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# The End of the Home Affordable Modification Program and the Start of a New Problem

## INTRODUCTION

The 2008 financial crisis wreaked havoc on the U.S. housing market. “At the end of 2010, 23.1 percent of all U.S. homeowners with a mortgage owed more on their homes than [what] their homes were worth.”<sup>1</sup> Responding to the housing crisis, “Congress . . . enacted manifold legislation” starting in 2008,<sup>2</sup> Congress began by passing the Emergency Economic Stabilization Act of 2008 (EESA), which allowed the Secretary of the Treasury to enact a plan to reduce foreclosures in the United States by establishing programs to identify and assist homeowners facing impending foreclosures.<sup>3</sup> The EESA was drafted with the goal of aiding homeowners and combating economic instability; however, the programs implemented under

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<sup>1</sup> See Michael Snyder, *27 Depressing Facts About the Housing Crash That Never Seems to End*, BUS. INSIDER (Mar. 29, 2011, 9:49 AM), <http://www.businessinsider.com/us-real-estate-crisis-facts-2011-3#as-of-the-end-of-2010-231-percent-of-all-us-home-owners-with-a-mortgage-owed-more-on-their-homes-than-their-homes-were-worth-3> [<https://perma.cc/LB2Y-F7GA>].

<sup>2</sup> Linda Elizabeth Coco, “*Foaming the Runway*” for Homeowners: U.S. Bankruptcy Courts “Preserving Homeownership” in the Wake of the Home Affordable Modification Program, 23 AM. BANKR. INST. L. REV. 421, 421 (2015); see also *Statistics and Historical Comparison*, GOVTRACK <https://www.govtrack.us/congress/bills/statistics> [<https://perma.cc/9UZ8-L5KV>] (detailing statistics of bills and resolutions introduced or enacted in each two-year Congress).

<sup>3</sup> See *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 228–29 (1st Cir. 2013); 12 U.S.C. § 5219(a)(1) (“To the extent that the Secretary acquires mortgages, mortgage backed securities, and other assets secured by residential real estate, including multifamily housing, the Secretary shall implement a plan that seeks to maximize assistance for homeowners and use the authority of the Secretary to encourage the servicers of the underlying mortgages, considering net present value to the taxpayer, to take advantage of the HOPE for Homeowners Program under section 1715z–23 of this title or other available programs to minimize foreclosures. In addition, the Secretary may use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures.”).

the act have proven to be more beneficial to banks and financial institutions than to the homeowners themselves.<sup>4</sup>

One such program, the Home Affordable Modification Program (HAMP), was established by the Secretary of the Treasury in 2009.<sup>5</sup> HAMP was the largest program to come out of ESSA.<sup>6</sup> The Secretary of the Treasury's central goal in enacting HAMP was to minimize foreclosures.<sup>7</sup> The program was designed to help homeowners in distress and set out qualification requirements.<sup>8</sup> The combination of these aimless requirements, poor accessibility, and ill-conceived incentives, amongst other things, proved to limit the program's availability to homeowners throughout the United States.<sup>9</sup>

HAMP assisted homeowners by effectuating a decrease in their mortgage payments.<sup>10</sup> Rather than the original mortgage payment plans, under HAMP, homeowners' payments were capped at a percentage of their respective incomes.<sup>11</sup> Nevertheless, not

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<sup>4</sup> See Coco, *supra* note 2, at 421–22.

<sup>5</sup> See *Making Home Affordable*, U.S. DEPT OF TREASURY, <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/default.aspx> [<https://perma.cc/3FZ2-627P>].

<sup>6</sup> See *Home Affordable Modification Program (HAMP)*, U.S. DEPT OF TREASURY, <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/hamp.aspx> [<https://perma.cc/6LVP-LBWS>].

<sup>7</sup> Jonathan A. Marcantel, *Enforcing the Home Affordable Modification Program*, 70 N.Y.U. ANN. SURV. AM. L. 121, 124 (2014).

<sup>8</sup> The requirements included, amongst other things, homeowners to be facing a long-term hardship, be behind on mortgage payments or likely to fall behind, have a mortgage that originated before January 1, 2009, and have adequate income. The program demanded additional requirements such as maximum limits on the amount a homeowner could owe under the program in addition to proof that modified payments could be made on a timely basis. See *Loan Modification Programs: How to Qualify and Apply*, HOMEOWNERSHIP, <http://www.homeownership.org/foreclosure-help/loan-modification-programs/> [<https://perma.cc/E6VD-G3X9>].

<sup>9</sup> See *HAMP: Home Loan Modification Program Information*, ZILLOW, <http://www.zillow.com/mortgage-learning/hamp/> [<https://perma.cc/TV8Z-R34Z>] (last visited Mar. 26, 2018) (Homeowners must “[o]we a maximum of \$729,750 on [their] primary residence or single-unit rental property or up to \$934,200 on a two-unit rental property (the government sets higher limits for rental properties with more units) . . . [h]ave enough documented income that [they] could pay [their] mortgage[s] if [they] w[ere] modified . . . show that they are facing ‘serious’ financial hardship such as a loss in income, illness or a divorce that puts them at risk of defaulting on their mortgage,” and “[t]hey must prove this hardship with documentation and sign an affidavit to that effect.”); see also David Dayen, *The Government Program That Failed Homeowners*, GUARDIAN (Mar. 30, 2015, 10:00 AM), <https://www.theguardian.com/money/2014/mar/30/government-program-save-homes-mortgages-failure-banks> [<https://perma.cc/F8Q8-UHGH>]; Lisa Prevost, *A Loan Modification Program's Limited Reach*, N.Y. TIMES: REAL ESTATE (May 8, 2015), <https://www.nytimes.com/2015/05/10/realestate/concerns-about-hamp-loan-modification-program.html> [<https://perma.cc/VJ8V-7B26>].

<sup>10</sup> *Principal Reduction Alternative Under the Home Affordable Modification Program*, IRS (Aug. 16, 2017), <https://www.irs.gov/newsroom/principal-reduction-alternative-under-the-home-affordable-modification-program> [<https://perma.cc/KA97-XVMR>].

<sup>11</sup> *Id.*

everyone eligible for the program qualified for a modification.<sup>12</sup> Eligible homeowners were placed in a Trial Period Plan (TPP) in which they were required to make modified, reduced payments for a period of three months.<sup>13</sup> At the end of the TPP, banks and servicers had the discretion to offer a permanent modification.<sup>14</sup> Although incentives existed for the bank and/or servicer such as “a \$1,000 payment for each permanent modification,”<sup>15</sup> the modification was not always implemented, leaving the homeowner with few to no options other than foreclosure.<sup>16</sup>

HAMP proved ineffective in reaching homeowners who needed assistance. HAMP’s original goal was to restructure three to four million homeowner mortgages by the program’s original deadline of December 31, 2012; however, as of December 2016, HAMP assisted just 1.6 million homeowners with permanent loan modifications.<sup>17</sup> This note suggests transforming the program’s strategy by building upon the small areas in which the program had seen success and re-implementing a revolutionized program utilizing the remaining budget. Congress should reinvent HAMP while strengthening the series of guidelines within HAMP, replacing them with mandates. In order to create an effective program, Congress must focus on establishing a program with the following five key principles: efficiency, affordability, accessibility, accountability, and enforceability. These principles, focused on both independently and collectively, will help replace the cracked foundation HAMP was built on, paving the way for an effective HAMP.

Part I of this note provides a brief overview of HAMP and the implications of its guidelines. Part II evaluates previous programs, discusses the various claims brought by homeowners, and recounts significant judicial decisions that strengthened the program by filling some of the holes within the overall plan. But HAMP ultimately failed and Part III reviews its failures,

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<sup>12</sup> See Tammy J. Raduege, Annotation, *Enforceability of Trial Period Plans (TPP) Under the Home Affordable Modification Program (HAMP)*, 88 A.L.R. Fed. 2d 331 (2014) at § 5.

<sup>13</sup> See *id.* at \*1.

<sup>14</sup> See *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 229 (1st Cir. 2013).

<sup>15</sup> *Id.*

<sup>16</sup> ALYS COHEN, ARIELLE COHEN & DIANE E. THOMPSON, NAT’L CONSUMER LAW CTR., AT A CROSSROADS: LESSONS FROM THE HOME AFFORDABLE MODIFICATION PROGRAM (HAMP), 46 (2013), [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/loan\\_mod/hamp-report-2013.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/loan_mod/hamp-report-2013.pdf) [<https://perma.cc/VU6U-W9XJ>]; see also Renae Merle, *After Helping a Fraction of Homeowners Expected, Obama’s Foreclosure Prevention Program is Finally Ending*, WASH. POST (Dec. 30, 2016), [https://www.washingtonpost.com/news/business/wp/2016/12/30/after-helping-a-fraction-of-homeowners-expected-obamas-foreclosure-prevention-program-is-finally-ending/?utm\\_term=.7c48beef27a9](https://www.washingtonpost.com/news/business/wp/2016/12/30/after-helping-a-fraction-of-homeowners-expected-obamas-foreclosure-prevention-program-is-finally-ending/?utm_term=.7c48beef27a9) [<https://perma.cc/6682-LEDH>].

<sup>17</sup> BROOKINGS INST., HOMEOWNERSHIP BUILT TO LAST: BALANCING ACCESS, AFFORDABILITY, AND RISK AFTER THE HOUSING CRISIS 423 (Eric S. Belsky, Christopher E. Herbert & Jennifer H. Molinsky eds., 2014); Merle, *supra* note 16.

touching upon key sectors where the program fell short and the overall ineffectiveness of HAMP as a solution to the housing crisis. Part IV discusses the federal government's plan for "Life After HAMP" and what has been implemented since HAMP's expiration on December 31, 2016.<sup>18</sup> This Part contrasts current implementations with proposed policies and discusses the possible effectiveness of these solutions. Part V proposes solutions to the lingering housing crisis and suggests legislative implementations that should be adopted to improve the effectiveness and establish a workable plan for "Life After HAMP." These congressional mandates will hold lenders accountable to complying homeowners, creating a more efficient, accessible, and effective program overall.

