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HELP OR HAMP(ER)? – THE COURTS' RELUCTANCE TO PROVIDE THE RIGHT TO A PRIVATE ACTION UNDER HAMP AND ITS DETRIMENTAL EFFECT ON HOMEOWNERS

I. INTRODUCTION

It is 2006: You have been living in your new home with your spouse and children for two years. You have a good job and the economy is thriving. You are living the American dream and are proud of yourself for making a good conservative investment in your future by purchasing a home. The early years of the millennium have been a time of rapid economic growth for Americans, and it appears that there is no end in sight.¹ However, unbeknownst to you and your family, the banking industry has been engaging in questionable lending practices, which will dramatically change your future.²

Two years pass and it is 2008: These questionable lending practices have finally caught up with the banking industry. Specifically, many of the largest financial institutions in the world have lost billions due to bad mortgage, finance, and real estate investments.³ Bear Stearns is the first major lending group to fall.⁴ Lehman Brothers files for bankruptcy.⁵

¹ See generally Alvin C. Harrell, *The Great Credit Contraction: Who, What, When, Where and Why*, 26 GA. ST. U. L. REV. 1209, 1214–37 (2010) (discussing the credit and housing boom of 1993–2006 and the factors that led to the boom).

² See Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP)*, 52 ARIZ. L. REV. 727, 744–47 (2010) (discussing the rise of securitization and third party servicing). The author illustrates an inverse correlation between foreclosure rates and the conservativeness of lending practices between the 1950's and 1998. *Id.* at 744–45. See also Juliet M. Moringiello, *Mortgage Modification, Equitable Subordination, and the Honest but Unfortunate Creditor*, 79 FORDHAM L. REV. 1599, 1607–13 (2011) (discussing the changes in lending practices over the course of the twenty-first century).

³ See generally *Credit Crisis Timeline*, CREDIT WRITEDOWNS, <http://www.creditwritedowns.com/credit-crisis-timeline/> (last visited Aug. 5, 2012) (providing a timeline as to the credit crisis from “HSBC shock announcement begins the pre-panic phase” in February 2007 to “Q4 after the panic” in December 2008). See generally Cheryl Evans, *What Makes You So Special? Ending the Credit Rating Agencies' Special Status and Access to Confidential Information*, 46 VAL. U. L. REV. 1091 (2012) (discussing how ratings firms contributed to the financial meltdown).

⁴ See Kate Kelly, *Inside the Fall of Bear Stearns*, WALL ST. J., May 9, 2009, <http://online.wsj.com/article/SB124182740622102431.html>.

⁵ See Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merrill Is Sold*, N.Y. TIMES, Sept. 15, 2008, <http://www.nytimes.com/2008/09/15/business/15lehman.html?pagewanted=all>; *The Collapse of Lehman Brothers*, THE TELEGRAPH, <http://www.telegraph.co.uk/finance/financialcrisis/6173145/The-collapse-of-Lehman-Brothers.html> (last visited Aug. 5, 2012) (providing an interactive timeline leading up to the bankruptcy of Lehman Brothers and the economic crisis in the following twelve months).

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Merrill Lynch is bought for roughly \$50 billion dollars, a fraction of its value in 2006.⁶ The U.S. government seizes control of Fannie Mae and Freddie Mac.⁷ And the insurance titan, American International Group (“AIG”), appears to be next on the chopping block.⁸

Another year has passed, and it is 2009: Your spouse is suddenly unemployed in the midst of an economic recession. Businesses are doing everything possible to cut fat and avoid having to close their own doors. Everyone in the family has “tightened their belt,” but you have fallen behind on the house payments. It appears that your home will be foreclosed upon. You hear on the news that the President has developed a program called the Home Affordable Modification Program (“HAMP”), which is designed to help homeowners facing foreclosure adjust their mortgage payments to prevent it. HAMP is an incentive based program in which mortgage servicers can contract with the federal government using a Servicer Participation Agreement (“SPA”) and various incentives.⁹ Diligently, you contact your bank about the program and fill out the application. After being told that you qualify for the program, you are asked to sign an agreement and enter a trial period. You are told that, if all goes well, your mortgage will be modified. You believe the lender and rely on the agreement for your financial planning. You make all your payments and submit them on time. You properly submit all of your paperwork in a timely manner. Your financials qualify you for the program, but the lender chooses to

⁶ Charlie Gasparino, *Bank of America to Buy Merrill Lynch for \$50 Billion*, CNBC, Sept. 14, 2008, http://www.cnbc.com/id/26708319/Bank_of_America_to_Buy_Merrill_Lynch_for_50_Billion; Sorkin, *supra* note 5.

⁷ See Neil Irwin & Zachary A. Goldfarb, *U.S. Seizes Control of Mortgage Giants*, WASH. POST, Sept. 8, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/07/AR2008090700259.html>.

⁸ Sorkin, *supra* note 5; *The Collapse of Lehman Brothers*, *supra* note 5.

⁹ See MAKING HOME AFFORDABLE PROGRAM: HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES V 3.4, § 13, at 105-10 (Dec. 15, 2011) [hereinafter *Handbook 3.4*], https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_34.pdf (explaining the incentive program associated with HAMP); see also *Belyea v. Litton Loan Servicing, LLP*, No. 10-10931-DJC, 2011 WL 2884964, at *2 (D. Mass. July 15, 2011) (stating that the federal government will award servicers three annual \$1,000 payments for successful modifications under HAMP); John R. Chiles & Matthew T. Mitchell, *HAMP: An Overview of the Program and Recent Litigation Trends*, 65 CONSUMER FIN. L. Q. REP. 194, 195 (2011) (providing an overview of which types of servicers are enrolled in HAMP). Fannie Mae and Freddie Mac backed mortgages are required to participate in HAMP, but many other servicers have enrolled covering almost eighty-nine percent of all first-lien mortgage loans. *Id.* But see Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 827-30 (2011) (arguing that the “incentives” HAMP uses to entice servicers for modification are not effective and that even when the modification would be profitable servicers often believe foreclosure to be of more value).

foreclose on your property anyway.¹⁰ Now what? Do you have any remedies?

This is the issue facing many homeowners who have participated in HAMP.¹¹ Even after participation in the program, homeowners faced with foreclosure have two options. They can: (1) wait and see what actions the federal government takes to ensure that more homeowners are securing permanent modifications,¹² or (2) attempt to take private action against the mortgage servicers themselves.¹³

¹⁰ This scenario is fictional and solely the work of the author.

¹¹ See, e.g., *Problems in Mortgage Servicing from Modification to Foreclosure: Hearing Before the S. Comm. on Banking, Hous., and Urb. Affairs*, 111th Cong. 9–11 (2010) (written testimony of Diane E. Thompson, National Consumer Law Center), http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/testimony-senate-banking.pdf (providing multiple examples of homeowners and the issues they have faced while participating in HAMP); Kevin G. Hall, *Homeowners Often Rejected Under Obama's Loan Plan*, McCLATCHY, Dec. 17, 2009, <http://www.mcclatchydc.com/2009/12/17/80867/homeowners-often-rejected-under.html> (featuring a story about Evangelina Flores of California who, after having completed the HAMP required Trial Period Plan and believing herself to be out of the woods, was greeted by two individuals informing her that they had bought her house and were evicting her); Kevin G. Hall, *Mortgage Modifications Are Still Messed Up, 4 Years Later*, McCLATCHY, Sept. 29, 2011, http://www.mcclatchydc.com/2011/09/29/125642/mortgage-modifications-are-still.html#storylink=omni_popular (discussing a similar story in which Jose Polamo's home was foreclosed upon even after being told that he was approved for a mortgage loan modification); Gretchen Morgenson, *Foreclosure Relief? Don't Hold Your Breath*, N.Y. TIMES, Dec. 24, 2011, <http://www.nytimes.com/2011/12/25/business/foreclosure-relief-dont-hold-your-breath-fair-game.html?emc=eta1> (criticizing HAMP and programs like it).

¹² See Braucher, *supra* note 2, at 770–88 (providing background as to the contractual relationship between the federal government and mortgage servicers, as well as providing suggested actions the government could take to improve upon the disappointingly low number of permanent loan modifications under HAMP). See generally Paul Kiel, *Secret Docs Show Foreclosure Watchdog Doesn't Bark or Bite*, PROPUBLICA, Oct. 4, 2011, <http://www.propublica.org/article/secret-docs-on-foreclosure-watchdog> (describing the lack of oversight and enforcement by Freddie Mac in ensuring adherence to HAMP regulations by mortgage servicers); Andrew Martin, *Big Banks Penalized for Performance in Mortgage Modification Program*, N.Y. TIMES, June 9, 2011, http://www.nytimes.com/2011/06/10/business/10hamp.html?_r=1&ref=loanmodifications (illustrating actions that have already been taken by the federal government against mortgage servicers for “subpar performance in administrating a government-sponsored program to modify mortgage loans for distressed homeowners”).

¹³ See generally *Miller v. Chase Home Fin., LLC*, 677 F.3d 1113 (11th Cir. 2012); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012); *Nadan v. Homesales, Inc.*, No. CV F 11-1181 LJO SKO, 2011 WL 3584213 (E.D. Cal. Aug. 12, 2011); *Rackley v. JPMorgan Chase Bank, N.A.*, No. SA-11-CV-387-XR, 2011 WL 2971357 (W.D. Tex. July 21, 2011); *Stagikas v. Saxon Mortg. Servs., Inc.*, 795 F. Supp. 2d 129 (D. Mass. 2011); *Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059 (N.D. Cal. 2011); *Nelson v. Bank of Am., N.A.*, No. 6:10-cv-929-Orl-35GJK, 2011 WL 545817 (M.D. Fla. Feb. 8, 2011); *Phipps v. Wells Fargo Bank, N.A.*, No. CV F 10-2025 LJO SKO, 2011 WL 302803 (E.D. Cal. Jan. 27, 2011); *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342 (D. Mass. 2011); *Grill v. BAC Home Loans Servicing LP*, No. 10-CV-03057-FCD/GGH, 2011 WL 127891 (E.D. Cal. Jan. 14, 2011); *Speleons v. BAC*

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Since 2008, private citizens have brought numerous cases attempting to use HAMP regulations as a defense to foreclosure.¹⁴ The issues raised in these suits are numerous, complex, and dependent on the type of foreclosure proceedings utilized in each state.¹⁵ This Note focuses on

Home Loans Servicing, L.P., 755 F. Supp. 2d 304 (D. Mass. 2010); *Khast v. Wash. Mut. Bank*, No. 10-CV-2168-IEG (JMA), 2010 WL 5115094 (S.D. Cal. Dec. 9, 2010); *Durmic v. J.P. Morgan Chase Bank, N.A.*, No. 10-CV-10380-RGS, 2010 WL 4825632 (D. Mass. Nov. 24, 2010); *Sampson v. Wells Fargo Home Mortg., Inc.*, No. CV 10-08836 DDP (SSx), 2010 WL 5397236 (C.D. Cal. Nov. 19, 2010); *Zoher v. Chase Home Fin.*, No. 10-14135-CIV, 2010 WL 4064798 (S.D. Fla. Oct. 15, 2010); *Nguyen v. BAC Home Loan Servs., LP*, No. C-10-01712 RMW, 2010 WL 3894986 (N.D. Cal. Oct. 1, 2010); *Hammonds v. Aurora Loan Servs. LLC*, No. EDCV 10-1025 AG (OPx), 2010 WL 3859069 (C.D. Cal. Sept. 27, 2010); *McKensi v. Bank of Am., N.A.*, No. 09-11940-JGD, 2010 WL 3781841 (D. Mass. Sept. 22, 2010); *Hart v. Countrywide Home Loans, Inc.*, 735 F. Supp. 2d 741 (E.D. Mich. 2010); *Marques v. Wells Fargo Home Mortg., Inc.*, No. 09-cv-1985-L(RBB), 2010 WL 3212131 (S.D. Cal. Aug. 12, 2010); *Hoffman v. Bank of Am., N.A.*, No. C 10-2171 SI, 2010 WL 2635773 (N.D. Cal. June 30, 2010); *Simmons v. Countrywide Home Loans, Inc.*, No. 09cv1245 JAH(JMA), 2010 WL 2635220 (S.D. Cal. June 29, 2010); *Marks v. Bank of Am., N.A.*, No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988 (D. Ariz. June 22, 2010); *Robinson v. Wells Fargo Bank, N.A.*, No. CV 09-2066-PHX-JAT, 2010 WL 2534192 (D. Ariz. June 18, 2010); *Benito v. Indymac Mortg. Servs.*, No. 2:09-CV-001218-PMP-PAL, 2010 WL 2130648 (D. Nev. May 21, 2010); *Lucero v. Countrywide Bank N.A.*, No. 09cv1742 BTM (BLM), 2010 WL 1880649 (S.D. Cal. May 10, 2010); *Villa v. Wells Fargo Bank, N.A.*, No. 10CV81 DMS (WVG), 2010 WL 935680 (S.D. Cal. Mar. 15, 2010); *Aleem v. Bank of Am., N.A.*, No. EDCV 09-01812-VAP (RZx), 2010 WL 532330 (C.D. Cal. Feb. 9, 2010); *Escobedo v. Countrywide Home Loans, Inc.*, No. 09cv1557 BTM(BLM), 2009 WL 4981618 (S.D. Cal. Dec. 15, 2009); *Williams v. Geithner*, No. 09-1959 ADM/JJG, 2009 WL 3757380 (D. Minn. Nov. 9, 2009); *Reyes v. Saxon Mortg. Servs., Inc.*, No. 09cv1366 DMS (WMC), 2009 WL 3738177 (S.D. Cal. Nov. 5, 2009); *Curio v. Wachovia Mortg. Corp.*, No. 09-CV-1498-IEG (NLS), 2009 WL 3320499 (S.D. Cal. Oct. 14, 2009); *Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177 (N.D. Cal. 2009). All of these cases stem from litigation brought either by homeowners pursuant to HAMP or by homeowners using HAMP as a defense to foreclosure.

¹⁴ See cases cited *supra* note 13 (providing numerous cases in which plaintiffs filed suit under HAMP).

¹⁵ See, e.g., *Durmic*, 2010 WL 4825632, at *1 (alleging “breach of contract . . . , breach of the implied covenant of good faith and fair dealing . . . , promissory estoppel as an alternative theory to recovery . . . , and violation of Massachusetts Consumer Protection Act”). *Durmic* was based on a motion to dismiss. *Id.* at *8. Plaintiffs’ claims arise from having participated in the HAMP program, passing the Net Present Value test, submitting financial information, and having made all the required payments (except one party who was short by a payment) for the three month Trial Period Plan. *Id.* at *2. See also *Benito*, 2010 WL 2130648, at *1 (asserting “claims for declaratory relief under RESPA and TILA and unfair lending practices under Nevada law . . . , injunctive relief . . . , breach of contract . . . , breach of the covenant of good faith and fair dealing . . . , wrongful foreclosure . . . , inspection and accounting . . . , slander of title . . . , unfair lending . . . , and deceptive trade practices”); *Escobedo*, 2009 WL 4981618, at *1 (alleging “(1) breach of written contract; (2) declaratory relief; (3) violation of California’s Rosenthal Fair Debt Collection Practices Act (‘RFDCPA’), Cal Civ. Code §1788, *et. seq.*; (4) invasion of privacy; and (5) unfair business practices in violation of Cal. Bus. & Prof.Code [sic] § 17200”). This case was based on a motion to dismiss. *Id.* *Escobedo* came before the court based on the Plaintiff’s claim that when he attempted to modify his loan, he was wrongfully denied a modification. *Id.*

two issues that are raised when plaintiffs bring affirmative suits in both non-judicial foreclosure states (states where foreclosures are not heard by judges) and judicial foreclosure states.¹⁶ First, does a borrower have standing as a third party beneficiary of HAMP to assert a claim based on mortgage servicers' alleged violations of HAMP?¹⁷ Second, can a borrower sue under traditional contract law, the law of implied contracts or promissory estoppel, when the borrower participated in the Trial Period Plan ("TPP") of HAMP and followed the requirements of TPP but was nevertheless denied a loan modification?¹⁸

¹⁶ See generally Rebekah Cook-Mack & Sarah Parady, *Enforcing the Home Affordable Modification Program Through the Courts*, 44 CLEARINGHOUSE REV. 371 (2010) (providing a general overview of HAMP litigation and strategies that have been attempted based on the foreclosure procedures of the state). Some states require judicial hearings and in those states judges "have shown a willingness to take noncompliance seriously and to apply commonsense." *Id.* at 372. South Carolina and Connecticut have actually created HAMP specific laws through the judiciaries or the legislature in reference to foreclosures. *Id.* at 372. Some other states require preforeclosure mediation between homeowners and service providers. *Id.* at 373–74. Lastly, the author explains a need for an affirmative suit in nonjudicial foreclosure states. *Id.* at 373, 378.

¹⁷ See *In re Bank of Am.*, No. 10 md 02193 RWZ, 2011 WL 2637222, at *3 (D. Mass. July 6, 2011) (stating that there is no third party standing stemming from HAMP); *Lucia*, 798 F. Supp. 2d at 1070–71 (citing to several Ninth Circuit decisions and determining that the "Servicer Participation Agreement" does not provide third party beneficiary standing); *Phipps*, 2011 WL 302803, at *8 (dismissing Plaintiff's standing as a third party beneficiary stating, "[t]he complaint lacks facts to support a third-party beneficiary theory of relief"); *Zoher*, 2010 WL 4064798, at *4–5 (dismissing an attempt by the Plaintiffs to enforce HAMP compliance as a third party beneficiary); *Hammonds*, 2010 WL 3859069, at *3 (indicating that HAMP does not create a third party beneficiary standing); *Hart*, 735 F. Supp. 2d at 748 (quoting *Aleem v. Bank of Am., N.A.*, No. EDCV 09-01812-VAP (RZx), 2010 WL 532330, at *4 (C.D. Cal. Feb. 9, 2010)) ("There is no express or implied right to sue fund recipients . . . under TARP or HAMP."); *Marques*, 2010 WL 3212131, at *7 (stating that a party could bring suit as a third party beneficiary, but that the plaintiffs at hand needed to amend their claim to specifically show details about their modification situation); *Hoffman*, 2010 WL 2635773, at *2–5 (denying third party standing); *Marks*, 2010 WL 2572988, at *3–5 (denying Plaintiff's standing as a third party beneficiary); *Benito*, 2010 WL 2130648, at *7 (denying third party standing, stating that government contracts are "assumed to be incidental beneficiaries" and Plaintiffs did not display any intent within the HAMP contract); *Villa*, 2010 WL 935680, at *2–3 (citing *Escobedo*, 2009 WL 4981618, at *3) (determining that there is a lack of third party standing); *Escobedo*, 2009 WL 4981618, at *2–3 (dismissing the claim of breach of contract based on third party beneficiary, stating "[q]ualified borrowers are incidental beneficiaries of the Agreement and do not have enforceable rights under the contract"); *Reyes*, 2009 WL 3738177, at *2 ("Plaintiff has alleged sufficient facts to support his third party beneficiary theory.").

