Litigating Consumer Protection Acts in the HAMP Context

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I. INTRODUCTION

At the height of the economic recession in 2010, over 2.9 million foreclosure actions were initiated nationally.[1] While the economy has improved, the foreclosure crisis lingers. Millions of Americans will face foreclosure in 2014.[2] The U.S. government responded by implementing the Home Affordable Mortgage Program (HAMP), a Treasury-sponsored initiative that aims to prevent foreclosure by encouraging mortgage loan servicers to modify the mortgages of qualified homeowners.[3] The Treasury Department has extended HAMP multiple times—from its original ending date in 2013 to its present ending date in 2016.[4]

While HAMP has indeed helped homeowners avoid foreclosure, the program has spawned an array of litigation as servicer misconduct runs rampant.[5] As the Ninth Circuit recently noted, "the [HAMP] program seems to have created more litigation than it has happy homeowners."[6] Litigation has had varying success for homeowners. Courts were initially reluctant to enforce Treasury directives regarding HAMP.[7] However, evolving case law has required a shift in strategy for home-

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1. Les Christie, *Foreclosures Hit Six-Year Low in 2013*, CNN MONEY (Jan. 16, 2014, 1:16 AM), http://money.cnn.com/2014/01/16/real_estate/foreclosure-crisis/.

2. *Id.*

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

4. *Secretary Lew Unveils New Efforts to Assist Struggling and Prospective Homeowners, Provide More Affordable Options for Renters*, U.S. DEP'T OF THE TREASURY (June 26, 2014), http://www.treasury.gov/press-center/press-releases/Pages/jl2444.aspx.

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

6. Corvello v. Wells Fargo Bank, N.A., 728 F.3d 878, 880 (9th Cir. 2013).

7. *See generally* Williams v. Timothy F. Geithner, No. 09-1959 ADM/JJG, 2009 WL 3757380 (D. Minn. Nov. 9, 2009).

owners to litigate under common law devices and state statutory law, such as consumer protection acts.[8] When servicers violate HAMP Guidelines, courts should afford homeowners legal recourse after the homeowner brings a consumer protection act claim against the servicer.

Part II of this Comment provides a brief overview of HAMP, including an explanation of the loan modification process. In Part III, the history of HAMP litigation is explored, from its weak beginnings to the mixed success of current claims. Finally, this Comment analyzes how homeowners can successfully litigate HAMP claims using consumer protection acts and how courts should respond to servicers' challenges to these claims.

II. THE HOME AFFORDABLE MODIFICATION PROGRAM

As part of the 2008 bailout of the financial industry, the Bush Administration passed the Emergency Economic Stabilization Act (EESA) of 2008,[9] which authorized the creation of the Making Home Affordable Program (MHA)—an initiative intended to stabilize the housing market and provide relief for homeowners.[10] As part of the MHA, the Treasury Department introduced HAMP.[11] The purpose of HAMP is to reduce the number of foreclosures by encouraging beneficiaries and servicers to modify mortgages for homeowners at risk of default or already in default on their mortgage loan.[12] Guidelines issued by the Treasury Department (HAMP Guidelines) set procedures and rules for participating servicers.[13] While the Obama Administration originally estimated that this program could benefit up to four million homeowners, there were only 939,008 active permanent HAMP loan modifications as of February 2014.[14] This Part explores the roles of HAMP participants, the benefits of HAMP for homeowners, and the process of HAMP loan modification.

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8. Chiles & Mitchell, *supra* note 3, at 198–200.

9. Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201–5253 (2008).

10. MAKING HOME AFFORDABLE PROGRAM, HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES, VERSION 4.4, at 14 (2014) [hereinafter MHA HANDBOOK], *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_44.pdf.

11. Chiles & Mitchell, *supra* note 3, at 194.

12. *Id.* at 194–95.

13. MHA HANDBOOK, *supra* note 10, at 14.

14. Chiles & Mitchell, *supra* note 3, at 194; U.S. DEP'T OF THE TREASURY, MAKING HOME AFFORDABLE PROGRAM PERFORMANCE REPORT THROUGH FEBRUARY 2014 (2014) [hereinafter HAMP SUMMARY], *available at* http://www.treasury.gov/initiatives/financial-stability/reports/Documents/February%202014%20MHA%20Report%20final.pdf.

A. HAMP Participants

HAMP creates a relationship between the U.S. Department of the Treasury, participating servicers, and homeowners whose residence is secured by a mortgage.[15] The Treasury Department oversees all MHA programs and publishes the HAMP Guidelines that regulate the loan modification process.[16]

Both government-sponsored entities (GSEs), including Freddie Mac and Fannie Mae, and non-government-sponsored entities (non-GSEs) participate in HAMP.[17] Non-GSEs participate in HAMP voluntarily,[18] and typically do so because they received Troubled Asset Relief Program (TARP) funds during the 2008 financial industry bailout.[19] Non-GSEs, including Bank of America, Wells Fargo, and JP Morgan Chase, commit to following HAMP Guidelines through signing a Servicer Participation Agreement (SPA) that imposes contractual obligations on the servicer to consider all eligible loans for MHA programs unless otherwise prohibited.[20] HAMP participants service approximately 89% of all first-lien mortgages.[21]

Homeowners must fit a narrow set of criteria to qualify for a HAMP loan modification.[22] This Comment only examines HAMP Tier 1 modifications as these are the oldest, most common, and as such, the most widely litigated type of HAMP modifications. Basic criteria for a HAMP Tier 1 modification include: (1) the mortgage is a first-lien loan originating on or before January 1, 2009; (2) the homeowner has a documented financial hardship; (3) the mortgage loan is secured by a single family property; (4) the mortgage loan was not previously modified under HAMP; (5) the mortgage loan is in default or "default is reasonably foreseeable"; (6) the residence is owner-occupied; and (7) the homeowner's current monthly mortgage payment is greater than 31% of his gross monthly income.[23] These criteria exclude a number of homeowners, including those who have less conventional sources of income or are un-

15. *See* MHA HANDBOOK, *supra* note 10, at 14.

16. *Id.*

17. *Id.*

18. *Home Affordable Modification Program (HAMP)*, U.S. DEP'T OF THE TREASURY, http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/hamp.aspx (last updated July 22, 2012, 2:26 PM).

19. Chiles & Mitchell, *supra* note 3, at 195.

20. MHA HANDBOOK, *supra* note 10, at 23. Exceptions to SPA include pooling and servicing agreements (PSAs). *Id.* PSAs govern the relationship between beneficiaries and servicers. *Id.*

21. Chiles & Mitchell, *supra* note 3, at 195.

22. MHA HANDBOOK, *supra* note 10, at 71–79.

23. *Id.* at 72–73.

employed.[24] However, these homeowners may qualify under other MHA programs, including the Home Affordable Unemployment Program, the Home Affordable Foreclosure Alternatives Program, or other foreclosure alternatives, including in-house modifications, short sales, or deed-in-lieu.[25] Even homeowners who meet the HAMP criteria are not guaranteed a loan modification, as the process requires a substantial amount of further effort by both the homeowner and the servicer.

