

Airing Out HAMP's Dirty Laundry: Resolving *Corvello*, *Wigod*, and the Inherent Problems of the Home Affordable Modification Program's Trial Period Plans*

INTRODUCTION

The Home Affordable Modification Program (“HAMP”) “seems to have created more litigation than it has happy homeowners,”¹ or so the Ninth Circuit recently acknowledged in *Corvello v. Wells Fargo Bank, N.A.*² HAMP was created as an administrative program in late 2008 in response to the nationwide housing collapse and recession.³ The initial goal of HAMP was to aid “3 to 4 million at-risk homeowners—both those who are in default and those who are at imminent risk of default—by reducing monthly payments to sustainable levels.”⁴ Despite its lofty goals, in its first five years the program has only managed to help 1.2 million out of the 3 or 4 million homeowners it was intended to help⁵ and has generated a blitz of litigation aimed at mortgage servicers.⁶ The basis of this litigation arises out of mortgage servicing companies’ apparent lack of

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

2. *Id.*

3. See Thomas M. Schehr & Matthew Mitchell, *The Home Affordable Modification Program and a New Wave of Consumer Finance Litigation*, MICH. B.J., June 2012, at 38, 38.

4. DEP’T OF THE TREASURY, HAMP SUPPLEMENTAL DIRECTIVE 09-01, at 1 (2009) available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0901.pdf [hereinafter HAMP SUPPLEMENTAL DIRECTIVE].

5. See DEP’T OF THE TREASURY, SEPTEMBER 2013 MAKING HOME AFFORDABLE PROGRAM PERFORMANCE REPORT 13 (2013), available at <http://www.treasury.gov/initiatives/financial-stability/reports/Documents/September%202013%20MHA%20Report%20Final.pdf>. Making the numbers appear even worse is the Congressional Budget Office (“CBO”) report that estimates that half of the modifications completed under HAMP were for loans owned by Fannie Mae and Freddie Mac and were not the result of the Treasury’s initiative to induce non-GSE loan servicers to participate in the program. See Benjamin B. Klubes, Michelle L. Rogers & Katherine L. Halliday, *HAMP Risk on the Rise: A Complicated Regulatory Scheme Under the Spotlight*, BLOOMBERG LAW (June 5, 2013), <http://about.bloomberglaw.com/practitioner-contributions/hamp-risk-on-the-rise-a-complicated-regulatory-scheme-under-the-spotlight/>.

6. See, e.g., Schehr & Mitchell, *supra* note 3, at 39–40 (detailing the successes and failures of HAMP-related litigation trends). See generally *HAMP Litigation Update 2013: The Year of the Trial Period Plan*, NOV. 2013 NEWSLETTER (Cal. Homeowner Bill of Rights Collaborative, San Francisco, CA) Nov. 2013 [hereinafter *HAMP Litigation Update 2013*] (presenting key cases in HAMP litigation in 2013).

cooperation in completing mortgage modifications or, worse, their intentional subversion of the program itself.⁷

Whereas companies that service mortgages owned by government-sponsored entities (“GSEs”) Fannie Mae and Freddie Mac are required to participate in HAMP, non-GSE mortgage servicers—such as Wells Fargo—are provided with an economic incentive to complete permanent modifications.⁸ Much of the legal controversy surrounding HAMP is directed at these participating non-GSE mortgage servicers.⁹ The most common and successful lawsuits against these participating servicers are breach of contract claims arising out of banks’ refusals to modify homeowners’ mortgages after the homeowners have satisfied the terms of an often-ambiguous agreement known as a Trial Period Plan (“TPP”).¹⁰ Under a typical TPP, the homeowner agrees to provide documentation on his income and make three or four monthly payments that are presumably below his original mortgage payment. If the homeowner has provided correct documentation, is eligible for HAMP, and has made the payments in full and on time, the mortgage servicer is then expected to offer a mortgage modification based on Treasury Guidelines.¹¹

Disputes arise when mortgage servicers refuse to make this modification offer, prompting homeowners to file a wide array of claims ranging from violations of HAMP guidelines to unfair and deceptive trade practices.¹² Although in most cases homeowners fail to get beyond the pleading stage,¹³ the plaintiffs’ bar has persisted in crafting new arguments based on state contract law. These arguments have gained some traction with the Seventh Circuit’s ruling in *Wigod v. Wells Fargo Bank, N.A.*¹⁴ and the more recent Ninth Circuit ruling

7. See Schehr & Mitchell, *supra* note 3, at 39; Zach Warren, *SunTrust Pays \$320 Million to Settle Government Probe of HAMP Mishandling*, INSIDECOUNSEL.COM (July 7, 2014), <http://www.insidecounsel.com/2014/07/07/suntrust-pays-320-million-to-settle-government-pro> (“[A] government inquiry found that between March 2009 and December 2010, SunTrust ‘did not have adequate personnel, infrastructure, and technological resources in place to process the paperwork, render decisions, and communicate with and about borrowers as represented.’ ”).

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

9. See generally, e.g., *Corvello*, 728 F.3d 878 (suing Wells Fargo); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012) (suing Wells Fargo).

10. See *HAMP Litigation Update 2013*, *supra* note 6, at 4.

11. *Corvello*, 728 F.3d at 880–81; see also HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 13–26 (outlining the HAMP processes and policies in detail).

12. Schehr & Mitchell, *supra* note 3, at 39–40.

13. See *id.* Many of these suits are dismissed for failure to state a valid cause of action. For further discussion see *infra* notes 46–57 and accompanying text.

14. 673 F.3d 547 (7th Cir. 2012).

in *Corvello v. Wells Fargo Bank, N.A.*¹⁵ Although *Wigod* makes a compelling case for some homeowners, *Corvello* fails to articulate the basis for its conclusions; it instead attempts to piggy-back its conclusions onto *Wigod* under slightly, yet materially different circumstances. The subtle distinctions in the facts of these cases highlight the inherent problems with the HAMP program—chiefly, the difficulty of enforcing HAMP guidelines against mortgage servicers—and also provide a basis for improving such an ambitious program.

This Recent Development proceeds in three parts. Part I explains the origins and mechanics of HAMP, as well as some of the recent litigation trends arising out of the program. Part II proceeds by examining both *Wigod* and *Corvello*, noting the subtle yet important distinctions between the two circuit court cases and, in particular, the shortcomings of *Corvello*. Lastly, Part III assesses the inherent problems with the HAMP program and the TPP process as demonstrated by these two cases and recommends a few changes that would give more clout and less controversy to a government program created to help—and not “HAMPer”—homeowners.

I. THE HOME AFFORDABLE MODIFICATION PROGRAM

To understand the problems HAMP faces, it is first necessary to understand the origins of the program, how the program works among its participants, the causes of its failures, and the effects of its failures on those meant to benefit from it. The story of HAMP begins with the 2008 financial crisis and the ensuing housing collapse.

A. HAMP, Servicer Participation Agreements, & Trial Period Plans

On October 3, 2008, Congress passed the Emergency Economic Stabilization Act, allocating \$700 billion to the Treasury for the purpose of stabilizing the economy.¹⁶ One of the Treasury's principal functions under the Act is to “preserve[] homeownership.”¹⁷ In order to accomplish this broad goal, Congress created the Troubled Asset Relief Program (“TARP”), which charged the Secretary of the Treasury with “implement[ing] a plan that seeks to maximize assistance for homeowners and . . . encourage the servicers of the

15. See generally 728 F.3d 878 (9th Cir. 2013) (applying *Wigod*).

16. Emergency Economic Stabilization Act, Pub. L. 110-343, § 115(a)(3), 122 Stat. 3765, 3780 (2008) (codified at 12 U.S.C. § 5211 (2012)); see Schehr & Mitchell, *supra* note 3, at 38.

17. 12 U.S.C. § 5201 (2012).

underlying mortgages . . . to take advantage of . . . available programs to minimize foreclosures.”¹⁸

TARP gave the Secretary of the Treasury wide discretion to use this immense amount of funding to prevent the foreseeable ill effects of mass foreclosures on the American housing market.¹⁹ In February 2009, Secretary of the Treasury Timothy Geithner partitioned \$50 billion worth of TARP funds specifically for HAMP in order to incentivize mortgage lenders to modify mortgages with more favorable interest rates, thus avoiding a large number of foreclosures.²⁰ Under HAMP, mortgage servicers not automatically participating in the program²¹ can cash in on these incentives by volunteering to participate.²² In order to participate, these non-GSE servicers begin by signing a Servicer Participation Agreement (“SPA”).²³

Under the terms of a typical SPA, participating mortgage servicers agree to perform the services aimed at completing mortgage modifications and those described in other supplemental directives issued by the Treasury.²⁴ For example, Supplemental Directive 09-01 (“Directive”) obligates all participating servicers “to consider all eligible mortgage loans unless prohibited by the rules of the applicable [pooling and servicing agreements] and/or other investor servicing agreements.”²⁵ In an effort to encourage as many mortgage modifications among ailing homeowners as possible, these SPAs require participating servicers “to use reasonable efforts to remove any prohibitions and obtain waivers or approvals from all necessary

18. *Wigod*, 673 F.3d at 556 (citing 12 U.S.C. § 5219(a) (2012)).

