[31] Outcomes in these cases depend largely[32] on whether the court accepts that homeowners are "intended" beneficiaries of the SPA. Thus, advocates would be well advised to brief this claim with care, drawing on the considerable evidence in the public record that HAMP was created precisely to aid struggling homeowners. Plaintiffs' memorandum of law in opposition to dismissal in *Edwards*[33] provides an excellent template for this argument.

Near simultaneously with the *Edwards* filing, a similar class action was filed in Utah against multiple servicers, alleging that each had failed to offer trial period plans to qualified borrowers and had mistakenly rejected them or failed to process their applications.[34] The case has not proceeded past the complaint stage, perhaps indicating that negotiations are occurring.[35]

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[25]Another possibility is to raise a due process challenge to the sufficiency of Treasury's implementing procedures (and/or to the procedures used by the servicers, on the theory that they are acting under color of federal law). However, because due process claims challenge the structure of the program rather than compliance with it, we do not review these claims here. A prior *Bulletin* article discussed Williams v. Geithner, which raised a due process challenge that was dismissed by a federal district court. Bowman & Ireland, *supra* note 5, at 231-33; Snow, *supra* note 5, at 12-13. Given the early stage at which *Williams* was sua sponte dismissed and the broad injunctive remedy it sought, it should not be read as a death knell for challenges based in due process. Indeed, another case seeking relief for an individual homeowner and asserting due process, among other claims, has since survived a motion to dismiss. Huxtable v. Geithner, No. 09cv1846, 2009 WL 5199333 (S.D. Cal. Dec. 23, 2009).

[26]Compl., Edwards v. Aurora Loan Servs., LLC, No. 09cv2100 (D.D.C. filed Nov. 9, 2009).

[27]This lawsuit was filed shortly after SD 09-08 was issued. This directive establishes (1) a requirement that servicers provide borrowers with denial letters giving the reason for the denial, and (2) a timeframe for borrowers to contest denials that are based in part upon borrower-provided information. *See* Supplemental Directive 09-08, Home Affordable Modification Program – Borrower Notices (Nov. 3, 2009), https://www.hmpadmin.com/portal/docs/hamp_servicer/sd0908.pdf.

[28]Plaintiffs also assert due process violations not discussed herein. *See* note 25, *supra*.

[29]The introductory summary of plaintiffs' claims states: "Aurora has (a) wrongfully denied Plaintiffs access to the benefits of HAMP by refusing to evaluate their non-GSE loans for modification, even when Plaintiffs approached Aurora with specific requests to be considered under HAMP; (b) instituted, failed to suspend, or threatened to institute foreclosure proceedings against certain Plaintiffs who asked to be considered under HAMP; and (c) offered Plaintiffs, in some instances, forbearance agreements that violate the HAMP program guidelines by not lowering Plaintiffs' monthly payments, requiring Plaintiffs to waive substantial legal rights, and not guaranteeing a modification even if the Plaintiff fully complies with the terms of the forbearance agreement." Compl., *supra* note 26, at 4-5.

[30]Reyes v. Saxon Mortgage Servs., Inc., 2009 WL 3738177 (S.D. Cal. Nov. 5, 2009) (denying defendant Saxon Mortgage Services' motion to dismiss plaintiffs' claim that Saxon had breached its HAMP SPA and finding that plaintiffs had alleged sufficient facts to support the third-party beneficiary claim).

[31]Escobedo v. Countrywide Home Loans, Inc., 2009 WL 4981618 (S.D. Cal. Dec. 15, 2009) (dismissing plaintiff's claim premised on Bank of America/Countrywide's breach of its HAMP SPA because plaintiff could not prove that he was an intended beneficiary of that agreement); Villa v. Wells Fargo Bank, N.A No. 10cv81, 2010 WL 935680 (S.D. Cal. Mar. 15, 2010) (same).

[32]An alternate basis for the court's decision in *Escobedo* should be more easily refuted. The court accepted defendant Countrywide's argument that, because HAMP does not guarantee a modification to any particular borrower, borrowers are not intended beneficiaries under the SPA. Properly viewed, however, the benefit secured to borrowers by the SPAs is the opportunity to be *fairly evaluated* for the program—or, viewed differently, the program intends to benefit those borrowers who objectively qualify for a modification under its assorted criteria.