B. Benefits of HAMP Participation for Homeowners

Participation in HAMP provides several advantages to homeowners that are unavailable outside of the HAMP context. Perhaps the most important benefit is that once a homeowner submits a complete loan modification application[26] to the servicer, the servicer may not begin or continue foreclosure proceedings.[27] Discontinuation of foreclosure proceedings is valuable as it gives the homeowner additional time in his residence and allows him time to explore alternatives to foreclosure. Another advantage of HAMP is increased transparency in the communication process between homeowners and servicers.[28] HAMP Guidelines provide that servicers must assign homeowners a "single point of contact"—an employee of the servicer that the homeowner can contact for information regarding their loan modification application.[29] HAMP Guidelines also specify that the servicer must provide certain notices to the homeowner, including when an application is considered complete and whether the loan modification has been approved.[30] This more open system of communication is imperfect at best, but it provides the homeowner with some important notices, such as when the application has been received. Finally, a servicer cannot charge a homeowner any fees to be considered for a loan modification.[31] These benefits are unique to HAMP, and as such, it places homeowners on a more even playing field with servicers.

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24. For example, a less conventional source of income is a charitable contribution by a church to a homeowner. This cannot be considered during a HAMP modification, even if properly documented. *Id.* at 105.

25. *Id.* at 15. These options are beyond the scope of this paper and will not be discussed further.

26. Servicers can reject homeowners on the grounds that their application is incomplete, but HAMP Guidelines do not require the servicer to describe how the application is "incomplete."

27. MHA HANDBOOK, *supra* note 10, at 89–92.

28. *See id.* at 79.

29. *Id.* at 64.

30. *Id.* at 79–88.

31. *Id.* at 80.

C. The HAMP Loan Modification Process

The HAMP loan modification process typically starts when the homeowner submits a loan modification application.[32] The servicer then performs a two-step analysis to consider whether the homeowner is eligible for a loan modification: (1) the waterfall approach, and (2) the Net Present Value (NPV) test.[33] Next, servicers offer approved homeowners a trial period plan (TPP) to ensure homeowners are able to make the modified monthly mortgage payments before a permanent loan modification is offered.[34] Completion of the entire process may span anywhere from a few months to a few years.[35]

1. The Loan Modification Application

Homeowners must submit a complete loan modification application to their mortgage loan servicer for consideration.[36] This application includes forms required by HAMP Guidelines, documentation of income, personal expenses worksheets, and tax returns.[37] Income may come from several sources, including salary/hourly wages, social security benefits, spousal and domestic support, rental income, income from a business, and support from other members of the household.[38] However, unemployment benefits are not considered as acceptable income under HAMP.[39] Income is consistently a problem for homeowners, as many homeowners default after experiencing a loss of income.[40] It is typical for homeowners to send several loan modification applications to servicers, as servicers can deny applications for being untimely or incomplete.[41] Many loan applications result in a paper chase, where the servicer

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32. *Id.* at 92–100.

33. Chiles & Mitchell, *supra* note 3.

34. *Id.*

35. *See, e.g.*, Morris v. BAC Home Loans Servicing, L.P., 775 F. Supp. 2d 255, 256–57 (D. Mass. 2011) (stating that homeowners submitted applications in January and February 2010 and commenced litigation two months later). *But see In re* JPMorgan Chase Mortg. Modification Litig., 880 F. Supp. 2d 220, 228 (D. Mass. 2012) (alleging that the homeowner applied for a modification starting May 2009 and was denied 14 months later); Sutcliffe v. Wells Fargo Bank, N.A., 283 F.R.D. 533, 537–39 (N.D. Cal. 2012) (alleging that homeowners' loan modification process started in 2009 and continued through December 2011).

36. MHA HANDBOOK, *supra* note 10, at 92.

37. *Id.* at 100–05.

38. *Id.*

39. *Id.* at 105.

40. *See* Chris Fleisher, *HAMP Limitations Frustrate Homeowners Trying to Avoid Foreclosure*, TRIBLIVE (Sept. 6, 2014, 9:00 PM), http://triblive.com/business/headlines/6659825-74/hamp-program-mortgage#axzz3DhrvcFyS.

41. *See, e.g.*, *Sutcliffe*, 238 F.R.D. at 537–39 (alleging that homeowner submitted several loan modification applications).

continually asks for additional or updated paperwork, extending the loan modification process and having many homeowners rack up the amount in arrears.[42]

Once the servicer does determine that the application is complete, it forwards the application to its underwriting department for review.[43] The review consists of the four to five-step waterfall approach, followed by the NPV test.

2. The Waterfall Approach

The overall goal of a loan modification is to bring the homeowner current on their mortgage loan and to lower the homeowner's mortgage payment to a target of 31% of their current monthly income.[44] Servicers' underwriters use a waterfall approach to reach the target payment. The analysis generally involves up to five steps: (1) capitalization; (2) interest rate reduction; (3) term extension; (4) principal forbearance; and (5) principal reduction alternative.[45]

First, the mortgage loan is capitalized.[46] A servicer "capitalizes accrued interest, out-of-pocket escrow advances to third parties, and any required escrow advances that will be paid to third parties by the servicer."[47] The servicer also capitalizes any "servicing advances that are made for costs and expenses incurred in performing servicing obligations" such as foreclosure fees.[48] Capitalization brings the mortgage current and out of default.[49] If the new monthly mortgage payment after capitalization is not equal to or less than 31% of the homeowner's monthly income, the underwriter moves to lower the interest rate.[50]

Next, the interest rate of the mortgage is lowered in increments of .0125% until the 31% target payment is met, or until the interest rate falls to the floor rate of 2.0%.[51] This step is especially beneficial to homeowners who have an adjustable-rate mortgage as the interest rate becomes fixed for the lifetime of the loan.[52] Then, if necessary, the servicer ex-

42. Arrears is the total amount past due, or rather, the total amount a homeowner would need to pay to become current on their mortgage loan.

43. MHA HANDBOOK, *supra* note 10, at 107.

44. Chiles & Mitchell, *supra* note 3, at 196.

45. *Id.*

46. MHA HANDBOOK, *supra* note 10, at 111.

47. *Id.*

48. *Id.*

49. *Id.*

50. Chiles & Mitchell, *supra* note 3, at 196.

51. MHA HANDBOOK, *supra* note 10, at 111–12.

52. *See id.* at 112.

tends the term of the loan up to 480 months.[53] If the 31% target is not met by term extension, the fourth step in the waterfall process is a principal forbearance.[54] Principal forbearances[55] do not accrue interest, but the amount forborn will be due upon transfer of property or maturity of the mortgage loan, whichever occurs first.[56] A possible fifth step is principal forgiveness, where the servicer forgives part of the mortgage loan in order to allow the homeowner to qualify for HAMP.[57] This is not required by HAMP, and as a result, the majority of HAMP loan modifications do not include principal forgiveness.[58]

If the monthly mortgage payment cannot be reduced to the 31% target payment by the four steps in the waterfall approach, and the servicer is unwilling to forgive part of the unpaid principal balance, then the application will be denied.[59] On the other hand, if the monthly mortgage payment is reduced to the 31% threshold through the waterfall approach, then the underwriter moves to the NPV test.[60]

3. The NPV Test

Generally, NPV is the value of an investment over time.[61] In this context, underwriters use NPV to calculate the value of the mortgage loan under two different scenarios: (1) if the homeowner receives a loan modification, and (2) if the servicer forecloses on the property instead.[62] The NPV considers a variety of inputs: homeowner income, current property value, risk of redefault, etc.[63] After calculating these inputs, the underwriter has the value of the mortgage loan under each of the two alternatives.[64] If the NPV for the modified mortgage is higher than the NPV for the nonmodified mortgage—the modified mortgage is a higher-

53. *Id.*

54. *Id.*

55. A principal forbearance occurs when the servicer agrees to let the homeowner pay off a portion of the total principal amount owed a later date, usually when the loan has matured or the property is sold.