19. DAVIS POLK & WARDWELL, EMERGENCY ECONOMIC STABILIZATION ACT OF 2008, at 3 (2008), *available at* <http://blogs.law.harvard.edu/corpgov/files/2008/10/dpw-stabil-memo.pdf> (“The [Emergency Economic Stabilization Act that created TARP] gives Treasury extraordinary new powers and wide discretion to establish the rules and design the procedures governing purchases of troubled assets.”).

20. *Wigod*, 673 F.3d at 556.

21. That is any mortgage servicer that services a non-GSE backed mortgage. GSE-backed mortgages are those owned or guaranteed by Fannie Mae or Freddie Mac. *See supra* note 5 and accompanying text.

22. MAKING HOME AFFORDABLE, HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES § 13.1 (2013), *available at* http://www.makinghomeaffordable.gov/partners/understanding-guidelines/Documents/mhahandbook_43.pdf.

23. HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 1.

24. DEP’T OF THE TREASURY, HAMP SERVICE PARTICIPATION AGREEMENT 2, ¶ 1.B., *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/servicerparticipationagreement.pdf.

25. HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 1. Pooling and servicing agreements relate to securitized mortgages that have certain restrictions on modification.

parties”²⁶ In exchange for each successful permanent modification, the servicers receive a \$1,000 payment along with other incentives based on the SPA.²⁷

From start to finish, modifying a mortgage under HAMP consists of numerous, simultaneous multi-step processes that are often ill-defined and convoluted. Some involve just the servicers, while others involve both the servicers and the homeowners.²⁸ In the first multi-step process, in order to determine each homeowner’s eligibility for a modification, the Treasury directs servicers to follow a three-step process outlined roughly in Supplemental Directive 09-01.²⁹

The first step requires the servicer to verify that the borrower meets certain threshold requirements.³⁰ A few of these requirements include verifying that the loan originated on or before January 1, 2009; it was secured by the borrower’s primary residence; the mortgage payments were more than 31% of the borrower’s monthly income; and for a one-unit home, the current unpaid principal balance was no greater than \$729,750.³¹ Once these requirements are met, the servicer can move on to the second step.

The second step requires that the servicer calculate the terms of the modification using a situation-dependent four-step process aimed at refinancing a borrower’s monthly mortgage payment to a target ratio of that homeowner’s income; this method is often called the “waterfall” method because of the number of permutations involved.³²

The last step requires the servicer to apply a Net Present Value (“NPV”) test to assess whether the value of the modified mortgage

26. *Id.*

27. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556 (7th Cir. 2012).

28. *See id.* at 556–57.

29. *Id.*; *see* HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 1–10.

30. *See Wigod*, 673 F.3d at 556; HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 2–3.

31. *See Wigod*, 673 F.3d at 556; HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 2–3.

32. *See Wigod*, 673 F.3d at 556–57; HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 8–10 (“Servicers must apply the modification steps enumerated below in the stated order of succession until the borrower’s monthly mortgage payment ratio is reduced as close as possible to 31 percent, without going below 31 percent”). The first step of the “waterfall” method requires capitalizing accrued interest and escrow payments. HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 9. Step two entails reducing the interest rate “to get as close to possible to the target monthly mortgage payment ratio.” *Id.* Step three requires the servicer to “extend and re-amortize the mortgage loan by up to 480 months from the modification effective date,” if necessary. *Id.* The final step obliges the servicer to provide a “principal forbearance to achieve the target monthly mortgage payment ratio.” *Id.*

would be greater to the servicer than the return on the mortgage if unmodified.³³ The NPV test is “essentially an accounting calculation to determine whether it is more profitable to modify the loan or allow the loan to go into foreclosure.”³⁴ If the NPV test proves that the value of the modified loan is higher than the servicer’s expected return after foreclosure, the servicer “MUST offer the modification.”³⁵

As this multi-step process is playing out, the completion of a different multi-step process involving the homeowner and the servicer is required for a modification to occur. This process is what is known as the Trial Period Plan (“TPP”).³⁶ By the terms of the Treasury Directive in place at the onset of HAMP in 2009,³⁷ a servicer could use “recent verbal financial information” from the homeowner to prepare and offer this TPP.³⁸ Providing this TPP and outlining its terms encompasses the first step in the two-step TPP process.³⁹ At this first step, the servicer is supposed to instruct the homeowner to execute and return the offered TPP, along with any income verification documents, a hardship affidavit, and the first payment per the terms of the plan, to the servicer.⁴⁰ The TPP is to last for three or four months, whereby the homeowner is to pay a reduced monthly amount calculated by the aforementioned “waterfall” method, and the servicer is required to service the loan in the same manner as it would under the original terms of the loan.⁴¹ In some circumstances,

33. See *Wigod*, 673 F.3d at 556–57; HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 4–5.

34. See *Wigod*, 673 F.3d at 556–57 (quoting *Williams v. Geithner*, No. 09-1959 ADM/JJG, 2009 WL 3757380, at *3 n.3 (D. Minn. Nov. 9, 2009)); HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 4–5.

35. HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 4. Although the language in this directive appears to create a strict requirement for mortgage servicers, there is no recourse for borrowers to enforce this provision, and this lack of enforceability is a principle focus of this Recent Development’s critique of the inherent problems with HAMP.

36. *Id.* at 2.

37. The directive was in place at the time the plaintiffs in *Wigod* and *Corvello* began their Trial Period Plans and is an important aspect of the factual records of both cases. See *infra* Part II. However, the directive changed in 2010 to allow servicers to offer a TPP only after reviewing the homeowner’s documented financial information. See *Wigod*, 673 F.3d at 557 n.2.

38. HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 17; see also *Wigod*, 673 F.3d at 557 (describing the original Trial Period Plan process).

39. HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 14.

40. *Id.* at 15.

41. *Wigod*, 673 F.3d at 557 (citing HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 17).

the TPP is considered a valid contract offer to modify homeowners' mortgages contingent upon the completion of the plan.⁴²

In the meantime, the servicer determines if the homeowner meets all the relevant criteria to remain eligible for a HAMP modification.⁴³ If the servicer finds that the homeowner is not eligible after the homeowner executes the TPP, then the servicer is required, per Treasury guidelines, to communicate that information to the homeowner in writing and to consider other alternatives to foreclosure.⁴⁴ Yet, if the servicer determines that the homeowner is eligible and the servicer has received funds for the first month's payment, it should then sign and return an executed copy of the TPP to the homeowner.⁴⁵

If the homeowner has complied with the terms and conditions of the TPP at the end of the period, has made all required payments, and has provided truthful information that qualifies that homeowner for a HAMP modification, "the loan modification will become effective on the first day of the month following the trial period as specified in the Trial Period Plan."⁴⁶ Thus, for a typical TPP, if all of the homeowner's qualifications are met and they have paid on time, the servicer is required to offer a permanent modification to the homeowner as if the TPP were a valid contract. This requirement creates the basic controversy over TPPs by raising questions over whether they are considered valid contracts in each individual circumstance and whether non-GSE participating mortgage servicers can be liable for failing to perform mortgage modifications at the end of these periods.

B. *Litigation Trends Arising Out of HAMP*

Considering the complicated steps that make up the modification process, servicers' apparent lack of motivation to cooperate in the program, and the lack of enforcement mechanisms,⁴⁷ it is no surprise

42. *Wigod* and *Corvello* are the two prominent circuit court decisions upholding this conclusion. *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 883 (9th Cir. 2013); *Wigod*, 673 F.3d at 557 n.2.

43. HAMP SUPPLEMENTAL DIRECTIVE 09-01, *supra* note 4, at 15.

44. *Id.*

45. *Id.* This is the exact process that occurred in *Wigod*, but not in *Corvello*. See *infra* Part II.

46. HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 18; see also *Wigod*, 673 F.3d at 557 (explaining the two-step TPP process).

47. For discussion on the major problems with HAMP, see generally, for example, Cushla E. Talbut, *HAMPed Hopes for Homeowners: An Analysis of How Litigation Trends Have Exposed the Home Affordable Modification Program's Weaknesses*, 68 U.

that HAMP has failed to deliver significant results for homeowners. HAMP has also driven plaintiffs' attorneys to target mortgage servicers that fail to modify or renegotiate mortgage loans and instead commence foreclosure to the detriment of the homeowner.⁴⁸ Since 2009, several waves of litigation have produced numerous legal theories from which plaintiff homeowners have filed complaints against their mortgage servicers.⁴⁹ However, many of these claims have not passed the pleading stage of litigation.⁵⁰

The first wave of litigation attempted to enforce the HAMP guidelines against mortgage servicers as a private right of action.⁵¹ During this stage, borrowers typically pled "violation of HAMP guidelines" as a cause of action, attaching these guidelines embodied in certain Treasury directives to their complaints.⁵² Other claims even alleged constitutional violations of the Due Process Clause for failing to comply with HAMP.⁵³ However, "courts around the country" have consistently rejected these theories by dismissing complaints and holding "unambiguously that there is no private right of action under HAMP."⁵⁴ The United States District Court for the District of Minnesota bluntly concluded that "the regulations at issue . . . did not intend to create a property interest in loan modifications for mortgages in default."⁵⁵ Thus, the first wave of litigation generally subsided with poor results for plaintiff-homeowners.