¹⁸ Compare *Rackley*, 2011 WL 2971357, at *3–4 (finding that TPP did not create a new contract due to lack of consideration and contractual language indicating a guaranteed modification), *Grill*, 2011 WL 127891, at *3–4 (finding that a meeting of the minds was insufficient, and there was no affirmative contractual language), and *Vida*, 2010 WL 5148473, at *5 (finding TPP argument unpersuasive, as the claim stems from HAMP regulations and therefore is not a separate agreement), with *Wigod*, 673 F.3d at 585–86

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The introduction to this Note illustrated a situation which could give rise to HAMP-specific litigation. Part II of this Note describes the economic atmosphere which led to the creation of HAMP.¹⁹ Next, Part III discusses and analyzes the likelihood of success for motions brought under third party beneficiary standing stemming from an agreement between mortgage servicers and the federal government. It also addresses a right of action arising from TPP agreements under traditional principals of contract law.²⁰ Finally, Part IV evaluates the likelihood for success of the TPP contract theory and third party beneficiary theory, recommending changes for HAMP or other future loan modification programs in order to balance the need for private action and the risk of excessive litigation.²¹

II. BACKGROUND

September 2008, in the midst of the U.S. financial crisis, Congress enacted the Emergency Economic Stabilization Act.²² The Act provided

(finding that traditional contract law in relation to the TPP was an appropriate claim), *In re Bank of Am.*, 2011 WL 2637222, at *4 (stating that there was sufficient consideration and condition precedent under TPP agreements to satisfy standing), *Stagikas*, 795 F. Supp. 2d at 135-36 (denying Saxon's motion to dismiss despite the TPP agreement stemming from HAMP because the court found there to be sufficient evidence that the TPP agreement was supported by consideration and therefore a TPP agreement is considered to be a new contract), *Fletcher*, 798 F. Supp. 2d at 930-32 (finding that TPP does create standing for a breach of contract claim), *Bosque*, 762 F. Supp. 2d at 350-53 (stating that a TPP agreement between a lender and borrower is sufficient to create standing), and *Durmick*, 2010 WL 4825632, at *2-4 (denying Defendant's motion to dismiss regarding TPP agreements).

¹⁹ See *infra* Part II (chronicling the economic atmosphere, reasons for the creation of HAMP, and a general understanding of third party beneficiary and breach of contract claims under TPP).

²⁰ See *infra* Part III (analyzing the use of third party beneficiary standing and creation of a new contract stemming from TPP).

²¹ See *infra* Part IV (discussing the likelihood for success in gaining standing for borrowers without explicitly being given standing and a model clause to correct the problem).

²² *Stagikas*, 795 F. Supp. 2d at 132; *Bosque*, 762 F. Supp. 2d at 346; *Williams v. Geithner*, No. 09-1959 ADM/JJG, 2009 WL 3757380, at *1 (D. Minn. Nov. 9, 2009); see Emergency Economic Stabilization Act of 2008 Pub. L. No. 110-343, 122 Stat. 3765 (codified as amended in scattered sections of 12 U.S.C.). See generally Harrell, *supra* note 1 (providing background for the 2008 housing crisis); Vikas Bajaj & Louise Story, *Mortgage Crisis Spreads Past Subprime Loans*, N.Y. TIMES, Feb. 12, 2008, <http://www.nytimes.com/2008/02/12/business/12credit.html?pagewanted=all> (discussing the economic environment in 2008); Jon Hilsenrath, Serena Ng & Damian Paletta, *Worst Crisis Since '30s, With No End Yet in Sight*, WALL ST. J., Sept. 18, 2008, <http://online.wsj.com/article/SB122169431617549947.html> (discussing the turmoil in the market and some of the actions that were being taken in an attempt to correct it). The article went so far as to describe the economic turmoil as a disease, stating "[t]he U.S. financial system resembles a patient in intensive care. The body is trying to fight off a disease that is spreading, and as it does so, the body

\$700 billion to the U.S. Treasury to stabilize financial systems.²³ As part of the Act, Congress enacted the Troubled Asset Relief Program (“TARP”) to aid in the prevention of foreclosures.²⁴

The Treasury Department, working with the Federal Housing Finance Agency (“FHFA”), the Federal Home Loan Mortgage Corporation (“Freddie Mac”), and the Federal National Mortgage Association (“Fannie Mae”), took a portion of the \$700 billion and developed the Home Affordable Modification Program (“HAMP”).²⁵ HAMP was unveiled on February 18, 2009, and is set to expire on December 31, 2013.²⁶

HAMP is not the only program designed by Congress to ameliorate “the housing crisis.”²⁷ To address the issues of second lien mortgages, the unemployed, those whose loans are held, insured or guaranteed by government agencies, and others who do not quite qualify for HAMP, the government has created additional programs such as Home Affordable Unemployment Program (“UP”), Principal Reduction

convulses, settles for a time and then convulses again. The illness seems to be overwhelming the self-healing tendencies of markets.” *Id.* Cases that use the language of “financial crisis” or “economic crisis” have predominantly found in favor of homeowners, which may show an influence of political beliefs.

²³ *Williams*, 2009 WL 3757380, at *1; *see also* 12 U.S.C. § 5201 (Supp. IV 2011) (stating that the intended purpose of the Act was to “restore liquidity and stability to the financial system of the United States”); *Stagikas*, 795 F. Supp. 2d at 132–33 (discussing the purpose of the Emergency Economic Stabilization Act); *Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059, 1062–63 (N.D. Cal. 2011) (explaining the origin of HAMP as an attempt to provide stability to the economy); *Bosque*, 762 F. Supp. 2d at 346–47 (providing a history of the Emergency Economic Stabilization Act and the subsequent Making Home Affordable program designed by the U.S. Treasury Department).

²⁴ *See* 12 U.S.C. § 5211 (Supp. IV 2011); *Stagikas*, 795 F. Supp. 2d at 132 (citing 12 U.S.C. §§ 5201, 5211–5241 (2008)); *Lucia*, 798 F. Supp. 2d at 1062 (citing 12 U.S.C. § 5219(a) (2008)); *Bosque*, 762 F. Supp. 2d at 346; *Williams*, 2009 WL 3757380, at *1 (citing 12 U.S.C. §§ 5211, 5225 (2008)).

²⁵ *See Williams*, 2009 WL 3757380, at *2; Richard E. Gottlieb & Brett J. Natarelli, *Update on Loan Modification Litigation*, 66 BUS. LAW. 539, 540 n.9 (2011) (discussing the Treasury’s announcement of HAMP); *Homeowner Frequently Asked Questions*, MAKING HOME AFFORDABLE, <http://www.makinghomeaffordable.gov/faqs/homeowner-faqs/Pages/default.aspx>. (last visited Aug. 3, 2012).

²⁶ *See Chiles & Mitchell*, *supra* note 9, at 194. HAMP was officially signed into law by President Obama on March 4, 2009. *Id.* *See also* Tim Massad, *Expanding Our Efforts to Help More Homeowners and Strengthen Hard-Hit Communities*, U.S. TREASURY DEPARTMENT (Jan. 27, 2012), <http://www.treasury.gov/connect/blog/Pages/Expanding-our-efforts-to-help-more-homeowners-and-strengthen-hard-hit-communities.aspx> (announcing the extension of HAMP to December 31, 2013); sources cited *supra* note 25 (providing the unveiling date of HAMP and its original expiration date).

²⁷ *See generally* MAKING HOME AFFORDABLE, MAKING HOME AFFORDABLE: OVERVIEW OF PROGRAMS (Feb. 2011), http://www.makinghomeaffordable.gov/faqs/homeowner-faqs/Documents/MHA_Presentation_Eng_211.pdf (providing an overview of the wide array of programs available to homeowners who are having trouble with their mortgages).

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Alternative (“PRA”), Second Lien Modification Program (“2MP”), Home Affordable Foreclosure Alternatives (“HAFA”), an alternate version of HAMP, Federal Housing Administration (“FHA-HAMP”), and Housing Finance Agency Innovation Fund for the Hardest Hit Housing Markets (“HHF”).²⁸

The HAMP program was designed to aid three to four million homeowners who had defaulted on their mortgages, or who were at imminent risk of defaulting, by modifying the interest of monthly payments to a more “affordable” rate.²⁹ The premise of HAMP was that lenders would be provided financial incentives to adjust this target group’s mortgages.³⁰ The Treasury Department provided mortgage servicers with a definition of borrowers eligible for the modification program, as well as specific modification protocols.³¹

²⁸ See *id.* (providing an overview of the many programs which have been designed by the U.S. Treasury Department to combat home foreclosures using TARP money).

²⁹ See *Belyea v. Litton Loan Servicing, LLP*, No. 10-10931-DJC, 2011 WL 2884964, at *2 (D. Mass. July 15, 2011); *Durmic v. J.P. Morgan Chase Bank, N.A.*, No. 10-CV-10380-RGS, 2010 WL 4825632, at *1 n.2 (D. Mass. Nov. 24, 2010); *Williams*, 2009 WL 3757380, at *2; Braucher, *supra* note 2, at 727; *Gottlieb & Natarelli*, *supra* note 25, at 541; *infra* notes 43–45 and accompanying text (providing the criteria for HAMP eligibility). See generally Stephanie Armour, *2008 Foreclosure Filings Set Record*, USA TODAY, Feb. 3, 2009, http://www.usatoday.com/money/economy/housing/2009-01-14-foreclosure-record-filings_N.htm (discussing foreclosure rates in 2008); Les Christie, *Foreclosures Up a Record 81% in 2008: Filings Continued to Soar Through the End of the Year and There’s No Relief in Sight for 2009*, CNNMONEY, Jan. 15, 2009, http://money.cnn.com/2009/01/15/real_estate/millions_in_foreclosure/index.htm (providing foreclosure rates for 2008); *Record 2.9 Million U.S. Properties Receive Foreclosure Filings in 2010 Despite 30-Month Low in December*, REALTYTRAC, Jan. 12, 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> (displaying a continued struggle in the U.S. housing market). *But cf.* Marc. T. Smith & Ruth L. Steiner, *Affordable Housing as an Adequate Public Facility*, 36 VAL. U. L. REV. 443 (2002), available at <http://scholar.valpo.edu/vulr/vol36/iss2/5> (discussing a need for the creation of additional affordable housing, which was a concern prior to the housing crisis and before the Government’s focus turned to keeping keep people in their homes).

³⁰ *Williams*, 2009 WL 3757380, at *2; see *In re Bank of Am.*, No. 10 md 02193 RWZ, 2011 WL 2637222, at *1 (D. Mass. July 6, 2011) (discussing money received by Bank of America as a part of HAMP); see also Massad, *supra* note 26 (providing for increased incentives to participating mortgage servicers). Servicers can earn up to triple the incentives based on modifications which will include principal reduction. *Id.* *But see* Thompson, *supra* note 9, at 827–29 (arguing that the “incentives” HAMP uses to entice servicers for modification are not effective and, even when profitable, servicers often believe foreclosure to be of more value).

³¹ *Williams*, 2009 WL 3757380, at *2; see *Home Affordable Modification Program*, MAKING HOME AFFORDABLE (FREDDIE MAC), Mar. 2012, at 1, http://www.freddiemac.com/service/factsheets/pdf/mha_modification.pdf (providing a general overview of HAMP and its criteria); see *infra* notes 43–45 and accompanying text (detailing the criteria necessary to qualify for HAMP modification).

On February 9, 2012, the U.S. Department of Justice reached a twenty-five billion dollar agreement with five of the largest mortgage servicers (Ally/GMAC, Bank of America, Citi, JPMorgan Chase, and Wells Fargo) pertaining to mortgage loan servicing and foreclosure abuses.³² The settlement provides for new servicing standards related to foreclosures and bankruptcy, which will be enforced by North Carolina Banking Commissioner Joseph A. Smith, who will be serving as monitor of the consent judgment.³³ This settlement will relate specifically to HAMP, providing homeowners formerly denied a modification with an opportunity to reapply and requiring quicker turn around in response time.³⁴ However, the settlement does not prevent individual borrowers from bringing their own lawsuits.³⁵

³² See *Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses*, U.S. DEP'T OF JUST. (Feb. 9, 2012), <http://www.justice.gov/opa/pr/2012/February/12-ag-186.html>. See generally Philip A. Lehman, *Executive Summary of Multistate/Federal Settlement of Foreclosure Misconduct Claims*, (NAT'L MORTGAGE SETTLEMENT) https://d9klfgibkcquc.cloudfront.net/NMS_Executive_Summary-7-23-2012.pdf (providing a history of the settlement negotiations); *Federal Government & Attorneys General Reach Landmark Settlement with Major Banks*, NAT'L MORTGAGE SETTLEMENT, <http://www.nationalmortgagesettlement.com/> (last visited Aug. 5, 2012) (providing an overview of the \$25 billion dollar settlement as well as links to additional information); *Mortgage Servicing Settlement*, U.S. DEPT. OF HOUSING AND URB. DEV., <http://portal.hud.gov/hudportal/HUD?src=/mortgageservicingsettlement> (last visited Aug. 5, 2012) (providing an overview of the settlement as well as links to additional information). The settlement includes payments of twenty billion dollars for relief to borrowers including principal reduction, refinancing, and other forms of relief. *Fact Sheet: Mortgage Servicing Settlement*, U.S. DEP'T OF HOUSING AND URB. DEV., <http://portal.hud.gov/hudportal/HUD?src=/mortgageservicingsettlement/fact-sheet> (last visited Aug. 5, 2012) [hereinafter *Fact Sheet: Mortgage Servicing Settlement*] (providing a general overview of financial relief committed to homeowners). The settlement will also provide for payments to the state and federal governments in the sum of five billion dollars in order to provide for payments to borrowers who have already been foreclosed upon between January 1, 2008, and December 31, 2011, and to pay for public funds lost due to servicer misconduct. *Id.*

³³ See generally *SERVICING STANDARDS HIGHLIGHTS*, http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Cases/National_Mortgage_Settlement/Servicing%20Standards%20Highlights.pdf (explaining the new requirements of mortgage servicers in interacting with homeowners and the handling of mortgages); Ben Hallman, *Mortgage Settlement Promises Reform of Banks' Bad Behavior*, HUFFINGTON POST, Sept. 9, 2012, http://www.huffingtonpost.com/2012/02/09/mortgage-settlement-bank-reform_n_1266428.html (evaluating and explaining elements of the new settlement including the role of Joseph A. Smith, North Carolina banking commissioner and the appointed "monitor" of the settlement); *Fact Sheet: Mortgage Servicing Settlement*, *supra* note 32 (providing an overview of new standards and enforcement).

³⁴ *SERVICING STANDARDS HIGHLIGHTS*, Section II, http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Cases/National_Mortgage_Settlement/ServicingStandardsHighlights.pdf. Compare Paul Kiel, *Will Mortgage Settlement Avoid Repeating Obama's Foreclosure Failures?*, PROPUBLICA, Feb. 10, 2012, <http://www.propublica.org/>

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A. HAMP Eligibility Requirements

Before addressing HAMP eligibility requirements, it is important to understand the foreclosure positions of the numerous parties involved in mortgages and how they interact.³⁶ Mortgage lenders in the years leading up to the housing crisis, and today, have tended to originate a loan with the intention of selling it to investors.³⁷ The majority of these loans have been purchased and pooled together in trusts.³⁸ Expected income streams from these trusts have been used to form bonds, which are then sold to hundreds or thousands of investors.³⁹ Bonds are often

article/will-mortgage-settlement-learn-from-obamas-foreclosure-failures (discussing how the new settlement, unlike HAMP, will have more bite and enforcement with a “Monitor” to impose penalties), with Hallman, *supra* note 33 (quoting several sources that have displayed skepticism as to the effectiveness of the settlement), and *Too Many Unanswered Questions, and Too Little Relief*, N.Y. TIMES, Feb. 11, 2012, <http://www.nytimes.com/2012/02/12/opinion/sunday/the-foreclosure-deal-unanswered-questions-and-little-relief.html> (stating that the settlement will likely only reach two million former and current homeowners). Joseph Sant, a foreclosure attorney at Staten Island Legal Services in New York, has explained that “[o]n paper [the settlement] looks like it will help people, . . . [b]ut we have a lot of programs that look good on paper that are failing because they aren’t being enforced. As soon as A.G.s lower their guns, the mortgage servicers will go back to flaunting the rules.” Hallman, *supra* note 33. The 1.5 billion dollars designated for some 750,000 borrowers, who were treated unfairly during foreclosures between 2008 and 2011, will receive a total of \$2,000 as part of this settlement. *Too Many Unanswered Questions, and Too Little Relief, supra*.

³⁵ See *Fact Sheet: Mortgage Servicing Settlement, supra* note 32; see also *Too Many Unanswered Questions, and Too Little Relief, supra* note 34 (noting that the banks did not get the blanket release they had originally wanted in the settlement, but they were able to get protection from civil law suits brought by the state and federal government). This Note will not be analyzing the settlement, because it does not materially affect the issues at hand. However, it is important to recognize the settlement, because it will be providing a second opportunity to many homeowners who were previously denied and could potentially lead to more litigation if standards are not properly followed.

³⁶ See *infra* notes 37–41 and accompanying text (illustrating the different players involved in mortgages). See generally 355: *The Giant Pool of Money*, THIS AM. LIFE, <http://www.thisamericanlife.org/radio-archives/episode/355/transcript> (last visited Jan. 22, 2012) (providing a narrative of several players involved with mortgage securities during boom time and outlining their responsibilities).

³⁷ See Thompson, *supra* note 9, at 763; see also THE GA. SUPERIOR CT. CLERKS’ COOPERATIVE AUTH., INDEXING PARTIES FROM SECURITIZATION AND MORTGAGE-BACKED CERTIFICATES INTO LAND RECORD INDEXES IN THE ST. OF GA. 3 (July 23, 2008) [hereinafter *Indexing*], http://www.gsccta.org/filesandforms/files/guidelines/Indexing_Securitization_Trust_Instruments.pdf (explaining a lender as those who “originate mortgages with property owners”); FREDDIE MAC, YOUR STEP-BY-STEP MORTGAGE GUIDE: FROM APPLICATION TO CLOSING 4, http://www.freddiemac.com/singlefamily/docs/Step_by_Step_Mortgage_Guide_English.pdf (defining mortgage lenders and servicers).