## I. A BRIEF OVERVIEW OF THE HOME AFFORDABLE MODIFICATION PROGRAM

The judicial system gave strength to homeowners' rights under the HAMP program. Ever since the Secretary of the Treasury enacted HAMP, there has been litigation, especially stemming from the subsequent supplemental directives.<sup>19</sup> The litigation typically was, and still is, targeted towards mortgage servicers that did not modify or renegotiate their clients' loans under HAMP, choosing instead to foreclose upon the property.<sup>20</sup>

HAMP was one of two prongs of the Homeowner Affordable Stability Plan (HASP) created on February 18, 2009.<sup>21</sup> HAMP came at a time when the U.S. economic collapse triggered the worst recession since the Great Depression.<sup>22</sup> The collapse was caused by numerous factors, with a significant element being the composition of mortgage-backed securities being comprised of less restrictive loans.<sup>23</sup> HAMP established a set of guidelines for servicers and lenders of mortgage loans to follow. These guidelines "require[d] any servicer of a loan guaranteed or owned by a government-sponsored entity or

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<sup>18</sup> See *Making Home Affordable*, *supra* note 5.

<sup>19</sup> Marcantel, *supra* note 7, at 127.

<sup>20</sup> See *infra* Part II.

<sup>21</sup> Breck Robinson, *An Overview of the Home Affordable Modification Program*, CONSUMER COMPLIANCE OUTLOOK (2009), [https://consumercomplianceoutlook.org/2009/third-quarter/q3\\_02/](https://consumercomplianceoutlook.org/2009/third-quarter/q3_02/) [<https://perma.cc/QEL7-VCSU>] (last visited Mar. 26, 2018). The other prong being the Home Affordable Refinance Program (HARP), which was established "to help borrowers refinance distressed mortgage loans into new loans with lower rates." *Id.*

<sup>22</sup> Ben S. Bernanke, Chairman, Fed. Reserve Bd., Speech at the Council on Foreign Relations, Washington D.C.: Financial Reform to Address Systemic Risk (Mar. 10, 2009), <http://www.federalreserve.gov/newsevents/speech/bernanke20090310a.htm> [<https://perma.cc/6XHR-FCSA>] ("The world is suffering through the worst financial crisis since the 1930s . . .").

<sup>23</sup> See Marcantel, *supra* note 7, at 122.

insured or guaranteed by a government agency (GSE Loan) to comply with HAMP's Supplemental Directives and Guidelines."<sup>24</sup> In essence, the guidelines prohibited foreclosure proceedings until modification eligibility for defaulting loans was assessed.<sup>25</sup> This review applied to all GSE Loans irrespective of the servicers' consent.<sup>26</sup> Servicers play an integral part in the mortgage process, particularly by maintaining the distribution of payments from homeowners to investors.<sup>27</sup> When homeowners fall behind on payments, servicers are tasked with handling the situation in favor of investors, implementing loss mitigation procedures such as a foreclosure action.<sup>28</sup>

For non-GSEs, HAMP promoted, through incentives, a Servicer Provider Agreement (SPA) to be implemented by servicers.<sup>29</sup> These agreements are contracts which necessitate compliance with HAMP guidelines in order to receive certain benefits in return.<sup>30</sup> HAMP's objective was to assist three to four million defaulting homeowners.<sup>31</sup> By modifying their monthly payments, the goal was to allow more homeowners to remain in their homes rather than face foreclosure.<sup>32</sup> HAMP alone committed \$75 billion in incentives to loan investors, servicers, and homeowners in an effort to meet the program's goals.<sup>33</sup> Securitization of mortgages held by non-GSEs lends to the difficulty of modifying loans that are no longer held by the servicer but rather held by investors.<sup>34</sup> This difficulty explains the difference in the loan modification review guarantee by GSEs and the lack of guarantee by non-GSEs.

In the first year of its operations through March 2010, HAMP produced 230,801 permanent modifications.<sup>35</sup> Yet at the

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<sup>24</sup> *Id.* at 124.

<sup>25</sup> *Id.* at 124–25.

<sup>26</sup> *Id.*

<sup>27</sup> Robinson, *supra* note 21; see also Suzanne Kapner, *The Role of Mortgage Servicers*, FIN. TIMES (June 15, 2010), <https://www.ft.com/content/59a6f4fc-78af-11df-a312-00144feabdc0> [<https://perma.cc/A7WZ-GSZU>].

<sup>28</sup> See Robinson, *supra* note 21.

<sup>29</sup> See Marcantel, *supra* note 7, at 125.

<sup>30</sup> *Id.*

<sup>31</sup> W. Justin Jacobs, Note, *Help Or Hamp(er)?—The Courts' Reluctance to Provide the Right to a Private Action Under HAMP and Its Detrimental Effect on Homeowners*, 47 VAL. U. L. REV. 267, 274 (2012).

<sup>32</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-837, TROUBLED ASSET RELIEF PROGRAM: TREASURY ACTIONS NEEDED TO MAKE THE HOME AFFORDABLE MODIFICATION PROGRAM MORE TRANSPARENT AND ACCOUNTABLE 11 (2009), <https://www.gao.gov/assets/300/292806.pdf> [<https://perma.cc/ML9R-HBW8>].

<sup>33</sup> *Id.* at 9.

<sup>34</sup> Robinson, *supra* note 21.

<sup>35</sup> 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, 729 (2010).

same time, the program experienced significant issues.<sup>36</sup> In June 2012, HAMP was significantly revised to both expand its scope and address issues that arose in its early years.<sup>37</sup> Throughout the lifetime of the program, many changes, such as streamline modifications, were made through supplemental directives issued by the Secretary of the Treasury.<sup>38</sup>

It is important to recognize that HAMP was an administrative program created pursuant to the EESA and not a codified statute.<sup>39</sup> The lack of codification hindered participation in HAMP by allowing for involvement to be voluntary and for the guidelines to act simply as recommendations.<sup>40</sup> Furthermore, “[HAMP did] not provide any express right of action in favor of borrowers (including the only provision of the Act that expressly deals with judicial review), and no language in the Act indicate[d] a congressional intent to create such a right.”<sup>41</sup> Through the development of several key court cases, borrowers began experiencing a stronger HAMP, but a HAMP that still fell short of its goals.<sup>42</sup>

## II. EARLY PROGRAMS, THE BEGINNING OF HAMP, AND THE LITIGATION THAT FOLLOWED

An evaluation of prior initiatives illustrates the few lessons HAMP learned from the initiatives’ failures. First announced in December 2007 by Treasury Secretary Henry Paulson, an early plan was the Streamlined Foreclosure and Loss Avoidance Framework program.<sup>43</sup> The program, which

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<sup>36</sup> See Dayen, *supra* note 9; see also Snyder, *supra* note 1 (listing twenty-seven statistics that illustrate the seriousness of the housing crisis and the nationwide mortgage problems HAMP faced).

<sup>37</sup> See generally MAKING HOME AFFORDABLE, HOME AFFORDABLE MODIFICATION PROGRAM: BASE NET PRESENT VALUE (NPV) MODEL V5.0 MODEL DOCUMENTATION (2012), [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/npvmodeldocumentationv50.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/npvmodeldocumentationv50.pdf) [<https://perma.cc/TF9T-ZNN8>] (detailing revisions to HAMP).

<sup>38</sup> See, e.g., MAKING HOME AFFORDABLE, SUPPLEMENTAL DIRECTIVE 15-06: MAKING HOME AFFORDABLE PROGRAM—STREAMLINED MODIFICATION PROCESS 1 (2015), [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/sd1506.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1506.pdf) [<https://perma.cc/TT7N-56K5>] [hereinafter SUPPLEMENTAL DIRECTIVE] (providing guidance to servicers on how to properly implement the streamlined modification process for non-GSE Mortgages).

<sup>39</sup> Thomas M. Schehr & Matthew Mitchell, *The Home Affordable Modification Program and a New Wave of Consumer Finance Litigation*, Mich. B.J., 38–39, June 2012, <https://www.michbar.org/file/journal/pdf/pdf4article2042.pdf> [<https://perma.cc/Z56X-H2KV>].

<sup>40</sup> *Id.* at 39; see also Andrew Jakobovics, *Called to the Carpet*, CENTER FOR AMERICAN PROGRESS (July 28, 2009, 9:00 AM), <https://www.americanprogress.org/issues/economy/news/2009/07/28/6461/called-to-the-carpet/> [<https://perma.cc/9KAY-93YT>].

<sup>41</sup> Schehr & Mitchell, *supra* note 39, at 39.

<sup>42</sup> See *infra* Section II.B.

<sup>43</sup> Robinson, *supra* note 21; see also AMERICAN SECURITIZATION FORUM, STREAMLINED FORECLOSURE AND LOSS AVOIDANCE FRAMEWORK FOR SECURITIZED

“applie[d] to all first lien subprime residential adjustable rate mortgage [] loans,” was established in order to minimize the number of delinquencies and foreclosures among homeowners possessing securitized mortgages.<sup>44</sup> Under this plan, the “mortgage servicers would be encouraged to initiate communication with subprime borrowers and to voluntarily modify their mortgages. Specifically, servicers were encouraged to modify mortgages by freezing the homeowner’s introductory interest rate for five years.”<sup>45</sup> In addition to restrictions on eligibility for the plan, major obstacles stood in the way of the participating servicers.<sup>46</sup> But this plan was not equipped to handle the growing mortgage crisis, thus overshadowing any positive impact of the program.<sup>47</sup>

Shortly after the announcement of the Streamlined Foreclosure and Loss Avoidance Framework program, the George W. Bush Administration introduced the FHASecure program in August 2007.<sup>48</sup> Being the first major refinance program implemented by the administration, it targeted homeowners of subprime adjustable-rate loans who experienced substantial increases in their monthly mortgage payments.<sup>49</sup> The program was unsuccessful, suffering not only because of its voluntary participation, but also because it forced servicers to take write-downs, causing them to reject the program entirely.<sup>50</sup> By the end of 2008, the program had only assisted 4,200 homeowners, resulting in the program’s termination.<sup>51</sup>

Following the failures of the Streamlined Foreclosure and Loss Avoidance Framework program and the FHASecure program, “the Bush Administration announced the creation of the Hope for Homeowners Program on October 1, 2008.”<sup>52</sup> This program was created to address the failures of previous initiatives, allowing homeowners to work with the Federal

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SUBPRIME ADJUSTABLE RATE MORTGAGE LOANS (2007), <http://portal.delaware.gov/foreclosureinfo/docs/FinalASFStatement.pdf> [<https://perma.cc/46NP-EJVJ>].