The second wave of litigation arose when homeowners attempted to enforce HAMP against mortgage servicers as third-

MIAMI L. REV. 295 (2013). *See also, e.g., infra* Part III.

48. Schehr & Mitchell, *supra* note 3, at 39.

49. *See id.* at 39–40 (discussing different legal theories); *see also* Wigod, 673 F.3d at 559, n.4 (detailing the three major waves of litigation arising out of failed mortgage modifications). *See generally* HAMP Litigation Update 2013, *supra* note 6 (discussing waves of litigation).

50. *See* Schehr & Mitchell, *supra* note 3, at 39 ("Though most courts have rejected borrowers' attempts to use HAMP as a sword against mortgage servicers, some courts have allowed certain claims to survive dispositive motions.").

51. HAMP Litigation Update 2013, *supra* note 6, at 3. Suits targeting mortgage servicers actually began in 2009 after the Treasury Department began to issue supplemental directives such as the one found in note 3. This was a departure from plaintiff attorneys' tactics to go after mortgage originators after the housing bubble burst. *See* Schehr & Mitchell, *supra* note 3, at 39.

52. Schehr & Mitchell, *supra* note 3, at 39.

53. *Id.* at 40; *see, e.g.,* Williams v. Geithner, No. 09-1959 ADM/JJG, 2009 WL 3757380, at *4 (D. Minn. Nov. 9, 2009).

54. Schehr & Mitchell, *supra* note 3, at 39; *see, e.g.,* Spaulding v. Wells Fargo Bank, N.A., 714 F.3d 769, 775–76 (4th Cir. 2013); Hoffman v. Bank of Am., N.A., No. C 10-2171 SI, 2010 WL 2635773, at *5 (N.D. Cal. June 30, 2010); Marks v. Bank of Am., N.A., No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988, at *5–7 (D. Ariz. June 22, 2010).

55. Williams, 2009 WL 3757380, at *6–7.

party beneficiaries to the SPAs between servicers and the Treasury Department.⁵⁶ This theory is rooted in contract law and seeks to enforce HAMP's requirements on participating mortgage servicers.⁵⁷ Yet, much like the first wave of litigation, the majority of courts have continually rejected this theory by holding that homeowners are merely incidental beneficiaries of SPAs and therefore have no rights emanating from them.⁵⁸ Although homeowners have failed to show a private right of action based on the regulations or as third-party beneficiaries, they have gained some traction arguing breach of contract claims arising out of the TPP agreements made directly with servicers.

The third wave of HAMP litigation aimed at enforcing TPPs as contracts has been the most successful for homeowners thus far.⁵⁹ This present wave of litigation moves away from attempting to enforce HAMP guidelines on mortgage servicers and focuses on state common law rights emanating from the direct transactions between servicer and mortgagor.⁶⁰ Some of these claims have alleged negligence or violations of state consumer fraud statutes with mixed results.⁶¹ Yet the most successful and thoroughly analyzed claim has arisen out of a homeowner's breach of contract claim where the mortgage servicer refuses to modify a mortgage after the homeowner complies with all the requirements of a TPP.⁶² Despite the continual

56. See *HAMP Litigation Update 2013*, *supra* note 6, at 3–4.

57. See Schehr & Mitchell, *supra* note 3, at 40.

58. *Id.* For examples of courts that have rejected this theory, see *Speleos v. BAC Home Loans Serv'g, L.P.*, 755 F. Supp. 2d 304, 308–09 (D. Mass. 2010); *Benito v. Indymac Mortg. Servs.*, No. 209-CV-001218-PMPPAL, 2010 WL 2130648, at *7 (D. Nev. May 21, 2010); *Wright v. Bank of Am., N.A.*, No. CV 10-01723 JF (HRL), 2010 WL 2889117, at *5 (N.D. Cal. July 22, 2010). In comparison, the cases that hold homeowners are intended third-party beneficiaries are fewer in number. See, e.g., *Sampson v. Wells Fargo Home Mortg., Inc.*, No. CV 10-08836 DDP (SSx), 2010 WL 5397236, at *3 (C.D. Cal. Nov. 19, 2010). Furthermore, *Sampson* was potentially misled by a Ninth Circuit case later overturned by the Supreme Court. See *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 559 n.4 (7th Cir. 2012).

59. See *HAMP Litigation Update 2013*, *supra* note 6, at 4.

60. See *id.*

61. See Schehr & Mitchell, *supra* note 3, at 40 (“The majority of courts have rejected borrowers’ attempts to restate claims under HAMP as tort claims.”). For a selection of cases rejecting homeowners’ claims under HAMP, see, for example, *Parks v. BAC Home Loan Serv., LP*, 825 F. Supp. 2d 713, 716 (E.D. Va. 2011); *Allen v. CitiMortgage, Inc.*, No. CIV CCB-10-2740, 2011 WL 3425665, at *9 (D. Md., Aug. 4, 2011); *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 353–54 (D. Mass. 2011).

62. See Schehr & Mitchell, *supra* note 6, at 40; *HAMP Litigation Update 2013*, *supra* note 6, at 4–6.

challenges to claims of this sort,⁶³ several circuits have allowed plaintiffs much leeway in pleading these claims.⁶⁴

II. THE SUCCESSES AND FAILURES OF BREACH OF CONTRACT CLAIMS ARISING OUT OF TRIAL PERIOD PLANS

When handed down in March 2012 *Wigod v. Wells Fargo*⁶⁵ became the first federal circuit court decision to address whether a plaintiff-homeowner could bring a common law breach of contract claim against a mortgage servicing company based on the failure of the servicer to honor the terms of a TPP.⁶⁶ Notwithstanding the generally negative treatment these claims have received in federal and state courts,⁶⁷ *Wigod* has opened the door for other courts to interpret these TPPs as valid contracts. However, every homeowner's experience with a TPP and her respective mortgage servicer is different. Therefore, *Wigod* cannot and should not apply to every instance where a mortgage servicer fails to offer a permanent mortgage modification. Instead, *Wigod* should only apply in the situation in which an offer and acceptance have created a valid contract under the terms of individual state common law.

63. See, e.g., *Bourdelaïs v. J.P. Morgan Chase*, No. 3:10 CV 670-HEH, 2011 WL 1306311, at *3–6 (E.D. Va. Apr. 1, 2011).

64. See, e.g., *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 883 (9th Cir. 2013); *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 235–36 (1st Cir. 2013); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 554–55 (7th Cir. 2012).

65. 673 F.3d 547.

66. See Arsen Sarapinian, *Fighting Foreclosure: Using Contract Law to Enforce the Home Affordable Modification Program*, 64 HASTINGS L.J. 905, 924 (2013) (“*Wigod v. Wells Fargo Bank, N.A.* is the only appellate court decision that addresses the validity of the TPP-based breach of contract theory.”). Since *Wigod*, other circuits have addressed this theory. See, e.g., *Corvello*, 728 F.3d at 880; *Young*, 717 F.3d at 232; *Pennington v. HSBC Bank USA, N.A.*, 493 F. App'x 548, 554 (5th Cir. 2012).

67. See, e.g., *Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769, 777–78 (4th Cir. 2013) (rejecting plaintiff's breach of implied-in-fact contract claim); *Vida v. OneWest Bank, F.S.B.*, No. Civ. No. 10–987–AC, 2010 WL 5148473, at *5 (D. Or. Dec. 13, 2010) (holding that plaintiffs' pleadings were “not sufficiently independent to state a separate state law cause of action for breach of contract”); *Trautman v. JPMorgan Chase Bank, No. A12-0300*, 2012 WL 3263907, at *4 (Minn. Ct. App. Aug. 13, 2012) (holding that no contract existed without the servicer returning and signing the TPP agreement to the mortgagor), review denied (Oct. 24, 2012).

A. Wigod v. Wells Fargo: *The Seventh Circuit Opens the Door Ever so Slightly*

1. Factual and Procedural History

Lori Wigod obtained a home mortgage loan in the amount of \$728,500 in 2007 from Wachovia Mortgage, which later became Wells Fargo.⁶⁸ In April 2009, Wigod applied by written request for a HAMP modification of her loan after she began to experience financial difficulties.⁶⁹ Wells Fargo required her to provide documentary proof of her financial information before the TPP could begin.⁷⁰ After Wigod provided this information and Wells Fargo determined that she was eligible for HAMP, Wells Fargo sent her a TPP in mid-May 2009.⁷¹

Per Wells Fargo's requirements, Wigod executed two copies of the TPP Agreement on May 28, 2009, returned them to Wells Fargo with additional documents, and made the first payment of the four required.⁷² Wells Fargo then executed the TPP Agreement and sent a copy to Wigod on June 4, 2009, along with a congratulatory letter approving her for a trial modification.⁷³ Thus, Wells Fargo communicated to Wigod that she qualified for HAMP and, as long as she was in compliance with the terms of the TPP, she would receive a permanent Loan Modification Agreement at the conclusion of the trial period.⁷⁴ From July 1 until November 1, 2009, Wigod made, and Wells Fargo accepted, her remaining three payments.⁷⁵ However, after the TPP expired with Wigod fulfilling all the terms of the agreement, Wells Fargo refused to modify her mortgage terms and threatened her with foreclosure if she failed to pay the outstanding

68. *Wigod*, 673 F.3d at 557–58.