56. MHA HANDBOOK, *supra* note 10, at 112.

57. *Id*. at 114.

58. *See id.*; *see also* Shahien Nasiripour, *Obama's HAMP Initiative Struggling to Help Homeowners*, HUFFINGTON POST (July 24, 2013, 11:37 AM), http://www.huffingtonpost.com/2013/07/24/obama-hamp-mortgage_n_3644187.html ("Treasury data" shows that "about one in seven HAMP modifications feature principal forgiveness").

59. *See* Chiles & Mitchell, *supra* note 3, at 196.

60. *Id.*

61. Arcadia Corbett, Demystifying Net Present Value (Aug. 21, 2013) (unpublished manuscript) (on file with Access to Justice Institute, Seattle University School of Law).

62. Chiles & Mitchell, *supra* note 3, at 196.

63. For a more in-depth look at inputs, see Corbett, *supra* note 61.

64. *Id.*

valued investment than the foreclosed home—then the modification passes the NPV test, and the servicer must approve the loan modification.[65] The servicer has discretion to approve a modification if it fails the NPV test.[66]

4. The Trial Period Plan

After submitting a complete loan modification application, undergoing the waterfall approach, and passing the NPV test, the homeowner is approved for a loan modification.[67] Nonetheless, the servicer wants to be assured that the homeowner is willing and able to make timely mortgage payments.[68] The servicer arranges a TPP where the homeowner makes a minimum of three payments that are at the target payment amount determined by the waterfall approach.[69] The benefits of a TPP include a continued stay of foreclosure proceedings and a reduced monthly mortgage payment.[70] However, homeowners should be aware that TPPs have credit consequences, as the homeowner is not submitting full mortgage payments as required under the original, still-valid mortgage loan contract.[71] The homeowner must submit the payments on time or the loan modification application will be rejected.[72] If the homeowner submits three or more timely TPP payments, then the servicer should offer the homeowner a permanent loan modification.[73] The permanent loan modification may include a slightly lower or higher monthly mortgage payment than the TPP payment, as any changes in the homeowner's financial situation are accounted for in the permanent loan modification.[74]

5. The Permanent Loan Modification

Upon completion of a TPP, the servicer is required to offer the homeowner a permanent loan modification.[75] Once the permanent loan

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65. MHA HANDBOOK, *supra* note 10, at 122–23.

66. *Id.*

67. *Id*. at 126.

68. *See id.* at 127.

69. *Id.* at 126–27.

70. *Id.*

71. *See, e.g.*, Wigod v. Wells Fargo, 673 F.3d 547, 574 (7th Cir. 2012) (alleging that homeowner suffered credit consequences from making TPP payments).

72. MHA HANDBOOK, *supra* note 10, at 127.

73. *Id.* This should happen but is not always the case. A large source of HAMP litigation comes when completed TPPs fail to result in permanent modifications. *See, e.g.*, *Wigod*, 673 F.3d 547.

74. MHA HANDBOOK, *supra* note 10, at 130–31.

75. *Id.*

modification is signed and executed, the homeowner becomes current on their mortgage loan and submits monthly payments to the servicer that are typically around 31% of the homeowner's monthly income.[76] Homeowners save a median average of $543 per month after executing a permanent loan modification.[77]

D. Violation of HAMP Guidelines

In the pursuit of obtaining a HAMP loan modification, homeowners face many hurdles placed by the servicer resulting in a delayed process, a wrongful denial, or both, of the loan modification application. This can occur for a variety of reasons, including the servicer's violation of HAMP Guidelines.[78] Participating servicers have a contractual obligation to follow HAMP Guidelines through their SPA.[79] HAMP Guidelines do not have the force of law,[80] but homeowners have a few different outlets for remedies when their servicer violates HAMP Guidelines. First, homeowners may "escalate" their case through the Treasury Department's MHA Help or the HAMP Solution Center.[81] The purpose of these programs is to work "with the servicer to identify and resolve the case in a manner consistent with MHA program guidelines."[82] The MHA Help or HAMP Solution Center contacts the servicer and then provides the homeowner with an explanation.[83] However, this option does not have the force of law and typically only provides information to the homeowner. Similar to the MHA Help and HAMP Solution Center, the Consumer Financial Protection Bureau also has a complaint system that allows homeowners to receive information from their servicer.[84] Again, this option does not have the force of law.[85] Finally, homeowners may bring their situation to their state's Attorney General, as the National Mortgage Settlement reinforces obligations on certain servicers to follow the HAMP Guidelines.[86] The National Mortgage Settlement is outside

76. *Id.*

77. HAMP SUMMARY, *supra* note 14.

78. Kiel, s*upra* note 5 (for example, some servicers allegedly engage in deceptive behavior by sending mass "blitz" denials, regardless of a homeowner's actual eligibility).

79. MHA HANDBOOK, *supra* note 10, at 23.

80. Chiles & Mitchell, *supra* note 3, at 197.

81. MHA HANDBOOK, *supra* note 10, at 60–63.

82. *Id.* at 60.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Joint State–Federal National Mortgage Servicing Settlement FAQ*, JOINT STATE–FEDERAL NAT'L MORTG. SERVICING SETTLEMENTS, http://www.nationalmortgagesettlement.com/faq (last visited Apr. 7, 2014).

the scope of this paper. A third option to resolve HAMP violations is through litigation. Litigation of any issue regarding the mortgage loan cannot disqualify a homeowner for a HAMP loan modification.[87] Violations of HAMP guidelines have been litigated in federal (including bankruptcy) and state courts under a wide array of claims and with a wide array of outcomes.

III. A HISTORY OF HAMP LITIGATION

Homeowners brought early HAMP cases under three legal theories: (1) private right of action in the Emergency Economic Stabilization Act (EESA); (2) breach of contract as third-party beneficiaries of a SPA; and (3) procedural due process rights. However, none of these approaches have proved successful.

A. Private Right of Action

State and federal courts have universally held that HAMP does not include a private right of action.[88] In *Marks v. Bank of America*, a homeowner filed suit against her servicer, claiming that the servicer violated HAMP Guidelines and wrongfully foreclosed on her property.[89] The homeowner argued that there was congressional intent for homeowners to have enforceable rights against their servicers under HAMP, as the program's overarching purpose is to protect the property interests of at-risk homeowners against unnecessary foreclosures.[90] The homeowner also argued that there is no explicit preclusion to a private right of action for homeowners in the EESA or HAMP Guidelines.[91] The court disagreed and held that "nowhere in the HAMP Guidelines, nor in the EESA, does it expressly provide for a private right of action."[92] The court reasoned that because EESA gave compliance authority to other entities, judicial review of HAMP violations under a private right of action would not comply with legislative intent.[93] This holding is common,[94] and HAMP cases should not be litigated under this theory.

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87. MHA HANDBOOK, *supra* note 10, at 74.

88. *See, e.g.*, Marks v. Bank of Am., N.A., No. 03:10-CV-08039-PHX-JAT, 2010 WL 2572988 (D. Ariz. June 22, 2010).

89. *Id.* at *1.

90. Response to Motion to Dismiss at *7–9, Marks v. Bank of Am., N.A., 03:10-CV-08039-PHX-JAT, 2010 WL 2572988 (D. Ariz. June 22, 2010), 2010 WL 3416138.