[33]Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss or in the Alternative for Summary Judgment, Edwards v. Aurora Loan Servs., No. 09cv2100 (S.D. Cal. filed Mar. 5, 2010).

[34]Class Action Complaint, Reese v. Citi Mortgage, No. 09cv1031 (D. Utah) (filed Nov. 18, 2009).

[35]Some non-class complaints have raised third-party beneficiary claims regarding a servicer's failure to analyze a borrower's HAMP

Direct Enforcement of Trial Period Plan Contracts

More recently, widespread servicer failure to convert trial period plans into permanent modifications has become a significant hurdle to the program's success. This has led to a second wave of HAMP enforcement litigation seeking to end the purgatory and cost of endless trial period plans. Advocates seeking conversion from a trial period to a final modification can sue for breach of contract without having to prevail on a third-party beneficiary claim. Their contract claims are premised on breaches of the trial period plan entered into by each individual borrower. Until recent program changes in supplemental directive 10-01, the trial period plan borrowers signed and returned to accept a three-month trial period contained specific provisions regarding when and how it would convert to a permanent modification.[36] Currently, however, trial periods are initiated by a brief announcement sent to the borrower and accepted via payment rather than signature. This announcement states only that "[a]fter all trial period payments are timely made and you have submitted all the required documents, your mortgage would then be permanently modified."[37] Given its lack of specificity, this language does less to support a breach of contract claim for failure to convert by a certain date, but does not totally remove such a claim from the arsenal.[38] Advocates have also augmented breach of trial period plan contract claims with breach of good faith and fair dealing and promissory estoppel claims.

In Massachusetts, consumer advocates recently filed class actions against a number of the largest HAMP servicers for failure to convert trial period plans into permanent modifications. In separate class actions, these advocates have sued BAC Home Loans Servicing, J.P. Morgan Chase, Wells Fargo, and IndyMac for their comprehensive failure to convert trial period plans into permanent modifications.[39] Similar cases have been filed in Washington and California.[40] These class actions seek injunctive relief to forestall foreclosure, specific performance of defendant's contractual obligations (that is, offering final modifications), and injunctions to systemically change the way in which each servicer trains its staff and implements the program. While these suits do not require the court to reach the question of whether homeowners are intended third-party beneficiaries under SPAs, they do require the court to interpret the supplemental directives insofar as these are reflected in and referenced by the trial period plans. Accordingly, they present an opportunity to achieve systemic change in the program as well as protecting the rights of individual trial period participants.[41]

Additional Common Law and State Statutory Claims

As program documentation develops and homeowners who are further along in the HAMP process find their way to advocates, possibilities for affirmative litigation expand. Advocates have increasingly asserted a wide range of common law claims against loan servicers for failure to convert trial period plans into final modifications and other HAMP violations. These include breach of the contractual duty of good faith and fair dealing (arising from the SPA, a trial period plan, or the original mortgage), promissory estoppel, misrepresentation, negligence, fraud and infliction of emotional distress.[42] In addition,

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application. Compl., Hausam v. Homecomings Fin., LLC, No. 09cv1437 (D. Or. filed Dec. 4, 2009); Verified Compl., Willms v. LNV Corp., No. 09cv1925 (Colo. D. Ct. Adams County filed Oct. 27, 2009); First Am. Compl., Romero v. Onewest Bank Group, LLC, No. C 09-03122 (Cal. Super. Ct. Contra Costa County filed Feb. 1, 2010).

[36]The last version of the model trial period plan drafted by Treasury, which servicers were not to modify except in respects not relevant here, provided, "If I comply with the requirements in Section 2 and my representations in Section 1 continue to be true in all material respects, the Lender will send me a Modification Agreement for my signature which will modify my Loan Documents as necessary to reflect this new payment amount and waive any unpaid late charges accrued to date." It also defined the "Modification Effective Date" as "the first day of the month following the month in which the last Trial Period Payment is due."