69. *Id.* at 558.

70. *Id.* “At that time, Treasury’s original guidelines were still in force, so Wells Fargo could choose whether (A) to offer Wigod a trial modification based on unverified oral representations, or (B) to require her to provide documentary proof of her financial information before commencing the trial plan.” *Id.* This was the first step of the two-step modification process prescribed by the Treasury Directive 09-01. *See supra* Part I.A.

71. *Wigod*, 673 F.3d at 558 (“Only after Wigod provided all required financial documentation did Wells Fargo, in mid-May 2009, determine that Wigod was eligible for HAMP and send her a TPP Agreement.”).

72. *Id.*

73. *Id.* at 562. For an example of this congratulatory notice, see *Home Affordable Modification Trial Period Plan Notice*, HMPADMIN.COM, <https://www.hmpadmin.com/portal/programs/hamp.jsp> (click on “Borrower Documents” Tab and the document is available under the “Firm Solicitation Offers” heading).

74. *Wigod*, 673 F.3d at 562.

75. *Id.* at 558.

balance of her loan.⁷⁶ Wells Fargo maintained that its reason for refusing the modification was that the post-modification monthly loan amount was not consistent with investor guidelines and that Treasury guidelines allowed servicers to verify all government and investor criteria before granting a modification.⁷⁷

After Wigod's suit was dismissed at the district court level,⁷⁸ she appealed on all counts to the Seventh Circuit, which addressed two issues.⁷⁹ The first issue was whether Wigod stated viable claims under Illinois law, including the breach of contract claim.⁸⁰ The second issue addressed Wells Fargo's assertion that the particular state law claims alleged by Wigod were preempted or barred by federal law.⁸¹ Ultimately, the Seventh Circuit held that federal law did not preempt the claim and proceeded to address the viability of Wigod's state common law claims.⁸²

2. The Seventh Circuit Finds a Valid Breach of Contract Claim

In analyzing the breach of contract claim, the court's decision focused on an analysis of the language of the TPP.⁸³ The Seventh Circuit interpreted the language of the TPP using Illinois contract law, which requires the fulfillment of six separate elements: "(1) offer and acceptance, (2) consideration, (3) definite and certain terms, (4) performance by the plaintiff of all required conditions, (5) breach, and (6) damages."⁸⁴ The language of this particular TPP stated, "I

76. *Id.*

77. *Id.*

78. *See* Wigod v. Wells Fargo Bank, N.A., No. 10 CV 2348, 2011 WL 250501 (N.D. Ill. Jan. 25, 2011), *aff'd in part, rev'd in part*, 673 F.3d 547 (7th Cir. 2012). After Wells Fargo denied Lori Wigod's application for a permanent loan modification in 2009, Wigod filed a putative class action against Wells Fargo alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), as well as common law breach of contract and tort theories. *Wigod*, 673 F.3d at 555. The Northern District of Illinois dismissed this complaint in its entirety under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a valid claim, ruling that Wigod's claims were based on the servicer's obligations under HAMP and that HAMP "does not confer a private federal right of action on borrowers to enforce its requirement." *Id.* (discussing the district court ruling).

79. *Wigod*, 673 F.3d at 555.

80. *Id.* In addition to the breach of contract claim, the court assessed whether Wigod had successfully stated viable claims under the ICFA, promissory estoppel, fraud, negligent hiring and supervision, and negligent misrepresentation or concealment. *Id.* The court determined that these last two claims were not viable. *Id.*

81. *Id.*

82. *Id.* ("HAMP and its enabling statute do not contain a federal right of action, but neither do they preempt otherwise viable state-law claims.").

83. *See id.* at 562–63.

84. *Id.* at 560–61 ("In Illinois, the 'test for an offer is whether it induces a reasonable

understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan if I qualify for the [permanent modification] Offer or will send me written notice that I do not qualify for the Offer.”⁸⁵ The TPP further stated, “If I am in compliance with this Loan Trial Period and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a [permanent] Loan Modification Agreement.”⁸⁶

According to the Seventh Circuit, this language formed a contingent contract if Wells Fargo returned a signed copy of the TPP to Wigod acknowledging her qualifications for a modification.⁸⁷ Wells Fargo’s performance on the contract—that is, making a permanent modification offer—was contingent on whether Wigod fulfilled two conditions precedent.⁸⁸ Those conditions were that she continue to comply with the payment plan and that her financial representations remain accurate.⁸⁹

Wells Fargo challenged the existence of a valid contract on the bases that there was no valid offer, that the agreement lacked consideration, and that there were no certain and definite terms.⁹⁰ However, Wells Fargo conceded the other three elements of a contract claim.⁹¹ Judge David Frank Hamilton, writing the opinion for the court, rejected Wells Fargo’s interpretations of the TPP.⁹² He acknowledged, “[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. This is so notwithstanding the qualifying language in section 2 of the TPP.”⁹³

belief in the recipient that he can, by accepting, bind the sender.’ ” (quoting *Boomer v. AT&T Corp.*, 309 F.3d 404, 415 (7th Cir. 2002)); see also RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) (“An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”).

85. *Wigod*, 673 F.3d at 562 (emphasis removed). This was to be the second step of the two-step process prescribed by the Treasury Directive 09-01. See *supra* Part I.A.

86. *Wigod*, 673 F.3d at 562.

87. *Id.*

88. *Id.*

89. See *id.* (“[W]hen 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.”).

90. See *id.* at 561.

91. See *id.*

92. *Id.* Despite this seemingly clear description of the process, Wells Fargo construed Section 2 of Wigod’s TPP in a way that negated this contingent contract and added a further condition precedent that entailed “Wells Fargo’s further review of her financial information to ensure she qualified under HAMP.” *Id.*

93. *Id.* at 562.

The court offered two basic rationales for this ruling.⁹⁴ First, it rejected Wells Fargo's ability to condition the offer on Wigod's continued eligibility once it sent her a signed copy of the TPP acknowledging that she qualified for a HAMP modification.⁹⁵ Second, the court rejected Wells Fargo's reading of Section 2 of the TPP as requiring that Wells Fargo actually send Wigod a Modification Agreement in the mail for the actual offer to have been made.⁹⁶ Under this reading, Wells Fargo could "simply refuse to send the Modification Agreement for any reason whatsoever—interest rates went up, the economy soured, it just didn't like Wigod—and there would still be no breach."⁹⁷ This reading of Section 2 turned an "otherwise straightforward offer into an *illusion*."⁹⁸ Thus, based on these two rationales, the court ruled that if Wells Fargo executed the TPP and Wigod met all other conditions—which she did—Wells Fargo was contractually obligated to offer her a permanent modification, which would come into effect once Wigod agreed to it.⁹⁹

In addition to the question of whether the bank made a valid offer to Wigod, Wells Fargo also argued that there was a lack of consideration and a lack of definite and certain terms that are required under Illinois law to create a contract.¹⁰⁰ With regard to adequate consideration, the court reasoned that Wigod sustained sufficient detriments by agreeing to "open new escrow accounts, undergo credit counseling (if asked), and to provide and vouch for the truth of her financial information."¹⁰¹ Secondly, the court rejected Wells Fargo's assertion that certain terms required for a valid contract of this nature—such as the interest rate, the principle balance, the loan duration, and the total monthly payment—were not adequately established by the terms of the TPP.¹⁰² Challenging this view, the court ruled that HAMP guidelines provided a sufficient standard for Wells Fargo to set the terms of the permanent modification.¹⁰³

Wigod's simple recognition that TPPs could potentially create valid contracts between homeowners and mortgage servicers—as long

94. *See id.* at 562–63.

95. *Id.*

96. *Id.*

97. *Id.* at 563.

98. *Id.* (emphasis added).

99. *Id.* at 562–63.

100. *Id.* at 561, 563–64.

101. *Id.* at 564.

102. *Id.*

103. *Id.* at 564–66.

as the servicer returned an executed copy of the TPP—was a giant step for plaintiff-homeowners in this wave of litigation. By the time the Seventh Circuit delivered this decision, two other plaintiffs from California were appealing similar claims against Wells Fargo in the Ninth Circuit. Yet, the Ninth Circuit's interpretation of the *Wigod* decision would go a step too far.

B. Corvello v. Wells Fargo: The Ninth Circuit Erroneously Extends Wigod

Federal courts are split when it comes to determining whether a servicer has to countersign and return a TPP to the homeowner for a valid contract to exist.¹⁰⁴ Whereas a close reading of *Wigod* suggests that this is in fact a requirement, *Corvello* eschews this logic and erroneously extends this wave of litigation into uncharted waters.

1. Factual and Procedural History

Like the plaintiff in *Wigod*, Phillip Corvello and Karen and Jeffrey Lucia (“the Lucias”) filed suit against Wells Fargo after the bank failed to offer them a permanent mortgage modification, subsequent to their alleged fulfillment of the terms of the TPP they had received and signed from Wells Fargo.¹⁰⁵ The only factual difference between their claims is that Corvello's dealings with Wells Fargo were via written documentation, whereas the Lucias' communications were conducted orally over the phone with the bank.¹⁰⁶ Notwithstanding this difference, their factual situations are substantially similar to each other and somewhat similar—but not identical—to that of Lori Wigod.¹⁰⁷ These minor differences between the cases of the Lucias and Corvello and Wigod's case are where the logical breakdown in this decision becomes relevant.