<sup>44</sup> See *id.* at 1, 6.

<sup>45</sup> Robinson, *supra* note 21.

<sup>46</sup> See *id.*

<sup>47</sup> Eliana Balla, Robert E. Carpenter & Breck Robinson, The Federal Reserve Bank of Richmond, Assessing the Effectiveness of the Paulson “Teaser Freezer” Plan: Evidence From the ABX Index, 1, 33 (2010), [https://fraser.stlouisfed.org/scribd/?item\\_id=477199&filepath=/files/docs/historical/frbrich/wp/frbrich\\_wp10-6.pdf](https://fraser.stlouisfed.org/scribd/?item_id=477199&filepath=/files/docs/historical/frbrich/wp/frbrich_wp10-6.pdf) [<https://perma.cc/P76R-U3B9>].

<sup>48</sup> Patricia A. McCoy, *Barriers to Foreclosure Prevention During the Financial Crisis*, 55 ARIZ. L. REV 723, 731 (2013).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See 12 U.S.C. § 1715z-23 (2012); see also Robinson, *supra* note 21.

Housing Administration in refinancing their mortgages.<sup>53</sup> Similar to the previous program “servicers had to first write down the principal, this time to no more than 96.5% . . . of [the] appraised value.”<sup>54</sup> In addition to writing down the principal, servicers paid a mandatory premium and forfeited certain additional fees from the mortgagors.<sup>55</sup> But these terms were viewed as being “no more attractive to servicers than going to foreclosure.”<sup>56</sup> The failure to create an enticing program for servicers resulted in the program failing, leaving homeowners with little to no help.<sup>57</sup> By May 2009, the program had assisted only one homeowner in refinancing into a Hope for Homeowners Program loan.<sup>58</sup>

Enacted shortly before HAMP was the Streamlined Modification Program.<sup>59</sup> This program “use[d] an affordability measure to modify mortgages held by government-sponsored enterprises (GSEs). To quickly modify mortgages at risk of default, the program modifie[d] first liens to reduce the homeowner’s front-end DTI [(debt-to-income)] ratio to 38 percent.”<sup>60</sup> If the DTI was still in excess of 38 percent, the program enabled servicers to reduce the interest rate on the mortgage in increments of 0.125 percent.<sup>61</sup> Servicers had one alternative: postponing mortgagors’ payments on a portion of the principal, resulting in an inevitable “extra” balloon payment for the mortgagor.<sup>62</sup> Typically, balloon payments are significantly greater than a homeowner’s previous mortgage payments, sometimes reaching “as high as hundreds of thousands of dollars.”<sup>63</sup> Many homeowners, particularly ones facing foreclosure, cannot afford such a large principal payment.<sup>64</sup> In fact, due to the financial constraints, rather than fulfilling all of these payments, mortgagors typically sell their homes.<sup>65</sup> Balloon payments are not ideal during a period where home values are

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<sup>53</sup> See 12 U.S.C. § 1715z-23 (2012); see also Robinson, *supra* note 21.

<sup>54</sup> McCoy, *supra* note 48, at 731–32.

<sup>55</sup> *Id.* at 732.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Fannie Mae, Announcement 08-33, Introduction of the Streamlined Modification Program 1 (Dec. 12, 2008), <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2008/0833.pdf> [<https://perma.cc/USM4-RCSX>].

<sup>60</sup> Robinson, *supra* note 21.

<sup>61</sup> See *id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Balloon Payment*, INVESTOPEDIA, <http://www.investopedia.com/terms/b/balloon-payment.asp> [<https://perma.cc/6PAZ-XH4S>].

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

decreasing,<sup>66</sup> therefore incorporating such payments into a solution can be problematic.

The government had good reason to create programs with tough terms due to the declining housing market. “[R]efinancing underwater loans at the full appraised value would have eventually saddled the government with unwanted losses while rewarding lenders and investors for making inflated loans.”<sup>67</sup> This potential burden explains the resistance illustrated by servicers and investors to swallow the losses themselves through compliance with the loan modification programs initiated prior to HAMP.<sup>68</sup>

Unlike previous programs, “HAMP require[d] all banks and lending institutions accepting funding from the Troubled Asset Relief Program (TARP)” to implement loan modifications for loans that were eligible under the HAMP guidelines.<sup>69</sup> As with previous programs, institutions not receiving such funding had full discretion whether to fulfill qualifying loan modifications.<sup>70</sup> The more attractive financial incentives to servicers and investors allowed HAMP to reach more homeowners—modifying a greater number of home loans than any program enacted before it, unfortunately, an unimpressive feat considering the dismal failures of earlier programs.<sup>71</sup>

#### A. *The Claims That Failed and Those That Strengthened Homeowners’ Rights*

The explosion of litigation since the initiation of HAMP has resulted in differing opinions among the courts on how to approach various claims brought by homeowners regarding HAMP.<sup>72</sup> Plaintiffs have brought suits stemming from theories of direct liability, contract, tort, equal credit opportunity, and even constitutional theories, the suits resulting in mixed opinions by the courts.<sup>73</sup>

In some of the earliest lawsuits regarding HAMP, homeowners argued servicers could be held directly liable for violating the terms of supplemental directives issued by the

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<sup>66</sup> *Id.*

<sup>67</sup> McCoy, *supra* note 48, at 732.

<sup>68</sup> *See id.*

<sup>69</sup> *See* Robinson, *supra* note 21.

<sup>70</sup> *Id.*

<sup>71</sup> *See* Arias v. Elite Mortg. Grp., Inc., 108 A.3d 21, 26 n.3 (N.J. Super. Ct. App. Div. 2015) (citing Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 556 (7th Cir. 2012)); *see also* COHEN, COHEN & THOMPSON, *supra* note 16, at 3; McCoy, *supra* note 48, at 739.

<sup>72</sup> *See generally* Schehr & Mitchell, *supra* note 39 (discussing the various legal theories homeowners brought against banks and servicers).

<sup>73</sup> *See id.* at 39–41.

Treasury.<sup>74</sup> As discussed in Part I, however, “HAMP [was] not a federal statute or regulation, and the program [was] not codified in any public law.”<sup>75</sup> Under HAMP, it is generally recognized that there exists no private right of action, therefore suits have been unsuccessful under the direct liability theory.<sup>76</sup>

Some HAMP plaintiffs have chosen to assert tort-based claims of negligence or fraud.<sup>77</sup> The majority of courts have rejected borrowers’ attempts to pursue these tort-based claims, citing a failure to establish a duty of care between the borrower and servicer.<sup>78</sup> In *Parks v. BAC Home Loan Servicing, LP*, the plaintiff claimed the mortgage servicer committed “negligence per se” by not satisfying the HAMP requirements.<sup>79</sup> But the court dismissed the negligence claim, finding it was “nothing more than the rebuffed theory that HAMP creates a cause of action,” and reaffirming the notion that HAMP does not create a private cause of action in favor of borrowers.<sup>80</sup>

Furthermore, some plaintiffs have claimed that mortgage servicers violated the Equal Credit Opportunity Act<sup>81</sup> by discriminating against them, favoring some applications over others, and in doing so, failing to offer a loan modification following a TPP agreement.<sup>82</sup> In *Willis v. Countrywide Home Loan Servicing, LP*, plaintiff Winfield Willis, representing himself, alleged that his loan modification application was not considered to the same degree as nonminority applications.<sup>83</sup> The court cited Willis’ failure to support his claims of racial

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<sup>74</sup> See *id.* at 39.

<sup>75</sup> Schehr & Mitchell, *supra* note 39, at 39.

<sup>76</sup> *Valtierra v. Wells Fargo Bank, N.A.*, No. 10-0849 AWI GSA, 2011 WL 590596, at \*4 (E.D. Cal. Feb. 10, 2011) (“[T]here is no private cause of action under HAMP.”); *Hart v. Countrywide Home Loans, Inc.*, 735 F. Supp. 2d 741, 748 (E.D. Mich. 2010) (“There is no express or implied right to sue fund recipients . . . under TARP or HAMP.”) (quoting *Aleem v. Bank of Am.*, No. EDCV 09-01812-VSP (RZx), 2010 WL 532330 at \*4 (C.D. Cal. Feb. 9, 2010)); See also *Raduege*, *supra* note 12, at \*2.

<sup>77</sup> See *Parks v. BAC Home Loan Servicing, LP*, 825 F. Supp. 2d 713, 716 (E.D. Va. 2011); *Stolba v. Wells Fargo & Co.*, No. 10-cv-6014 (WJM) (MF), 2011 WL 3444078, at \*1 (D.N.J. Aug. 8, 2011).

<sup>78</sup> See *Miller v. CitiMortgage, Inc.*, 970 F. Supp. 2d 568 (N.D. Tex. 2013) (dismissing borrower’s negligence claim based on servicer’s misrepresentations, concluding that the servicer owed no duty to the borrower); see also *Parks*, 825 F. Supp. 2d at 716; *Stolba*, 2011 WL 3444078 at \*1; *Clay v. First Horizon Home Loan Corp.*, 392 S.W.3d 72, 79 (Tenn. Ct. App. 2012).

<sup>79</sup> *Parks*, 825 F. Supp. 2d at 716.