91. *Id.* at *16.

92. *Marks*, 2010 WL 2572988, at *6.

93. *Id.* at *6–7.

94. *See, e.g.*, Vida v. OneWest Bank, F.S.B., No. Civ. No. 10–987–AC, 2010 WL 5148473 (D. Or. Dec. 13, 2010); Hoffman v. Bank of Am., N.A., No. C 10-2171 SI, 2010 WL 2635773 (N.D.

B. Third-Party Beneficiaries

Courts have also rejected the theory that homeowners can litigate against servicers as third-party beneficiaries of the SPAs.[95] SPAs create a contractual obligation between the Treasury Department and a participating servicer to follow HAMP Guidelines.[96] For a person to qualify as a third-party beneficiary, generally, the person must show that the contracting parties created a promise with the intention of benefiting said third person.[97] In addition, courts have added a reasonableness element for government contracts.[98] In *Escobedo v. Countrywide Home Loans, Inc.*, a homeowner sued under the third-party beneficiary theory and claimed his servicer failed to approve his loan modification application even though he qualified under HAMP.[99] The court held that the homeowner was not a third-party beneficiary because it would be unreasonable for the homeowner to rely on the promises in the servicer's SPA.[100] Furthermore, the court reasoned that the SPAs only require servicers to consider homeowners for loan modifications with no requirement to actually modify mortgages.[101]

Similarly, *In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation* involved a class of homeowners suing under a third-party beneficiary theory.[102] The Massachusetts District Court stated: "In determining whether a plaintiff is a third-party beneficiary to a government contract, courts must first determine whether the contract intended to provide the plaintiff with a legal cause of action, not merely whether the plaintiff is within the class the contract was intended to benefit."[103] The court held that the homeowners were not third-party beneficiaries, finding no evidence that Congress intended the SPA

Cal. June 30, 2010); Manabat v. Sierra Pac. Mortg. Co., CV F 10-1018 LJO JLT, 2010 WL 2574161 (E.D. Cal. June 25, 2010).

95. Escobedo v. Countrywide Home Loans, Inc., No. 09CV1557 BTM(BLM), 2009 WL 4981618, at *2 (S.D. Cal. Dec. 15, 2009).

96. MHA HANDBOOK, *supra* note 10, at 23.

97. *See Escobedo*, 2009 WL 4981618, at *2, *6–7; RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979).

98. *Escobedo*, 2009 WL 4981618, at *6–7.

99. *Id.*

100. *Id.* at *3.

101. *Id.*

102. *In re* Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig., No. CIV.A.10-MD-02193-RWZ, 2011 WL 2637222, at *1 (D. Mass. July 6, 2011) (finding no intent to create private right of action for third-party beneficiaries).

103. *See id.* at *3; *see generally* Astra USA, Inc. v. Santa Clara Cnty., Cal., 131 S. Ct. 1342 (2011).

to provide homeowners with a private right of action.[104] Precedent has uniformly held that homeowners are not third-party beneficiaries of HAMP.[105]

C. Procedural Due Process

Finally, courts have held that HAMP does not expand homeowners' procedural due process rights.[106] In *Williams v. Timothy F. Geithner*, plaintiff homeowners argued that HAMP Guidelines created a right to a loan modification, and thus created a property interest.[107] The homeowners claimed that they were deprived of this property interest by their servicers without the procedural due process right of notice.[108] Homeowners additionally argued that HAMP Guidelines supplemented this procedural due process right of notice with specific notice duties for servicers.[109] The court ruled against the homeowners, declaring that HAMP did not create any property interests in addition to the property interests inherent in the homeowners' mortgage loan contracts.[110] The court reasoned that there was no absolute right to a loan modification guaranteed under a plain language reading of the HAMP Guidelines: "It is not 'language of an unmistakably mandatory character.'"[111] In conclusion, HAMP Guidelines provide no additional procedural due process rights to homeowners.[112]

D. Current HAMP Litigation

After the failure of the private right of action, third-party beneficiary theories, and procedural due process claims, HAMP litigation began to turn to common law and state statutory claims.[113] Litigation under torts claims such as negligence, fraud, misrepresentation, and infliction of emotional distress, in addition to breach of contract claims—outside

104. *In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.*, 2011 WL 2637222, at *3.

105. *See, e.g.*, Pennington v. PNC Mortg., No. 2:10CV361, 2010 WL 8741958, at *4 (E.D. Va. Aug. 11, 2010).

106. Williams v. Timothy F. Geithner, No. 09-1959 ADM/JJG, 2009 WL 3757380, at *5–7 (D. Minn. Nov. 9, 2009).

107. *Id.* at *5.

108. *Id.* at *4.

109. *Id.* at *5.

110. *Id.* at *6.

111. *Id.*

112. *See generally id.*

113. *See* Chiles & Mitchell, *supra* note 3, at 200.

of the SPA context—began to fill the courts.[114] These claims have had mixed results.[115]

Breach of contract claims have become one of the most prevalent and successful trends in HAMP litigation.[116] In a landmark Seventh Circuit case, *Wigod v. Wells Fargo*, the homeowner entered a TPP agreement with the servicer.[117] The terms of the TPP agreement provided that the servicer would permanently modify the homeowner's mortgage upon completion of four timely TPP payments.[118] The homeowner alleged that she fully complied with the terms of the TPP agreement, and the servicer then breached the TPP by refusing to modify her mortgage.[119] The homeowner sued, arguing that the TPP was a valid contract that created an obligation on the servicer to permanently modify her mortgage loan in exchange for her completion of the TPP payments.[120] In considering a motion to dismiss, the court held that the homeowner's allegations, if true, sustained a breach of contract claim against the servicer.[121] The Ninth Circuit followed *Wigod* in *Corvello v. Wells Fargo Bank, N.A.*, and held that failure to permanently modify a homeowner's mortgage loan after promising to do so in a TPP agreement is a breach of contract.[122] These are promising results for homeowners who reach the TPP stage, but servicers are changing their practices to avoid making conditional promises of permanent loan modifications in TPPs,[123] and this legal theory can only help homeowners offered a TPP. In contrast, homeowners at any stage in the loan modification process are potentially able to litigate under consumer protection act (CPA) violations.

IV. CONSUMER PROTECTION ACT CLAIMS IN HAMP LITIGATION

CPAs are state statutes designed to "regulate business activities [and] provid[e] a more equitable balance in the relationship of consumers to persons conducting such activities."[124] These statutes provide relief for

114. *Id.*

115. *Id.* at 194 (discussing various state law tort claims in the HAMP context).

116. Arsen Sarapinian, Note, *Fighting Foreclosure: Using Contract Law to Enforce the Home Affordable Modification Program (HAMP)*, 64 HASTINGS L.J. 905, 919 (2013).

117. Wigod v. Wells Fargo, N.A., 673 F.3d 547, 558 (7th Cir. 2012).

118. *Id.* at 558–59.

119. *Id.*

120. *Id.*

121. *See id.* at 559.

122. Corvello v. Wells Fargo Bank, N.A., 728 F.3d 878, 884–85 (9th Cir. 2013).

123. *See* Reitz v. Nationstar Mortg., LLC., 954 F. Supp. 2d 870, 885 (E.D. Mo. 2013) (showing an example of language in the TPP that did not obligate servicer to modify a mortgage after completion of a TPP).