³⁸ See Thompson, *supra* note 9, at 763; *Indexing, supra* note 37, at 2–4.

³⁹ See sources cited *supra* note 38 (providing an explanation of the parties involved with the mortgage process and specifically explaining the securitization of home mortgages into bonds).

broken into four different categories: “interest payments, principal payments, late payments, and prepayment penalties.”⁴⁰ Finally, there are servicers who stand in for the trusts, or persons legally holding the mortgages, handling the day-to-day involvement with homeowners, such as billing, collections, and receiving distress petitions from homeowners.⁴¹

- The class of loans eligible for HAMP modification is described in *Williams v. Geithner*.⁴² Eligible loans must meet the following criteria:
- The loan is a first-lien mortgage originated on or before January 1, 2009;⁴³
- The loan is secured by a one-to-four unit property, one unit of which is the borrower’s principal residence;
- The property has not been abandoned or condemned;
- The current unpaid principal balance is no greater than specified limits (\$729,750 for a one-unit property)
- The loan is delinquent or default is reasonably foreseeable;
- The borrower has a monthly mortgage payment [including principal, interest, taxes, insurance, and when applicable, association fees, and existing escrow shortages] greater than 31 percent of monthly income, and has insufficient assets to make the payment; and

⁴⁰ Thompson, *supra* note 9, at 763.

⁴¹ *Id.* at 765; see *Indexing*, *supra* note 37, at 5 (defining servicers); FREDDIE MAC, YOUR STEP-BY-STEP MORTGAGE GUIDE: FROM APPLICATION TO CLOSING 4, http://www.freddiemac.com/singlefamily/docs/Step_by_Step_Mortgage_Guide_English.pdf (defining mortgage lenders and servicers).

⁴² *Williams v. Geithner*, No. 09-1959 ADM/JJG, 2009 WL 3757380, at *2 (D. Minn. Nov. 9, 2009).

⁴³ Recognizing a need for providing second lien homeowners with modifications, Fannie Mae announced the creation of the 2MP program. See generally *Home Affordable Modification Program: Introduction of Second Lien Modification Program*, FANNIE MAE, Sept. 21, 2010, <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/svc1014.pdf> (discussing how HAMP and the 2MP program could be used to benefit homeowners with second lien mortgages). Cf. Jonathan R. Sichter, *Slowing the PACE of Recovery: Why Property Assessed Clean Energy Programs Risk Repeating the Mistakes of the Recent Foreclosure Crisis*, 46 VAL. U. L. REV. 263 (2011) (illustrating the importance of lien order for lenders and the risks associated with junior or secondary liens).

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- The borrower documents a financial hardship.⁴⁴

On January 27, 2012, the U.S. Treasury expanded the scope of HAMP to include not just principal residences, but also currently occupied rental properties or vacant properties which the owner intends to rent.⁴⁵

The Treasury guidelines, as quoted in *Williams*, require “participating servicers . . . to consider all eligible mortgage loans unless prohibited by the rules of the applicable [pooling and servicing agreement] and/or other investor servicing agreements.”⁴⁶ Properties meeting the criteria stated above are then valued using the net present value (“NPV”) test.⁴⁷ If the modification would raise NPV, then the borrower must be offered a Trial Period Plan, that is, an opportunity to obtain a loan modification.⁴⁸ If the modification does not raise NPV,

⁴⁴ *Williams*, 2009 WL 3757380, at *2; see Chiles & Mitchell, *supra* note 9, at 195; *Home Affordable Modification Program*, MAKING HOME AFFORDABLE (FREDDIE MAC), Mar. 2012, at 1, http://www.freddiemac.com/service/factsheets/pdf/mha_modification.pdf (providing program eligibility as of June 30, 2011). See generally MAKING HOME AFFORDABLE PROGRAM: HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES V 2.0 (Sept. 22, 2010) [hereinafter *Handbook 2.0*], https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_20.pdf (providing the lending criteria at the time of the *Williams* case).

⁴⁵ Massad, *supra* note 26 (providing for an expansion of those parties eligible for HAMP including owners of rental properties).

⁴⁶ *Williams*, 2009 WL 3757380, at *2.

⁴⁷ See *Stagikas v. Saxon Mortg. Servs., Inc.*, 795 F. Supp. 2d 129, 133 (D. Mass. 2011); *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 347 (D. Mass. 2011); *Vida v. OneWest Bank, F.S.B.*, No. 10-987-AC, 2010 WL 5148473, at *6 (D. Or. Dec. 13, 2010); *Durmic v. J.P. Morgan Chase Bank, N.A.*, No. 10-CV-10380-RGS, 2010 WL 4825632, at *1 (D. Mass. Nov. 24, 2010); *Williams*, 2009 WL 3757380, at *3; Gottlieb & Ntarelli, *supra* note 25, at 542; see also Chiles & Mitchell, *supra* note 9, at 196 (explaining the Net Present Value test necessary to determine if a modification would be economically beneficial). See generally *Home Affordable Modification Program Base Net Present Value (NPV) Model Specifications*, (MAKING HOME AFFORDABLE), June 11, 2009 https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/npvoverview.pdf (providing a simplified five page explanation of the NPV test); MAKING HOME AFFORDABLE, HOME AFFORDABLE MODIFICATION PROGRAM: BASE NET PRESENT VALUE (NPV) MODEL v4.03 MODEL DOCUMENTATION (Sept. 1, 2011), https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/npvmodeldocumentationv403.pdf (providing a detailed explanation of the NPV). Net Present Value is defined as “[t]he present value of net cash flow from a project, discounted by the cost of capital. This value is used to evaluate the project’s investment potential.” BLACK’S LAW DICTIONARY 1304 (9th ed. 2009).

⁴⁸ See *Vida*, 2010 WL 5148473, at *6; *Williams*, 2009 WL 3757380, at *3; cf. *Stagikas*, 795 F. Supp. 2d at 133 (stating that if the homeowner qualifies then the servicer *may* provide a TPP agreement); *Bosque*, 762 F. Supp. 2d at 347 (stating that if the homeowner is qualified then the servicer *should* provide a TPP).

then the applicant does not have to be offered this opportunity.⁴⁹ If the eligible borrower remains current throughout the trial period, the servicer is required to provide a loan modification.⁵⁰ However, even if the borrower for some reason is not able to complete the TPP, the servicer is required to consider the borrower for “all other available loss mitigation options.”⁵¹

As part of HAMP, the Treasury, Fannie Mae, and Freddie Mac have attempted to implement remedies and offer education for potential HAMP borrowers.⁵² Even before the NPV determination, HAMP requires mortgage servicers to explain the procedures for applying for a loan modification and provide information on financial counseling.⁵³ Inquiries and complaints are to be “provided fair consideration, and timely and appropriate responses and resolution.”⁵⁴ A federal hotline was established to advise borrowers and to direct complaints to the servicer’s senior level management.⁵⁵ If the problem is unresolved, the counselor can transfer the case to a designated team at Fannie Mae, whose chief responsibility is to resolve individual and systemic problems.⁵⁶ To ensure further compliance by servicers, Freddie Mac is

⁴⁹ See *Stagikas*, 795 F. Supp. 2d at 133; *Vida*, 2010 WL 5148473, at *6; *Durmic v. J.P. Morgan Chase Bank, N.A.*, No. 10-CV-10380-RGS, 2010 WL 4825632, at *1 n.3 (D. Mass. Nov. 24, 2010); *Williams*, 2009 WL 3757380, at *3; *Gottlieb & Ntarelli*, *supra* note 25, at 542.

⁵⁰ See *In re Bank of Am.*, No. 10-md-02193-RWZ, 2011 WL 2637222, at *1 (D. Mass. July 6, 2011); *Stagikas*, 795 F. Supp. 2d at 133; *Bosque*, 762 F. Supp. 2d at 348; *Williams*, 2009 WL 3757380, at *3. *But see* *Rackley v. JPMorgan Chase Bank, N.A.*, No. SA-11-CV-387-XR, 2011 WL 2971357, at *3-4 (W.D. Tex. July 21, 2011) (finding that no contract existed, and therefore the borrower is not entitled to a loan modification); *Grill v. BAC Home Loans Servicing LP*, No. 10-CV-03057-FCD/GGH, 2011 WL 127891, at *3-4 (E.D. Cal. Jan. 14, 2011) (stating that there was a failure to show the existence of a contract and therefore the servicer was not required to provide a modification); *Vida v. OneWest Bank, F.S.B.*, No. 10-987-AC, 2010 WL 5148473, at *5 (D. Or. Dec. 13, 2010) (finding the TPP argument unpersuasive because the claim stems from HAMP regulations and therefore is not a separate agreement).

⁵¹ *Handbook 3.4*, *supra* note 9, at 92.

⁵² See *Williams*, 2009 WL 3757380, at *3.

⁵³ See *Single-Family Seller/Servicer Guide*, BULL. (Freddie Mac), June 30, 2011, at 2, available at <http://www.freddiemac.com/sell/guide/bulletins/pdf/bl1111.pdf> (discussing escalated cases and the necessary processes and procedures to address complaints of borrowers). *But see* *HAMP Changes Urgently Needed*, NAT’L CONSUMER L. CENTER, Sept. 2010, http://www.nclc.org/images/pdf/foreclosure_mortgage/loan_mod/hamp_policy_brief.pdf (discussing the lack of accountability and transparency in HAMP, especially pertaining to the NPV).

⁵⁴ *Williams*, 2009 WL 3757380, at *3.

⁵⁵ See *Williams*, 2009 WL 3757380, at *3; see also *Handbook 3.4*, *supra* note 9, at 43-44 (discussing escalated cases and the necessary processes and procedures to address complaints of borrowers).

⁵⁶ Compare *Williams*, 2009 WL 3757380, at *3, with *HAMP Changes Urgently Needed*, NAT’L CONSUMER L. CENTER, Sept. 2010, http://www.nclc.org/images/pdf/foreclosure_

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charged with auditing a sample of loan modification applications that have been denied in order to minimize overlooked or inadvertently denied applications.⁵⁷ Lastly, servicers are required to provide the U.S. Treasury and Fannie Mae with specific reasons for denial through a coded system.⁵⁸ However, the Servicer Handbook hardly mentions the ramifications to servicers for failure to comply.⁵⁹

Lawsuits pertaining to HAMP generally involve issues arising out of the requirements necessary for HAMP modifications.⁶⁰ The complaint or defense made by homeowners is that mortgage servicers do not follow the program's guidelines by pre-emptively initiating foreclosure proceedings and/or wrongfully denying petitions for modification.⁶¹ But homeowners can have no legal recourse against lenders unless the courts recognize the homeowners' right to bring suit.⁶² The following

mortgage/loan_mod/hamp_policy_brief.pdf (describing the HAMP escalations center, the group tasked with resolving disputes, as "seldom offer[ing] beleaguered homeowners relief, usually offering homeowners nothing more than a restatement of the servicer's unsupported assertions"), and *Problems in Mortgage Servicing From Modification to Foreclosure: Hearing Before the S. Comm. on Banking, Hous., and Urb. Affairs*, 111th Cong. 6 (2010) (written testimony of Diane E. Thompson, National Consumer Law Center), http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/testimony-senate-banking.pdf (suggesting that there is a lack of "quality mediation programs" and "legal services" supporting homeowners in trouble).

⁵⁷ See sources cited *supra* note 56 (discussing the ideal process for HAMP and documenting the lack of enforcement by the government pertaining to HAMP); see also *Marks v. Bank of Am., N.A.*, No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988, at *6 (D. Ariz. June 22, 2010) (discussing Freddie Mac's charge to assure compliance through "evaluation of documented evidence to confirm adherence") (internal quotations omitted); Chiles & Mitchell, *supra* note 9, at 197 (defining Freddie Mac as the "sole compliance agent").

⁵⁸ See *Williams*, 2009 WL 3757380, at *3. See generally MAKING HOME AFFORDABLE (MHA) SERVICER REPORTING REQUIREMENTS 8-20 (Feb. 2011), https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/servicerreportingrequirements.pdf (providing servicer reporting requirements). Specific data set reporting requirements provide several scenarios in which servicers must provide a reason for denying a modification. *Id.* at 30.

⁵⁹ See generally *Handbook 3.4*, *supra* note 9 (making little reference to the penalties for a lack of compliance and at best requiring the servicer to take a first step towards resolution in cases of escalation); COMMITMENT TO PURCHASE FINANCIAL INSTRUMENT AND SERVICER PARTICIPATION AGREEMENT, https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/servicerparticipationagreement.pdf [hereinafter *SPA Agreement*] (providing Freddie Mac the ability to reduce payments, require additional oversight, terminate the Service Participation Agreement, or gather additional information, but there is no mention of being able to force a modification).

⁶⁰ See *supra* note 11 (illustrating several examples of borrowers' experiences with HAMP).

⁶¹ See sources cited *supra* note 13 (demonstrating litigation brought by homeowners and mortgage servicers' attempts to have the case dismissed).

⁶² See *Rackley v. JPMorgan Chase Bank, N.A.*, No. SA-11-CV-387-XR, 2011 WL 2971357, at *4 (W.D. Tex. July 21, 2011); *Bourdelaix v. J.P. Morgan Chase*, No. 3:10CV670-HEH, 2011 WL 1306311, at *4-5 (E.D. Va. Apr. 1, 2011); *Grill v. BAC Home Loans Servicing LP*, No. 10-

sections will provide background information on this problem, discussing the two principal methods used by homeowners to bring affirmative suits in non-judicial based foreclosure states.⁶³

B. Third Party Beneficiary Rights Under HAMP and Servicer Participation Agreements

Third party beneficiary issues are pertinent to HAMP litigation because the borrowers facing foreclosure were not original parties to the Servicer Participation Agreement (“SPA”) between a mortgage servicer and agents of the federal government—Fannie Mae signs agreements as an agent of the government and Freddie Mac is charged with compliance enforcement in the SPA.⁶⁴

CV-03057-FCD/GGH, 2011 WL 127891, at *4 (E.D. Cal. Jan. 14, 2011); *Vida v. OneWest Bank*, F.S.B., No. 10-987-AC, 2010 WL 5148473, at *6-7 (D. Or. Dec. 13, 2010); *Zoher v. Chase Home Fin.*, No. 10-14135-CIV, 2010 WL 4064798, at *4 (S.D. Fla. Oct. 15, 2010) (citing *Hoffman v. Bank of Am.*, No. C 10-2171, 2010 WL 2635773, at *3 (N.D. Cal. 2010)); *Hoffman*, 2010 WL 2635773, at *4-5; *Marks*, 2010 WL 2572988, at *3-4 (D. Ariz. June 22, 2010); *Villa v. Wells Fargo Bank, N.A.*, No. 10CV81 DMS (WVG), 2010 WL 935680, at *3 (S.D. Cal. Mar. 15, 2010); *Escobedo v. Countrywide Home Loans, Inc.*, No. 09cv1557 BTM (BLM), 2009 WL 4981618 (S.D. Cal. Dec. 15, 2009) (cases dismissing claims brought by homeowners based on HAMP and occasionally causing foreclosure to move forward).

⁶³ See *infra* Part II.B-C (discussing the background of third party beneficiary and the use of TPP in creating a new contract to provide standing for homeowners).

⁶⁴ See *In re Bank of Am.*, No. 10-md-02193-RWZ, 2011 WL 2637222, at *3 (D. Mass. July 6, 2011) (stating that there is no third party standing stemming from HAMP); *Lucia v. Wells Fargo Bank N.A.*, 798 F. Supp. 2d 1059, 1070-71 (N.D. Cal. 2011) (citing to several Ninth Circuit decisions, the court determined that the “Servicer Participation Agreement” does not provide third party beneficiary standing); *Phipps v. Wells Fargo Bank, N.A.*, No. CV F 10-2025 LJO SKO, 2011 WL 302803, at *8 (E.D. Cal. Jan. 27, 2011) (dismissing Plaintiff’s standing as a third party beneficiary stating, “[t]he complaint lacks facts to support a third-party beneficiary theory of relief”); *Hart v. Countrywide Home Loans, Inc.*, 735 F. Supp. 2d 741, 748 (E.D. Mich. 2010) (quoting *Aleem v. Bank of Am., N.A.*, No. EDCV 09-01812-VAP (RZx), 2010 WL 532330, at *4 (C.D. Cal. Feb. 9, 2010)) (“There is no express or implied right to sue fund recipients . . . under TARP or HAMP.”) (internal quotation omitted); *Sampson v. Wells Fargo Home Mortg., Inc.*, No. CV 10-08836 DDP (SSx), 2010 WL 5397236 (C.D. Cal. Nov. 19, 2010) (finding for third party beneficiary standing); *Zoher*, 2010 WL 4064798, at *4-5 (dismissing an attempt by the plaintiffs to enforce HAMP compliance as a third party beneficiary); *Hammonds v. Aurora Loan Servs. LLC*, No. EDCV 10-1025 AG (OPx), 2010 WL 3859069, at *3 (C.D. Cal. Sept. 27, 2010) (indicating that HAMP does not create a third party beneficiary standing); *Marques v. Wells Fargo Home Mortg. Inc.*, No. 09-cv-1985-L(RBB), 2010 WL 3212131, at *7 (S.D. Cal. Aug. 12, 2010) (stating that a party could bring suit as third party beneficiary, but that the plaintiff at hand needed to amend his claim to specifically show details about his modification situation); *Hoffman*, 2010 WL 2635773, at *2-5 (denying third party standing); *Marks*, 2010 WL 2572988, at *2-5 (denying Plaintiff’s standing as a third party beneficiary); *Benito v. Indymac Mortg. Servs.*, No. 2:09-CV-001218-PMP-PAL, 2010 WL 2130648, at *7 (D. Nev. May 21, 2010) (denying third party standing, stating that government contracts are “assumed to be incidental beneficiaries” and the plaintiffs did not display any intent within the HAMP contract) (internal

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When dealing with third party beneficiary issues, it is important to keep in mind the fundamental distinction, as stated by the Supreme Court, between “an intention to benefit a third party and an intention that the third party should have the right to enforce[ment]. . . .”⁶⁵ Often, to avoid any question, private parties will be sure to use express language, placing a clause in the contract naming “third party beneficiaries.”⁶⁶ The situation is less clear in the case of government contracts.⁶⁷

In every issue there are two ends of the spectrum which are often quite polarized, and government contracts concerning third party beneficiaries are no different.⁶⁸ At one end of the spectrum is the argument that all citizens should be third party beneficiaries, because government is representative of the people and is supposed to act on behalf of the people.⁶⁹ Thus, the government implicitly intends that each citizen benefit from that contract.⁷⁰ On the opposite side of the spectrum,

quotations omitted); *Villa*, 2010 WL 935680, at *3 (citing *Escobedo*, 2009 WL 4981618, at *2-3) (determining that there was a lack of third party standing); *Escobedo*, 2009 WL 4981618, at *2-3 (dismissed the claim of breach of contract based on third party beneficiary, stating “[q]ualified borrowers are incidental beneficiaries of the Agreement and do not have enforceable rights under the contract”); *Reyes v. Saxon Mortg. Servs., Inc.*, No. 09cv1366 DMS (WMC), 2009 WL 3738177, at *2 (S.D. Cal. Nov. 5, 2009) (“Plaintiff has alleged sufficient facts to support his third party beneficiary theory.”); *Chiles & Mitchell*, *supra* note 9, at 197 (defining Freddie Mac as the “sole compliance agent responsible for enforcing HAMP” and discussing the potential details of its enforcement).