<sup>80</sup> *Id.*

<sup>81</sup> See 15 U.S.C. § 1691 (2012).

<sup>82</sup> See *Adams v. U.S. Bank*, No. 10-10567, 2010 WL 2670702, at \*4 (E.D. Mich. July 1, 2010) (dismissing Plaintiff’s ECOA claim for failure to support her claim); see also *Willis v. Countrywide Home Loans Servicing, L.P.*, No. CCB-09-1455, 2009 WL 5206475 (D. Md. Dec. 23, 2009).

<sup>83</sup> *Willis*, 2009 WL 5206475, at \*1, \*7.

discrimination, finding them to be “too conclusory and speculative” and awarded summary judgment to the servicer.<sup>84</sup>

Additionally, some plaintiffs attempted to raise constitutional challenges in response to servicers failing to issue loan modifications. In *Williams v. Geithner*, plaintiffs alleged “a violation of their constitutional right to procedural due process . . . [claiming] the history and requirements of the HAMP demonstrate that Congress intended to provide a particular benefit to homeowners facing foreclosure, and, therefore, Defendants are required to provide that benefit in accordance with Plaintiffs’ constitutional rights.”<sup>85</sup> The court ruled against the plaintiffs though, finding that HAMP “did not intend to create a property interest in loan modification[]” plans for defaulting homeowners.<sup>86</sup>

Constitutional issues have not only been raised but have played integral parts in litigation. The Minnesota Supreme Court held that HAMP did not impliedly preempt a Minnesota statute, or violate other constitutional provisions in its decision in *Gretsch v. Vantium Capital, Inc.*<sup>87</sup> The court reasoned that the lack of a federal cause of action to force HAMP directives did not prohibit a state from providing a private cause of action.<sup>88</sup> Constitutional claims continued to be raised throughout the operation of HAMP, most of which were either dismissed by the courts or amended under other causes of action.<sup>89</sup>

Numerous claims, stemming from HAMP, failed over the duration of the program; however, the prolific number of lawsuits gave HAMP plaintiffs insight as to which claims might survive the pleading stage.<sup>90</sup> HAMP, lacking codification, stands starkly juxtaposed with other federal statutes and regulations which clearly provide liability for failure to comply.<sup>91</sup> Although

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<sup>84</sup> *Id.* at \*24.

<sup>85</sup> *Williams v. Geithner*, No. 09-1959 ADM/JJG, 2009 WL 3757380, at \*13–14 (D. Minn. Nov. 9, 2009).

<sup>86</sup> *Id.* at \*17; *see also* *Huxtable v. Geithner*, No. 09cv1846 BTM (WVG), 2010 WL 11570882, at \*14 (S.D. Cal. Sept. 2, 2010) (“Congress did not intend to create an entitlement or protected property interest in HAMP modifications.”).

<sup>87</sup> *Gretsch v. Vantium Capital, Inc.*, 846 N.W.2d 424, 434–35 (Minn. 2014).

<sup>88</sup> *Id.*

<sup>89</sup> *See* *Neal v. E-Trade Bank*, No. S-11-0954 FCD/GGH, 2011 WL 3813158, at \*3 (E.D. Cal. Aug. 26, 2011) (dismissing plaintiffs’ Fifth Amendment due process claims relating to the HAMP for failure to allege sufficient state action); *Ozogu v. CitiMortgage, Inc.*, No. CV 10-9687 CAS (AGRx), 2011 WL 2940391, at \*6 (C.D. Cal. July 19, 2011) (holding that the “[borrowers] do not have a protected property interest in a loan modification under HAMP”).

<sup>90</sup> *See supra* notes 73–89 and accompanying text.

<sup>91</sup> *See, e.g.*, Fair Credit Reporting Act, 15 U.S.C. § 1681n(a) (2012) (“Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer . . .”).

HAMP remained an incentive-based program throughout its duration, some litigation helped create a foundation for homeowners to stand on, one which it lacked upon initiation.<sup>92</sup>

Some of the lawsuits brought against lenders and servicers under HAMP were successful. Two theories, brought by borrowers approved for TPPs, were based on third-party-beneficiary and breach of contract.<sup>93</sup> “Plaintiffs often claim that they are third-party intended beneficiaries of the [Servicer Participation Agreement (SPA)] and, therefore, have standing to sue for a purported violation of the SPA.”<sup>94</sup> The SPA, a form contract issued by the government and distributed to servicers as a template, specifies thirty-six pages worth of information regarding the agreement between the two parties.<sup>95</sup> A few years after HAMP was enacted, borrowers began to experience some success claiming liability through a breach of contract claim, arguing that a mortgage servicer that fails to offer a permanent loan modification following the successful completion of the TPP should be held liable.<sup>96</sup>

### B. *Specific Cases That Strengthened Homeowners’ Rights Within HAMP*

Since the inception of HAMP, courts nationwide have seen an outpouring of lawsuits by borrowers based on loan servicers’ decisions to decline loan modifications under HAMP.<sup>97</sup> Unsure of how to address the groundswell of lawsuits and various claims, courts in the early years of HAMP often dismissed claims.<sup>98</sup> As litigation continued over the years, some district courts began giving new meaning to allegations brought against servicers and investors involving HAMP.<sup>99</sup> Eventually, court decisions gave new life to HAMP and hope for borrowers, beginning with the landmark decision in *Wigod v. Wells Fargo Bank, N.A.*<sup>100</sup>

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<sup>92</sup> See Schehr & Mitchell, *supra* note 39, at 38.

<sup>93</sup> See *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012); *Miller v. Chase Home Fin., LLC*, 677 F.3d 1113, 1116 (11th Cir. 2012).

<sup>94</sup> Schehr & Mitchell, *supra* note 39, at 40.

<sup>95</sup> *Id.* at 39; see also COMMITMENT TO PURCHASE FINANCIAL INSTRUMENT AND SERVICER PARTICIPATION AGREEMENT, [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/servicerparticipationagreement.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/servicerparticipationagreement.pdf) [<https://perma.cc/8325-4YK8>].

<sup>96</sup> See *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 236 (1st Cir. 2013); *Wigod*, 673 F.3d at 566; *Arias v. Elite Mortg. Grp., Inc.*, 108 A.3d 21, 24 (N.J. Super. Ct. App. Div. 2015); *Miller v. Bank of Am. Home Loan Servicing, L.P.*, 110 A.3d 137, 143 (N.J. Super. Ct. App. Div. 2015).

<sup>97</sup> See *supra* Section II.A.

<sup>98</sup> See *supra* Section II.A.

<sup>99</sup> See *supra* notes 93–96 and accompanying text.

<sup>100</sup> *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012).

### 1. Wigod v. Wells Fargo Bank, N.A.

In 2012, the United States Court of Appeals for the Seventh Circuit ruled that a homeowner within HAMP could maintain a private cause of action against lenders or servicers under specified circumstances.<sup>101</sup> The court in *Wigod* held that borrowers that entered into a TPP under HAMP are in direct privity with their servicer and can bring a claim for relief when the servicer fails to fulfill the terms of the TPP.<sup>102</sup> The homeowner in *Wigod* submitted financials to the servicer and requested a HAMP modification.<sup>103</sup> The homeowner was offered a HAMP modification and received a TPP based on her financials.<sup>104</sup> In the agreement signed by both parties prior to the TPP taking effect, the plan clearly stated that the servicer would offer her a permanent modification after all payments were made and if all representations made during the modification process remained current and accurate.<sup>105</sup> But following the TPP, the homeowner was not offered a permanent modification and she filed suit.<sup>106</sup> After evaluating both arguments, the court stated “[h]ere a reasonable person in Wigod’s position would read the TPP as a definite offer to provide a permanent modification that she could accept so long as she satisfied the conditions.”<sup>107</sup> The court ruled in Wigod’s favor, reversing the district court ruling, *inter alia*, on the contract claim.<sup>108</sup>

The decision in *Wigod* was a huge victory for borrowers, giving plaintiffs reaching the TPP stage of a modification some ground to stand upon while also lending courts a potentially new avenue in which to rule.<sup>109</sup> Prior to the *Wigod* decision, courts agreed that HAMP did not give borrowers a private cause of action against the lender or servicer if after the duration of a TPP they did not approve a loan modification.<sup>110</sup> As the court in *Brown v. Bank of N.Y. Mellon* stated, “[a]ll of the district courts that have considered the [breach of contract] issue have held

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<sup>101</sup> *See id.* at 576.

<sup>102</sup> *Id.* at 562 (“In more abstract terms, then, when Wells Fargo executed the TPP, its terms included a unilateral offer to modify Wigod’s loan conditioned on her compliance with the stated terms of the bargain.”).

<sup>103</sup> *Id.* at 558.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 558, 560.

<sup>106</sup> *Id.* at 558–90.

<sup>107</sup> *Id.* at 562.

<sup>108</sup> *Id.* at 586.

<sup>109</sup> *See infra* notes 126–132 and accompanying text.

<sup>110</sup> *Brown v. Bank of N.Y. Mellon*, No. 1:10-CV-550, 2011 WL 206124, at \*2 (W.D. Mich. Jan. 21, 2011); *Cohn v. Bank of Am.*, No. 2:10-cv-00865, 2011 WL 98840, at \*6 (E.D. Cal. Jan. 12, 2011).

that homeowners do not have a private right of action under HAMP for denial of a loan modification.”<sup>111</sup> Post *Wigod*, courts began “reviewing trial period plans,” between borrower and servicers, more closely.<sup>112</sup>

Interpretations of the *Wigod* holding have varied.<sup>113</sup> In some instances, where the TPP was not signed by the servicer, courts refused to rule in favor of the borrower.<sup>114</sup> Alternatively, the *Sutcliffe v. Wells Fargo Bank, N.A.* court found “the reasoning of *Wigod* . . . to be persuasive,” concluding there to be a sufficient allegation of mutual assent when the TPP agreement was not signed by the servicer.<sup>115</sup> While others, although agreeing with the holding in *Wigod*, have dug deeper into the facts by distinguishing the language within the respective TPPs.<sup>116</sup> Although some rulings that followed still varied, *Wigod* gave much needed strength to homeowners seeking qualification under HAMP, especially for borrowers that were able to reach the TPP stage of a loan modification.