124. Donald M. Zupanex, Annotation, *Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts*, 89 A.L.R.3D 449 § 2(a) (1979).

consumers when businesses engage in unfair or deceptive acts or practices that are not otherwise prohibited by statute.[125] Most CPAs have intentionally broad language that gives great discretion to the courts to define what is unfair or deceptive.[126] Types of relief available vary from state to state, but typically include injunctive relief and actual damages.[127] Actions that could be considered unfair or deceptive acts or practices include general misrepresentations and fraud.[128] While misrepresentations and fraud may be actionable on their own, some CPA statutes provide that these claims do not have to meet all the common law elements of their name to be litigated as CPA violations.[129] Additionally, some states limit CPA claims to actions that affect the public interest.[130] This Part analyzes (1) the elements of a HAMP CPA claim as illustrated in a recent Massachusetts case; (2) what constitutes unfair and deceptive acts or practices in the HAMP context; and (3) other factors considered by the courts when they review these CPA claims.

A. Massachusetts and Morris v. BAC Home Loans Servicing, L.P.

Massachusetts has seen its fair share of HAMP litigation under CPA claims. Massachusetts' CPA is typical: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[131] Relief available to consumers in Massachusetts includes compensatory damages, injunctive relief, attorneys' costs and fees, and double or treble damages.[132] "To prevail on a [CPA] claim, the plaintiff 'must prove that a person who is engaged in trade or business committed an unfair or deceptive trade practice and that the [plaintiff] suffered a loss of money or property as a result.'"[133]As the U.S. District Court for the District of Massachusetts recently noted, "[C]onsumer protection statutes—and Massachusetts' broadly interpreted [CPA] in particular—have become an attractive alternative means of attempting to recover for alleged HAMP violations where no action is otherwise available."[134]

125. *See id.*
126. *Id.*
127. *Id.*
128. *Id.* §§ 3(a), (4).
129. *Id.* § 2(a).
130. *Id.* § 3(c).
131. MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (West 2014).
132. 31 JOSEPH R. NOLAN & LAURIE J. SARTORIO, MASSACHUSETTS PRACTICE SERIES, EQUITABLE REMEDIES § 28.8 (3d ed. 2011).
133. Morris v. BAC Home Loans Servicing, L.P., 775 F. Supp. 2d 255, 259 (D. Mass. 2011).
134. Okoye v. Bank of N.Y. Mellon, No. 10-11563-DPW, 2011 WL 3269686, at *7 (D. Mass. July 28, 2011).

Homeowners have successfully litigated HAMP violations under Massachusetts' CPA in large number.[135] For example, in *Morris v. BAC Home Loans Servicing, L.P.*, the homeowners experienced financial hardship and defaulted on their mortgage loan.[136] The homeowners submitted multiple HAMP loan modification applications to their servicer, Bank of America.[137] According to the homeowners, Bank of America sent them "a non-HAMP modification agreement that did not comply with HAMP [G]uidelines."[138] The homeowners also claimed that Bank of America failed to acknowledge receipt of their loan modification application and failed to respond to their application in a timely manner.[139] If true, all are clear violations of HAMP Guidelines.[140] The homeowners filed suit, alleging, among other claims, that Bank of America engaged in unfair or deceptive acts or practices by violating specific HAMP Guidelines.[141]

The court reasoned that violations of HAMP Guidelines are not per se CPA violations, but the violations can be used as evidence of a CPA violation if the alleged action is independently unfair or deceptive.[142] Under this standard, the homeowners had to prove three elements: (1) that Bank of America engaged in unfair or deceptive acts or practices; (2) that the homeowners suffered loss or injury; and (3) that loss or injury was proximately caused by Bank of America's actions.[143]

For the first element, the homeowners argued that violating HAMP Guidelines was an unfair practice, as Bank of America has made representations to the public (via its SPA) that it would abide by these guidelines.[144] For the second element, the homeowners alleged that they suffered loss or injury by the damage to their credit, the loss of time spent preparing the loan modification application (in some instances, submitting the application multiple times), the accumulating interest, and the unnecessary initiation of foreclosure action by Bank of America.[145] For the third element, the homeowners argued that Bank of America's failure to timely evaluate the homeowners for HAMP was the proximate cause

135. *Morris*, 775 F. Supp. 2d at 259.
136. *See id.* at 257.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *See id.*
142. *See id.* at 259.
143. *Id.*
144. *Id.*
145. *Id.* at 260.

of the wrongful continuation of foreclosure proceedings and substantial arrearages.[146]

The court held that if the facts alleged were true, Bank of America engaged in unfair or deceptive acts or practices by repeatedly failing to respond to the homeowners' complete loan modification applications.[147] The court agreed with the homeowners that Bank of America agreed to consider loan modification applications in its SPA and failing to do so was inherently unfair.[148] This was a great victory for homeowners. This result, however, is not universal, and courts continually redefine what HAMP violations are considered unfair or deceptive.

B. HAMP Violations as Unfair or Deceptive Acts or Practices

In the HAMP context, the staple of any CPA claim is proof that the servicer engaged in unfair or deceptive acts or practices. As most CPAs do not statutorily define "unfair" or "deceptive," courts have broad discretion to determine whether a HAMP violation supports a CPA claim. However, several HAMP cases have given guidance as to which violations of HAMP Guidelines are considered unfair or deceptive.[149]

1. What Actions are Unfair or Deceptive?

Violations of some HAMP Guidelines have been successfully litigated as unfair or deceptive. These violations include:

1. "instructing mortgagors to stop making mortgage payments with the false assurance that doing so will not hurt their credit scores and is a necessary step in obtaining a loan modification;"
2. "misrepresenting the status of loan modification applications;"
3. "misrepresenting the status of mortgagors' accounts;" and
4. "refusing to put statements in writing when asked."[150]

Furthermore, misrepresentations about HAMP eligibility requirements, misrepresentations about a modification complying with HAMP,

146. *Id.*

147. *See id.*

148. *Id.* at 160.

149. *See generally In re* JPMorgan Chase Mortg. Modification Litig., 880 F. Supp. 2d 220, 237–38 (D. Mass. 2012); Ansanelli v. JP Morgan Chase Bank, N.A., No. C 10-03892 WHA, 2011 WL 1134451 (N.D. Cal. 2011); Fletcher v. OneWest Bank, FSB, 798 F. Supp. 2d 925, at 930 (N.D. Ill. March 28, 2011); Okoye v. Bank of N.Y. Mellon, No. 10-11563-DPW, 2011 WL 3269686, at *9–10 (D. Mass. July 28, 2011).

150. *In re JPMorgan Chase Mortg. Modification Litig.*, 880 F. Supp. 2d at 237.

and failure to grant a permanent loan modification after completion of a TPP have all been considered unfair or deceptive acts or practices.