104. *See id.*

105. *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 881 (9th Cir. 2013). Corvello's case was consolidated with the Lucias' after they originally filed separate claims. *See id.*

106. *Id.* at 881–82. For the sake of brevity and to mirror the *Corvello* decision, the principal focus of this Recent Development is on Phillip Corvello's experience with Wells Fargo even though their experiences were almost the same. However, the fact that Corvello made his contact through writing and the Lucias did so over the phone carries some significance when discussing the inconsistency by which TPPs were implemented by mortgage servicers.

107. The material difference between these two cases is that Wells Fargo executed and returned a copy of the TPP to Wigod, where it did not do the same for Corvello or the Lucias. *Compare Corvello*, 728 F.3d at 881–82, *with Wigod*, 673 F.3d at 558 (demonstrating this difference).

Following the facts of Corvello's TPP process provides insight into both his exchange with Wells Fargo and the wide-scale inconsistencies of how mortgage servicers implement TPPs. Corvello alleged in his complaint that he provided all of his financial information via a worksheet in June of 2009.¹⁰⁸ Subsequently, the bank sent him a TPP stating that if his representations were accurate and if he complied with the terms of the trial plan by making the requisite payments, he would receive a modification offer.¹⁰⁹ The TPP further stated that the bank would inform him whether he qualified for the modification agreement, as the Treasury Directive required,¹¹⁰ by either sending a copy of the plan signed by the bank confirming qualification for the modification or a notice that the borrower did not qualify.¹¹¹

In addition to this language, paragraph 2F of the TPP gave notice to Corvello of the obligations that he and the bank were required to fulfill before a permanent modification could take effect:

If prior to the Modification Effective Date, (i) the Lender does not provide me a fully executed copy of this Plan and the Modification Agreement; (ii) I have not made the Trial Period payments required under Section 2 of this Plan; or (iii) the Lender determines that my representations in Section 1 are no longer true and correct, the Loan Documents will not be modified and this Plan will terminate.¹¹²

108. *Corvello*, 728 F.3d at 881.

109. *Id.*

110. See HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 13–15.

111. *Corvello*, 728 F.3d at 881. This language is very similar to the language in the first section of Wigod's TPP. See *supra* notes 83–86 and accompanying text. Here it reads:

If I am in compliance with this Loan Trial Period and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a Loan Modification Agreement, as set forth in Section 3, that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage . . . I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan if I qualify for the Offer or will send me written notice that I do not qualify for the Offer.

Corvello, 728 F.3d at 881.

112. *Corvello*, 728 F.3d at 881. In addition, paragraph 2G of the TPP indicated that “no modification would take effect until the borrower received a signed copy of the Modification Agreement.” *Id.* at 882. This is essentially the same language as Wigod's TPP, which the Seventh Circuit found did not create a condition precedent that must be fulfilled to enforce the contract. See *supra* notes 88–95 and accompanying text. However, the difference here is that neither Corvello nor the Lucias received a signed copy of the TPP from the bank acknowledging that they were eligible for a HAMP loan. *Corvello*, 728

Corvello alleged in his complaint that he complied with the terms of the TPP and made all three of his payments within the time constraints of the Plan, as did Wigod.¹¹³ However, in contrast to the facts of *Wigod*, Corvello received neither any notification of his eligibility status for a modification as required by the language of the TPP, nor a signed copy of the Modification Agreement after satisfying all the terms of the TPP.¹¹⁴ He also never received an executed copy of the TPP from Wells Fargo as Wigod did.¹¹⁵ In his complaint Corvello sought enforcement of the permanent modification he claimed was due to him after complying with all the material requirements as well as damages for the payments he made to Wells Fargo.¹¹⁶

In response to these complaints, Wells Fargo filed a motion to dismiss for failure to state a claim, which the district court granted.¹¹⁷ The district court came to the conclusion that the TPP language found in Paragraph 2G required that the plaintiffs receive a “fully executed copy of a Modification Agreement” to have any claim for breach of contract.¹¹⁸

2. The Ninth Circuit Extends *Wigod*

On appeal, the Ninth Circuit took up the issue of whether Corvello could state a valid cause of action for breach of contract, as did the Seventh Circuit in *Wigod*.¹¹⁹ The court characterized the

F.3d at 882.

113. *Corvello*, 728 F.3d at 882.

114. *Id.*

115. *Id.*

116. *Id.* The Lucias’ experience with Wells Fargo was not much different even though they did not receive a written TPP as Corvello did. They alleged that Wells Fargo offered them a trial plan and that they subsequently complied by providing the relevant financial information and by making the timely payments. Yet, even though they complied with the terms of this TPP, Wells Fargo failed to notify them that they were ineligible for a modification and also failed to offer them a permanent modification. Instead, the bank initiated foreclosure proceedings without providing any notice to the Lucias of their failure to qualify. Subsequently, the Lucias sought rescission of the foreclosure, a permanent modification offer, and damages. *See id.*

117. *See id.* at 881; *see also* *Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059, 1062 (N.D. Cal. 2011), *rev’d sub nom. Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013).

118. *Corvello*, 728 F.3d at 882 (quoting *Lucia*, 798 F. Supp. 2d at 1068). In addition, the district court also dismissed the plaintiffs’ claims of promissory estoppel, breaches of the covenant of good faith and fair dealing, and violations of California’s Unfair Competition Law and Rosenthal Fair Debt Collection Practices Act “[b]ecause all these claims depended on a promise by the bank to offer a permanent modification if the plaintiffs met the conditions of the TPP” *Id.* at 882–83.

119. *See id.* at 883.

Seventh Circuit's holding in *Wigod* thusly: “[B]anks [are] required to offer permanent modifications to borrowers who [have] completed their obligations under the TPPs, unless the banks timely notif[y] those borrowers that they did not qualify for a HAMP modification.”¹²⁰ In doing so, the court challenged two of Wells Fargo's arguments claiming that no valid contract existed based on the language of the TPP and the transactions between the homeowners and mortgage servicer.¹²¹ Thereby, the *Corvello* court misinterpreted the logic applied in *Wigod*.¹²²

Wells Fargo first argued that the language of Paragraph 2G of the TPP required a signed Modification Agreement for a valid contract to exist.¹²³ The court rejected this argument in the same way that the *Wigod* court did.¹²⁴ Specifically, the *Corvello* court claimed that the way the arrangement was set up allowed Wells Fargo “to avoid [its] obligations to borrowers merely by choosing not to send a signed Modification Agreement, even though the borrowers made both accurate representations and the required payments.”¹²⁵ In characterizing the arrangement this way, the court assumed that the situation was materially similar to that in *Wigod*.¹²⁶ It continued this reasoning by determining that Paragraph 2G does not allow the bank to avoid a clear obligation to send the plaintiffs a signed Modification Agreement once they have met their end of the bargain.¹²⁷

Wells Fargo's second argument rested on the fact that *Wigod* was materially distinguishable from the facts of this case.¹²⁸ It argued that

120. *See id.* (citing *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 562–63 (7th Cir. 2012)).

121. *See id.* at 883–85.

122. *See id.* In addition to the arguments that there was no valid contract based on the language of the TPPs, the court also addressed a conflict of California common law. *See id.* at 884 (comparing *West v. JP Morgan Chase Bank, N.A.*, 214 Cal. App. 4th 780 (2013) with *Nungaray v. Litton Loan Servicing, LP*, 200 Cal. App. 4th 1499 (2011)).

123. *See id.* at 883. Paragraph 2G stated, “[T]he Loan Documents will not be modified unless and until . . . (ii) [the borrower] receive[s] a fully executed copy of a Modification Agreement.” *Id.*

124. *Id.*; *see supra* notes 95–100 and accompanying text.

125. *Corvello*, 728 F.3d at 883.

126. *See id.* However, this part of the decision overlooks the fact that *Wigod* had received a signed TPP from the bank approving her HAMP eligibility, whereas the plaintiffs here had not. *Compare Corvello*, 728 F.3d at 881–82, with *Wigod*, 673 F.3d at 558 (demonstrating this difference).

127. *Corvello*, 728 F.3d at 883. (“Wells Fargo's interpretation of the TPP was suspect because it allowed banks to avoid their obligations to borrowers merely by choosing not to send a signed Modification Agreement, even though the borrowers made both accurate representations and the required payments.”).