Under HAMP, a homeowner that met the qualifications for a loan modification was first placed on a TPP for a short duration, often no longer than three months.<sup>117</sup> As a New Jersey appellate court noted in a later opinion, citing the Seventh Circuit’s ruling in *Wigod*, “[e]ven though there is no private cause of action under HAMP, a mortgagor may nonetheless assert a common-law contract claim based on a bank’s failure to honor promises made in a HAMP [TPP] Agreement.”<sup>118</sup> This holding solidifies the notion that if all payments during the TPP are made on time and the rest

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<sup>111</sup> *Brown*, 2011 WL 206124, at \*5 (W.D. Mich. Jan. 21, 2011); see, e.g., *Cohn*, 2011 WL 98840, at \*22 (E.D. Cal. Jan. 12, 2011) (finding no private right of action under HAMP); *Wilson v. GMAC Mortgage LLC*, 10CV2559 DMS (NLS), 2010 WL 5387829, at \*1 (S.D. Cal. Dec. 22, 2010) (“HAMP generally involves an agreement between a participating loan servicer and the U.S. Department of Treasury and a borrower does not have a private right to enforce the HAMP contract.”).

<sup>112</sup> See *What’s Good Following Wigod?*, WELTMAN, WEINBERG & REIS CO., LPA (Feb. 6, 2013), <http://www.weltman.com/?t=40&an=40059&format=xml&p=8082> [<https://perma.cc/6U3P-6EZ3>].

<sup>113</sup> See *Cave v. Saxon Mortg. Servs., Inc.*, No. 12-5366, 2013 WL 1915660, at \*6 (E.D. Pa. May 9, 2013); see also *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, 551–52 (N.D. Cal. 2012).

<sup>114</sup> See *Rummel v. Vantium Captial, Inc.*, No. 12-10952, 2012 WL 2564846, at \*7 (E.D. Mich. July 2, 2012); *Brady v. Chase Home Fin., LLC*, No. 1:11-CV-838, 2012 WL 1900906, at \*7 (W.D. Mich. May 24, 2012); *Soin v. Fed. Nat’l Mortg. Ass’n*, 2:12-634 WBS EFB, 2012 WL 1232324, at \*5–6 (E.D. Cal. Apr. 12, 2012).

<sup>115</sup> *Sutcliffe*, 283 F.R.D. at 545, 551–52.

<sup>116</sup> *Cave v. Saxon Mortg. Servs., Inc.*, No. 11-4586, 2012 WL 1957588, at \*4–5 (E.D. Pa. May 30, 2012).

<sup>117</sup> U.S. Dep’t of the Treasury, Home Affordable Modification Program Guidelines 9 (2009), [https://www.treasury.gov/press-center/press-releases/Documents/modification\\_program\\_guidelines.pdf](https://www.treasury.gov/press-center/press-releases/Documents/modification_program_guidelines.pdf) [<https://perma.cc/2MP6-JZUV>].

<sup>118</sup> *Arias v. Elite Mortg. Grp., Inc.*, 108 A.3d 21, 22 (N.J. Super. Ct. App. Div. 2015).

of the TPP requirements are fulfilled, the homeowner will possess rights to a permanent modification agreement.<sup>119</sup>

## 2. *Young v. Wells Fargo Bank, N.A.*

The trend continued and a year after the landmark decision in *Wigod*, the United States Court of Appeals for the First Circuit held that a servicer may be held liable for failing to convert a trial loan modification to a permanent modification in a timely manner.<sup>120</sup> In *Young v. Wells Fargo Bank*, the lender refused to provide a permanent modification agreement by the modification effective date after the borrower fulfilled the TPP.<sup>121</sup> The “[borrower] asserted several claims, including breach of contract, breach of good faith and fair dealing, and violation of [the State Unfair Debt Collection Practices Act]” (UDCPA) under Massachusetts General Laws Chapter 93A.<sup>122</sup> “The District Court dismissed Young’s claims, and she appealed to the First Circuit.”<sup>123</sup> Reversing the dismissal, the First Circuit noted that the fulfillment of a borrower’s obligations under the TPP would require Wells Fargo to offer a permanent modification under the terms agreed upon in the TPP.<sup>124</sup>

Following the *Wigod* and *Young* holdings, courts have been more inclined to declare a breach of contract “when a borrower fully complies with a trial period plan and the servicer fails to timely offer a permanent modification consistent with servicing guidelines.”<sup>125</sup> A flood of victories was not necessarily evident following both *Young* and *Wigod*. Rather, the cases demonstrate a “common thread . . . that situation-specific facts are critical” to the borrower’s case, preventing the floodgates of class actions from opening.<sup>126</sup>

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<sup>119</sup> See *id.* at 22–23.

<sup>120</sup> See *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 233–36 (1st Cir. 2013); *Young v. Wells Fargo: First Circuit Holds That Failure to Timely Convert Trial Modification Gives Rise to Breach of Contract Claim*, HOUSE KEEPING REPORT (May 28, 2013), <http://www.housekeepingreport.com/young-v-wells-fargo-first-circuit-holds-that-failure-to-timely-convert-trial-modification-gives-rise-to-breach-of-contract-claim/> [<https://perma.cc/PHA4-E8NT>] [hereinafter Housekeeping Report].

<sup>121</sup> *Young*, 717 F.3d at 234, 230; see also Housekeeping Report, *supra* note 120.

<sup>122</sup> *Young*, 717 F.3d at 234, 228; see also Housekeeping Report, *supra* note 120.

<sup>123</sup> *Id.*

<sup>124</sup> See *Young*, 717 F.3d at 234, 242.

<sup>125</sup> See Housekeeping Report, *supra* note 120.

<sup>126</sup> Neil Jonas & Cory Howard, Essay, *Avoiding Liability for Mortgage Lenders and Servicers Under HAMP and State Consumer Protection Laws During the Mortgage Modification Process*, 1 SUFFOLK U. L. REV. ONLINE 83 (Nov. 15, 2013), <http://suffolklawreview.org/jonas-hamp/> [<https://perma.cc/MNF8-A58P>] (“[T]he same situationally specific facts, which are necessary components of a well-pleaded complaint seeking lender liability, also cut against the possibility of creating a class of similarly situated plaintiffs harmed by the loan-modification process.”).

### 3. *Arias v. Elite Mortg. Grp., Inc.*

In *Arias v. Elite Mortgage Group, Inc.*, the first reported New Jersey case on this issue, “[t]he [trial court found] that the TPP . . . was not a binding contract to modify the [borrower’s] loan.”<sup>127</sup> The issue before the court was whether the lender would be bound by a written TPP which allowed the borrower to make three reduced monthly mortgage payments as a requirement of the TPP.<sup>128</sup> The court examined whether the TPP constituted a unilateral offer by the lender contingent on the borrower complying with the requirements within the TPP.<sup>129</sup> Further the court stated that “case law suggests that an agreement that purports to bind a debtor to make payments while leaving the mortgage company free to give her nothing in return might violate the New Jersey Consumer Fraud Act.”<sup>130</sup> The court cited *Wigod* to support its holding that “even though there is no private cause of action under HAMP, a mortgagor may nonetheless assert a common-law contract claim based on a bank’s failure to honor promises made in a HAMP Trial Period Plan Agreement.”<sup>131</sup> The court noted that *Wigod* rejected any argument that a TPP lacked consideration, as a borrower’s obligation to submit additional financial information and submit to counseling would be sufficient.<sup>132</sup> Regrettably, the borrowers in *Arias* failed to make the required payments under the TPP, leading to the appellate court’s decision to affirm the trial court’s ruling in favor of the lender.<sup>133</sup> *Arias* set precedent in New Jersey holding that HAMP does not prohibit a borrower from asserting a breach of contract claim under state law. This decision came at a time where courts throughout the country went both ways on the issue.<sup>134</sup>

### 4. *Miller v. Bank of Am. Home Loan Servicing, L.P.*

Shortly after *Arias*, the New Jersey Superior Court, Appellate Division was again asked to address whether a

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<sup>127</sup> See *Arias v. Elite Mortg. Grp., Inc.*, 108 A.3d 21, 22 (N.J. Super. Ct. App. Div. 2015).

<sup>128</sup> See *id.* at 22–24.

<sup>129</sup> *Id.* at 23–24.

<sup>130</sup> *Id.* at 23.

<sup>131</sup> *Id.* at 22.

<sup>132</sup> *Id.* at 23.

<sup>133</sup> See *id.* at 25–26.

<sup>134</sup> Michael Anselmo & John Blatt, *It has Been One Year Since the 7th Circuit Issued Its Opinion on Wigod*, National (Aug. 1, 2013), [http://alolawgroup.com/content/learningpdfs/387-learning\\_pdf-wigod.pdf](http://alolawgroup.com/content/learningpdfs/387-learning_pdf-wigod.pdf) [<https://perma.cc/JZ45-NLKKQ>] (“[r]ulings from courts around the country run the gamut”); see also *Miller v. Bank of Am. Home Loan Servicing, L.P.*, 110 A.3d 137, 142–43 (N.J. Super. Ct. App. Div. 2015); *Arias*, 108 A.3d at 23.

borrower under HAMP could sustain claims against a servicer for denying to modify his or her mortgage following the TPP.<sup>135</sup> The *Miller v. Bank of Am. Home Loan Servicing, L.P.* court did not stray from *Arias*, stating that “borrowers should not be denied the opportunity to assert claims alleging a lender failed to comply with its stated obligations under the TPP.”<sup>136</sup> The court further held that as long as all terms of the TPP are fulfilled by the borrower, then “the specific terms of the TPP govern the parties’ agreement.”<sup>137</sup> It is important to note, however, that the court did not suggest that the “temporary payment under any TPP will necessarily become the adjusted rate in a modification agreement” and, therefore, the adjusted rate calculated by the lender may differ from the TPP payment.<sup>138</sup> Following the rulings in *Arias* and *Miller*, a party may bring a common-law breach of contract action based on a lender denying modification, thus taking away much of the lender’s discretion after a borrower fulfills the required terms of the TPP.