Misrepresenting that a homeowner must be in default in order to apply for a loan application is an unfair act.[151] In *Fletcher v. OneWest Bank*, the servicer allegedly told the homeowner that she must default on her mortgage loan in order to apply for a HAMP loan modification.[152] The homeowner argued that this misrepresentation was unfair and deceptive, as she relied upon it and purposefully defaulted on her mortgage.[153] The servicer responded that, if true, this was a misrepresentation of law, not fact, and the homeowner could not have reasonably been expected to rely on this statement.[154] The U.S. District Court for the Northern District of Illinois refused to dismiss the CPA claim because it disagreed with the servicer's characterization of the statement as a misrepresentation of law.[155] The court reasoned:

> Depending on how the statement was worded, it might have been a straightforward statement about how Fletcher could legally qualify for a loan modification under HAMP. However, it may have also been a factual statement about when OneWest would consider her for a loan modification. The statement would have been deceptive since OneWest had agreed to follow the HAMP [G]uidelines, but it was not necessarily a statement about what those guidelines were.[156]

Misrepresenting that a loan modification complies with HAMP Guidelines can also be unfair or deceptive.[157] In *Sutcliffe v. Wells Fargo*, the homeowner argued that the servicer engaged in unfair or deceptive acts or practices by offering the homeowner a loan modification that did not comply with HAMP Guidelines.[158] In holding that the facts alleged a sufficient CPA violation, the court reasoned that the homeowner could have reasonably "understood [the loan modification] as offering a trial plan that complied with HAMP when in fact, it did not."[159]

Failing to grant a permanent modification after completion of a TPP can also result in a CPA violation.[160] In *Okoye v. Bank of New York*

151. *Fletcher*, 789 F. Supp. 2d at 934.
152. *Id.*
153. *Id.* at 928–29, 934.
154. *Id.* at 934.
155. *Id.*
156. *Id.*
157. *See* Sutcliffe v. Wells Fargo Bank, N.A., 283 F.R.D. 533, 549 (N.D. Cal. 2012).
158. *Id.*
159. *Id.*
160. Okoye v. Bank of N.Y Mellon, No. 10-11563-DPW, 2011 WL 3269686, at *10 (D. Mass. July 28, 2011).

Mellon, the homeowners alleged that their servicer violated HAMP Guidelines by failing to modify the homeowners' mortgage after successful completion of a TPP and after several representations by the servicer promising such action.[161] Furthermore, HAMP Guidelines proscribe the result promised by the servicer.[162] The court allowed the claim to survive summary judgment.[163] The legally significant fact here was not that a HAMP Guideline proscribed completion of a TPP shall result in a permanent loan modification, but that the servicer made a representation about such a result.[164] The court considered this misrepresentation independently unfair.[165]

2. What Actions Are Not Unfair or Deceptive?

Courts have little patience for litigation of technical violations of HAMP and summarily dismiss complaints that allege only these types of violations.[166] Examples include clerical errors that resulted in wrongfully sent notices or untimely reviews of a loan modification application.[167] "[D]ecisions generally have required allegations of more than mere technical violations and clerical errors to support a [CPA] claim predicated on HAMP violation."[168] This only reinforces the principle that any violation of a HAMP Guideline is not necessarily unfair or deceptive.[169]

C. Other Considerations

In addition to the general requirements of CPA claims, courts consider several other factors to determine whether a CPA claim based on HAMP violations should be dismissed.[170] For example, Massachusetts developed its own set of elements for addressing these claims:

> (1) [H]ave plaintiffs adequately plead that defendant violated HAMP; (2) are those violations of the type that would be independently actionable conduct under chapter 93A [Massachusetts'

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161. *Id.* at *6–7.

162. MHA HANDBOOK, *supra* note 10, at 131.

163. *Okoye*, 2011 WL 3269686, at *10.

164. *Id.*

165. *Id.*

166. *Id.* at *9.

167. Kozaryn v. Ocwen Loan Servicing, LLC, 784 F. Supp. 2d 100, 103 (D. Mass. 2011); Morris v. BAC Home Loans Servicing, L.P., 775 F. Supp. 2d 255, 263 (D. Mass. 2011) (stating plaintiff's allegations that the servicer did not timely provide appropriate notifications is not enough to substantiate a CPA violation).

168. *Okoye*, 2011 WL 3269686, at *9; *see also Kozaryn*, 784 F. Supp. 2d at 103.

169. *Kozaryn*, 784 F. Supp. 2d at 103.

170. *Morris*, 775 F. Supp. 2d at 259 (considering policy rationale); *Okoye*, 2011 WL 3269686, at *8 (considering independence of claim from HAMP).

> CPA] even absent violation of a statutory provision (i.e. are the violations unfair or deceptive); and (3) if the conduct is actionable, is recovery pursuant to chapter 93A compatible with the "objectives and enforcement mechanisms" of HAMP?[171]

These three elements, well established in Massachusetts, are also found in variants throughout most of the successfully litigated HAMP CPA claims.[172] This section focuses on these common elements of successful HAMP CPA cases: (1) violations of HAMP guidelines as evidence of the action being unfair or deceptive; (2) actions being pleaded as unfair or deceptive independent of HAMP; and (3) policy rationale for HAMP CPA litigation.

1. Violations of HAMP Guidelines as Evidence

Although CPAs vary as to whether the unfair act must be "tethered" to a statutory provision or agency regulation, pleading specific violations of HAMP Guidelines is persuasive in any jurisdiction.[173] In CPAs without a tethering requirement, courts have considered violations of HAMP Guidelines as evidence that an act or practice is inherently unfair or deceptive.[174] "Violations of agency directives like [HAMP] can be a hallmark of unfairness under the [CPA]."[175] In contrast, homeowners in jurisdictions requiring "tethering" must show specific actions that violate HAMP Guidelines.[176] For example, a recent Sixth Circuit case required that the homeowner specify particular violations of HAMP Guidelines in his pleadings for the CPA claim to proceed.[177] Because of the weight given to tethered claims, homeowners should always specify particular violations of HAMP Guidelines in their allegations regardless of a jurisdiction's tethering requirements.

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171. *Morris*, 775 F. Supp. 2d at 259.

172. *See generally id.*; *Okoye*, 2011 WL 3269686, at *8; *In re* JPMorgan Chase Mortg. Modification Litig., 880 F. Supp. 2d 220, 237–38 (D. Mass. 2012); Ansanelli v. JP Morgan Chase Bank, N.A., No. C 10-03892 WHA, 2011 WL 1134451 (N.D. Cal. 2011).

173. *Compare* MASS. GEN. LAWS ANN. ch. 93A, § 9 (West 2004), *with* CAL. BUS. & PROF. CODE § 17200 (West 1992).

174. *See generally* Boyd v. U.S. Bank, N.A., 787 F. Supp. 2d 747, 753 (N.D. Ill. 2011).

175. *Id.*

176. *Compare* Jackson v. Ocwen Loan Servicing, LLC, No. 13-5793, 2011 WL 587587, at *10 (E.D. Cal. Feb. 9, 2011), *with* Humphreys v. Bank of Am., 557 F. App'x 416, 425 (6th Cir. 2014).

177. *Compare Humphreys*, 557 F. App'x at 425, *with* Marks v. Bank of Am., N.A., No. 03:10-CV-08039-PHX-JAT, 2010 WL 2572988 (D. Ariz. June 22, 2010) (where the mere mention of HAMP Guidelines precluded all recovery).