⁶⁵ *Astra USA, Inc. v. Santa Clara Cnty.*, 131 S. Ct. 1342, 1348 (2011) (quoting J. MURRAY, CORBIN ON CONTRACTS, § 45.6, at 92 (rev. ed. 2007)); *see also In re Bank of Am.*, 2011 WL 2637222, at *3 (discussing whether the government intended to provide a benefit to the plaintiff).

⁶⁶ RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981).

⁶⁷ *Id.* § 313.

⁶⁸ *See infra* notes 69-72 and accompanying text (discussing the two extremes that can be argued involving government contracts and third party beneficiaries).

⁶⁹ *See* Robert S. Adelson, Note, *Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Governmental Intent*, 94 YALE L.J. 875, 878-79 (1985) (discussing a need for a restrictive test on third party beneficiary because “every member of the public is in some sense an intended beneficiary of a government contract”). *Contra* *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1211-12 (9th Cir. 1999) (discussing a contract between the United States and a dam operator and asserting that even though the contract was entered into with irrigators in mind, they were not beneficiaries of that contract). The court stated, “[t]o allow them intended third-party beneficiary status would open the door to all users receiving a benefit from the Project achieving similar status, a result not intended by the Contract.” *Id.* at 1212; *Marks*, 2010 WL 2572988, at *4 (citing *Klamath*, 204 F.3d at 1211-12); *Escobedo*, 2009 WL 4981618, at *2 (citing to *Klamath*, 204 F.3d at 1211); Patience A. Crowder, *More Than Merely Incidental: Third-Party Beneficiary Rights in Urban Redevelopment Contracts*, 17 GEO. J. ON POVERTY L. & POL’Y 287, 297-98 (2010) (discussing the fear of mass litigation and some of the changes in perception amongst the courts).

⁷⁰ *See supra* note 69 (discussing how government’s function can be interpreted to benefit all citizens).

it is argued that government contracts must expressly identify who will own the right to enforce the contract as a third party beneficiary.⁷¹ It is the gray area between these extremes where HAMP litigation originates, creating a difficult decision for courts who struggle to determine whom the government *intended* to benefit or who they simply believed would *incidentally* benefit.⁷²

Third party beneficiary status is a relatively new concept in contract theory and is still debated by legal scholars.⁷³ In the case of government contracts the substantive law pertaining to third parties is governed by

⁷¹ See Adelson, *supra* note 69, at 881 (“Often, courts expend considerable energy determining that a private action cannot be implied from a statute and then with little consideration brush aside the contractual issue, as if its failure follows *a fortiori* from the failure of the statutory claim.”).

⁷² See *In re Bank of Am.*, No. 10-md-02193-RWZ, 2011 WL 2637222, at *3 (D. Mass. July 6, 2011) (stating that there is no third party standing stemming from HAMP); *Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059, 1070–71 (N.D. Cal. 2011) (citing to several Ninth Circuit decisions, the court determined that the “Servicer Participation Agreement” does not provide third party beneficiary standing); *Phipps v. Wells Fargo Bank, N.A.*, No. CV F 10-2025 LJO SKO, 2011 WL 302803, at *8 (E.D. Cal. Jan. 27, 2011) (dismissing Plaintiff’s claim as a third party beneficiary stating, “[t]he complaint lacks facts to support a third-party beneficiary theory of relief”); *Zoher v. Chase Home Fin.*, No. 10-14135-CIV, 2010 WL 4064798, at *4–5 (S.D. Fla. Oct. 15, 2011) (dismissing an attempt by the plaintiffs to enforce HAMP compliance as a third party beneficiary); *Hammonds v. Aurora Loans Servs. LLC*, No. EDCV 10-1025 AG (OPx), 2010 WL 3859069, at *3 (C.D. Cal. Sept. 27, 2010) (indicating that HAMP does not create a third party beneficiary standing); *Hart v. Countrywide Home Loans, Inc.*, 735 F. Supp. 2d 741, 748 (E.D. Mich. 2010) (quoting *Aleem v. Bank of Am., N.A.*, No. EDCV 09-01812-VAP (RZx), 2010 WL 532330 (C.D. Cal. Feb. 9, 2010)) (“There is no express or implied right to sue fund recipients . . . under TARP or HAMP.”); *Marques v. Wells Fargo Home Mortg., Inc.*, No. 09-cv-1985-L(RBB), 2010 WL 3212131, at *7 (S.D. Cal. Aug. 12, 2010) (stating that a party could bring a suit as third party beneficiary, but the Plaintiff at hand needed to amend his claim to specifically show details about his modification situation); *Hoffman v. Bank of Am., N.A.*, No. C 10-2171 SI, 2010 WL 2635773, at *2–5 (N.D. Cal. June 30, 2010) (denying third party standing); *Marks*, 2010 WL 2572988, at *3–5 (denying Plaintiff’s standing as a third party beneficiary); *Benito v. Indymac Mortg. Servs.*, No. 2:09-CV-001218-PMP-PAL, 2010 WL 2130648, at *7 (D. Nev. May 21, 2010) (denying third party standing, stating that persons who are not parties to a government contract are “assumed to be incidental beneficiaries” and Plaintiffs did not display any intent within the HAMP contract); *Villa v. Wells Fargo Bank, N.A.*, No. 10CV81 DMS (WVG), 2010 WL 935680, at *3 (S.D. Cal. Mar. 15, 2010) (citing *Escobedo*, 2009 WL 4981618, at *2–3) (determining that there is a lack of third party standing); *Escobedo*, 2009 WL 4981618, at *2–3 (dismissing the breach of contract claim based on third party beneficiary, stating “[q]ualified borrowers are incidental beneficiaries of the Agreement and do not have enforceable rights under the contract”); *Reyes v. Saxon Mortg. Servs.*, No. 09cv1366 DMS (WMC), 2009 WL 3738177, at *2 (S.D. Cal. Nov. 5, 2009) (“Plaintiff has alleged sufficient facts to support his third party beneficiary theory.”).

⁷³ See generally Crowder, *supra* note 69 (providing a general background of the development of third party beneficiaries from common law through the modern approach).

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federal law.⁷⁴ In order for a third party to be deemed a third party beneficiary, that party must establish that he or she is an intended beneficiary of the contract in question, not just an incidental beneficiary of it.⁷⁵ The Restatement (Second) of Contracts describes the difference between intended and incidental beneficiaries:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.⁷⁶

The Restatement, in making specific reference to third party beneficiaries and government contracts, states that, generally, a party who contracts with the government is not subject to liability to a member of the public.⁷⁷ However, there are two exceptions: (1) the contract specifically creates a liability, and (2) “the promisee is subject to liability

⁷⁴ See *Hammonds*, 2010 WL 3859069, at *2; *Marques*, 2010 WL 3212131, at *3 (citing *Cnty. of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1243 (9th Cir. 2009)); *Benito*, 2010 WL 2130648, at *7 (quoting *Klamath*, 204 F.3d at 1210); *Escobedo*, 2009 WL 4981618, at *2 (citing *Klamath*, 204 F.3d at 1210); Ronald G. Morgan, *Foreign Military Sales Cash Procurements: Additional Liability Considerations*, 25 PUB. CONT. L.J. 617, 625–26 (1996).

⁷⁵ *Klamath*, 204 F.3d at 1211 (“To sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party.”); see *In re Bank of Am.*, 2011 WL 2637222, at *3 (citing *Astra USA*, 131 S.Ct. at 1347–48); *Zoher*, 2010 WL 4064798, at *4–5; *Marques*, 2010 WL 3212131, at *3 (citing to *Astra USA*, 588 F.3d at 1244); *Hoffman*, 2010 WL 2635773, at *3; *Marks*, 2010 WL 2572988, *3 (citing to RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981)); *Benito*, 2010 WL 2130648, at *7; *Villa*, 2010 WL 935680, at *2; *Escobedo*, 2009 WL 4981618, at *2 (citing *Klamath*, 204 F.3d at 1211); Adelson, *supra* note 69, at 877–78; Lori A. Alvino, Note, *Who’s Watching the Watchdogs? Responding to the Erosion of Research Ethics by Enforcing Promises*, 103 COLUM. L. REV. 893, 915 (2003).

⁷⁶ RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

⁷⁷ *Id.* § 313; Morgan, *supra* note 74, at 625–26.

to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.”⁷⁸

The U.S. Supreme Court has gone further to differentiate between “intended beneficiaries” and “incidental beneficiaries” in regards to government contracts.⁷⁹ “The distinction between an intention to benefit a third party and an intention that the third party should have the right to enforcement is emphasized where the promisee is a governmental entity.”⁸⁰ Traditionally, parties that benefit from government contracts are assumed to be incidental beneficiaries, rather than intended beneficiaries.⁸¹ Mentioning a party within a contract is not enough by itself.⁸² The question then becomes under what circumstances, other than being stated expressly, can a party become an intended beneficiary for the purpose of legal action.

When determining if someone is a third party beneficiary of a contract, the courts will occasionally look to the circumstances leading to the formation of the agreement.⁸³ Even with the use of outside sources, it

⁷⁸ RESTATEMENT (SECOND) of CONTRACTS § 313 (1981).

⁷⁹ See *Astra USA, Inc.*, 131 S. Ct. at 1348 (quoting J. MURRAY, CORBIN ON CONTRACTS, § 45.6, at 92 (rev. ed. 2007)) (addressing the issue of third party beneficiary).

⁸⁰ *Id.*; see *In re Bank of Am.*, 2011 WL 2637222, at *3 (quoting *Speleos v. BAC Home Loans Servicing, L.P.*, No. 10-cv-11503-NMG, 2010 WL 5174510 (D. Mass. Dec. 14, 2010)).

⁸¹ See *In re Bank of Am.*, 2011 WL 2637222, at *3; *Hammonds v. Aurora Loan Servs. LLC*, No. EDCV 10-1025 AG (OPx), 2010 WL 3859069, at *3 (C.D. Cal. Sept. 27, 2010) (citing *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999)); *Marques v. Wells Fargo Home Mortg., Inc.*, No. 09-CV-1985-L(RBB), 2010 WL 3212131, at *3 (S.D. Cal. Aug. 12, 2010) (citing *Cnty. of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1244 (9th Cir. 2009)); *Marks v. Bank of Am., N.A.*, No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988, at *3 (D. Ariz. June 22, 2010); *Benito v. Indymac Mortg. Servs.*, No. 2:09-CV-001218-PMP-PAL, 2010 WL 2130648, at *7 (D. Nev. May 21, 2010) (citing *Astra USA*, 588 F.3d at 1244); *Villa v. Wells Fargo Bank, N.A.*, No.10CV81 DMS (WVG), 2010 WL 935680, at * 2 (S.D. Cal. Mar. 15, 2010); *Escobedo v. Countrywide Home Loans, Inc.*, No. 09cv1557 BTM (BLM), 2009 WL 4981618, at *2 (S.D. Cal. Dec. 15, 2009) (quoting *Klamath*, 204 F.3d at 1211); *Gottlieb & Natarelli*, *supra* note 25, at 544.

⁸² See *Hammonds*, 2010 WL 3859069, at *3 (explaining that the difference between an intended beneficiary and an incidental one is determined by the reasonableness of one’s reliance on the promise); *Marques*, 2010 WL 3212131, at *4 (stating that beneficiaries do not need to be expressly named in the contract, but that it must be clear that the party falls within an intended class); *Marks*, 2010 WL 2572988, at *4 (displaying a need for precise language as compared to potentially vague language); *Escobedo*, 2009 WL 4981618, at *2 (stating that an agreement was entered in part for the benefit of borrowers, but that the language of the contract was not sufficient to support them as third party beneficiaries); *Gottlieb & Natarelli*, *supra* note 25, at 544.

⁸³ *Morgan*, *supra* note 74, at 627–28. See generally *Marques*, 2010 WL 3212131, at *4–7 (explaining the history of HAMP’s creation to show the intention to have borrowers recognized as third party beneficiaries); *Adelson*, *supra* note 69 (discussing third party

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can be difficult to fully comprehend the intentions of the contracting parties.⁸⁴ It has been suggested that beneficiary rights pertaining to government contracts should be determined by weighing the impact that the creation of an “additional remedy” would have on the goals of the statute.⁸⁵ Another suggested test is whether there is “justifiable reliance” by a beneficiary based upon commercial and social circumstances.⁸⁶ The same author proposed that there may be an implied right of action for third party beneficiaries that can be determined by an examination of the scope and stated intentions of the administrative agency charged with implementing the legislation.⁸⁷ There would appear to be some basis for such an argument, because the Supreme Court has used “administrative interpretation” in interpreting silent or ambiguous statutes.⁸⁸ Lastly, it has been put forth that “a right of action is favored ‘when there is evidence that existing remedies are inadequate and that additional remedies would increase the likelihood of compliance and afford direct relief to a class which the legislature wished to protect.’”⁸⁹ Many courts discussing HAMP and third party beneficiaries have tested standing on the basis of whether it would be reasonable for a party to *expect* to be a

beneficiary and the use of statutes as well as congressional history by the courts to determine intent).

⁸⁴ See generally Adelson, *supra* note 69 (examining third party beneficiary and the use of statutes as well as congressional history by the courts to determine intent).

⁸⁵ See Alvino, *supra* note 75, at 917.

⁸⁶ Alvino, *supra* note 75, at 917. This proposed method would be beneficial to homeowners attempting to enforce a loan modification because, while many courts have recognized the circumstances which have led borrowers to believe they are third party beneficiaries, they simply did not see enough evidence for a “clear intent.” *Id.*

⁸⁷ See generally Adelson, *supra* note 69, at 875–76 (arguing that although the statutes provide power to administrative agencies, it is the agencies themselves who provide the wording and documentation for government contracts). Therefore, it is really the agency’s intentions that the court should look to because it is the actual contracting body. *Id.*

⁸⁸ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

Id.

⁸⁹ Charles Tiefer, *No More Nisour Squares: Legal Control of Private Security Contractors in Iraq and After*, 88 OR. L. REV. 745, 771 (2009).

beneficiary under the circumstances.⁹⁰ No matter what method a court uses to interpret whether a third party beneficiary has standing, there is a nearly universal fear amongst courts and scholars that litigation will run rampant.⁹¹

1. Major Cases Relating to HAMP and the Third Party Beneficiary

In several cases, *Escobedo v. Countrywide Home Loans, Inc.* is cited to explain the lack of “clear intent” needed for third party beneficiary

⁹⁰ See *Zoher v. Chase Home Fin.*, No. 10-14135-CIV, 2010 WL 4064798, at *4 (S.D. Fla. Oct. 15, 2010); *Hammonds v. Aurora Loan Servs. LLC*, No. EDCV 10-1025 AG (OPx), 2010 WL 3859069, at *3 (C.D. Cal. Sept. 27, 2010) (citing RESTATEMENT (SECOND) OF CONTRACTS § 302); *Hoffman v. Bank of Am., N.A.*, No. C 10-2171 SI, 2010 WL 2635773, at *3 (N.D. Cal. June 30, 2010); *Marks v. Bank of Am., N.A.*, No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988, at *4 (D. Ariz. June 22, 2010); see also *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999) (providing the original criteria used by many courts to determine what is a reasonable expectation).

⁹¹ See *Klamath*, 204 F.3d at 1211–12 (discussing a contract between the United States and a dam operator). Even though the parties entered into the contract with irrigators in mind, they were not beneficiaries of that contract. *Id.* at 1212. The court stated that “to allow them intended third-party beneficiary status would open the door to all users receiving a benefit from the Project achieving similar status, a result not intended by the Contract.” *Id.* See also *Marks*, 2010 WL 2572988, at *4 (quoting *Klamath*, 204 F.3d at 1212) (“[T]o allow them intended third-party beneficiary status would open the door to all users receiving a benefit from the Project achieving similar status, a result not intended by the contract.”); *Escobedo v. Countrywide Home Loans, Inc.*, No. 09cv1557 DTM (BLM), 2009 WL 4981618, at *2 (S.D. Cal. Dec. 15, 2009) (quoting *Klamath*, 204 F.3d at 1212); *Adelson*, *supra* note 69, at 878–79 (discussing a need for a restrictive test on third party beneficiary because “every member of the public is in some sense an intended beneficiary”). *Contra* Toby J. Stern, Comment, *Federal Judges and Fearing the “Floodgates of Litigation,”* 6 U. PA. J. CONST. L. 377 (2003) (proposing that the use of a “Floodgates of Litigation” theory is unconstitutional in certain circumstances under Article III separation of powers and that the power to prevent mass litigation predominantly falls into the hands of Congress). The author points to several flaws in the concept of “floodgates” but not all will be mentioned in this footnote. *Id.* First, he describes the floodgates as being an attractive method of limiting additions to already full dockets. *Id.* at 386–88. On the other hand, citing to Justice Posner, the author then discusses the potential problem of diluting the quality of judges by having clerks writing opinions. *Id.* at 390–91. The author again cites to Justice Posner, explaining that when the “floodgates” doctrine first appeared, judges would use this to prevent cases without knowledge as to its actual effects on the judicial system and often without ever looking at legislative intent. *Id.* at 394–95. Quoting Justice Tobriner in *Dillion v. Legg*, the author demonstrates that the mere existence of mass litigation shows a pressing need for legal redress. *Id.* at 398. As part of the separation of powers, the author points to courts not being able to impose new federal filing fees and argues that they “likewise may not control its own jurisdiction through aversion to a flood of litigation.” *Id.* at 400. Last, the author highlights “[t]he lifting of the ‘impact’ rule in rewarding damages for mental anguish,” asserting that this did not cause the judicial system to collapse. *Id.* at 403.