[37]Trial Period Plan Notice – Stated Income, https://www.hmpadmin.com/portal/docs/hamp_borrower/ hampstatedincome.doc, and Trial Period Plan Notice – Verified Income, https://www.hmpadmin.com/portal/docs/hamp_borrower/hampverfiedincome.doc; *see also* Supplemental Directive 10-01, Home Affordable Modification Program – Program Update and Resolution of Active Trial Modifications at 3 (Jan. 28, 2010).

[38]Moreover, it is worth bearing in mind that if current statistics are any guide, it will be some time before the many borrowers already offered trial period plan contracts manage to obtain final modifications, leaving many of these old contracts available as grounds for suit.

[39]*See* Compl., Durmic v. J.P. Morgan Chase Bank, NA, No. 10cv10380 (D. Mass. filed Mar. 3, 2010); Am. Compl., Johnson v. BAC Home Loans Servicing, LP, No. 10cv10316 (D. Mass. filed Apr. 30, 2010); Compl., Reyes v. IndyMac Mortgage Servs., FSB, No. 10cv10389 (D. Mass. filed Mar. 4, 2010); Compl., Bosque v. Wells Fargo Bank, N.A., No. 10cv10311 (D. Mass filed Feb. 23, 2010).

[40]Compl., Bayramian v. Bank of America, No. 10cv1458 (N.D. Cal. filed Apr. 6, 2010); Compl., Kahlo v. Bank of Am., No. 10cv488 (W.D. Wash. filed Mar. 22, 2010).

[41]Of course, non-class suits have raised breaches of trial period plan contracts as well. *See, e.g.*, Compl., Begum v. J.P. Morgan Chase Bank., N.A., No. 10cv2014 (E.D.N.Y. filed May 4, 2010); Compl., Kaczmarczyk v. Select Portfolio Servicing, Inc., No. 2010 CA 000937 CI (Fla. Cir. Ct. Osceola County filed Feb. 5, 2010); Verified Compl., Rudan v. Metlife Bank, N.A., No. CV OC 1006520 (Idaho D. Ct. Ada County filed Apr. 6, 2010); Compl., Akins v. Wells Fargo Bank, N.A., No. CI 201002723 (Ohio Ct. of Common Pleas Lucas County filed Mar. 15, 2010).

[42]*See, e.g.*, *Rudan*, No. CV OC 1006520 (raising, in addition to a breach of trial period plan claim and accompanying breach of good faith and fair dealing claim, claims of promissory estoppel and fraud); *Begum*, No. CV10-2014 (raising, in addition to breach of trial period plan contract claim, a claim of breach of the accompanying duty of good faith and fair dealing, alternate claims of promissory estoppel and breach of implied contract, and fraud and negligent misrepresentation claims); Compl., Ponder v. Bank of Am., N.A., No. 10cv81 (S.D. Ohio filed Feb. 10, 2010) (where multiple homeowners were promised modifications at a Bank of America event and these did not materialize, raising claims of misrepresentation, promissory estoppel, breach of fiduciary duty, breach of the duty of good faith and fair dealing arising from the SPA, negligence, defamation in credit reporting and infliction of emotional distress); *Hausam*, No. 09cv1437 (raising, in addition to third-party beneficiary

some state laws, such as unfair and deceptive practices statutes, may apply.[43] Unlike third-party beneficiary theories, these claims are not structured to address the full range of HAMP violations. Rather, they rely on careful parsing of facts specific to the individual homeowner. Not surprisingly, these claims lend themselves to individual rather than class plaintiffs. In newer cases where a trial period was offered through a notice of trial period plan, these claims will take on increasing importance.

HAMP Compliance as a Basis for Rescission of Sale

Even after sale, homeowner claims that a servicer failed to properly follow the HAMP directives remain relevant. In these cases, the question becomes whether rescission of sale (rather than damages) is a possible remedy under state law. In many states, obtaining this remedy may be an uphill battle.[44] A related and highly state-specific issue is whether HAMP violations (or a simultaneous affirmative suit alleging such violations) provide a defense to post-foreclosure eviction proceedings. Advocates in New York have obtained stays of at least two evictions based on HAMP violations underlying the foreclosure sale.[45] Even if post-sale cases prove to be difficult to win in court, servicers may be willing to voluntarily rescind sales if the foreclosed homeowner is genuinely HAMP-eligible, and a suit may draw the servicer's attention to this possibility.