2. Independently Unfair and Deceptive

Many courts require the homeowner show that the servicer's actions, pleaded as HAMP violations, are unfair or deceptive in their own right, independent of HAMP.[178] These courts agree with servicers' private right of action arguments, but still reason that servicers cannot be "wholly immunized for their conduct so long as the subject transaction is associated with HAMP."[179] This allows homeowners to litigate against servicers for significant grievances such as the failure to consider the homeowner for a loan modification or violating a TPP agreement.[180] The degree of independence required varies by court, with some requiring complete independence[181] and other courts using violations of HAMP as evidence of unfairness, mentioned above.[182]

Misrepresentations are independently actionable.[183] In *Okoye v. Bank of New York Mellon*, the servicer allegedly represented that homeowners would be offered a permanent loan modification if they complied with the terms of the TPP agreement.[184] The homeowners complied with the terms of the TPP, but the servicer refused to offer them a permanent loan modification.[185] The court sustained the CPA claim.[186] It reasoned "HAMP violations can give rise to a viable [CPA] claim if the activity would be independently actionable under [the CPA] as unfair and deceptive."[187] The court noted that the "[servicer's] denial of the [homeowner's] application for loan modification itself may not amount to unfair or deceptive practices action under [the CPA], and indeed may not even allege sufficient facts to demonstrate that any HAMP Guidelines were violated."[188] However, the court reasoned that the alleged misrepresentation regarding the promise of a permanent loan modification was enough to substantiate a CPA claim, as misrepresentations are generally actiona-

178. *See, e.g.*, Vida v. OneWest Bank, F.S.B., No. 10-987-AC, 2010 WL 5148473, at *4 (D. Or. 2010); Okoye v. Bank of N.Y. Mellon, No. 10-11563-DPW, 2011 WL 3269686, at *6–10 (D. Mass. 2011); *In re* JPMorgan Chase Mortg. Modification Litig., 880 F. Supp. 2d 220, 237–38 (D. Mass. 2012).

179. *Vida*, 2010 WL 5148473, at *5 (dismissing the homeowners' claims but noting that servicers can be liable for misconduct involving HAMP).

180. *Id.*; Boyd v. U.S. Bank, N.A., 787 F. Supp. 2d 747, 753 (N.D. Ill. 2011).

181. *See, e.g.*, *Okoye*, 2011 WL 329686, at *8.

182. Morris v. BAC Loan Servicing, LLP, 775 F. Supp. 2d 255, 259 (D. Mass. 2011).

183. *See, e.g.*, *Okoye*, 2011 WL 3269686, at *9.

184. *Id.* at *1–3.

185. *Id.*

186. *Id.* at *10.

187. *Id.* at *8.

188. *Id.* at *10.

ble under CPAs.[189] Thus, the homeowner effectively established independence.[190]

3. Policy Rationale

Finally, courts address whether allowing litigation to continue would be consistent with HAMP's purposes, with overwhelmingly successful results for homeowners and consumer advocates.[191] Courts look primarily to HAMP for the purpose of: "help[ing] homeowners avoid foreclosure by obtaining loan modifications."[192] Specifically, it can be "assume[d] that one purpose of Congress in enacting the 2008 Act [the EESA] was to ensure mortgage servicers participated in the foreclosure mitigation programs [i.e., HAMP] it empowered the Treasury Department to set up."[193] HAMP Guidelines protect homeowners from servicing misconduct, and as such, courts should allow CPA litigation to address violations of HAMP Guidelines because it furthers the general purpose of HAMP and EESA.

V. CHALLENGES TO HAMP CPA LITIGATION

HAMP litigation continues to face many challenges as the program grows. As homeowners change their litigation strategies, servicers continue to raise new challenges. First, servicers consistently raise preemption challenges.[194] Second, servicers argue that homeowners disguise HAMP violations as CPA claims to circumvent the commonly held principle that there is no private right of action in EESA.[195] Finally, courts routinely dismiss HAMP litigation for failure to properly plead causation, especially when homeowners defaulted on their mortgage loan before applying for a modification.[196] This section addresses all three major arguments presented by servicers and discusses why the courts should reject each.

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189. *Id.*

190. *See id.*

191. Morris v. BAC Loan Servicing, LLP, 775 F. Supp. 2d 255, 259 (D. Mass. 2011); Boyd v. U.S. Bank, N.A., 787 F. Supp. 2d 747, 753 (N.D. Ill. 2011).

192. *Morris*, 775 F. Supp. 2d at 261.

193. Wigod v. Wells Fargo, 673 F.3d 547, 580 (7th Cir. 2011).

194. *See generally* Olivares v. PNC Bank, N.A., No. 11-1626 ADM/JJK, 2011 WL 4860167, at *2 (D. Minn. Oct. 13, 2011).

195. *See, e.g.*, Grill v. BAC Home Loans Servicing LP, No. 10-CV-03057-FDC/GGH, 2011 WL 127891 (E.D. Cal. Jan. 14, 2011); Torres v. Litton Loan Servicing LP, No. 1:10-cv-01709-OWW-SKO, 2011 WL 149833 (E.D. Cal. Jan. 18, 2011); Morales v. Chase Home Fin. LLC, No. C 10-02068 JSW, 2011 WL 1670045 (N.D. Cal. Apr. 11 2011).

196. Kozaryn v. Ocwen Loan Servicing, LLC, 784 F. Supp. 2d 100, 103 (D. Mass. 2011).

A. Preemption

"Preemption can take on three different forms: express preemption, field preemption, and conflict preemption."[197] Express preemption is typically not raised in HAMP litigation cases, as the statutory language in EESA does not speak to this issue.[198] Therefore, this section focuses on field preemption and conflict preemption.

Field preemption "occurs when 'federal regulation [is] so pervasive that the only reasonable inference is that [Congress] meant to displace the states' from their own regulation."[199] Servicers typically argue that EESA or the Home Owners Loan Act (HOLA) occupies the field of loan modifications or mortgage lending, respectively.[200] Courts should reject this argument because HAMP targets a small subset of homeowners—primarily those who were victims of subprime lending prior to 2009.[201] Furthermore, servicers offer loan modifications outside HAMP.[202] "Servicers and [homeowners remain] free to modify home loans under common law principles of contracts or pursuant to other federal, state, or local programs," and as such, "HAMP does not preempt the field of home loan modification."[203] Additionally, courts should reject any HOLA preemption argument. The Treasury Department declared that it "occup[ied] the entire field of lending regulation for federal savings associations" under HOLA.[204] However, in the same declaration, the Treasury Department acknowledged,

> [S]tate tort, contract, and commercial laws are "not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of [HOLA]."[205]

Furthermore, in *Wigod*, the Seventh Circuit reasoned that HOLA does not give the Treasury Department authority to "adjudicate disputes" between servicers and homeowners.[206] Thus, like EESA, courts should fol-

197. *Wigod*, 673 F.3d at 576 (quoting Aux Sable Liquid Prods. v. Murphy, 526 F.3d 1028, 1033 (7th Cir. 2008)).

198. Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201–53 (2008).

199. *Olivares*, 2011 WL 4860167, at *4.

200. *See, e.g.*, *id.*

201. Chiles & Mitchell, *supra* note 3, at 196.

202. *Id.*

203. *Olivares*, 2011 WL 4860167, at *4 (quoting Wuebker v. Wilbur-Ellis Co., 418 F.3d 883, 885 (8th Cir. 2005).