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standing.⁹² In *Escobedo*, the Plaintiff alleged that he was denied a modification and claimed to be a third party beneficiary of the Servicer Participation Agreement between Countrywide and Fannie Mae, arguing that he was therefore entitled to a cause of action.⁹³ Because the agreement at issue stated that it “shall inure to the benefit of . . . the parties to the Agreement and their permitted successors-in-interest,” the court found that there was no clear intent to create a third party beneficiary.⁹⁴ Furthermore, the court found that since the Servicer Participation Agreement did not *require* Countrywide to modify eligible loans, there was no basis for the benefit.⁹⁵ The court took the position that “[t]he Guidelines set forth eligibility requirements and state[d]: ‘Participating servicers are required to *consider* all eligible loans under the program guidelines unless prohibited by the rules of the applicable PSA and/or other investor servicing agreements.’”⁹⁶

The key case supporting mortgage holders claiming third party beneficiary standing under HAMP is *Marques v. Wells Fargo Home Mortgage, Inc.*⁹⁷ In this case, Ademar A. Marques’s loan was deemed eligible for modification, but his application was nonetheless denied by Wells Fargo and foreclosure proceedings commenced.⁹⁸ The court examined the agreement between the federal government and mortgage servicers, finding that the agreement expressly provided that a servicer

⁹² See *Zoher*, 2010 WL 4064798, at *4; *Hoffman*, 2010 WL 2635773, at *4-5; *Marks*, 2010 WL 2572988, at *3-4; *Villa v. Wells Fargo Bank, N.A.*, No. 10CV81 DMS (WVG), 2010 WL 935680, at *3 (S.D. Cal. Mar. 15, 2010).

⁹³ *Escobedo*, 2009 WL 4981618, at *1-2.

⁹⁴ *Escobedo*, 2009 WL 4981618, at *2; see *In re Bank of Am.*, No. 10-md-02193-RWZ, 2011 WL 2637222, at *3 (D. Mass. July 6, 2011); see also *Marks*, 2010 WL 2572988, at *3-4 (finding that there was no express private right of action, but rather that Congress designated compliance duties solely to Freddie Mac); *Villa v. Wells Fargo Bank, N.A.*, No. 10CV81 DMS (WVG), 2010 WL 935680, at *3 (S.D. Cal. Mar. 15, 2010) (quoting *Escobedo*, 2009 WL 4981618, at *3).

⁹⁵ *Escobedo*, 2009 WL 4981618, at *3; see also *Hoffman*, 2010 WL 2635773, at *4 (citing *Escobedo*, 2009 WL 4981618, at *7) (stating that the agreement does not require modification, but requires only consideration of modification); *Villa*, 2010 WL 935680, at *3 (citing *Escobedo*, 2009 WL 4981618, at *3) (describing a lack of requirement for loan modification stemming from HAMP agreements).

⁹⁶ *Escobedo*, 2009 WL 4981618, at *3.

⁹⁷ See generally *Marques v. Wells Fargo Home Mortg., Inc.*, No. 09-CV-1985-L(RBB), 2010 WL 3212131 (S.D. Cal. Aug. 12, 2010).

⁹⁸ *Marques*, 2010 WL 3212131; cf. Jon Prior, *More Failed HAMP Trials End in Foreclosure*, HOUSINGWIRE, Jan 16, 2012, <http://www.housingwire.com/2012/01/16/more-failed-hamp-trials-end-in-foreclosure> (providing statistical evidence of the increase of foreclosures in failed HAMP trials).

must provide loan modifications and avoid foreclosure using “Program Guidelines.”⁹⁹

The bank argued that the contracting parties had no intention to give third parties the right to sue as evidenced by the contract, stating that Fannie Mae will be the administrator and Freddie Mac will be the compliance agent.¹⁰⁰ The court dismissed this argument.¹⁰¹ The language in the remedy and default provisions of the contract was deemed an insufficient defense for mortgage servicers, because those provisions only pertained to situations where an agreement is in place and not when a plaintiff, such as Marques, has been denied loan a modification.¹⁰²

If HAMP and SPAs do not establish standing under third party beneficiary theory, then the question becomes: Can standing be established using the TPP agreement between a borrower and his or her servicer?¹⁰³

⁹⁹ *Marques*, 2010 WL 3212131, at *5; *see, e.g., SPA Agreement, supra* note 59; *Handbook 3.4, supra* note 9 (evidencing the guidelines, in their current manifestation, referenced in the *Marques* case).

¹⁰⁰ *Marques*, 2010 WL 3212131, at *6; *see also Marks*, 2010 WL 2572988, at *4 (stating that allowing individual claims would undermine Freddie Mac’s role in the compliance process); *Chiles & Mitchell, supra* note 9, at 197 (deeming Freddie Mac as the sole compliance agent).

¹⁰¹ *Marques*, 2010 WL 3212131, at *6.

¹⁰² *Id.*

¹⁰³ *See Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 585–86 (7th Cir. 2012) (finding that traditional contract law was an appropriate claim in relation to the TPP); *Rackley v. JPMorgan Chase Bank, N.A.*, No. SA-11-CV-387-XR, 2011 WL 2971357, at *3–4 (W.D. Tex. July 21, 2011) (finding that the TPP agreement did not create a new contract due to a lack of consideration and contractual language and that it failed to indicate a guaranteed modification); *In re Bank of Am.*, No. 10-md-02193-RWZ, 2011 WL 2637222, at *3–4 (D. Mass. July 6, 2011) (stating that there was sufficient consideration and condition precedent under TPP agreements); *Stagikas v. Saxon Mortg. Servs., Inc.*, 795 F. Supp. 2d 129, 136 (D. Mass. 2011) (finding that although TPP stems from the HAMP agreement, the plaintiffs had sufficiently alleged that the TPP was supported with consideration); *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 350–53 (D. Mass. 2011) (stating that TPP agreement between a lender and borrower is sufficient to create a cause of action); *Grill v. BAC Home Loans Servicing LP*, No. 10-CV-03057-FCD/GGH, 2011 WL 127891, at *3–4 (E.D. Cal. Jan. 14, 2011) (finding a lack of meeting of the minds and non-affirmative contractual language); *Vida v. OneWest Bank, F.S.B.*, No. 10-987-AC, 2010 WL 5148473, at *5 (D. Or. Dec. 13, 2010) (finding TPP argument unpersuasive as the claim stems from HAMP regulations and therefore is not a separate agreement); *Durmic v. J.P. Morgan Chase Bank, N.A.*, No. 10-CV-10380-RGS, 2010 WL 4825632, at *2–4 (D. Mass. Nov. 24, 2010) (denying Defendant’s motion to dismiss and discussing TPP and sufficient evidence of intent to maintain the suit). *See generally* Part II.C (discussing claims brought under TPP agreements).

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C. Claims Under TPP Agreements

District courts that support TPP agreements as an affirmative cause of action tend to use breach of contract and promissory estoppel—the latter often as a corollary to the breach of contract claim.¹⁰⁴ A breach of contract claim requires four elements: “(1) *the existence of the contract*; (2) plaintiff’s performance or excuse for nonperformance of the contract; (3) defendant’s breach of the contract; and (4) resulting damages.”¹⁰⁵

A contract can be defined as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”¹⁰⁶ To successfully create such a duty, courts require a bargain of offer and acceptance, involving mutual assent and consideration.¹⁰⁷

In cases involving TPP agreements, consideration is almost always in question.¹⁰⁸ A party has provided consideration when it has paid something, or given something up, or suffered a detriment.¹⁰⁹ Merely agreeing to perform obligations of a prior contract is not deemed to be sufficient consideration for a

¹⁰⁴ See generally *In re Bank of Am.*, 2011 WL 2637222 (denying a motion to dismiss for lack of standing based upon a breach of contract claim stemming from TPP). The court also denied the motion to dismiss the promissory estoppel claim because Plaintiffs reasonably relied upon the TPP. *Id.* See also *Stagikas*, 795 F. Supp. 2d 129 (denying a motion to dismiss for lack of standing and failure to state a claim under TPP); *Bosque*, 762 F. Supp. 2d 342 (finding sufficient evidence for a claim of breach of contract and promissory estoppel); *Durmic*, 2010 WL 4825632 (denying the motion to dismiss for promissory estoppel and breach of contract based on the TPP).

¹⁰⁵ *Grill*, 2011 WL 127891, at *3 (quoting *Armstrong Petrol. Corp. v. Tri Valley Oil & Gas Co.*, 11 Cal. Rptr. 3d 412 (2004)); see *Rackley*, 2011 WL 2971357, at *4 (quoting *Smith Intern, Inc. v. Egle Group, LLC*, 490 F.3d 380, 387 (5th Cir. 2007)); *In re Bank of Am.*, 2011 WL 2637222, at *3 (citing *Guckenberger v. Bos. Univ.*, 957 F. Supp. 306, 316 (D. Mass. 1997)); *Bosque*, 762 F. Supp. 2d at 351 (citing *Guckenberger*, 957 F. Supp. at 316); *Durmic*, 2010 WL 4825632, at *2 (citing *Guckenberger*, 957 F. Supp. at 316).

¹⁰⁶ RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

¹⁰⁷ See *In re Bank of Am.*, 2011 WL 2637222, at *3 (citing *Vadnais v. NSK Steering Sys. Am., Inc.*, 675 F. Supp. 2d 205, 207 (D. Mass. 2009)); *Stagikas*, 795 F. Supp. 2d at 136 (citing *Trifiro v. N.Y. Life Ins. Co.*, 845 F.2d 30, 31–32 (1st Cir. 1988)); *Bosque*, 762 F. Supp. 2d at 351 (citing *Vadnais*, 675 F. Supp. 2d at 207); RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981); see also Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts*, 57 UCLA L. REV. 669, 673 (2010) (discussing the contradiction of traditional contract theory and promissory estoppel).

¹⁰⁸ See *In re Bank of Am.*, 2011 WL 2637222, at *4 (focusing on the element of consideration in discussing breach of contract); *Stagikas*, 795 F. Supp. 2d at 136 (denying Defendant’s motion to dismiss for lack of consideration); *Bosque*, 762 F. Supp. 2d at 351–53 (denying a motion to dismiss for lack of a valid offer, consideration, material terms, and valid measure of any damages); *Durmic*, 2010 WL 4825632, at *2–4 (denying the motion to dismiss a breach of contract claim for lack of consideration, material terms, and causal connection between harm and damages).

¹⁰⁹ See *In re Bank of Am.*, 2011 WL 2637222, at *4 (citing *Marine Contractors Co., Inc. v. Hurley*, 310 N.E.2d 915, 919 (D. Mass. 1974)); *Stagikas*, 795 F. Supp. 2d at 136; *Durmic*, 2010 WL 4825632, at *3; RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981); Jimenez, *supra* note 107, at 673.

new contract.¹¹⁰ Mortgage servicers, when addressing consideration, often argue that because borrowers were already required to make mortgage payments there is no new consideration under TPP.¹¹¹ Borrowers, on the other hand, submit that the rule of pre-existing legal duty is not applicable because new consideration is given in the form of legal representations, submissions of financials, partaking in credit counseling, opening of escrow accounts, and trial payments under a TPP agreement.¹¹²

The issues of offer and material terms have also been raised.¹¹³ An offer is a stated intention by one party to enter into a bargain thus inviting another party into an agreement.¹¹⁴ *Bosque v. Wells Fargo Bank, N.A.*, asserts that the servicer, in providing a TPP agreement to a borrower, is making an offer because the agreement has signature lines, HAMP guidelines refer to TPP agreements as an “offer,” and there is a “time is of the essence” clause.¹¹⁵

The greatest controversy in establishing a right of action involves interpretations and the source of the material terms of TPP agreements.¹¹⁶

¹¹⁰ See *In re Bank of Am.*, 2011 WL 2637222, at *4 (quoting *In re Lloyd, Carr & Co.*, 617 F.2d 882, 890 (1st Cir. 1980)); *Stagikas*, 795 F. Supp. 2d at 136 (citing *In re Lloyd, Carr & Co.*, 617 F.3d at 890); *Bosque*, 762 F. Supp. 2d at 351–52 (citing *In re Lloyd, Carr & Co.*, 617 F.3d at 890); *Durmic*, 2010 WL 4825632, at *3 (quoting *In re Lloyd, Carr & Co.*, 617 F.2d at 890).

¹¹¹ See *Rackley v. JPMorgan Chase Bank, N.A.*, No. SA-11-CV-387-XR, 2011 WL 2971357, at *4 (W.D. Tex. July 21, 2011) (citing *McCallum Highlands, Ltd. v. Wash. Capital Dus, Inc.* 66 F.3d 89, 93 (5th Cir. 1995)); *In re Bank of Am.*, 2011 WL 2637222, at *4 (quoting *In re Lloyd, Carr & Co.*, 617 F.2d at 890); *Stagikas*, 795 F. Supp. 2d at 136 (citing *In re Lloyd, Carr & Co.*, 617 F.3d at 890); *Bosque*, 762 F. Supp. 2d at 351–52 (citing *In re Lloyd, Carr & Co.*, 617 F.3d at 890); *Durmic*, 2010 WL 4825632, at *3 (quoting *In re Lloyd, Carr & Co.*, 617 F.2d at 890).

¹¹² See *In re Bank of Am.*, 2011 WL 2637222, at *4; *Stagikas*, 795 F. Supp. 2d at 136; *Bosque*, 762 F. Supp. 2d at 352; *Durmic*, 2010 WL 4825632, at *3.

¹¹³ See *Bosque*, 762 F. Supp. 2d at 352 (denying a motion to dismiss for lack of a valid offer, material terms, and valid measure of any damages); *Durmic*, 2010 WL 4825632, at *4 (denying the motion to dismiss a breach of contract claim for lack of material terms).

¹¹⁴ *Bosque*, 762 F. Supp. 2d at 351 (D. Mass. 2011); RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981).

¹¹⁵ *Bosque*, 762 F. Supp. 2d at 351; see *Vida v. OneWest Bank, F.S.B.*, No. 10-987-AC, 2010 WL 5148473, at *5 (D. Or. Dec. 13, 2010) (discussing the Plaintiff's claim of an offer, but making no direct reference as to whether there was a valid claim). Rather, the court dismissed the independent contract theory as a whole because *Vida's* claim stemmed from HAMP, which did not allow a private action. *Id.* See also, *eg.*, Home Affordable Modification Trial Period Notice, MAKING HOME Affordable, <https://www.hmpadmin.com/portal/programs/borrower.jsp> (follow “Firm Solicitation Offers;” then follow “Home Affordable Modification Trial Period Plan Notice” hyperlink). *But see* *Grill v. BAC Home Loans Servicing LP*, No. 10-CV-03057-FCD/GGH, 2011 WL 127891, at *3 (E.D. Cal. Jan. 14, 2011) (quoting *Banner Entm't, Inc. v. Superior Court of L.A. Cnty.*, 72 Cal. Rptr. 2d 598 (1989)) (discussing the need for a “meeting of the minds”).

¹¹⁶ See *Rackley*, 2011 WL 2971357, at *3–4 (finding that the TPP agreement did not create a new contract due to lack of consideration and contractual language, which would fail to indicate a guaranteed modification); *In re Bank of Am.*, 2011 WL 2637222, at *3–4 (stating that there was sufficient consideration and condition precedent under TPP agreements to satisfy standing); *Stagikas*, 795 F. Supp. 2d at 135–36 (dismissing a motion to dismiss based upon TPP and stating that although TPP stems from HAMP, the agreement provides a

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Mortgage servicers, in defending against claims on the basis of TPP, assert that because TPP agreements allow for a modification to be denied if a borrower does not meet all the criteria, they contain no material terms and therefore do not constitute enforceable contracts.¹¹⁷ However, courts finding that TPP agreements contain sufficient material terms have taken the position that TPP is not a loan agreement, but rather a promise to provide a loan agreement.¹¹⁸

Lastly, the question asked by several courts, when considering TPP for the purposes of creating a right of action, is whether this is simply an end-run around third party beneficiary and therefore precluding private action.¹¹⁹

1. Major Cases Relating to HAMP and TPP Agreements

Durmic v. J.P. Morgan Chase Bank, N.A. was brought by a group of borrowers who had fallen behind on their loans and who either were solicited by J.P. Morgan Chase for the loan modification program, or independently learned of HAMP and initiated a request.¹²⁰ The court stated, “[t]he TPP is a Fannie Mae/Freddie Mac ‘Uniform Instrument’ that has the appearances of a contract.”¹²¹ The TPP agreement between the borrower and Chase expressly stated that if the borrower stayed in compliance with the TPP requirements, the servicer would provide a Home Affordable Modification Agreement.¹²² The Plaintiffs followed all of the requirements, successfully passing the NPV test, meeting all of HAMP requirements, signing a TPP agreement, submitting proof of

proper cause of action); *Fletcher v. OneWest Bank, FSB*, 798 F. Supp. 2d 925, 931-32 (N.D. Ill. 2011) (finding that TPP does create a cause of action for a breach of contract claim); *Bosque*, 762 F. Supp. 2d at 350-53 (stating that the TPP agreement between a lender and borrower is sufficient to create a cause of action); *Grill*, 2011 WL 127891, at *3-4 (finding a lack of meeting of the minds and non-affirmative contractual language); *Vida*, 2010 WL 5148473, at *5 (finding the TPP argument unpersuasive because the claim stems from HAMP regulations and therefore is not a separate agreement); *Durmic*, 2010 WL 4825632, at *2-4 (denying Defendant’s motion to dismiss under TPP and finding sufficient evidence of intent to maintain the suit).

¹¹⁷ See *Rackley*, 2011 WL 2971357, at *4; *Bourdelais v. J.P. Morgan Chase Bank, N.A.*, No. 3:10CV670-HEH, 2011 WL 1306311, at *4-5 (E.D. Va. Apr. 1, 2011); *Bosque*, 762 F. Supp. 2d at 352; *Grill*, 2011 WL 127891, at *4; *Durmic*, 2010 WL 4825632, at *4.

¹¹⁸ *Durmic*, 2010 WL 4825632, at *4 (stating that this was sufficient to state a claim for breach of contract); see *In re Bank of Am.*, 2011 WL 2637222, at *4; *Bosque*, 762 F. Supp. 2d at 352.

¹¹⁹ See *Rackley*, 2011 WL 2971357, at *3; *Bourdelais*, 2011 WL 1306311, at *4; *Grill*, 2011 WL 127891, at *3-4; *Vida*, 2010 WL 5148473, at *5.

¹²⁰ *Durmic*, 2010 WL 4825632, at *1.

¹²¹ *Durmic*, 2010 WL 4825632, at *1; see *Belyea v. Litton Loan Servicing, LLP*, No. 10-10931-DJC, 2011 WL 2884964, at *2 (D. Mass. July 15, 2011) (quoting *Durmic*, 2010 WL 4825632, at *1); *Stagikas*, 795 F. Supp. 2d at 133 (quoting *Durmic*, 2010 WL 4825632, at *1); *Bosque*, 762 F. Supp. 2d at 348 (quoting *Durmic*, 2010 WL 4825632, at *1).