HAMP litigation has continued even after the program’s expiration.<sup>139</sup> As the Treasury continues to roll out new initiatives, homeowners will likely continue to allege legal wrongdoing against mortgage investors and servicers.<sup>140</sup> HAMP litigation has helped clarify the duties of servicers and investors and established some guidance for plaintiffs looking to hold servicers accountable.<sup>141</sup> The resulting HAMP precedent benefitted servicers who developed “a road map of how to defend against these claims.”<sup>142</sup> Despite these defensive roadmaps, litigating remains a useful tool to homeowners trying to keep their homes.<sup>143</sup> Courts have illustrated a greater inclination to enforce HAMP when borrowers claim non-compliance.<sup>144</sup> Due in part to the more favorable precedent supporting borrower claims and potentially because “judges who routinely decide foreclosure cases” have gained a greater understanding of HAMP making

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<sup>135</sup> See *Miller*, 110 A.3d at 141.

<sup>136</sup> *Id.* at 143.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 143 n.7.

<sup>139</sup> See Appellant’s Brief on Appeal, *Bank of N.Y. Mellon v. Bronson*, No. 2017AP2301, 2018 WL 1109989 (Wis. App. IV Dist.).

<sup>140</sup> See Marcantel, *supra* note 7, at 126–27.

<sup>141</sup> See *supra* Section II.A.

<sup>142</sup> Michael F. Hord Jr. & Joshua A. Huber, *Loss Mitigation, HAMP and Lawsuits: A Recipe for Litigation*, HG.ORG, <http://www.hg.org/article.asp?id=21651> [<https://perma.cc/WRC7-QXPV>].

<sup>143</sup> Rebekah Cook-Mack & Sarah Parady, *Home Affordable Modification Program Enforcement Through the Courts*, 40 HOUSING L. BULL. 136, 141 (2010), <http://www.massforeclosuresutorial.org/seminar/09-HAMP-court%20enforcement.pdf> [<https://perma.cc/76LL-HCZZ>].

<sup>144</sup> *Id.*

them better equipped to handle the issues surrounding HAMP related cases.<sup>145</sup>

### III. HOW HAMP HAS FAILED

HAMP “seems to have created more litigation than it has happy homeowners.”<sup>146</sup> The program failed to meet its objective of helping homeowners facing foreclosure and instead has largely benefitted financial institutions, leaving most of the problems it set out to fix, or at least significantly improve, still looming over the housing market.<sup>147</sup> The government’s use of HAMP to simply encourage mortgage companies to assist borrowers rather than mandate assistance is largely to blame.<sup>148</sup> When the program was first announced by President Obama on February 18, 2009, “he promised it would assist [three] to [four] million homeowners to modify their loans [in order] to avoid foreclosure.”<sup>149</sup> As of December 2015, “less than [one] million borrowers have received ongoing assistance [with] nearly one in three re-default[ing] after receiving inadequate modifications.”<sup>150</sup> “[Six] million families lost their homes [in foreclosure] over the same time period.”<sup>151</sup>

HAMP’s failure is primarily a result of its poor strategy and design.<sup>152</sup> Rather than stimulating the housing market by distributing resources directly to the borrowers, it gave the funds to mortgage servicing companies with simple guidelines, leaving mortgage companies to ultimately decide when, how, and why they should issue assistance to borrowers.<sup>153</sup> Leaving such discretion in the hands of for-profit mortgage companies built a foundation that was ready to crack from the start.

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<sup>145</sup> *See id.*

<sup>146</sup> *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 880 (9th Cir. 2013).

<sup>147</sup> *See* David Dayen, *Obama Program That Hurt Homeowners and Helped Big Banks is Ending*, INTERCEPT (Dec. 28, 2015, 12:07 PM), <https://theintercept.com/2015/12/28/obama-program-hurt-homeowners-and-helped-big-banks-now-its-dead/> [<https://perma.cc/73L8-AWKU>].

<sup>148</sup> *See* Casey B. Mulligan, *The Failure of Mortgage Modification*, N.Y. TIMES: ECONOMIX (Nov. 3, 2010, 6:00 AM), <https://economix.blogs.nytimes.com/2010/11/03/the-failure-of-mortgage-modification/> [<https://perma.cc/4UR7-EBT7>].

<sup>149</sup> Dayen, *supra* note 147; OFF. OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, QUARTERLY REPORT TO CONGRESS 132, 140 (July 29, 2015), [https://www.sigtar.gov/Quarterly%20Reports/July\\_29\\_2015\\_Report\\_to\\_Congress.pdf](https://www.sigtar.gov/Quarterly%20Reports/July_29_2015_Report_to_Congress.pdf) [<https://perma.cc/BA2P-EAKA>] [hereinafter OFFICE OF THE SPECIAL INSPECTOR GEN.].

<sup>150</sup> Dayen, *supra* note 147.

<sup>151</sup> *See id.*

<sup>152</sup> *See id.*

<sup>153</sup> *See id.*

HAMP simply encouraged banks and servicers to conduct loan modifications for struggling homeowners.<sup>154</sup> There exists a large difference between urging banks and servicers to take certain actions and forcing them to implement change. Even after a homeowner fulfilled all payments of a TPP, “provid[ed] the necessary supporting documentation, and maintain[ed] eligibility, . . . the servicer should offer the borrower a permanent loan modification” but did not necessarily have to.<sup>155</sup> The *Wigod* holding helped alleviate some of this burden upon the borrower, but not all courts followed suit.<sup>156</sup> In addition, court decisions were based on specific facts, preventing borrowers from bringing a class action lawsuit which would have significantly reduced the financial burden on plaintiffs seeking justice.<sup>157</sup>

“Although HAMP never covered the entire mortgage marketplace, HAMP’s failure to reach its intended scale has one root cause: massive servicer noncompliance.”<sup>158</sup> The program never reached the promised number of homeowners and instead fell far short of this goal, having only lowered mortgage payments for about 1.6 million borrowers as of the end of 2016.<sup>159</sup> Even after the government extended HAMP application deadlines on multiple occasions, the results were still lackluster.<sup>160</sup> According to the Office of the Special Inspector General for the Troubled Asset Relief Program, “extending HAMP’s timeframe without eliminating the barriers homeowners face will not increase HAMP’s effectiveness.”<sup>161</sup> The government has spent billions of taxpayer dollars on an ineffective program, yet of the \$29.8 billion used to fund HAMP, \$18.5 billion remained unspent as of June 30, 2015.<sup>162</sup>

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<sup>154</sup> *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 228 (1st Cir. 2013).

<sup>155</sup> *See id.* at 229; Dayen, *supra* note 9 (Chris Cooley, a California homeowner, renegotiated his loan through HAMP. After reducing his mortgage to an affordable rate, Wells Fargo “rejected [Cooley] for a permanent modification . . . [but] never informed him [of the denial.]” “What followed was what most homeowners would consider a nightmare. While Cooley tried to stave off foreclosure to save his home and livelihood, Wells Fargo paid the other renters living in the property \$5,000 to move out behind his back, and then denied Cooley further aid—because his income, which he drew from the rentals, was too low. ‘They took my income away from me, and then they couldn’t give me a loan because I had no income,’ Cooley said. ‘What a wonderful catch-22.’ . . . Tired of fighting, Cooley ended up leaving his home, and became just one of the seven million foreclosure victims in the US since the bursting of the housing bubble in 2007.”).

<sup>156</sup> *See* Anselmo & Blatt, *supra* note 134.

<sup>157</sup> *See id.*; *see also* Jonas & Howard, *supra* note 126.

<sup>158</sup> COHEN, COHEN & THOMPSON, *supra* note 16, at 4.

<sup>159</sup> *See* OFFICE OF THE SPECIAL INSPECTOR GEN., *supra* note 149, at 56, 100; Merle, *supra* note 16 (“About a third of [the 1.6 million borrowers] eventually fell behind on their payments again.”).

<sup>160</sup> *See* OFFICE OF THE SPECIAL INSPECTOR GEN., *supra* note 149, at 56.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 99.

HAMP left many homeowners in foreclosure rather than fulfilling its goal of relieving the majority of them from inevitable foreclosure.<sup>163</sup> “Servicers have denied an alarmingly high number of applications for the Home Affordable Mortgage Program, with only 30 [percent] of homeowners who applied for HAMP getting in.”<sup>164</sup> As of April 2015, JPMorgan Chase Bank, Citibank, and Bank of America had all turned down at least 80 percent of HAMP applications, leaving a majority of HAMP applicants with no economic alternatives.<sup>165</sup> It is important to note, however, that denials for reasons in control of the homeowner are included in this percentage.<sup>166</sup> Even if homeowners received modifications through HAMP, the modifications often did not alleviate many of the financial hardships experienced by homeowners.<sup>167</sup> On average, “HAMP modifications reduced monthly mortgage payments to [31 percent] of gross monthly income.”<sup>168</sup> The modifications “left borrowers with high overall debt-to-income ratios, did not require reduction of loan principal even for those owing much more than the value of their homes, and used primarily temporary interest rate breaks, resulting in a high risk of redefault.”<sup>169</sup>

Of significant issue during the existence of HAMP were widespread inconsistencies in the modification process.<sup>170</sup> Many homeowners entered into TPPs and did not receive permanent HAMP modifications following the completion of the trials.<sup>171</sup> Homeowners, fulfilling the obligations of their TPPs, have sued in response to being denied for permanent modification, typically asserting breach of contract claims.<sup>172</sup> In response to these claims:

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<sup>163</sup> See Marcantel, *supra* note 7, at 126–27.