204. Wigod v. Wells Fargo, 673 F.3d 547, 577 (7th Cir. 2012) (quoting 12 C.F.R. § 560.2(a)).

205. *Id.* (quoting 12 C.F.R. § 560.2(c))

206. *Id.*

low the Seventh Circuit approach and hold that HOLA does not preempt HAMP litigation.[207]

Servicers also raise conflict preemption challenges. Conflict preemption occurs when it is impossible to comply with both state and federal law, or when state law is in conflict with the purposes of the federal law.[208] Courts should reject the conflict preemption challenge because there is nothing preventing servicers from complying with both HAMP Guidelines and state consumer protection acts as the SPAs impose a contractual obligation on servicers to comply with state and federal law along with HAMP Guidelines.[209] In addition, precedent exists in the Seventh Circuit to reject conflict preemption arguments.[210] In *Wigod*, the court reasoned that CPAs impose no additional obligations on servicers beyond their duties imposed by HAMP.[211] "Where federal law supplies the standard of care imposed by state law, it is hard to see how they could conflict."[212] Therefore, courts should reject servicers' field and conflict preemption arguments by citing to the Treasury Department's intent in EESA and HOLA and by citing to servicers' contractual obligations in the SPAs.

B. Wolf in Sheep's Clothing

The crux of servicers' defenses against CPA claims is that homeowners use CPAs as cover for the lack of a private right of action in EESA.[213] In other words, servicers argue that CPA claims are a "wolf in sheep's clothing."[214] Servicers successfully made this argument in *Vida v. OneWest Bank, F.S.B.*, where the district court in Oregon "explained that state common law claims cannot be used to enforce federal program provisions."[215] The U.S. District Court for the Northern District of Cali-

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207. *See id.*

208. *Olivares*, 2011 WL 4860167, at *4.

209. *Id.*

210. *See, e.g.*, *Wigod*, 673 F.3d at 579.

210. *Id.*

211. *Id.*

212. *Id*.

213. *See* Morales v. Chase Home Fin. LLC, No. C 10-02068 JSW, 2011 WL 1670045 (N.D. Cal. Apr. 11, 2011); Torres v. Litton Loan Servicing LP, No. 1:10-cv-01709-OWW-SKO, 2011 WL 149833 (E.D. Cal. Jan. 18, 2011); Grill v. BAC Home Loans Servicing LP, No. 10-CV-03057-FDC/GGH, 2011 WL 127891 (E.D. Cal. Jan. 14, 2011).

214. *See Morales*, 2011 WL 1670045; *Torres*, 2011 WL 149833; *Grill*, 2011 WL 127891.

215. Arsen Sarapinian, *Fighting Foreclosure: Using Contract Law to Enforce the Home Affordable Modification Program (HAMP)*, 64 HASTINGS L.J. 905, 920 (2013).

fornia also followed this approach.[216] However, this appears to be a minority view, as the First, Seventh, and Ninth Circuits have each allowed common law claims based on HAMP violations.[217]

Courts should reject the reasoning in *Vida*, even when homeowners fail to sufficiently plead that the servicer misconduct is independently unfair or deceptive. The purpose of CPAs is to protect consumers against conduct that is otherwise not necessarily actionable.[218] HAMP Guidelines do not provide for a private right of action, yet violations of these guidelines—such as telling the homeowner to default on their mortgage to obtain a loan modification—are inherently unfair. Therefore, while homeowners make their strongest case by properly pleading servicer misconduct is unfair or deceptive in its own right, courts should nonetheless reject the "wolf in sheep's clothing" argument.

C. CAUSATION

Finally, many homeowners have difficulty proving causation.[219] Homeowners must establish that their servicers proximately caused some type of injury, such as wrongful foreclosure proceedings (including loss of the foreclosed home), damage to the homeowner's credit, loss of alternatives to foreclosure, and additional and unnecessary fees throughout the prolonged foreclosure process.[220]

Jurisdictions are currently split on what constitutes causation in this context. Particularly, some courts are unsympathetic when the homeowners defaulted on their mortgage loan before applying for a modification.[221] For example, the U.S. District Court for the Northern District of California rejected a CPA claim alleging the servicer violated HAMP Guidelines and caused the homeowner to lose her home to foreclosure.[222] The court reasoned the "plaintiff lost her home because she defaulted on the loan, not because of defendants' alleged representations that defend-

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216. *Morales*, 2011 WL 1670045, at *10 ("Plaintiffs therefore may not assert a UCL claim based on alleged violations of HAMP because the UCL cannot create a private right of action where none exists under the federal statute.").

217. *See, e.g.*, Corvello v. Wells Fargo, 728 F.3d 878, 884–85 (9th Cir. 2013); Wigod v. Wells Fargo, 673 F.3d 547, 577 (7th Cir. 2012); Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 242 (1st Cir. 2013).

218. Zupanex, *supra* note 124, § 2(a).

219. Ortiz v. Am.'s Servicing Co., No. EDCV 12-191 CAS (SPx), 2012 WL 2160953, at *8 (C.D. Cal. June 11, 2012).

220. *See, e.g.*, *Young*, 717 F.3d at 241; Stagikas v. Saxon Mort. Servs. Inc., 795 F. Supp. 2d 129, 137 (D. Mass. 2011); Allen v. CitiMortgage, Inc., No. CCB-10-2740, 2011 WL 3425665, at *10 (D. Md. Aug. 4, 2011).

221. *Ortiz*, 2012 WL 2160953, at *8.

222. *Id.*

ants would approve plaintiff for a loan modification."[223] This line of reasoning rests blame on the homeowner, and it fails to acknowledge any potential servicer misconduct that contributed to the injury. Additionally, this reasoning fails to acknowledge HAMP's purpose—preventing foreclosure even in cases where the homeowner is in default.

Courts should reject *Ortiz* and instead acknowledge that servicer misconduct proximately causes homeowners injury by extending the loan modification process, increasing the amount in arrears, and in some cases actually causing the homeowner to default.[224] For example, courts should find causation when repetitive violations of HAMP Guidelines cause loss of equity in a home and damage to credit ratings.[225] In *In re JPMorgan Chase Mortgage Modification Litigation*, a class action alleged the servicer violated Massachusetts' CPA by violating HAMP Guidelines.[226] The court explored two different classes of homeowners and their causation arguments.[227] One group of homeowners alleged that they owed more on their mortgages after participating in the loan modification process than what they would have owed if they did not participate in HAMP.[228] The second group of homeowners alleged that they would have financially benefited more from being foreclosed upon immediately rather than foreclosed upon after participating in HAMP.[229] The court allowed both claims to survive a motion to dismiss.[230] The court reasoned that both sets of homeowners had plausible claims as servicer misconduct could prolong the loan modification process and cause homeowners to incur late fees, additional interest, and other foreclosure-related fees that the homeowner would not have incurred otherwise.[231]

VI. CONCLUSION

HAMP litigation is an emerging area of law. As the foreclosure crisis lingers, homeowners must continually evolve their litigation strategies to address servicer violations of HAMP Guidelines. Consumer protection acts provide one outlet for HAMP litigation, and homeowners can successfully bring claims under this theory by adequately pleading that

223. *Id.*

224. *See, e.g.*, *In re* JPMorgan Chase Mortg. Modification Litig., 880 F. Supp. 2d 220, 238 (D. Mass. 2012).

225. *Young*, 717 F.3d at 241–42.

226. *In re JPMorgan Chase Mortg. Modification Litig.*, 880 F. Supp. 2d at 225.

227. *Id.* at 225, 238.

228. *Id.* at 238.

229. *Id.*

230. *Id.*

231. *Id.*

their servicer engaged in an unfair or deceptive act or practice. Servicers' litigation strategies will also continue to evolve, and homeowners must continue to be creative in their responses. However, courts should allow the broad language of CPAs to provide a remedy for homeowners when servicers violate HAMP Guidelines and enforce the policy behind CPAs to protect consumers, and more particularly, homeowners, from unfair or deceptive acts and practices of mortgage servicers.