¹²² *Durmic*, 2010 WL 4825632, at *1; see *Belyea*, 2011 WL 2884964, at *2-3; *Stagikas*, 795 F. Supp. 2d at 133-34; *Bosque*, 762 F. Supp. 2d at 348.

income, and making the three required payments.¹²³ However, none of the Plaintiffs received an executed TPP or modification agreement.¹²⁴ The *Durmic* court agreed with Chase that HAMP precluded a private right of action under HAMP alone, but because this case was being contested based upon the TPP agreement between Chase and the borrower, Plaintiffs had successfully stated a cause of action.¹²⁵

Chase initially claimed that Plaintiffs were prevented from bringing suit based on breach of contract because of a lack of consideration.¹²⁶ The mortgage company argued that the monthly payments the Plaintiffs made under the TPP agreement did not constitute consideration because “performance of a pre-existing legal duty that is neither doubtful nor subject to honest and reasonable dispute is not valid consideration where the duty is owed to the promisor, or to the public at large.”¹²⁷ However, the court dismissed this theory and ruled that the Plaintiffs were required to relinquish more than simply the TPP payments.¹²⁸ Specifically, the Plaintiffs were required to provide documentation of their income, make legal representations of their current circumstances, agree to undergo credit counseling, and in some cases make payments into an escrow account.¹²⁹

¹²³ *Durmic*, 2010 WL 4825632, at *2.

¹²⁴ *Id.*

¹²⁵ *Id.* at *4; see *Belyea*, 2011 WL 2884964, at *6; *Stagikas*, 795 F. Supp. 2d at 136; *Fletcher v. OneWest Bank, FSB*, 798 F. Supp. 2d 925, 930 (N.D. Ill. 2011); *Bosque*, 762 F. Supp. 2d at 350–51.

¹²⁶ *Durmic*, 2010 WL 4825632, at *3; see *Belyea*, 2011 WL 2884964, at *7; *In re Bank of Am.*, No. 10-md-02193-RWZ, 2011 WL 2637222, at *3 (D. Mass. July 6, 2011); *Stagikas*, 795 F. Supp. 2d at 136; *Fletcher*, 798 F. Supp. 2d at 931; *Bosque*, 762 F. Supp. 2d at 351.

¹²⁷ *Durmic*, 2010 WL 4825632, at *3 (quoting *In re Lloyd, Carr & Co.*, 617 F.2d 882, 890 (1st Cir. 1980)); see *Belyea*, 2011 WL 2884964, at *7 (citing *In re Lloyd, Carr & Co.*, 617 F.2d at 890); *In re Bank of Am.*, 2011 WL 2637222, at *4 (quoting *In re Lloyd, Carr & Co.*, 617 F.2d at 890); *Stagikas*, 795 F. Supp. 2d at 136 (citing *In re Lloyd, Carr & Co.*, 617 F.2d at 890); *Fletcher*, 798 F. Supp. 2d at 931–32 (citing *DiLorenzo v. Valve & Primer Corp.*, 807 N.E.2d 673, 679 (Ill. App. Ct. 2004)); *Bosque*, 762 F. Supp. 2d at 351–52 (citing *In re Lloyd, Carr & Co.*, 617 F.2d at 890).

¹²⁸ *Durmic*, 2010 WL 4825632, at *3; see *Belyea*, 2011 WL 2884964, at *8; *In re Bank of Am.*, 2011 WL 2637222, at *4; *Stagikas*, 795 F. Supp. 2d at 136; *Fletcher*, 798 F. Supp. 2d at 932; *Bosque*, 762 F. Supp. 2d at 352.

¹²⁹ *Durmic*, 2010 WL 4825632, at *3; see *Belyea*, 2011 WL 2884964, at *8 (quoting *Durmic*, 2010 WL 4825632, at *3); *In re Bank of Am.*, 2011 WL 2637222, at *4 (citing *Durmic*, 2010 WL 4825632, at *3); *Stagikas*, 2011 WL 2652445, at *5 (quoting *Durmic*, 2010 WL 4825632, at *3); *Bosque*, 762 F. Supp. 2d at 352 (quoting *Durmic*, 2010 WL 4825632, at *3); see also *Chiles & Mitchell*, *supra* note 9, at 195–96 (explaining the additional elements of the initial package that homeowners must submit to qualify under TPP rules). Homeowner must submit a Request for Modification and Affidavit (“RMA”) Form, an IRS Form 4506-T or 4506T-EZ, and lastly provide evidence of the homeowner’s income. *Id.*

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Lastly, Chase put forth a defense based on lack of material terms (principal amount, monthly payment, applicable interest, loan term, or escrow payments), arguing that the TPP was really a contingent agreement.¹³⁰ The Plaintiffs' premise was that this was not a loan agreement *per se*, but rather "a promise to *provide* Plaintiffs with [a loan agreement] at a specified date . . ."¹³¹ An alternative theory suggests that not all terms of an agreement must be specified, and, because the terms are well established through mathematical equations put forth by HAMP, the terms were already in place.¹³² The court held that the issue of the parties' intent could not be resolved in the context of a motion to dismiss.¹³³

In *Wigod v. Wells Fargo Bank, N.A.*, borrowers gained a great victory when the Seventh Circuit bought into the concept that TPP agreements create a new contractual relationship.¹³⁴ The court determined that a TPP agreement contains a valid offer, clear and definite terms, and consideration under Illinois State common law.¹³⁵

Similar to previous arguments, Wells Fargo claimed that, because the TPP agreement required further review of Wigod's financials, this did not qualify as an offer for modification.¹³⁶ However, the Seventh Circuit rejected this claim, finding that "when the promisor conditions a promise on *his own* future action or approval, there is no binding offer. But when the promise is conditioned on the performance of some act *by the promisee* or a third party, there can be a valid offer."¹³⁷ In the case of the TPP agreement, there were two specific actions which Wigod had to accomplish before a modification could be made: (1) comply with the requirements of the trial plan, and (2) make true and accurate financial submissions.¹³⁸ Wells Fargo argued in the alternative that it reserved the right to determine whether Wigod qualified for a loan modification, but the court, rejecting this theory, stated that if Wells Fargo had wanted to cancel the TPP, its opportunity was before it countersigned the TPP agreement; thus, the court held that Wigod needed simply to complete

¹³⁰ *Durmic*, 2010 WL 4825632, at *4; *see Belyea*, 2011 WL 2884964, at *8; *Bosque*, 762 F. Supp. 2d at 352.

¹³¹ *Durmic*, 2010 WL 4825632, at *4; *see also Belyea*, 2011 WL 2884964, at *8 (arguing that the TPP simply provides for a decision on the modification); *Bosque*, 762 F. Supp. 2d at 352 (arguing that the agreement simply controls the three month trial period and will entitle borrower to either a modification or a decision on the modification).

¹³² *Durmic*, 2010 WL 4825632, at *4.

¹³³ *Id.*; *see Belyea*, 2011 WL 2884964, at *8.

¹³⁴ *See generally Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012).

¹³⁵ *Id.* at 561-66.

¹³⁶ *Id.* at 561.

¹³⁷ *Id.*

¹³⁸ *Id.* at 562.

the proper payments.¹³⁹ The court determined that to interpret the agreement any other way would provide Wells Fargo an opportunity to cancel the agreement based on its own whims, rather than the criteria set forth in the TPP.¹⁴⁰

Next, Wells Fargo challenged the consideration element of the TPP, arguing that there was a need for a “bargained-for exchange.”¹⁴¹ Like many other cases, the issue of pre-existing legal obligation was raised as a concern.¹⁴² The court found that there were sufficient legal detriments including: opening a new escrow account, potentially undergoing credit counseling, and providing and vouching for the truth and accuracy of financial information.¹⁴³

Last, Wells Fargo claimed that there were insufficient material terms.¹⁴⁴ The court agreed with Wells Fargo that the TPP only provided an “estimate” and that the lender had *some* discretion as to the final terms, but nonetheless it determined that the future terms were “independent of a party’s mere ‘wish, will, and desire.’”¹⁴⁵ It was the court’s determination that the terms were predominantly set by HAMP guidelines and the NPV waterfall test, which Wigod would have reasonably relied upon.¹⁴⁶ While the terms may not have been fully hashed out, it was clear to the court that the two parties had agreed to a modification based on Wigod’s compliance with the TPP.¹⁴⁷

On the other hand, *Rackley v. JPMorgan Chase Bank, N.A.* sums up the approach taken by courts that have rejected TPP for a lack of

¹³⁹ *Id.*

¹⁴⁰ *See id.* at 563. The TPP agreement states:

I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of the Modification Agreement, and (iii) the Modification Effective Date has passed.

Id. However, the court did not find this to mean that Wells Fargo held the right to deny the contract at any point for reasons such as “interest rates went up, the economy soured, it just didn’t like Wigod,” but rather it stated that the language provides requirements of the promisee and therefore constitutes a valid offer. *Id.*

¹⁴¹ *See id.* at 563–64.

¹⁴² *See id.* at 563; *see, e.g., infra* note 212 (providing a list of cases in which courts have discussed the issue revolving around pre-existing legal duties).

¹⁴³ *Wigod*, 673 F.3d at 563.

¹⁴⁴ *Id.* Wells Fargo argued that because the terms were to be determined at a later date there could be no “meeting of the minds,” and therefore there was no enforceable agreement. *Id.*

¹⁴⁵ *See id.* at 564–65 (quoting *United States v. Orr Constr. Co.*, 560 F.2d 765, 769 (7th Cir. 1977)).

¹⁴⁶ *See id.* at 565.

¹⁴⁷ *Id.*

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consideration.¹⁴⁸ Plaintiff entered into a TPP agreement to make modified monthly payments for a three-month trial period and to provide documentation of his finances.¹⁴⁹ Plaintiff made the scheduled payments and provided the financial information, but his home was still foreclosed upon.¹⁵⁰ The court in *Rackley* rejected the payments under TPP as consideration, because Plaintiff would have been required to make payments prior to his TPP agreement.¹⁵¹ The court emphasized that the TPP is only providing an “estimate” and that the lender’s obligation to modify arises only after, among other things, “borrower receipt of a lender-executed Modification Agreement before the Modification Effective date.”¹⁵²

With so many questions facing homeowners in cases pertaining to HAMP, the following section will attempt to provide the reader with a full analysis of the previous two arguments.¹⁵³

III. ANALYSIS

This section discusses and evaluates arguments made by homeowners under HAMP using either third party beneficiary standing or TPP agreements to create a new contractual relationship.¹⁵⁴ Part III.A examines the competing interests in determining the applicability of third party beneficiary standing involving HAMP litigation.¹⁵⁵ Part III.B assesses the arguments as to whether TPP agreements constitute a new contractual relationship under which borrowers can bring a private action.¹⁵⁶

¹⁴⁸ *Rackley v. JPMorgan Chase Bank, N.A.*, No. SA-11-CV-387-XR, 2011 WL 2971357, at *4 (W.D. Tex. July 21, 2011).

¹⁴⁹ *Id.* at *1.

¹⁵⁰ *Id.*

¹⁵¹ *Rackley*, 2011 WL 2971357, at *4; see *Vida v. OneWest Bank, F.S.B.*, No. 10-987-AC, 2010 WL 5148473, at *7 (D. Or. Dec. 13, 2010) (citing *Barinaga v. JP Morgan Chase & Co.*, No. 10-CV-266-AC, 2010 WL 4338326, at *5 (D. Or. Oct. 26, 2010)).

¹⁵² *Rackley*, 2011 WL 2971357, at *4.

¹⁵³ See *infra* Part III (analyzing the arguments involved in gaining standing for cases stemming from HAMP).

¹⁵⁴ See *infra* Part III.A-B (analyzing the arguments used to determine standing in cases involving third party beneficiaries and TPP agreements).

¹⁵⁵ See *infra* Part III.A (laying out a clear definition, both sides of the argument, and external factors that may be playing a role in the decision making of the courts).

¹⁵⁶ See *infra* Part III.B (discussing the issues of consideration and offer as they pertain to TPP and the creation of a new contract).

A. *Third Party Beneficiary*

Across the country, a number of cases have been brought before district courts pertaining to HAMP and the assertion of third party standing by borrowers.¹⁵⁷ While the majority of courts have dismissed the theory of third party beneficiary standing based on insufficient evidence of governmental intent, a few decisions have accepted the stated goals of the government program as adequate evidence of governmental intent to create standing.¹⁵⁸ The issues facing the courts are not based solely upon the empirical evidence, but also the public

¹⁵⁷ See *In re Bank of Am.*, No. 10-md-02193-RWZ, 2011 WL 2637222, at *3 (D. Mass. July 6, 2011) (stating that there is no third party standing stemming from HAMP); *Phipps v. Wells Fargo Bank, N.A.*, No. CV F 10-2025 LJO SKO, 2011 WL 302803, at *8 (E.D. Cal. Jan. 27, 2011) (dismissing Plaintiff's standing as a third party beneficiary stating, "[t]he complaint lacks facts to support a third-party beneficiary theory of relief"); *Zoher v. Chase Home Fin.*, No. 10-14135-CIV, 2010 WL 4064798, at *4-5 (S.D. Fla. Oct. 15, 2010) (dismissing an attempt by the plaintiffs to enforce HAMP compliance as a third party beneficiary); *Hammonds v. Aurora Loan Servs. LLC*, No. EDCV 10-1025 AG (OPx), 2010 WL 3859069, at *3 (C.D. Cal. Sept. 27, 2010) (indicating that HAMP does not create third party beneficiary standing); *Hart v. Countrywide Home Loans, Inc.*, 735 F. Supp. 2d 741, 748 (E.D. Mich. 2010) (quoting *Aleem v. Bank of Am., N.A.*, No. EDCV 09-01812-VAP (RZx), 2010 WL 532330 (C.D. Cal. Feb. 9, 2010)) ("There is no express or implied right to sue fund recipients . . . under TARP or HAMP."); *Marques v. Wells Fargo Home Mortg., Inc.*, No. 09-cv-1985-L(RBB), 2010 WL 3212131, at *7 (S.D. Cal. Aug. 12, 2010) (stating that a party could bring suit as a third party beneficiary, but that the Plaintiff at hand needed to amend his claim to specifically show details about his modification situation); *Hoffman v. Bank of Am., N.A.*, No. C 10-2171 SI, 2010 WL 2635773, at *2-5 (N.D. Cal. June 30, 2010) (denying third party standing); *Marks v. Bank of Am., N.A.*, No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988, at *3-5 (D. Ariz. June 22, 2010) (denying Plaintiff's standing as a third party beneficiary); *Benito v. Indymac Mortg. Servs.*, No. 2:09-CV-001218-PMP-PAL, 2010 WL 2130648, at *7 (D. Nev. May 21, 2010) (denying third party standing, stating that "government contracts are 'assumed to be incidental beneficiaries . . .'" and the plaintiffs did not display any intent within the HAMP contract); *Villa v. Wells Fargo Bank, N.A.*, No. 10CV81 DMS (WVG), 2010 WL 935680, at *3 (S.D. Cal. Mar. 15, 2010) (citing *Escobedo v. Countrywide Home Loans, Inc.*, No. 09cv1557 DTM (BLM), 2009 WL 4981618, at *2-3 (S.D. Cal. Dec. 15, 2009)) (determining that there was a lack of third party standing); *Escobedo*, 2009 WL 4981618, at *2-3 (dismissing the breach of contract claim based on third party beneficiary, stating "[q]ualified borrowers are incidental beneficiaries of the Agreement and do not have enforceable rights under the contract"); *Reyes v. Saxon Mortg. Servs.*, No. 09cv1366 DMS (WMC), 2009 WL 3738177, at *2 (S.D. Cal. Nov. 5, 2009) ("Plaintiff has alleged sufficient facts to support his third party beneficiary theory.").

¹⁵⁸ See *supra* notes 97-102 and accompanying text (discussing the merits of third party beneficiary standing pertaining to actions brought by private citizens in reference to the SPAs between the federal government and participating mortgage servicers); see *infra* notes 185-88 and accompanying text (discussing the *Marques* case and finding that there is express language supporting borrowers as third party beneficiaries).

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policy problems involved with third party beneficiary doctrine and government contracts.¹⁵⁹

1. Third Party Beneficiary

The basic rule, when relating third party beneficiary status to government contracts, is that taxpayers do not have a right to bring private action to enforce government contracts unless they are intended beneficiaries and not just incidental beneficiaries.¹⁶⁰ Third party beneficiary standing may be established either by analyzing the language within the contract or by construing the circumstances which led to the creation.¹⁶¹

The issue has been interpreted in *Klamath Water Users Protective Association v. Patterson* and *Astra USA, Inc. v. Santa Clara County*.¹⁶² These two cases establish the precedents for the interpretation of HAMP and third party beneficiaries, defining the difference between “intended beneficiaries” and “incidental beneficiaries.”¹⁶³ *Astra USA, Inc.* is particularly important because it illustrates the difficult task facing the courts in construing the difference between intended and incidental

¹⁵⁹ See Tiefer, *supra* note 89, at 771 (discussing some of the policy of third party beneficiary). “[A] right of action is favored ‘when there is evidence that the existing remedies are inadequate and that additional remedies would increase the likelihood of compliance and afford direct relief to a class which the legislature wished to protect.’” *Id.* See also Crowder, *supra* note 69, at 307 (discussing the difficulty in inferring intent, the author writes “[t]he relevant intent to be divined is [not] . . . that of a single individual or entity, but rather that of an amalgam of legislative bodies, administrative agencies, and government officials—each of whom may have differing expectations and objectives with regard to the contract”). See generally Adelson, *supra* note 69 (arguing that although the statutes provide power to administrative agencies, it is the agencies themselves who provide the wording and documentation for government contracts). Therefore, the court should look to an agency’s intentions, because the agency is the actual contracting body. *Id.*

¹⁶⁰ RESTATEMENT (SECOND) OF CONTRACTS § 313 (1981); see also Morgan, *supra* note 74, at 625–26.

¹⁶¹ RESTATEMENT (SECOND) OF CONTRACTS § 313 (1981); see also Crowder, *supra* note 69, at 306 (discussing the contractual language as well as the interpretation stemming from the circumstances forming the contract); Morgan, *supra* note 74, at 625–26 (emphasizing the need for explicit language to establish intended parties).

¹⁶² *Astra USA, Inc. v. Santa Clara Cnty.*, 131 S. Ct. 1342, 1348 (2011) (citing J. MURRAY, CORBIN ON CONTRACTS, § 45.6, at 92 (rev. ed. 2007)); *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1211–12 (9th Cir. 1999) (discussing the differences between an intended and incidental beneficiary involving a government contract).