128. *See id.* at 884.

the bank actually sent Wigod a signed copy of the TPP approving her HAMP eligibility and that, based on the language in Paragraph 2F of the TPP, a signed writing was required for the TPP to continue and further obligate Wells Fargo to modify the plaintiffs' mortgages upon completion of the contractual terms.¹²⁹ However, the court dismissed this argument by asserting that the *Wigod* decision did not turn on that specific fact, but rather on the fact that Wells Fargo failed to tell Wigod that she did not qualify for a modification.¹³⁰ By coming to this conclusion, the Ninth Circuit borrowed language from *Wigod* indicating that "[u]nder the terms of the TPP Agreement, then, that moment [when Wells Fargo received the borrower's TPP] was Wells Fargo's opportunity to determine whether [the borrower] qualified. If [the borrower] did not, it could have and should have denied [the borrower] a modification on that basis."¹³¹ In addition, the court noted that Treasury Directive 09-01 also established this obligation and that Wells Fargo's failure to fulfill the obligation would not deprive the plaintiffs the benefits of their TPP agreement.¹³²

By rejecting these two arguments, the Ninth Circuit extended the *Wigod* reasoning further by focusing on the requirement that the bank notify the homeowner of his HAMP eligibility and acknowledging that an agreement is in place even before the bank executes the TPP.¹³³ More succinctly, *Corvello* stands for the proposition that—regardless of whether the bank actually executes the TPP—if the bank fails to notify the homeowners of their HAMP eligibility per the Treasury Directive guidelines, it is required to offer them a permanent modification upon the homeowners' fulfillment of the TPP terms.¹³⁴

3. Analyzing Where *Corvello* Falls Short

By determining that *Wigod* was a persuasive and indistinguishable precedent, the *Corvello* court failed to understand the reasoning behind the *Wigod* decision. This is most evident where the *Corvello* court attempted to paraphrase the ruling in *Wigod* as requiring that Wells Fargo notify the homeowner of his HAMP

129. *See id.*

130. *Id.*

131. *Id.* (quoting *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 562 (7th Cir. 2012)).

132. *Id.* at 884–85; *see also* HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 15 (noting the obligation that the bank “should promptly communicate that determination to the borrower in writing and consider the borrower for another foreclosure prevention alternative”).

133. *Corvello*, 728 F.3d at 884–85.

134. *Id.*

eligibility, or else face the obligation of offering a permanent modification upon the homeowner's fulfillment of the TPP terms.¹³⁵ By interpreting *Wigod* this way, the *Corvello* court assumed that a contract was already in place as soon as the homeowner received the TPP.¹³⁶ However, this is an erroneous assumption. In fact, the *Wigod* court only recognized the existence of an offer upon Wells Fargo's execution of the TPP and an acknowledgement that the homeowner qualified under HAMP guidelines.¹³⁷

Corvello's misunderstanding of *Wigod* does not end there. The *Corvello* court also misinterpreted the *Wigod* decision by asserting that the reason the Seventh Circuit rejected Wells Fargo's position concerning the language in Paragraph 2G was "because it made the existence of any obligation conditional solely on action of the bank, and conflicted with . . . the bank's promise to send the borrower a Modification Agreement if the borrower complied with the obligations under the TPP"¹³⁸ Although the *Wigod* court made this acknowledgement, it did so on the facts of that particular case. Considering that *Corvello* never received an executed TPP from Wells Fargo, this argument does not carry the same weight as it did in *Wigod*.

In *Wigod*, the "qualifying language" of Paragraph 2G in the TPP turned the executed offer and acceptance "into an illusion" because Wells Fargo could get out of the contractual obligations by simply refusing to provide a permanent modification upon *Wigod*'s fulfillment of the contract terms.¹³⁹ In the same vein, the *Corvello* court implied that Wells Fargo could get out of its apparent contract by simply failing to notify the homeowner of her HAMP eligibility.¹⁴⁰ However, based on the language of the TPP and the clear reasoning in *Wigod*, Wells Fargo does not assent to the contract—and does not officially make an offer—until it sends an executed copy of the TPP acknowledging the homeowner's qualification for HAMP.¹⁴¹ The fact

135. See *supra* note 121 and accompanying text.

136. See *Corvello*, 728 F.3d at 883–84. Many other courts have also adopted this shortsighted view. See, e.g., *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 233–34 (1st Cir. 2013); *Sutcliffe v. Wells Fargo, N.A.*, 283 F.R.D. 533, 549–50 (N.D. Cal. 2012); *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 787–80 (2013).

137. See *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 562 (7th Cir. 2012) ("[W]hen 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.").

138. *Corvello*, 728 F.3d at 883.

139. See *Wigod*, 673 F.3d at 563.

140. See *Corvello*, 728 F.3d at 883.

141. See *Wigod*, 673 F.3d at 563. Other courts, including the Fifth Circuit, have recognized this distinction as well. See, e.g., *Pennington v. HSBC Bank USA, N.A.*, 493

that the TPP remained unexecuted is the pivotal distinction in *Wigod* and *Corvello* and is the source of *Corvello*'s shortsightedness.

Even though the *Corvello* court dismissed this argument, Wells Fargo correctly argued that this situation was materially different from *Wigod* because the bank never sent back an executed copy of the TPP to Corvello informing him that he was approved for modification.¹⁴² *Corvello* claims that “*Wigod*’s holding, however, does not turn on that fact, but instead on the bank’s failure to tell the borrowers that they did not qualify.”¹⁴³ This is wrong on two counts. First, in *Wigod*, Wells Fargo signed the TPP and sent it back to Wigod telling her that she qualified for the modification but later failed to offer the modification per the TPP executed by both parties.¹⁴⁴ The *Wigod* court found that there was a valid breach of contract claim because Wells Fargo executed the TPP and created a valid offer, which promised a modification assuming Wigod had fulfilled all her obligations—which she did.¹⁴⁵ This was not the case in *Corvello*.¹⁴⁶

Corvello’s second failure is that *Wigod* was not premised on the fact that the bank was obligated to inform Wigod of her HAMP eligibility based on the Treasury guidelines.¹⁴⁷ To assume that the decision was based on this fact is akin to allowing an individual to bring a private right of action against a servicer for failure to follow the guidelines. As noted before, most courts have dismissed these types of claims as an invalid right of action under HAMP.¹⁴⁸ Rather, up until Wells Fargo returned an executed version of the TPP to Wigod congratulating her on her HAMP eligibility, Wells Fargo had not extended her an offer and thus no contract existed.¹⁴⁹

Ultimately, *Wigod* is premised on the fact that Wells Fargo sent an executed version of the TPP to the homeowner that constituted a valid contract. Several other courts have reinforced that requirement for a valid offer to arise out of a standard TPP.¹⁵⁰ As for the plaintiffs

Fed. App’x 548, 554 (5th Cir. 2012); *Nash v. Green Tree Serv., LLC*, 943 F. Supp. 2d 640, 646–47 (E.D. Va. 2013); *Chancellor v. OneWest Bank*, No. C12-01068LB 2012 WL 1868750, at *11 n.5 (N.D. Cal. May 22, 2012).

142. *Corvello*, 728 F.3d at 884.

143. *Id.*

144. *See Wigod*, 673 F.3d at 562.

145. *Id.* at 562–63.

146. *See Corvello*, 728 F.3d at 884–85.

147. *See id.* at 884 (citing *Wigod*, 673 F.3d at 562).

148. *See supra* Part I.B.

149. *Wigod*, 673 F.3d at 562. This is clear by the court’s plain expression that “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.” *Id.*

150. *See, e.g., Pennington v. HSBC Bank USA, N.A.*, 493 Fed. App’x 548, 554 (5th Cir.

in *Corvello*, this requirement was not met, and in almost every other jurisdiction their claim for breach of contract would not survive. Although the factual differences between these two cases are miniscule, their existence points out both the inconsistency in which mortgage servicers proceed with TPPs and also the narrow set of circumstances required for homeowners to enforce a valid contract against uncooperative servicers.

III. THE INHERENT PROBLEMS OF HAMP AND HOW TO FIX THEM

The factual differences between *Wigod* and *Corvello* illustrate the disorganized and unpredictable fashion of the TPP process. Even though *Wigod*, *Corvello*, and the *Lucias* began the home mortgage application process with the same servicer within months of each other, their experiences differed.¹⁵¹ The content of their respective TPPs was also materially different.¹⁵² These differences point out some of the weaknesses and failures of the HAMP program and offer insight on how to improve the program and reduce litigation. With HAMP extended through the end of 2015,¹⁵³ plaintiffs will likely continue to churn out litigation as they are denied permanent modifications and forced into foreclosure. In the meantime, *Wigod* and *Corvello* will serve as two—albeit limited—benchmarks in the push for greater servicer accountability and improvements to HAMP.

A. *The Inherent Problems of HAMP and the TPP Process*

HAMP's failures certainly have not gone unnoticed in the public eye.¹⁵⁴ Of the three to four million homeowners it was intended to help, only 1.2 million have received a permanent modification.¹⁵⁵

2012); *Nash v. Green Tree Servicing, LLC*, 943 F. Supp. 2d 640, 646–47 (E.D. Va. 2013); *Chancellor v. One West Bank*, No. C12-01068LB 2012 WL 1868750, at *11 n.5 (N.D. Cal. May 22, 2012).

151. Compare *supra* Part II.A.1, with *supra* Part II.B.1 (giving the facts of each case).

152. Compare *supra* Part II.A.1, with *supra* Part II.B.1 (giving the facts of each case).

153. Clea Benson, *Treasury Extends HAMP Mortgage-Modification Program Through 2015*, BLOOMBERG (May 30, 2013, 9:27 AM), <http://www.bloomberg.com/news/2013-05-30/treasury-extends-hamp-mortgage-modification-program-through-2015.html>.