Lessons from Existing Litigation

Given the dearth of meaningful oversight and enforcement of the HAMP program, litigation has offered a promising avenue for advocates to protect client homes and avoid irresponsible foreclosures. Favorable decisions in these cases have been more easily obtained where noncompliance was raised as a defense to foreclosure. Courts' greater willingness to enforce HAMP in such cases is likely due to a combination of factors. First and foremost, the hurdle of finding an applicable cause of action is not present, since the party raising HAMP noncompliance is the defendant. Moreover, judges who routinely decide foreclosure cases are well versed in the responsibilities inherent in sitting as a court of equity.

An additional reason for the limited number of decisions in affirmative suits is unrelated to judicial receptiveness: affirmative litigation captures servicer attention and can motivate action where previous efforts to negotiate were met with inattention. Ultimately, this reality combined with the cost of delay suggests that for many clients, individual, fact-specific filings may present the best strategy for enforcing HAMP and gaining sorely needed relief from high monthly payments.

The Coming Wave of HAMP Litigation

As HAMP is modified, litigation strategies will change accordingly. The next wave of litigation will likely focus on the documentation requirements of recent supplemental directives (09-08, 10-01, and 10-02), which add a powerful resource for HAMP enforcement.[46]

The new directives set forth requirements covering both documentation of the individual borrower's HAMP process and documentation of internal HAMP policies and procedures, all of which must be on file with the loan servicer before foreclosure may proceed.[47] Of particular

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claim, claims of breach of implied and oral contracts arising from a HAMP offer made by phone, promissory and equitable estoppel, and breach of the duty of good faith and fair dealing arising from the oral contract); Second Am. Compl., Simpson v. Am. Home Servicing, Inc., No. 09-C-97 (N.D.W. Va. filed Dec. 16, 2009) (raising a claim of breach of the duty of good faith and fair dealing in the original mortgage); *Romero*, No. C 09-03122 (raising, in addition to third-party beneficiary claim, claims of breach of the duty of good faith and fair dealing in the original mortgage, negligence, and negligent and intentional infliction of emotional distress); *Akins,* No. CI 201002723 (raising, in addition to a breach of trial period plan claim and accompanying breach of good faith and fair dealing claim, a claim of promissory estoppel).

[43]*See, e.g.*, *Romero*, No. C 09-03122 (raising claims of violations of the California Finance Code, Fair Debt Collection Practices Act and Unfair Competition Law); *Kaczmarczyk*, No. 2010 CA 000937 CI (raising unfair or deceptive acts or practices claims); *Simpson*, No. 09-C-97 (raising violations of West Virginia statutes regarding illegal debt collection and illegal return of payments).

[44]Hass, supra note 24, was a post-sale case. As noted above, in that case the judge was willing to rescind the foreclosure sale if the plaintiffs proved the violations they alleged. Of the pending complaints cited in note 41, *supra*, at least one—*Rudan*—was filed post-sale. A complaint filed in Colorado also requested rescission and damages after a homeowner was foreclosed after a successful HAMP trial period without being offered a final modification. Verified Compl., Svejcar v. Fed. Nat'l Mortgage Ass'n, No. 2010CV192 (Colo. Dist. Ct. Boulder County filed Feb. 21, 2010).

[45]Huntington Nat'l Bank v. Reed, No. 9018/2009 (N.Y. Sup. Ct. Saratoga County) (staying eviction proceedings based on an order to show cause brought to vacate a foreclosure sale based on the meritorious defense that the homeowner had been attempting to obtain a HAMP modification at the time the sale was conducted); Mortgage Electronic Registration Systems, Inc. v. Petrella, No. 2008-0425 (N.Y. Sup. Ct. Tompkins County Feb. 3, 2010) (denying writ of removal in eviction proceeding "on the grounds that the plaintiff has failed to furnish proof of a 'HAMP' review or any analysis with regard to the defendant['s] eligibility for a loan modification").