¹⁶³ *In re Bank of Am.*, No. 10-md-02193-RWZ, 2011 WL 2637222, at *3 (D. Mass. July 6, 2011); *Marks v. Bank of Am., N.A.*, No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988, at *4 (D. Ariz. June 22, 2010); *Escobedo v. Countrywide Home Loans, Inc.*, No. 09cv1557 DTM(BLM), 2009 WL 4981618, at *2 (S.D. Cal. Dec. 15, 2009).

beneficiaries.¹⁶⁴ In the case of HAMP this is particularly difficult because one must wonder exactly who was intended when the foreword of the guidelines describes Making Home Affordable as a program “to stabilize the housing market and help struggling homeowners.”¹⁶⁵ Is it all homeowners, including the neighbors of foreclosed-upon borrowers, given the effects that the foreclosure will have on their own property value?¹⁶⁶ Should it be only homeowners who have participated in HAMP?¹⁶⁷ Or is it exclusively Fannie Mae and the mortgage servicer who have agreed to an SPA?¹⁶⁸

2. Majority Opinion: District Court Cases Opposing Third Party Beneficiary Standing

Escobedo is the preeminent case opposing third party beneficiary standing in HAMP cases.¹⁶⁹ *Escobedo*, interpreting the SPA, sparked a ground swell in favor of mortgage servicers, denying the “clear intent” needed for third party beneficiary standing.¹⁷⁰ *Escobedo* stands for the

¹⁶⁴ See *supra* note 65 and accompanying text (discussing the difference between the intent to benefit a party and an intention for that party to receive a right of action).

¹⁶⁵ *Handbook 3.4*, *supra* note 9.

¹⁶⁶ See *Soaring Spillover: Accelerating Foreclosures to Cost Neighbors \$502 Billion in 2009 Alone; 69.5 Million Homes Lose \$7,200 on Average*, CENTER FOR RESPONSIBLE LENDING, May 2009, <http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-3-09.pdf> (displaying the drastic effects that foreclosure can have upon the value of neighboring properties). The Center for Responsible Lending estimated that in 2009 alone foreclosures would cause “69.5 million nearby homes to suffer price declines averaging \$7,200 per home and resulting in a \$502 billion total decline in property values.” *Id.* at 1.

¹⁶⁷ See *supra* Part II.A (defining homeowners who are eligible to participate in HAMP and the steps necessary towards modification).

¹⁶⁸ See *SPA Agreement*, *supra* note 59, at 13 (providing only signature sections for Fannie Mae and the servicer).

¹⁶⁹ See generally *Bourdelaís v. J.P. Morgan Chase Bank*, No. 3:10CV670-HEH, 2011 WL 1306311, at *3 (Apr. 1, 2011) (explaining that private citizens have been deemed “incidental beneficiaries” by most courts); *Zoher v. Chase Home Fin.*, No. 10-14135-CIV, 2010 WL 4064798, at *4 (S.D. Fla. Oct. 15, 2010) (stating that it would be unreasonable for private citizens to rely on the SPA because there is specific language allowing for loans not to be granted); *Hoffman v. Bank of Am., N.A.*, No. C 10-2171 SI, 2010 WL 2635773, at *5 (N.D. Cal. June 30, 2010) (dismissing the Plaintiff’s third party beneficiary claim); *Marks v. Bank of Am., N.A.*, No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988, at *4-5 (D. Ariz. June 22, 2010) (describing *Escobedo*’s use of the *Klamath* case in its reasoning that private citizens are not to be considered third party beneficiaries); *Villa v. Wells Fargo Bank, N.A.*, No. 10CV81 DMS (WVG), 2010 WL 935680 (S.D. Cal. Mar. 15, 2010) (citing *Escobedo v. Countrywide Home Loans, Inc.*, No. 09cv1557 DTM (BLM), 2009 WL 4981618, at *2-3 (S.D. Cal. Dec. 15, 2009)) (discussing third party beneficiaries). *Escobedo* was persuasive enough to Justice Sabraw that he reversed direction from his previous decision. *Id.*; *Reyes v. Saxon Mortg. Servs.*, No. 09cv1366 DMS, 2009 WL 3738177 (S.D. Cal. Nov. 5, 2009).

¹⁷⁰ See generally *Escobedo*, 2009 WL 4981618. *Escobedo* has essentially outlined the briefs for mortgage servicers because it has been cited in many courts and provides the dominant

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proposition that there is no clear intent to establish third party beneficiary standing in SPA agreements, and this decision's influence upon other courts has created a significant burden to borrowers in trying to gain standing.¹⁷¹

Other cases opposing the use of third party beneficiary as a means for private action also focus upon the language within the SPA.¹⁷² One problem in focusing on the language of the SPA is that it incorporates the *Making Home Affordable Program: Handbook for Servicers of Non-GSE Mortgages*, and the handbook is constantly being updated, which can create confusion.¹⁷³

There are three primary arguments in construing the ambiguity of SPA language, which explain why borrowers should be considered incidental beneficiaries rather than intended beneficiaries: (1) within the SPA there is specific language stating that the SPA "shall inure to the benefit of . . . the parties to the Agreement and their permitted successors-in-interest," which might be interpreted to mean that third parties are precluded;¹⁷⁴ (2) because there is no explicit mention of a third party beneficiary, a court may determine that there was no intention for the benefit to be created; and (3) due to a lack of requirements for service providers to give modifications under the SPA, it is unreasonable for borrowers to depend on the SPA for standing.¹⁷⁵

The court's decision in *Benito* illustrates the troubling dependence of the courts on the requirement to find "express intention."¹⁷⁶ Specifically, the court acknowledged that HAMP "undoubtedly has a goal of

perspective involving HAMP. See, e.g., *Zoher*, 2010 WL 4064798, at *4; *Hoffman*, 2010 WL 2635773, at *4-5; *Marks*, 2010 WL 2572988, at *3-4; *Villa*, 2010 WL 935680, at *3.

¹⁷¹ See *supra* Part II.B.2 (describing the ruling and reasoning in the *Escobedo* case).

¹⁷² See *In re Bank of Am.*, 2011 WL 2637222, at *3; *Hoffman*, 2010 WL 2635773, at *4; *Benito v. Indymac Mortg. Servs.*, No. 2:09-CV-001218-PMP-PAL, 2010 WL 2130648, at *6-7 (D. Nev. May 21, 2010).

¹⁷³ See generally *SPA Agreement*, *supra* note 59 (providing the legal framework under TARP to enter into an agreement between U.S. Treasury and a service provider with Fannie Mae as the administrator and Freddie Mac as the compliance agent and stating that the specific terms are incorporated from the MHA handbook); *Handbook 3.4*, *supra* note 9 (providing the guidelines and rules for which servicers are held, based upon their SPAs). GSE is defined as Government Sponsored Entities. *Sichtermann*, *supra* note 43, at 271.

¹⁷⁴ See *supra* note 94 and accompanying text (discussing the quoted language which displays no clear intention from the government to qualify homeowners as intended beneficiaries).

¹⁷⁵ See *infra* notes 185-88 and accompanying text (discussing the lack of clear intent, because there is no express mention of homeowners and that without clear intent it would be unreasonable for a homeowner to rely upon SPAs to create private standing between service providers and the federal government).

¹⁷⁶ See *infra* note 177 and accompanying text (illustrating the paralyzing effects that an "express intention" criterion may have on judges whom recognize the benefit to homeowners, but feel that they cannot oblige in providing standing).

assisting homeowners,” but still found that there was no express intention and thus no right of action.¹⁷⁷ There is a presumption that government contracts create incidental beneficiaries, rather than intended beneficiaries.¹⁷⁸ The lack of express intention places private actors at a distinct disadvantage when bringing an action because of the presumption that government contracts create incidental beneficiaries, rather than intended beneficiaries.¹⁷⁹

Furthermore, those opposing third party beneficiary standing in relation to HAMP have argued that the mortgage servicers were not *required* to provide modifications, and therefore borrowers’ reliance on HAMP would be unreasonable.¹⁸⁰ *Escobedo* specifically emphasizes that the HAMP Guidelines require participating servicers only “to *consider* all eligible loans under the program guidelines”¹⁸¹ This reasoning can be taken a step further by arguing that Fannie Mae and Freddie Mac, as government agents which are *named* parties in the SPA, lack the right to

¹⁷⁷ *Benito*, 2010 WL 2130648, at *7; *see also Hammonds*, 2010 WL 3859069, at *3 (“Even though the contract does benefit homeowners such as Plaintiff, the contract lacks the required clear intention.”); *Hoffman v. Bank of Am., N.A.*, No. C 10-2171 SI, 2010 WL 2635773, at *4 (N.D. Cal. June 30, 2010) (“[T]hrough the agreement was made with the benefit of qualified borrowers in mind, the language of the agreement itself does not grant them enforceable rights.”); *Benito*, 2010 WL 2130648, at *7 (“Although the overall HAMP program undoubtedly has a goal of assisting homeowners, the HAMP contract does not express any intent to grant borrowers a right to enforce the HAMP contract . . .”).

¹⁷⁸ *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999); *In re Bank of Am.*, No. 10-md-02193-RWZ, 2011 WL 2637222, at *3 (D. Mass. July 6, 2011) (quoting *Speleos v. BAC Home Loans Servicing, L.P.*, No. 10-cv-11503-NMG, 2010 WL 5174510 (D. Mass. Dec. 14, 2010)); *Hammonds*, 2010 WL 3859069, at *3 (quoting *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999)); *Benito*, 2010 WL 2130648, at *7 (quoting *Cnty. of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1244 (9th Cir. 2009)); *Escobedo v. Countrywide Home Loans, Inc.*, No. 09cv1557 DTM (BLM), 2009 WL 4981618, at *2 (S.D. Cal. Dec. 15, 2009) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 313(2) (1979)).

¹⁷⁹ *In re Bank of Am.*, 2011 WL 2637222, at *3 (quoting *Speleos*, 2010 WL 5174510); *Hammonds*, 2010 WL 3859069, at *3 (quoting *Klamath*, 204 F.3d 1206); *Marques*, 2010 WL 3212131, at *4 (quoting *Astra USA*, 588 F.3d at 1244); *Marks*, 2010 WL 2572988, at *3 (citing *Klamath*, 204 F.3d at 1211); *Benito*, 2010 WL 2130648, at *7 (quoting *Astra USA*, 588 F.3d at 1244); *Escobedo*, 2009 WL 4981618, at *2 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 313(2) (1979)); *Klamath*, 204 F.3d at 1211.

¹⁸⁰ *Hart v. Countrywide Home Loans, Inc.*, 735 F. Supp. 2d 741, 748 (E.D. Mich. 2010) (citing *Escobedo*, 2009 WL 4981618, at *3); *Hoffman*, 2010 WL 2635773, at *4; *Marks*, 2010 WL 2572988, at *3; *Escobedo*, 2009 WL 4981618, at *3; *see also Benito*, 2010 WL 2130648, at *7 (asserting that even Fannie Mae cannot force a mortgage servicer to provide a modification).

¹⁸¹ *Escobedo*, 2009 WL 4981618, at *3; *see also Marks*, 2010 WL 2572988, at *3 n.3 (quoting *Escobedo*, 2009 WL 4981618, at *3).

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force a modification upon lenders.¹⁸² Collectively, these interpretations are a gauntlet of bad news for borrowers.¹⁸³

However, even with the appearance of a dominant interpretation, this is not a unanimous interpretation and borrowers should not give up all hope.¹⁸⁴

3. Minority Opinion: Supporting Third Party Beneficiary Standing

Although the deck is stacked against homeowners with the majority of cases ruling against borrowers, *Marques* should provide some hope.¹⁸⁵ It is clear that the agreement between the federal government and mortgage servicers expressly states that a servicer should provide loan modifications and avoid foreclosure using “Program Guidelines.”¹⁸⁶ For example, the *Marques* court highlighted language from the SPA, such as: “[s]ervicer shall perform the Services for all mortgage loans it services”; “[p]articipating servicers are required to consider all eligible loans under the program guidelines unless precluded by the rules”; and “[e]very potentially eligible borrower who calls or writes in to their servicer in reference to a modification must be screened for hardship.”¹⁸⁷ *Marques*, in discussing the SPA and the enabling legislation surrounding it, shows clearly that homeowners are *intended* beneficiaries and not just *incidental*.¹⁸⁸

¹⁸² See *Benito*, 2010 WL 2130648, at *7.

¹⁸³ See *supra* text accompanying notes 174–75 (offering three unique explanations for why servicers do not need to provide loan modifications and each appear to be progressively insurmountable).

¹⁸⁴ See *Infra* Part III.A.4.

¹⁸⁵ See generally *Marques v. Wells Fargo Home Mortg., Inc.*, No. 09-cv-1985-L(RBB), 2010 WL 3212131 (S.D. Cal. Aug. 12, 2010) (discussing third party beneficiary and how the servicer agreements provide a requirement for modifications); Part II.B.1 (providing the history involved in third party beneficiary and comparing the majority opinion with the minority opinion).

¹⁸⁶ See *Marques*, 2010 WL 3212131, at *5; see also *Cook-Mack & Parady*, *supra* note 16, at 376 (discussing the “clear intent” requirement, which has been established in *Marques*, other state cases, and the public records).

¹⁸⁷ *Marques*, 2010 WL 3212131, at *5.

¹⁸⁸ See *Marques*, 2010 WL 3212131, at *5; see also *Sampson v. Wells Fargo Home Mortg., Inc.*, No. CV 10-08836 DDP (SSx), 2010 WL 5397236, at *3 (C.D. Cal. Nov. 19, 2010) (emphasizing that HAMP’s clearly stated mission is “foreclosure prevention” and thus homeowners in danger of being foreclosed upon must be intended beneficiaries); *Cook-Mack & Parady*, *supra* note 16, at 376 (discussing the “clear intent” requirement established in *Marques*, other state cases, and the public records).

4. Ambiguities, Public Policy, and Ramifications

One can see from the sections above that there are some obvious ambiguities within the SPA.¹⁸⁹ The existence of these ambiguities allows judges to read the agreement as *requiring* modification, or, at the very least, the opportunity for modification, whereas other judges could fairly claim there is no *requirement* for modification.¹⁹⁰ A better reading of the law is to define “intended beneficiaries” for modification as those who achieve certain milestones in the HAMP process, such that their reliance would be deemed reasonable.¹⁹¹ Doing so would provide homeowners an opportunity to defend their homes while still limiting the amount of cases that homeowners can bring before the court.¹⁹²

As mentioned previously, a number of courts have acknowledged that SPAs were entered into, in part, for the benefit of borrowers, but several of these courts have expressed a concern that permitting third party beneficiary standing would “open the flood gates” to litigation.¹⁹³ Although there is merit to the argument that there could be a staggering number of potential lawsuits if third party beneficiary standing were accorded to all mortgage holders in these cases, the problem with the theory of “floodgates” is that courts cannot know the *actual* effects on the judicial system of allowing third party beneficiary standing under HAMP.¹⁹⁴

¹⁸⁹ See *supra* Part III.A.2-3 (discussing the majority and minority opinions interpreting SPAs).

¹⁹⁰ See *supra* Part III.A.2-3 (comparing and contrasting whether the SPA creates a requirement for modification).

¹⁹¹ See *supra* Part III.A.2-3 (interpreting the language within the SPA in order to distinguish the intended beneficiaries). However, if borrowers do comply with all of the requirements, the argument can be made that reliance would be reasonable, and thus one could argue that these borrowers should be “intended beneficiaries” because “the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him or her.” *Escobedo v. Countrywide Home Loans, Inc.*, No. 09cv1557 BTM (BLM), 2009 WL 4981618, at *3 (S.D. Cal. Dec. 15, 2009) (quoting *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999)).

¹⁹² See *infra* Part IV (offering a new right for homeowners under Making Home Affordable program guidelines).

¹⁹³ See *supra* notes 177-78 and accompanying text (illustrating that certain courts recognize the HAMP program as being developed with homeowners at least partially in mind).

¹⁹⁴ See generally Stern, *supra* note 91, at 402-04 (discussing the inability of courts to gauge the actual effects of allowing litigation). “The ‘floodgates of litigation’ argument has proven wrong time and again. The lifting of the ‘impact’ rule in rewarding damages for mental anguish, allowing third parties to recover under contracts, and the recognition of the right to privacy, were all prophesied to overwhelm the court with frivolous claims. They have not.” *Id.* at 403.

Unfortunately, judges fearing this floodgate of litigation are often too quick on the draw and fail to adequately examine the legislative intent, which results in inconsistent rulings.¹⁹⁵ Courts should not be concerned about the possible increase of litigation on this issue; rather, they should permit the U.S. Treasury to address the potential issues by creating guidelines.¹⁹⁶ Furthermore, it can be argued that there is simply a need to address something because it is wrong, and there is a pressing need for “legal redress.”¹⁹⁷ The remaining portion of this analysis will discuss some of these alternatives in relationship to HAMP.¹⁹⁸

One approach to combat the imbalance amongst the courts as to whether borrowers should be granted third party beneficiary standing is to weigh the impact of creating new remedies based on the original statute’s goals.¹⁹⁹ But as we have seen from some previous rulings relating to HAMP, there is an obvious fear of unfettered litigation, and the ability to create new remedies may open the door to more litigation.²⁰⁰

Another approach is based upon “justifiable reliance.”²⁰¹ Justifiable reliance is interpreted using the surrounding commercial and social circumstances.²⁰² TARP and HAMP were created to combat an economic crisis and were portrayed in the media as being for the benefit of homeowners so that they could keep their homes.²⁰³ Courts finding in favor of homeowners often choose to use distinct and strong terminology, such as “crisis,” when describing the 2008 economic

¹⁹⁵ See generally Stern, *supra* note 91 (arguing against the use of “floodgates of litigation” reasoning in deciding cases).

¹⁹⁶ See *infra* text accompanying notes 234–35 (illustrating the author’s proposed amendment to the HAMP guidelines). See generally Handbook 3.4, *supra* note 9 (providing the guidelines and rules for servicers, the criteria of who is to be considered eligible for loan modification, and the course of action available to borrowers who are denied a modification).

¹⁹⁷ See Stern, *supra* note 91, at 398 (arguing that because of the litigious nature of our society there is an even greater need for people to be heard and that preventing suits due to the number may be unfairly biased against merit based suits). W. Page Keeton said, “[i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a ‘flood of litigation,’ and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds.” *Id.* at 398–99.

¹⁹⁸ See *infra* notes 199–207 and accompanying text (discussing alternative methods for interpreting third party beneficiary standing and how it may relate to HAMP).

¹⁹⁹ Alvino, *supra* note 75, at 917.

²⁰⁰ See *supra* note 91 (discussing the debate amongst courts and scholars regarding the fear of opening litigation to anyone).