154. See, e.g., Kristin Roberts & Stacy Kaper, *Out of Their Depth*, NAT'L J. (March 22, 2012), <http://www.nationaljournal.com/magazine/the-white-house-s-housing-fumbles-20120322> (reporting that President Obama's economic team has found little consensus on how to address the housing crisis); Jessica Silver-Greenberg, *Foreclosure Crisis, Part 2: Modifications*, WALL ST. J., (Nov. 6, 2010, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052748704805204575594453938527666> (“[A]necdotal evidence points to a modification process at least fraught with miscommunication and misunderstanding.”).

155. DEP'T OF THE TREASURY, *supra* note 5, at 1; see also *Wigod v. Wells Fargo*, N.A., 673 F. 3d 547, 557 n.2 (7th Cir. 2012) (noting even worse figures after the first year of the program).

While that number may not imply a complete failure of the program, it does not represent a complete picture of the situation. Of those 1.3 million homeowners who received a permanent modification after completing a TPP, more than 300,000 eventually defaulted.¹⁵⁶ Even more telling is the fact that the Congressional Budget Office has estimated that over half of those mortgages permanently modified were owned by Fannie Mae and Freddie Mac and were therefore mandated to participate in the program.¹⁵⁷ This shortfall is unfortunate because HAMP will only make a difference in the housing market if participating mortgage servicers, such as Wells Fargo, are encouraged to facilitate the modification process.¹⁵⁸

However, there is little indication that mortgage servicers have facilitated the process even with the incentive programs in place. In May 2011 the U.S. Government Accountability Office (“GAO”) published results from a survey it conducted through the National Foreclosure Mitigation Counseling Program. In the survey, housing counselors cited the most frequent reasons for homeowners to contact them.¹⁵⁹ Among the most common reasons were that servicers had lost HAMP application documentation, that the homeowner felt that he or she had been wrongfully denied a HAMP modification, and that the homeowner was having difficulty contacting the servicer.¹⁶⁰ Not surprisingly, wrongful rejection and communication problems were evident in *Wigod* and *Corvello*.¹⁶¹

These were not the only glaring results of the survey. Of the nearly 400 counselors surveyed, 76% claimed that borrowers’ overall experience with the HAMP program from the time they first inquired

156. See Klubes et al., *supra* note 5. The Special Inspector General for TARP (SIGTARP) has estimated that “[b]etween thirty and forty percent of homeowners who obtained modifications in 2010 have re-defaulted” on their mortgages. See Benson, *supra* note 153. That percentage is even worse for those obtained in 2009. See SPEC. INSPEC. GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, RISING REDEFAULTS OF HAMP MORTGAGE MODIFICATIONS HURT HOMEOWNERS, COMMUNITIES, AND TAXPAYERS 3 (2013) (“Redevelopment rates of the oldest 2009 HAMP permanent mortgage modifications have continued to increase as they age at a redefault rate of 46%.”).

157. Klubes et al., *supra* note 5.

158. See U.S. Dept. of the Treasury, *Home Affordable Modification Program*, MAKING HOME AFFORDABLE (last visited February 25, 2014), available at <http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/hamp.aspx> (noting that HAMP is a voluntary program).

159. U.S. GOV’T ACCOUNTABILITY OFFICE, TROUBLED ASSET RELIEF PROGRAM: RESULTS OF HOUSING COUNSELORS SURVEY ON BORROWERS’ EXPERIENCES WITH THE HOME AFFORDABLE MODIFICATION PROGRAM 4 (2011), available at <http://www.gao.gov/new.items/d11367r.pdf> [hereinafter GAO REPORTS].

160. *Id.*

161. See *supra* Parts II.A.2, II.B.2.

about it to the time of a decision was “negative” or “very negative.”¹⁶² Other important concerns recorded among the housing counselors were long waiting periods during the trial modification process and denials resulting from miscalculating the borrower’s income.¹⁶³ The vast majority of counselors surveyed responded that a decision on a trial modification took four months or longer and that the main reason for this delay is that servicers continued to request updated financial information from the borrower.¹⁶⁴ These problems are most likely an indication that servicers were not prepared to handle the modification program from the outset, were not incentivized enough by the Treasury to hire and train personnel to do so, or both. While these faults may be attributed to the Treasury, another disappointing revelation is that servicers purposefully delayed HAMP modifications and rewarded their employees for forcing homeowners into foreclosures and racking up delinquent and penalty payments, which were ultimately more profitable for these servicers than cooperating with the program.¹⁶⁵

In light of all the negative publicity and the bevy of complaints, the Treasury made some efforts to ramp up its response through the HOPE Hotline and to offer some form of appeals process through the HAMP Solution Center (HSC).¹⁶⁶ However, these efforts have been largely ineffective. As of February 2011, only 32% of the approximately 21,000 complaints escalated to the HSC had ended in a permanent modification.¹⁶⁷ The GAO survey of housing counselors provided first-hand information that the agents at the Solution Center provided little help either because they had little authority or failed to communicate adequately with the counselors.¹⁶⁸ This is an indicator of both a poorly planned program and a failure to train personnel adequately.

The National Consumer Law Center has also raised a myriad of issues with this complaint and appeals process.¹⁶⁹ First, homeowners

162. GAO REPORTS, *supra* note 159, at 5.

163. *Id.* at 4.

164. *Id.* at 6. This is probably explained by HAMP guidelines that require servicers to reject income documentation older than 90 days. HAMP SUPPLEMENTAL DIRECTIVE, *supra* note 4, at 5.

165. See Alanna Byrne, *Lawsuit: BofA Paid Bonuses for Foreclosures*, INSIDECOUNSEL (June 17, 2013), <http://www.insidecounsel.com/2013/06/17/lawsuit-bofa-paid-bonuses-for-foreclosures>.

166. See GAO REPORTS, *supra* note 159, at 9.

167. *Id.*

168. See *id.*

169. ALYS COHEN, ARIELLE COHEN & DIANE E. THOMPSON, NAT’L CONSUMER LAW CTR., AT A CROSSROADS: LESSONS FROM THE HOME AFFORDABLE

who are not represented by an attorney cannot access the HSC.¹⁷⁰ Even when the homeowners are represented, their attorneys are sometimes denied access unless they work for a nonprofit.¹⁷¹ Second, when an HSC representative determines that a servicer has violated the Treasury rules, the “HSC will close the case if the servicer refuses to change its position.”¹⁷² Furthermore, one study found that while the HSC was helpful in getting the servicer to provide a denial notice, it was never helpful in moving a homeowner from a trial modification to a permanent modification.¹⁷³ Again, these facts are indicators of an ill-planned program with little clout to either incentivize or pressure servicers to cooperate with the program and ultimately make a difference in the number of permanent modifications.

In addition to failed communication, inadequate appeals processes, and the program’s lack of influence, it is apparent that the Treasury’s guidelines created some of the problems for servicers and homeowners as well. Volatile changes, loose rules, and inconsistencies in HAMP guidelines and standard TPP documents provided by the Treasury Department tend to contribute to modification delays, poor communication between servicers and homeowners, and general confusion amongst participating servicers.¹⁷⁴

Many of these changes and inconsistencies are noticeable in *Wigod* and *Corvello*.¹⁷⁵ For instance, at the time of Wigod’s modification request, the Treasury’s original guidelines were in place. These guidelines allowed servicers to “choose whether (A) to offer Wigod a trial modification based on unverified oral representations, or (B) to require her to provide documentary proof of her financial information before commencing the trial plan.”¹⁷⁶ For both Wigod and Corvello, Wells Fargo chose option B.¹⁷⁷ However, when dealing with the Lucias, Wells Fargo chose option A, in spite of the fact that

MODIFICATION PROGRAM (HAMP) 40–41 (2013).

170. *Id.*

171. *Id.* at 40.

172. *Id.* at 41.

173. CONNECTICUT FAIR HOUSING CTR., REPORT ON THE EFFICACY OF THE HAMP SOLUTION CENTER 1–2 (2012).

174. See COHEN ET AL., *supra* note 169, at 9–10.

175. Another great example of inconsistency throughout the process is the differing TPP language in Wigod’s and Corvello’s TPP documents. Even though they received them from the same bank within a couple of months, the differing language has a material impact on the legal analysis. See *supra* Part II.C.

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

177. *Id.*; see *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 881 (9th Cir. 2013).

all three homeowners began the process nearly simultaneously.¹⁷⁸ These inconsistencies are evidence of a disorganized and dysfunctional program.

Also problematic is the miniscule portion of TARP funds used to administer the program. As of February of 2013, the Treasury had spent only about \$4.7 billion of the \$29 billion that was originally allocated for HAMP over the life of the program.¹⁷⁹ One reason for this is that the HAMP funds that are meant to incentivize servicers are paid out only for completed modifications and disbursed over a five-year period.¹⁸⁰ Another explanation for the lack of spending may be political. HAMP's unpopularity in Congress stems from its costly and inefficient use of TARP funds and its clear ineffectiveness in creating permanent modifications.¹⁸¹ Although these are valid explanations for the government's failure to implement these programs to their fullest potential, they are not worthy excuses.