[46]In addition, the new directives provide that borrowers in active bankruptcy must be considered for HAMP, and will give rise to HAMP challenges in a new judicial context. In re Roderick, No. 09-22866-C-7 (Bankr. E.D. Cal. Mar. 8, 2010), gives a preview of the kind of issues that may arise. The bankruptcy court interpreted the Federal Rules of Bankruptcy Procedure to allow extension of the automatic stay and deferment of the discharge as long as the servicer and homeowner wished to continue negotiations regarding a modification. The court explained that it chose to do so to preserve the possibility of a reaffirmation of personal liability in a modification and forestall foreclosure.

[47]*See* Supplemental Directive 10-02, Home Affordable Modification Program – Borrower Outreach and Communication 10 (Mar. 24, 2010), https://www.hmpadmin.com/portal/docs/hamp_servicer/sd1002.pdf. Prefacing a specific list of required documentation, the directive states that "Servicers are required to maintain appropriate documentary evidence of their HAMP-related activities, and to provide that documentary evidence upon request to Freddie Mac as the Compliance Agent for Treasury. . . . Servicers must maintain documentation in

relevance to future litigation, before proceeding with foreclosure, servicers must certify to their local foreclosure counsel that HAMP has been complied with.[48] This pre-foreclosure documentation requirement presents an opportunity for discovery requests and, potentially, Fair Debt Collection Practices Act claims against local "foreclosure mills."

The new directives should also bolster the use of HAMP noncompliance as a defense to foreclosure. Under these directives, foreclosure actions must be frozen completely once a borrower enters a trial period plan. Once the court has halted sale pending proof of the outcome of the trial period, it can use the newly required documentation to measure compliance.

Undoubtedly, advocates will have to educate the judiciary to ensure that compliance with the new directives is meaningful. The trend is clear, however: HAMP noncompliance presents a meaningful defense to foreclosure for homeowners. By working together to build authority for reference and citation,[49] advocates can build judicial knowledge and create enforcement momentum, aiding homeowners well beyond those they are able to represent. ■

well-documented servicer system notes or in loan files for all HAMP activities addressed in this Supplemental Directive."

[48]"Servicers must develop and implement written procedures applicable to all loans that are potentially eligible for HAMP . . . that require the servicer to provide to the foreclosure attorney/trustee a written certification that (i) one of the five circumstances under the 'Prohibition on Referral and Sale' section of this Supplemental Directive exists, and (ii) all other available loss mitigation alternatives have been exhausted and a non-foreclosure outcome could not be reached. This certification must be provided no sooner than seven business days prior to the scheduled foreclosure sale date (the Deadline) or any extension thereof." *Id*. at 7.

[49]To help build this momentum, please email authors (see email addresses *supra* note 1) with any new pleadings or decisions.

NHLP Testifies on Public Housing One-for-One Replacement

At the request of the House Subcommittee on Housing and Community Opportunity, the National Housing Law Project (NHLP) presented testimony on a discussion draft of a bill titled "The Public Housing One-for-One Replacement and Tenant Protection Act."[1] The discussion draft is focused on revising and improving Section 18, the public housing demolition and disposition provisions of the United States Housing Act. The discussion draft contains a number of principles that NHLP supports, including:

- One-for-one replacement of any units that are approved for demolition or disposition will be required.
- The replacement housing must be comparable to public housing and affordable to the lowest-income families.
- A sufficient number of units must be located in the original neighborhood for all who wish to remain in that community.
- Residents who are displaced must be allowed to return without rescreening.
- Any displacement and/or multiple involuntary relocations should be minimized.
- Residents will play an active and effective role in the development of any plan for demolition or disposition and implementation of the plan for the replacement housing.
- Residents will receive counseling and services for relocation and mobility.
- Plans for demolition or disposition must be consistent with a housing authority's duty to affirmatively further fair housing, and residents have rights to enforce this duty.
- Stricter preconditions for demolition or dispossession will be imposed.

In addition, NHLP suggested that the discussion draft could be improved if the following provisions were added or changed:

1. The one-for-one replacement requirement must state that the replacement units must be *rental* units.

[1]The testimony is available at NHLP's homepage at www.nhlp.org. The testimony will be archived on the Public Housing Demolition and Disposition webpage at NHLP's Attorney/Advocate Resource Center at http://nhlp.org/resourcecenter?tid=38.