²⁰¹ See *supra* text accompanying note 86 (defining “justifiable reliance”).

²⁰² See *supra* note 86 (promoting a justifiable reliance theory, which may be beneficial to borrowers considering the economic environment at the time of the creation of HAMP).

²⁰³ See *supra* Part II (discussing the circumstances that led to the creation of HAMP and TARP).

condition, and one might argue that this is, in and of itself, an application of justifiable reliance.²⁰⁴

Another approach to establish third party beneficiary standing is to use the intentions of the administrative agency that developed or is charged with implementing the governmental contract, rather than the language of the applicable statute.²⁰⁵ This would perhaps be the best support for borrowers in gaining third party beneficiary standing because of the Treasury Department's announced intentions and purpose in creating HAMP.²⁰⁶ The counter argument, without denying the intentions of the Treasury Department, would be that this intention is insufficient to distinguish borrowers as an intended beneficiary from an incidental beneficiary.²⁰⁷

In sum, most courts addressing the issue have rejected homeowners' attempts to obtain standing in HAMP related litigation as third party beneficiaries, and homeowners are searching for a new avenue of litigation based on TPP agreements.²⁰⁸

B. TPP Agreements

An alternative theory to third party beneficiary standing is that TPP agreements create a new contractual relationship separate from the SPA.²⁰⁹ However, there are two questions that should be asked when discussing the use of TPP agreements to establish standing: (1) Is there proper consideration to constitute a contract, and (2) does the TPP agreement constitute an offer with material terms?²¹⁰

²⁰⁴ See *supra* note 22 (illustrating the economic environment in 2008 and providing examples of the potentially loaded wording used to decipher who should be deemed an "intended" beneficiary).

²⁰⁵ See *supra* note 87 and accompanying text (proposing that when interpreting "intended" beneficiaries the courts should look to the intentions of the agencies and not just to the legislative intent). The principles put forth by Adelson pertaining exclusively to administrative agencies can be taken further to relate not just to the agencies but any governmental body other than the legislature that has aided in the design and implementation of a program.

²⁰⁶ See *supra* notes 22-31 and accompanying text (providing a background of the creation of HAMP).

²⁰⁷ See *supra* note 177 and accompanying text (recognizing that Congress considered homeowners in part when creating HAMP, but Congress did not necessarily deem them as intended beneficiaries).

²⁰⁸ See *infra* Part III.B (analyzing arguments pertaining to TPP agreements and a right to private action).

²⁰⁹ See *supra* note 108 (citing cases that have discussed the issue of TPP agreements creating a right to private action based on contract theory with a particular focus on the consideration element).

²¹⁰ See *supra* notes 116-18 and accompanying text (citing to cases that discuss the issue of consideration and the issue of offer pertaining to material terms).

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1. Is There Proper Consideration to Constitute a Contract?

In regards to consideration and TPP agreements, the question is whether the additional actions taken by a borrower participating in the program are to be considered additional consideration, or whether the TPP is lacking consideration because it is simply a promise to make payments, which homeowners were previously obligated to make in compliance with their mortgage note.²¹¹ Those who oppose using TPP to establish a cause of action argue that the TPP requires only that the homeowner perform pre-existing legal duties; therefore, their actions cannot constitute new consideration.²¹² On the other hand, it can be argued that there are additional requirements created by TPP that are separate from the original mortgage agreement, and therefore the TPP would constitute a new contract and not a prior obligation.²¹³

The split in interpretations as to what constitutes new consideration reflects different readings of the original lending agreements between borrowers and lenders, as some cases have found auxiliary requirements, such as submission of financial statements in the original lending agreements to be a pre-existing requirement, while other courts interpret this as a new requirement.²¹⁴ However, borrowers could argue that making legal representations of their financial situation, undergoing credit counseling, opening new escrow accounts, and paying new fees in connection with the modification of payments creates a new legal detriment.²¹⁵ Naturally, lenders are unlikely to make mention of these

²¹¹ See *supra* notes 108–12 and accompanying text (discussing the issue of consideration and whether the actions taken by homeowners should constitute new consideration or simply the fulfilling of a previously established legal obligation).

²¹² See *In re Bank of Am.*, No. 10-md-02193-RWZ, 2011 WL 2637222, at *4 (D. Mass. July 6, 2011) (denying the defense's claim that there was a lack of consideration because of a pre-existing legal duty); *Stagikas v. Saxon Mortg. Servs., Inc.* 795 F. Supp. 2d 129, 136 (D. Mass. 2011) (citing *In re Lloyd Carr & Co.*, 617 F.2d 882, 890 (1st Cir. 1980)); *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 351–52 (D. Mass. 2011) (denying the defendant's proposition that there was a pre-existing duty because the partial payments under TPP should be considered as previously obligated in the mortgage agreement).

²¹³ *In re Bank of Am.*, 2011 WL 2637222, at *4; *Stagikas*, 795 F. Supp. 2d at 136; *Fletcher v. OneWest Bank, FSB*, 798 F. Supp. 2d 925, 932 (N.D. Ill. 2011); *Bosque*, 762 F. Supp. 2d at 352; *Durmic v. J.P. Morgan Chase, N.A.*, No. 10-CV-10380-RGS, 2010 WL 4825632, at *3 (D. Mass. Nov. 24, 2010).

²¹⁴ Compare *Rackley v. JPMorgan Chase Bank, N.A.*, No. SA-11-CV-387-XR, 2011 WL 2971357, at *4 (W.D. Tex. July 21, 2011) (“Plaintiff was already obligated to disclose to JPMC his financial information under his original loan document . . .”), with *In re Bank of Am.*, 2011 WL 2637222, at *4 (stating that a “provision of financial information and trial payments” constituted consideration).

²¹⁵ See *Bosque*, 762 F. Supp. 2d at 352 (quoting *Durmic*, 2010 WL 4825632, at *3); *In re Bank of Am.*, 2011 WL 2637222, at *4; *Stagikas*, 795 F. Supp. 2d at 136 (quoting *Durmic*, 2010 WL 4825632, at *3); *Fletcher*, 798 F. Supp. 2d at 930–32; *Durmic*, 2010 WL 4825632, at *3.

additional requirements, focusing on the payments as pre-existing legal duties, which cannot constitute consideration.²¹⁶

2. Does the TPP Constitute as an Offer with Material Terms?

An offer is an intention by one party to enter into a bargain, thus inviting another party into an agreement.²¹⁷ The difficulty in determining what is an actual offer is trying to construe the intentions of the parties and what exactly all parties involved intended.²¹⁸ When evaluating the material terms and HAMP, the argument that the TPP agreement cannot constitute a contract emphasizes that the TPP lacks repayment dates, amounts of repayments, interest rates for a permanent modification, a principal amount, and the amount to be paid into escrow, among other things.²¹⁹ However, it can be argued that the terms laid out in the TPP agreement, together with HAMP itself, are sufficient to make the TPP a binding loan modification agreement.²²⁰ Alternatively, even if the TPP is not itself a permanent loan modification agreement, it is at least an agreement to modify the terms of the loan at a later date should the borrowers uphold their end of the bargain.²²¹

An alternative interpretation to TPP contract theory is that TPP is only an “estimate” or “part of the application process.”²²² Under this

²¹⁶ Compare *Vida v. OneWest Bank, F.S.B.*, No. 10-987-AC, 2010 WL 5148473, at *7 (D. Or. Dec. 13, 2010) (making exclusive mention of payments rather than the other legal detriments which proponents have stated), and *Rackley*, 2011 WL 2971357, at *4 (discussing the pre-existing duty to make payments and disclose financial information), with *Bosque*, 762 F. Supp. 2d at 352 (asserting that modified mortgage payments alone would not suffice for consideration), and *Stagikas*, 795 F. Supp. 2d at 136 (stating that modified mortgage payments alone would not be suitable for consideration).

²¹⁷ *Bosque*, 762 F. Supp. 2d at 351 (quoting *Bourque v. FDIC*, 42 F.3d 704, 709 (1st Cir. 1994)); RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981).

²¹⁸ See *Grill v. BAC Home Loans Servicing LP*, No. 10-CV-03057-FCD/GGH, 2011 WL 127891, at *3 (E.D. Cal. Jan. 14, 2011) (quoting *Banner Entm't, Inc. v. Superior Court of L.A. Cnty.*, 72 Cal. Rptr. 2d 598 (1998)). This case discusses the need for a meeting of the minds on all material points. *Id.* See also *Bosque*, 762 F. Supp. 2d at 352 (discussing the defense's claims of a lack of definite and essential terms); *Durmic*, 2010 WL 4825632, at *4 (discussing the defense's claim that there was not a suitable contract due to a lack of material terms).

²¹⁹ *Bosque*, 762 F. Supp. 2d at 352; *Durmic*, 2010 WL 4825632, at *4; see *Belyea v. Litton Loan Servicing, LLP*, No. 10-10931-DJC, 2011 WL 2884964, at *8 (D. Mass. July 15, 2011).

²²⁰ See *supra* notes 130-33 (evidencing that there were sufficient terms to avoid a dismissal of the case). The *Durmic* court found that there was sufficient evidence to allow standing but that a full hearing was needed in order to decipher the intent of the parties. *Durmic*, 2010 WL 4825632, at *4.

²²¹ See *supra* notes 131-32 and accompanying text (determining that the terms were sufficient for further exploration in a full trial).

²²² *Rackley v. JPMorgan Chase Bank, N.A.*, No. SA-11-CV-387-XR, 2011 WL 2971357, at *4 (W.D. Tex. July 21, 2011); *Grill v. BAC Home Loans Servicing LP*, No. 10-CV-03057-FCD/GGH, 2011 WL 127891, at *4 (E.D. Cal. Jan. 14, 2011).

rationale, the greatest problem facing borrowers is the requirement for a lender to send a modification agreement.²²³ *Rackley* provides an illustration of the difficulties facing borrowers in that the TPP itself states that “[i]f prior to the Modification Effective Date, (I) the Lender does not provide [the borrower] a fully executed copy of this Plan and the Modification Agreement. . . . the Loan Documents will not be modified and this Plan will terminate.”²²⁴ Although most cases to date have involved signed contracts, borrowers are now able to accept simply through performance, but this could potentially expose them to a statute of frauds defense by servicers in some states.²²⁵ However, the borrower can always argue partial performance as a counter argument to statute of frauds.²²⁶

These differing positions need to be reconciled to provide a clear direction for homeowners attempting to save their homes.²²⁷

IV. CONTRIBUTION

It seems likely that third party beneficiary standing will not survive the scrutiny of most courts and that there is a limited opportunity for TPP contractual obligation theory.²²⁸ However, there is a possibility that the argument asserting that TPP agreements create a new contract could gain steam. This argument might become an accepted basis for standing in the First Circuit due to its support in Massachusetts and has already been accepted by the Seventh Circuit in the *Wigod* case under state common law.²²⁹

HAMP has not only become a frustration for many borrowers but a source of embarrassment to the Treasury Department and a non-incentivizing program to the service providers.²³⁰ HAMP will be

²²³ See *Rackley*, 2011 WL 2971357, at *4 (stating that a modification agreement may only be executed if all obligations were performed, including the borrower receipt of a lender-executed modification); *Grill*, 2011 WL 127891, at *4 (explaining that if a borrower follows all the rules, then the lender *will* send a modification agreement for a signature).

²²⁴ *Rackley*, 2011 WL 2971357, at *4.

²²⁵ Cook-Mack & Parady, *supra* note 16, at 377.

²²⁶ *Id.*

²²⁷ See *infra* Part IV (providing solutions to allow homeowners to bring private actions).

²²⁸ See *supra* Part III (evidencing the court’s reluctance to provide third party beneficiary standing to borrowers and maintaining that the TPP creation of a new contract theory has been limited predominantly to Massachusetts district courts).

²²⁹ See *supra* Part III.B (discussing the various arguments for and against creating a contract under TPP agreements). See generally *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012).

²³⁰ See Morgenson, *supra* note 11 (demonstrating some of the frustration, disgust, and lack of faith that borrowers and agencies involved with borrowers are having). See generally Braucher, *supra* note 2; Gottlieb & Natarelli, *supra* note 25, at 541 (discussing HAMP’s lack

expiring December 31, 2013.²³¹ Lawmakers need to decide what should happen now. Should the HAMP program be extended in its current form? Should the current legislation be modified? Should a decision be made to let HAMP lapse and be supplanted by alternative Making Home Affordable Programs? Or is the entire HAMP program a failure?

Assuming that the HAMP program is renewed or its aims are incorporated into other programs, the effectiveness of the program will hinge on whether the government provides an explicit remedy for homeowners in the SPA. Service providers and the government are likely to agree that the right to private action should be limited and not available to everyone who has a home loan and a desire to modify. However, as recognized by the courts, HAMP “undoubtedly has a goal of assisting homeowners,” and therefore a remedy should be provided to those who have jumped through certain hoops.²³² This Note submits that HAMP should continue and that those who have been enrolled in the TPP program and made their payments as required should explicitly be given standing in the Making Home Affordable Handbook.²³³ This Note suggests that such a clause in the SPA should state as follows:

Upon successful enrollment into the TPP, the borrower will be designated as a third party beneficiary to this Servicer Participation Agreement and thus given standing to bring forth private action based upon the Servicer Participation Agreement. The servicer's receipt of 'the first payment due under the TPP Notice on or before the last day of the month in which the first payment is due (TPP offer deadline) . . . [will be] evidence of the borrower's acceptance of the TPP Notice and its terms and conditions.'²³⁴ However, otherwise eligible borrowers will lose the right to private action under this Servicer

of success in the first year and reasons why the mortgage servicers do not like the program). *But see* Massad, *supra* note 26 (providing increased incentives to participating mortgage servicers).

²³¹ *Homeowner Frequently Asked Questions*, MAKING HOME AFFORDABLE, <http://www.makinghomeaffordable.gov/faqs/homeowner-faqs/Pages/default.aspx> (last visited Dec. 26, 2011).

²³² *See supra* note 177 and accompanying text (evidencing the courts' recognition that HAMP was created with struggling homeowners in mind). Therefore, borrowers should have some level of protection that would not be accorded if action can only be taken by Fannie Mae and Freddie Mac.

²³³ *See generally Handbook 3.4, supra* note 9 (providing the guidelines and rules for which servicers are held, based upon their SPAs).

²³⁴ *Handbook 2.0, supra* note 44.

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*Participation Agreement if they have falsified any of the documentation or have failed to provide modified payments.*²³⁵

The obvious question relating to the proposed solution is: “What happens if HAMP is not renewed?” Even if HAMP is not renewed the issues raised by the shortcomings of the HAMP program will continue to be relevant. Other programs that might be developed in the future, as part of the Making Home Affordable Program, can and should provide standing to private citizens to enforce their rights. Standing should not necessarily be extended to all homeowners, but it should be extended to those who meet the defined threshold requirements, which would pare down the possible number of qualified litigants.

The proposed change to HAMP and other potential future programs would alleviate the conflict between (a) getting TARP money into the hands of homeowners and holding servicers accountable and (b) massive litigation which could seriously burden the courts.

Some may argue that the proposed changes are simply a Band-Aid upon a flesh wound.²³⁶ There are still issues of potential failure by the homeowners to make their modified payments, or the possibility that even if homeowners are heard, they may be unsuccessful in their claims. However, the ability to be heard will at least provide borrowers with more leverage in negotiating a modification or new deal, as well as providing an opportunity for discovery. In its current form, many of the service providers are insulated from even discovery and can simply roll the dice on whether or not Fannie Mae and Freddie Mac will enforce the SPA agreement.²³⁷

Perhaps the greatest concern is that if such a change were to be made to the Handbook then servicers will choose to opt out. According to section 10.C of the SPA, changes to the “rights, duties, or obligations of Participating Servicers” will allow the servicer to opt out.²³⁸ Under section 10.C the servicer is required to continue providing services where the documentation existed prior to the changes in the Handbook.²³⁹ This

²³⁵ See, e.g., Handbook 3.4, *supra* note 9. The author recommends adding the new clause following section 8.7 *Alternative Loss Mitigation Options* as section 8.8 “Right to Private Action Stemming from the TPP.” Italicized portions are the author’s proposed amendments to the guidelines.

²³⁶ See generally Braucher, *supra* note 2 (discussing all of the difficulties that HAMP faced in its first year, not only with the banks but also the homeowners).

²³⁷ See *supra* note 59 (discussing compliance enforcement options allowed by the SPA).

²³⁸ SPA Agreement, *supra* note 59, at section 10.

²³⁹ *Id.* at section 5.C. Section 5.C states the following:

Following the Servicer’s election to opt out of the Second Lien Modification Program, the Servicer will not be required to perform any Services for any new mortgage loans under the Second Lien Modification Program; however, the Servicer must continue to

would mean that anyone who has begun the process of trying to gain a modification or has successfully received a modification would continue to be protected under the previous guidelines. Nonetheless, it is a reasonable fear that some servicers may choose to no longer offer modifications and that the program may lose some opportunities to provide modifications to borrowers.

IV. CONCLUSION

At the beginning of this Note, the story of a hypothetical family illustrates the feelings of helplessness and anger about the inability to control the disposition of their home. The HAMP legislation was purportedly designed specifically to address the needs of a family like the one described.

This Note has explored two questions: (1) Does the borrower have standing as a third party beneficiary of HAMP to assert a claim based on mortgage servicers' alleged violations of HAMP, and (2) Does the borrower have standing under traditional contract law, the law of implied contracts or promissory estoppel, in cases where the borrower was a participant in the Trial Period Plan (TPP) of HAMP and followed the requirements of TPP but was nevertheless denied a loan modification?

The arguments for allowing borrowers to sue the mortgage providers seem to have little traction in the courts at this time. Freddie Mac and Fannie Mae enforcement provisions have failed to protect the class of citizens that the HAMP program was created to serve. For many borrowers, this failure is already a reality. For those currently enrolled in the program, it may be that they cannot be helped because the previous terms would be applicable. The current legislation expires in December 2013. There is widespread opinion that this ineffective program should not continue in its current form.

However, the need for government aid still exists. Many Americans are still reeling and trying to maintain their homes, and it is vitally important to provide protection for them. If the HAMP program is to be salvaged, a more meaningful enforcement mechanism must emerge.

Allowing borrowers who have satisfied the requirements of the program to sue lenders for noncompliance seems like a reasonable approach. By setting a compliance threshold for standing the courts would not be clogged with suits from every disgruntled homeowner;

perform any Services for any mortgage loan for which it had already begun performing Services prior to electing to opt out of the Second Lien Modification Program.

Id.

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rather, this new approach would provide a remedy for mortgage holders who have performed their duties under HAMP and who have a reasonable case that they were unjustly denied modification.

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