<sup>164</sup> Brena Swanson, *SIGTARP Report Reveals Massive Failure of HAMP*, HOUSINGWIRE (July 29, 2015), <http://www.housingwire.com/articles/34609-sigtarp-report-reveals-massive-failure-of-hamp> [<https://perma.cc/A6XK-KEPG>].

<sup>165</sup> *Id.*

<sup>166</sup> See Colin Robertson, *Four Million Homeowners Denied HAMP Loan Modifications, More Changes Coming?*, THE TRUTH ABOUT MORTGAGE (July 30, 2015), <http://www.thetruthaboutmortgage.com/four-million-homeowners-denied-hamp-loan-modifications-more-changes-coming/> [<https://perma.cc/YH74-J27Z>] (Some reasons behind denials are (1) the homeowner’s application was “incomplete” (2) the homeowner withdrew the HAMP application or “failed to accept” an offered HAMP trial, (3) the homeowner’s income fell outside of HAMP eligibility.).

<sup>167</sup> See Dayen, *supra* note 9 (“Around 28% of all modified loans have slipped back into default, including nearly half of those loans modified back in 2009 at the height of the foreclosure crisis.”).

<sup>168</sup> Braucher, *supra* note 35, at 729.

<sup>169</sup> *Id.*

<sup>170</sup> See Raduege, *supra* note 12 at \*2.

<sup>171</sup> See *id.*

<sup>172</sup> *Id.*

courts have [often] disallowed [them] holding, for example, that TPP agreements do not promise permanent modifications, their terms are not sufficiently definite, the homeowners do not give adequate consideration, the TPP is not effective without the servicer's signature, there was a failure of a condition, that enforcement is barred by the statute of frauds, or that specific factual circumstances warranted a finding that a contract either did not exist or that it was not breached.<sup>173</sup>

The numerous homeowners that failed to qualify for HAMP are left with poor alternatives that put extreme strain on the homeowners' livelihoods. One option is for the homeowner to short sell their home.<sup>174</sup> A second is for the homeowner to "giv[e] the home back to the lender via a 'deed-in-lieu of foreclosure.'"<sup>175</sup> A more ideal alternative, but one that is potentially difficult for homeowners to achieve, is receiving a forbearance, which results in the lender reducing or suspending the homeowner's loan payments.<sup>176</sup> This suspension typically lasts for up to ninety days, allowing the homeowner more time to gather the required payment amounts.<sup>177</sup> Alternatively, some homeowners may attempt to find suitable tenants who will rent their homes, allowing them to pay down the mortgage through rental income.<sup>178</sup> Lastly, homeowners sometimes turned to bankruptcy courts for help.<sup>179</sup> These courts have played a significant role in helping homeowners when HAMP failed to improve their situation.<sup>180</sup>

HAMP proved to be a poor alternative to homeowners facing foreclosure, often resulting in simply delaying the imminent foreclosure process.<sup>181</sup> HAMP's overall poor strategy and design resulted in high rates of denial for borrowers seeking modification.<sup>182</sup> Many borrowers turned to the courts and expensive litigation for assistance.<sup>183</sup> While Congress watched from afar, some courts gave life to borrowers' claims, but the

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<sup>173</sup> *Id.*

<sup>174</sup> *HAMP: Home Loan Modification Program Information*, *supra* note 9 (A short sale is when the borrower "[and] bank negotiate a deal [which] allow[s] the homeowner] to sell [the] home for [an amount] less than [the amount] currently owe[d] to] the bank.").

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *See id.*

<sup>178</sup> *Id.*

<sup>179</sup> *See Coco*, *supra* note 2, at 435–44.

<sup>180</sup> *See id.*

<sup>181</sup> *See generally* Peter Miller, *Did the HAMP Mod Program Delay the Foreclosure Crisis?*, REALTYTRAC (Sept. 16, 2014), <https://www.realtytrac.com/news/did-the-hamp-mod-program-delay-the-foreclosure-crisis/> [<https://perma.cc/7UFF-8V88>] ("HAMP was *not* designed to help distressed borrowers, but was implemented to 'foam the runway' for Wall Street banks by 'stretching out foreclosures, giving the banks more time to absorb losses while the other parts of the bailouts juiced bank profits.'").

<sup>182</sup> *See Swanson*, *supra* note 164; *see also Dayen*, *supra* note 147.

<sup>183</sup> *See supra* Part II.

inconsistency in these decisions proved detrimental to the very borrowers that HAMP was intended to help.<sup>184</sup>

#### IV. LIFE AFTER HAMP

“On Dec[ember] 31, 2016, the government’s Home Affordable Modification Program . . . [came to an] end” with no expectation of an extension.<sup>185</sup> The program’s expiration may result in significant consumer harm if the government fails to strategically implement loss mitigation programs that encompass solutions to the exact problems that arose during the housing crisis.<sup>186</sup> The Treasury, Department of Housing and Urban Development, and the Federal Housing Finance Agency stated prior to the program’s end that, “while these programs are set to end this year, the government plans to continue working with the mortgage industry on various loss-mitigation programs moving forward, but caution that the industry needs to be prepared to do more moving forward.”<sup>187</sup> For the purposes of preventing future foreclosure crises, the agencies cited the importance of several principles that they believe should establish the foundation for future programs in the loss mitigation sector.<sup>188</sup> These “guiding principles” include: “accessibility, affordability, sustainability, transparency, and accountability.”<sup>189</sup>

The government remained cautiously optimistic as the program came to an end, with strong hope that the industry could learn from past mistakes and simplify the modification process.<sup>190</sup> “According to the agencies, other pieces of the infrastructure supported by MHA and HAMP, such as requirements to offer post-modification counseling, third-party escalation centers, and public reporting of modification and servicer performance will also be phased out, or provided on a limited basis depending on investor or servicer.”<sup>191</sup> The Treasury has since created a series of measures for the years following the

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<sup>184</sup> See *supra* Section II.A.

<sup>185</sup> Ben Lane, *Obama Administration Presents a Look at Life After HAMP*, HOUSINGWIRE (July 25, 2016), <http://www.housingwire.com/articles/37608-obama-administration-presents-a-look-at-life-after-hamp> [<https://perma.cc/EG9V-MJER>].

<sup>186</sup> Bob Sullivan, *What Happens When HAMP Expires at the End of This Year?*, CREDIT.COM (Aug. 4, 2016), <http://blog.credit.com/2016/08/what-should-life-after-hamp-look-like-153247/> [<https://perma.cc/32NC-MY68>].

<sup>187</sup> Lane, *supra* note 185.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> See Sullivan, *supra* note 186; See also *Life After HAMP—The Future of Loss Mitigation*, MORTG. BANKERS ASS’N (Sept. 2016), <https://www.mba.org/issues/residential-issues/one-mod-a-post-hamp-loan-modification> [<https://perma.cc/HM3E-FVUZ>].

<sup>191</sup> Lane, *supra* note 185.

expiration of HAMP. The programs, in the process of being implemented, include “a principal reduction alternative, a first and second lien modification program, and post modification counseling, [which will lend] assist[ance to] struggling borrowers and prevent them from defaulting or [in some cases] re-defaulting.”<sup>192</sup> The government did not seem concerned with the end of HAMP and expressed high hope for the planned measures following HAMP’s end. A program viewed largely as a complete failure paves an even rockier road for the time period following.

## V. SOLUTIONS TO HAMP

### A. *Non-HAMP Alternatives*

A significant issue HAMP faced during its lifetime was the fact that it was not only implementing a program, but it was also trying to fix the mortgage business. One proposed solution is “eliminat[ing] government-sponsored Fannie Mae and Freddie Mac, which currently own or guarantee nine out of every [ten] new mortgages on behalf of the government.”<sup>193</sup> Eliminating the two dominant mortgage holders in the industry would place the “responsibility for buying mortgages and packaging them into [sellable] bundles” on “private financial firms.”<sup>194</sup> Keeping both Fannie Mae and Freddie Mac in the market is allowing them, and essentially the government, to shoulder the majority of the risk of new mortgages.<sup>195</sup> This solution is flawed, however, because allowing private investors to shoulder the burden is what brought on the mortgage crisis in the first place. The key is to spread the burden and regulate the market, preventing private investors from making unrealistic investments in thousands of mortgages that are likely to fail. Careful regulation may reduce the chances of a future mortgage crisis; however, a program designed with the average American borrower in mind is what will alleviate the current problem.

### B. *Rebuilding HAMP from the Ground Up*

Much of HAMP, as well as other past initiatives, has lacked core principles such as efficiency, affordability,

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<sup>192</sup> Brian Honea, *Treasury Looks to the Future as HAMP Winds Down*, DSNEWS (Mar. 16, 2016, 3:46 PM), <http://www.dsnews.com/news/03-16-2016/treasury-looks-to-the-future-as-hamp-winds-down> [<https://perma.cc/BNS5-V3D6>].

<sup>193</sup> Dayen, *supra* note 9.

<sup>194</sup> *Id.*

<sup>195</sup> *See id.*

accessibility, accountability, and enforceability.<sup>196</sup> These five values should form the foundation of most, if not all, government programs designed to better the general welfare and assist those in need. Building a foundation upon these principles will lend greater support to the main goal of HAMP: effectiveness.

As of June 30, 2015, “\$18.5 billion . . . remain[ed] unspent and available for HAMP [initiatives].”<sup>197</sup> This amount is not only significant, it is adequate to fund a new program with the same goals as the original HAMP, but with a reinvented foundation built upon applicable principles. These funds were allocated for the development and implementation of HAMP; however, due likely in part to HAMP failing to reach the three to four million homeowners promised by the Treasury, significant funds have been left unused.<sup>198</sup> A solution to the problems that HAMP has poorly addressed, primarily financial difficulties, will require substantial capital. Sufficient unused capital already budgeted by the Treasury will allow a solution, or a combination of solutions, to be seamlessly integrated without the need for additional funding from Congress.