B. How to Improve the Program: Using Allocated Money to Create More Carrots & More Sticks for Servicer Participation and Oversight

By the fifth year after the HAMP program was initiated, the Treasury had spent only a small fraction of the money committed to it.¹⁸² Thus far, servicers have little incentive to follow through with modifications because they are not as profitable to them as they are to homeowners, lenders, or investors.¹⁸³ While the participation of

178. See *Corvello*, 728 F.3d at 882.

179. Benson, *supra* note 153.

180. Olga Pierce and Paul Kiel, *By the Numbers: A Revealing Look at the Mortgage Mod Meltdown*, PROPUBLICA (March 8, 2011, 12:37 PM), <http://www.propublica.org/article/by-the-numbers-a-revealing-look-at-the-mortgage-mod-meltdown#unused>.

181. See *House Votes to Terminate Another Failed Government Program, Prevents \$29 Billion in TARP Funds From Being Spent*, THE COMMITTEE ON FINANCIAL SERVICES (Mar. 29, 2011), <http://financialservices.house.gov/news/documentsingle.aspx?DocumentID=237041>; *Obama Administration To Extend HAMP By Two More Years*, HUFFINGTON POST (May 30, 2013, 10:14 AM), http://www.huffingtonpost.com/2013/05/30/hamp-program-extended_n_3359565.html.

182. SPEC. INSPECT. GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, QUARTERLY REPORT TO CONGRESS 56 (April 30, 2014), available at http://www.sig tarp.gov/Quarterly%20Reports/April_30_2014_Report_to_Congress.pdf ("As of March 31, 2014, only 11.7 billion (30% of obligated funds) has been expended.").

183. See DIANE E. THOMPSON, NAT'L CONSUMER LAW CTR., WHY SERVICERS FORECLOSE WHEN THEY SHOULD MODIFY AND OTHER PUZZLES OF SERVICER BEHAVIOR 25–28 (2009); see also *HAMP-ering the Recovery*, ECONOMIST (Nov. 1, 2012, 14:54) <http://www.economist.com/blogs/freeexchange/2012/11/mr-obamas-economic-record> ("As if that were not bad enough, servicers—and therefore the banks that own them—often profit from foreclosures. This is especially true if borrowers build up a balance of late fees on their mortgage payments.").

non-GSE servicers is incentivized through certain carrots in the form of compensation for each permanent modification,¹⁸⁴ these incentives are not large enough to encourage acceptable servicer compliance throughout the process. Furthermore, these incentivized carrots lack any corresponding sticks in the form of increased oversight and enforcement by both the Treasury and homeowners, such as Wigod and Corvello.¹⁸⁵

Allocating HAMP funds in order to bolster the incentive program for non-GSE servicers is an excellent place for the Treasury Department to start improving servicer participation and the program as a whole. The most obvious way is to increase the payments to servicers who complete a permanent modification, which may make modifications profitable for servicers and allow them to hire personnel to oversee the massive amounts of administrative work. Another idea is a restructured incentive program aimed at awarding payments to servicers for each particular checkpoint in the service of the modified loan. This would incentivize servicers to spend more time seeking out the homeowners who have the highest chance of continued success with a permanent modification.¹⁸⁶ The Treasury could also allocate funds for improved HAMP training programs for servicer personnel¹⁸⁷ and even bonuses for servicers that meet substantial compliance goals. These carrots are a necessary first step in garnering servicer compliance and cooperation with homeowners, thus limiting litigation and leading to eventual program success.

However, the aspect that is truly lacking from HAMP is adequate enforcement of the TPP process and repercussions against servicers who fail to comply with Treasury guidelines. In the GAO survey housing counselors were asked to rank three actions that the

184. Most recently the top payment to a servicer for a permanent modification within the first 120 days of the homeowner's delinquency was \$2,100. See *Reporting and Incentive*, FREDDIE MAC, http://www.freddiemac.com/singlefamily/service/hmp_reporting.html (last visited August 6, 2014).

185. See Cohen et al., *supra* note 170, at 36–41.

186. As the compensation matrix provided on the HAMP website would suggest, the Treasury has increased incentive payments in 2014 and has provided a number of post modification incentives for servicers. See *generally Making Home Affordable (MHA) Compensation*, HMPADMIN.COM, https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhacompensationmatrix01242014.pdf (last updated Jan. 24, 2014) (outlining the most recent compensation scheme for servicers). I would argue these incentive schemes are too convoluted and insignificant to create any material effect on servicers' willingness to cooperate with the program.

187. See Talbut, *supra* note 47, at 320. For a general discussion of why many servicers eschew incentives in favor of foreclosures and refinancing, see Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 840 (2011).

Treasury could take to improve the HAMP program and increase successful modifications.¹⁸⁸ The most common answer was that the Treasury should enforce sanctions on servicers that did not comply with the HAMP guidelines.¹⁸⁹ Even after HAMP had been in existence for almost a year and a half, the Treasury still had not adequately stated the consequences of a servicer's noncompliance with HAMP guidelines.¹⁹⁰ Instead, the only repercussion for failing to adhere to the guidelines is the occasional withholding of promised financial incentives, as homeowners have had minimal success enforcing these guidelines through litigation.¹⁹¹

One way to improve oversight and enforce servicer noncompliance is by "providing an avenue for homeowners to timely address their grievances" without time-consuming and costly litigation.¹⁹² Although the Treasury has created the HOPE Hotline and HAMP Support Center, these support programs have proven largely ineffective and inaccessible to unrepresented homeowners.¹⁹³ The Treasury could improve this process by providing more funding for a more expansive support system with qualified employees who have the authority to move modifications along, forestall servicers from initiating foreclosures, and force servicers to comply with the terms of the respective TPP.¹⁹⁴ This would prevent servicers from denying homeowners a permanent modification based on frivolous or unsubstantiated bases, such as "investor guidelines," as was the case in *Wigod*.¹⁹⁵ Having such an authoritative appeals process could also force servicers to become more transparent and timely with their communications regarding modification eligibility and the foreclosure process.¹⁹⁶ This lack of communication was an obvious problem in *Corvello*.¹⁹⁷

Thus, *Corvello* and *Wigod* are reminders of not only the inherent technical problems with the program itself, but also the hardships placed on homeowners struggling to enforce mortgage servicer

188. See GAO REPORTS, *supra* note 159, at 10–12.

189. *Id.*

190. *Id.*; see COHEN ET AL., *supra* note 169, at 36.

191. See GAO REPORTS, *supra* note 159, at 10–12; *supra* notes 48–52 and accompanying text.

192. See Talbut, *supra* note 47, at 319.

193. See *supra* notes 159–62 and accompanying text.

194. See COHEN ET AL., *supra* note 169, at 60–64.

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

196. See generally COHEN ET AL., *supra* note 169 (suggesting ways in which homeowners can be protected from servicer noncompliance).

197. See *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 882 (9th Cir. 2013) ("Wells Fargo . . . never told Corvello whether he qualified for a modification.").

compliance with the program. These suggested enforcement sticks must accompany the inventive carrots in order to make the HAMP program and the TPP process work as they were intended.

CONCLUSION

Wigod and *Corvello* provide examples of the inconsistencies and inefficiencies of the HAMP program and the problem of servicer noncompliance. They also serve as a narrative of the struggles of homeowners following the financial crisis of 2008. Although HAMP was meant as a program to rescue homeowners from the perils of the housing crisis, it has arguably left many homeowners in a worse position than if the bank had foreclosed on them in the first place, as they have accrued costs in the form of late fees, prolonged foreclosures, harmed credit scores, and the costs of protracted litigation.¹⁹⁸ The waves of unsuccessful litigation to spin out of HAMP, and in particular the TPP process, are significant.¹⁹⁹ The fact that a relatively small number of jurisdictions have recognized a valid breach of contract claim where servicers have failed to meet their end of the bargain in a TPP agreement is a signal that homeowners have a small chance of enforcing servicer cooperation in the TPP process. This lack of enforcement is a significant weakness in the overall effectiveness of HAMP.

What makes this chance of enforcement so small is the precise set of circumstances that must occur for a valid contract to exist by which homeowners can use the courts to enforce servicer cooperation via a common law breach of contract claim. This narrow avenue is evident in *Wigod* and confirmed by the erroneous holding in *Corvello*.²⁰⁰ In order for HAMP to move beyond these shortcomings and limit the amount of litigation, the Treasury must make numerous systemic changes and provide a more effective internal resolution process for homeowners to air their grievances in a timely and efficient manner, rather than airing out “HAMP’s Dirty Laundry” in the courts. This effort will not only require more carrots for mortgage

198. See *HAMP-ering the Recovery*, *supra* note 183 (noting how Special Inspector General for TARP, Neil Barofsky, has stated that HAMP has actually hurt the homeowners it was intended to help).

199. See *supra* Part I.B.

200. See *supra* notes 134–35 and accompanying text. It is also worth noting that the Supreme Court has most recently denied certiorari for homeowners seeking retribution against Wells Fargo arising out of a botched TPP, furthering the argument that homeowners have a very limited chance at receiving help through the courts. See *Bloch v. Wells Fargo Home Mortg.*, 755 F.3d 886, (11th Cir. 2014), *cert denied* 134 S.Ct. 2711, No. 13–1275 (June 2, 2014).

servicers to buy into HAMP, but also more sticks for servicers who fail to adequately comply with HAMP guidelines.

CLAY S. HESTER**

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