A key element to an effective program is efficiency. Not only does efficiency reduce unneeded expenditures, it also creates ease on both ends of the transaction for both the borrowers and the lenders.<sup>199</sup> “Loan modifications must be mandated for qualified homeowners facing hardship where the modification also produces more income for the investor than foreclosure.”<sup>200</sup> Additionally, the “modification evaluation should be completed [prior to] foreclosure,” and if foreclosure has already been initiated before the homeowner applied for a loan modification, then “the foreclosure should be paused.”<sup>201</sup> Initiating the modification evaluation prior to commencing foreclosure will prevent the homeowner and servicer from incurring foreclosure fees in a situation where foreclosure may never occur.<sup>202</sup> Avoiding these unnecessary fees would better serve the parties by allocating those funds towards the modification plan. Additionally, homeowners typically oppose foreclosures, creating litigation that further depletes resources

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<sup>196</sup> See COHEN, COHEN & THOMPSON, *supra* note 16, at 6–9.

<sup>197</sup> OFFICE OF THE SPECIAL INSPECTOR GEN., *supra* note 149, at 99.

<sup>198</sup> See Jacobs, *supra* note 31, at 274; see also OFFICE OF THE SPECIAL INSPECTOR GEN., *supra* note 149, at 99.

<sup>199</sup> COHEN, COHEN & THOMPSON, *supra* note 16, at 53.

<sup>200</sup> *Id.* at 6.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 54.

that could be allocated towards curing the initial issue—a defaulted mortgage.<sup>203</sup>

Ensuring a modification evaluation is carried out in a timely manner will educate the homeowner on the reality of the situation, allowing them to understand whether foreclosure is the correct option or if a loan modification will allow them to remain without the risk of re-defaulting. This will not only speed up the modification evaluation, but it will prevent the servicer from pouring more resources into a foreclosure that may not ever occur.<sup>204</sup>

Affordability on a national scale is essential to the solution. The little success HAMP has had is primarily through reducing re-default rates of its successful modifications. Keeping re-default rates low is essential to any loan modification program's success. "National standards should follow HAMP's template by requiring affordable monthly payments and prioritizing interest rate reduction and principal forgiveness for long-term sustainability."<sup>205</sup> Allowing access to a loan modification is only the first piece of the puzzle. Lenders must be tasked with correctly determining adequate payment plans that limit the chances of re-default by the homeowner and are fair to both the homeowner and the lender.<sup>206</sup> Throughout the mortgage crisis, lenders have been viewed negatively as a result of ignoring HAMP's guidelines and foreclosing on American homes.<sup>207</sup> Rather than acting solely with their own interests in mind, lenders should approach homeowners as teammates, ready to assist them and with the goal of establishing affordable plans that are favorable and realistic for both parties. Re-defaulting not only creates hardships for the homeowners, but also results in foreclosure which can lead to significant troubles for lenders.<sup>208</sup> Lenders continue to face many hardships when foreclosing upon homes, leading one to believe that foreclosure is not in the lenders' best interest.<sup>209</sup>

Throughout its duration, HAMP exemplified a program built with barriers, heavily restricting its accessibility. These superficial "barriers [have excluded] access for many homeowners [such as] those with second mortgage debt, extended unemployment, [and] subsequent hardships after

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<sup>203</sup> See *id.* at 53–55.

<sup>204</sup> See *id.*

<sup>205</sup> *Id.* at 12.

<sup>206</sup> Dayen, *supra* note 147.

<sup>207</sup> See *id.*; see also *supra* Part II.

<sup>208</sup> See Christopher K. Odinet, *Banks, Break-ins, and Bad Actors in Mortgage Foreclosure*, 83 U. CIN. L. REV. 1155, 1166 (2015).

<sup>209</sup> See *id.*

modification.”<sup>210</sup> Additionally, HAMP failed to adequately reach populations such as those lacking English proficiency.<sup>211</sup> “Reaching homeowners in need requires expansive eligibility rules and additional assistance for certain populations.”<sup>212</sup>

The mortgage crisis hit the nation as a whole, yet HAMP did not address the crisis on the same scale. In order to reach the millions of people the Treasury promised but failed to reach, homeowners across the nation must be educated about their rights and informed of the actions they can take to avoid foreclosure. The burden of educating homeowners must be placed on both lenders and servicers who have direct lines of communication with the struggling homeowners. Technological advances in communication and the spread of information should be utilized by the Treasury and lenders to reach the population that has been ignored throughout the lifetime of HAMP. For example, lenders and servicers should be required to hold both in-person and video conference outreach programs where homeowners can meet one-on-one with mortgage servicers. Such in-person programs were not held in six of the ten states most underserved by HAMP, even though previous outreach events demonstrated success.<sup>213</sup> The Office of the Special Inspector General for the Troubled Asset Relief Program recommended that “the Treasury [] hold additional and sustained public service campaigns . . . in all major cities and high foreclosure cities within the 10 HAMP-underserved states.”<sup>214</sup> Additionally, servicers and lenders should be required to hold similar informative campaigns in order to receive the financial benefits included in HAMP participation.

A significant issue with the HAMP process was that once homeowners filed for a modification, they were often left unsure of their statuses. The “Treasury should hold servicers accountable for extensive delays, lost paperwork, and errors in calculating key eligibility factors such as income.”<sup>215</sup> A lack of transparency between servicers and homeowners was prevalent during HAMP’s lifespan. Often homeowners were assigned TPPs only to find out at the end of the TPPs that they were denied permanent modification.<sup>216</sup> Both transparency and accountability throughout the loan modification process are essential to a

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<sup>210</sup> COHEN, COHEN & THOMPSON, *supra* note 16, at 6.

<sup>211</sup> *See id.* at 60.

<sup>212</sup> *Id.* at 6.

<sup>213</sup> *See* OFFICE OF THE SPECIAL INSPECTOR GEN., *supra* note 149, at 57.

<sup>214</sup> *Id.* at 58.

<sup>215</sup> Swanson, *supra* note 164.

<sup>216</sup> *See supra* Section II.B.

successful program. Servicers should be held accountable to homeowners, ensuring that the homeowner is aware of what actions they are taking and when these actions are being made. The need for congressional mandates is essential:

Without strong mandates and real consequences for noncompliance, servicers will continue to implement modifications haphazardly or not at all, leaving the economy in a tailspin. Eligible homeowners must be able to rely directly on national servicing standards to save their homes from avoidable foreclosures.<sup>217</sup>

Real consequences would include measures such as reducing the “bonuses” received by lenders that are paid out when permanent modifications are made;<sup>218</sup> as well as increasing fees and fines levied upon lenders that fail to comply or choose to implement abusive tactics that stretch the boundaries of the implemented guidelines. A lack of accountability results in a lack of protection, in this case, protection for the participants in which the program was designed.<sup>219</sup> Holding lenders accountable will lend strength to a reinvented and newly implemented HAMP program, allowing for greater overall effectiveness and therefore noticeable improvement to the lingering housing crisis.

Courts were (and, regarding any lingering litigation since the end of the program, still are) left to interpret the guidelines of HAMP and enforce what they find the program supports.<sup>220</sup> Homeowners should not be required to bring costly litigation and fill the courts’ dockets with disputes revolving around loan modifications. These homeowners turned to HAMP due to financial difficulties and, therefore, likely lack the funds needed to hire adequate representation. Therefore, homeowners should have the right to appeal modification decisions and obtain independent review of their applications. Furthermore, the guidelines established by the Treasury should be converted to mandates in exchange for the billions of dollars the Treasury has made available to banks and servicers.<sup>221</sup> A task force or current government agency should be expanded and tasked to ensure that the billions of dollars in American taxes are used in an effective manner and any noncompliance is rigorously enforced. Given the level of authority the Treasury possesses, it should exercise its “power to permanently withhold TARP incentive payments from

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<sup>217</sup> COHEN, COHEN & THOMPSON, *supra* note 16, at 4.

<sup>218</sup> *See Making Home Affordable*, *supra* note 5.

<sup>219</sup> *See OFFICE OF THE SPECIAL INSPECTOR GEN.*, *supra* note 149, at 59.

<sup>220</sup> *See supra* Part II.

<sup>221</sup> *See Merle*, *supra* note 16; *see also* Robinson, *supra* note 21.

servicers who fail to [comply.]”<sup>222</sup> Additionally, regulators should review servicing practices by posing as fictional homeowners attempting to apply for modification; this could assist in maintaining a higher level of compliance and overall effectiveness of the program.<sup>223</sup> If the Treasury continues to fail in standing firmly and authoritatively behind its own programs, lenders and “servicers will have no reason to change.”<sup>224</sup>

## CONCLUSION

The U.S. recession destroyed the housing market and left the economy in shambles. The federal government was faced with one of the most serious structural problems the United States had ever faced. The federal government attempted to mask the severe and growing mortgage crisis with the issuance of weak mortgage servicing standards through the establishment of HAMP. The HAMP program was only an attempt at solving the ongoing mortgage crisis. The economy may be improving, but foreclosures are still occurring at an alarming rate.

The judicial system gave HAMP the strength the federal government failed to provide.<sup>225</sup> It is not the duty of the courts to create law, but rather it is the duty of Congress to create laws that are effective at solving the issues they face. Now that HAMP has ended, there still exists a grave need for meaningful federal action on loan modifications. “Swift adoption of strong national servicing standards could still save many homes, preserve investments, and transform the servicing industry for the betterment of the market for decades to come.”<sup>226</sup> The choice is left to the federal government. It can look at HAMP as its best effort or it can reinvent and reestablish the program by utilizing efficient programs that are not only accessible to the nation as a whole but hold lenders accountable for their actions. Through the adoption of strong national mortgage servicing standards, the mortgage crisis will finally be beaten in more ways than one.

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<sup>222</sup> See Swanson, *supra* note 164.

<sup>223</sup> See COHEN, COHEN & THOMPSON, *supra* note 16, at 63–64.

<sup>224</sup> Swanson, *supra* note 164.

<sup>225</sup> See *supra* Part II.

<sup>226</sup> COHEN, COHEN & THOMPSON, *supra* note 16, at 65.

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