THE HOME AFFORDABLE MODIFICATION PROGRAM AND A NEW WAVE OF CONSUMER FINANCE LITIGATION

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Courts in Michigan have been flooded with consumer finance litigation during these turbulent economic times. A federal program called the Home Affordable Modification Program (HAMP) was created by the Department of Treasury (Treasury) in 2009 to encourage modification of residential loans and avoid foreclosure where possible. Although HAMP is an administrative program that is not intended to create a cause of action for failure to provide a loan modification, borrowers have attempted to use HAMP as a sword in contesting their foreclosures. This article discusses the nature of HAMP generally and examines some trends in HAMP litigation, including a focus on some of the recent caselaw from federal courts in Michigan.

Creation of HAMP

On October 3, 2008, Congress passed the Emergency Economic Stabilization Act (the Act).[1] The Act initially allocated $700 billion to the Treasury to restore liquidity and stability to the financial system; one of its goals was to "preserve homeownership."[2] The Act also authorized the Secretary of the Treasury (Secretary) to establish the Troubled Asset Relief Program (TARP).[3]

Pursuant to the Act, the Treasury created the Making Home Affordable program on February 18, 2009, of which HAMP is a part.[4] The Treasury's stated purpose for HAMP is to financially assist three to four million homeowners who have defaulted on their mortgages or are at imminent risk of default by reducing their monthly payments to sustainable levels.[5] HAMP works by providing financial incentives—TARP funds—to participating mortgage servicers to modify the terms of certain eligible loans to a level that is affordable for borrowers now and sustainable over the long term.

In April 2009, the Treasury issued uniform guidance for loan modifications across the mortgage industry and subsequently updated and expanded that guidance in a series of policy announcements. Some borrowers have sought to use these policy

FAST FACTS:

HAMP is a federal program to encourage loan modifications.

Courts generally reject borrowers' attempts to use HAMP as a sword against their mortgage servicers.

Courts in Michigan follow the majority rule that HAMP is not designed to provide a defaulting borrower with a remedy relating to a request for a loan modification.

announcements—including the Treasury's supplemental directives—and other program guidelines as the basis for a new wave of consumer finance litigation.

What HAMP Is

HAMP is an administrative program created by the Treasury pursuant to legislative authority from the Act.[6] Mortgage servicers voluntarily participate in HAMP by executing a servicer participation agreement (SPA)[7] with the Federal National Mortgage Association (Fannie Mae) in its capacity as financial agent for the United States.[8]

The standard SPA incorporates the supplemental directives[9] and requires that participating servicers adhere to program guidelines.[10] The standard SPA also outlines certain rights and remedies that Fannie Mae can exercise if a participating mortgage servicer fails to comply with its obligations under the SPA.[11] Notably, Fannie Mae cannot force a mortgage servicer to modify an eligible loan even if a default occurs. Borrowers often claim that HAMP entitles them to a loan modification, but not even Fannie Mae has the power to compel a modification under the terms of the standard SPA.[12]

What HAMP Is Not

HAMP is not a federal statute or regulation, and the program is not codified in any public law.[13] The Act does 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 indicates a congressional intent to create such a right.[14] The Act stands in stark contrast to other federal statutes that clearly provide a private remedy for statutory violations, such as the Fair Credit Reporting Act.[15]

There also is no language in the standard SPA providing any right in favor of borrowers to enforce the SPA's provisions, and individual borrowers are not signatories to the SPA. To the contrary, the standard SPA states that the "Agreement shall inure to the benefit of and be binding upon the parties to the Agreement and their permitted successors-in-interest."[16] It is clear from the language of the Act and the terms of the SPA that neither Congress nor the Treasury intended the Act or HAMP as remedial legislation against mortgage servicers and in favor of borrowers; however, that has not stopped some borrowers from suing mortgage servicers for purported violations of HAMP guidelines or SPAs under various theories.

Litigation Under HAMP

Suits under HAMP have been increasing since the Treasury began issuing supplemental directives in 2009. These suits typically target mortgage servicers, which represents a shift in tactics for plaintiffs' lawyers. During the so-called real estate "bubble" that occurred in 2003–2007, a substantial number of lawsuits in the field of consumer finance centered on alleged origination improprieties. When the "bubble" burst, several loan originators disappeared. Plaintiffs' lawyers have refocused their efforts to attack mortgage servicers that did not modify or renegotiate their clients' loans under HAMP and commenced foreclosure activities. The claims are that mortgage servicers have a duty to borrowers under HAMP—both contractual and, more recently, in tort—despite the voluntary nature of the program. 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.

Review of the caselaw reveals some distinct theories that plaintiffs' attorneys are asserting in HAMP litigation.

The Direct Liability Theory

Borrowers in many cases plead "violation of HAMP guidelines" or something similar as a cause of action against mortgage servicers, often attaching copies of and citing certain supplemental directives. However, as stated, HAMP is not a law, and the Act contains no private right of action in favor of borrowers.

This theory of direct liability under HAMP has been soundly rejected by courts around the country, and the courts have stated unambiguously that there is no private right of action under HAMP.[17] These decisions are entirely consistent with the text of the Act.

THE TREASURY'S STATED PURPOSE FOR HAMP IS TO FINANCIALLY ASSIST THREE TO FOUR MILLION HOMEOWNERS WHO HAVE DEFAULTED ON THEIR MORTGAGES OR ARE AT IMMINENT RISK OF DEFAULT BY REDUCING THEIR MONTHLY PAYMENTS.

Contract Theories

Other theories presented by plaintiffs in HAMP litigation are rooted in contract. Two theories that have emerged are a third-party-beneficiary theory and a breach of contract under a trial-period-plan theory.

Plaintiffs often claim that they are third-party intended beneficiaries of the SPA and, therefore, have standing to sue for a purported violation of the SPA. The vast majority of courts have rejected this theory of liability, holding that borrowers are mere incidental beneficiaries of, and have no rights under, the SPA.[18]

More recently, some borrowers have had success arguing that a mortgage servicer may be liable for breach of contract if it fails to offer a permanent loan modification after the borrower complies with the terms of a HAMP "trial period plan" (TPP). A TPP is a plan put in effect for a limited time—typically three months—after a mortgage servicer determines that a borrower is eligible for a loan modification under HAMP. During this time, a borrower must comply with certain requirements and make payments if he or she wants to be considered for a "permanent" loan modification. In *Wigod v Wells Fargo Bank, NA,*[19] the United States Court of Appeals for the Seventh Circuit held that a borrower had stated a valid claim under Illinois law for a breach of contract relating to a TPP. Other courts have rejected similar HAMP-related claims.[20] In *Miller v Chase Home Finance, LLC,*[21] the Eleventh Circuit held that HAMP does not create any implied right of action in favor of borrowers and dismissed the borrower's breach of contract claim. The courts remain split on this issue, but *Miller* represents the better view because, as noted by the court, "providing a private right of action against mortgage servicers contravenes the purpose of HAMP—to encourage servicers to modify loans—because it would likely chill servicer participation based on fear of exposure to litigation."[22]

Tort-Based Theories

Plaintiffs sometimes disguise a claim under HAMP as a tort claim sounding in negligence or consumer protection. The majority of courts have rejected borrowers' attempts to restate claims under HAMP as tort claims.[23] For example, in *Parks v BAC Home Loan Servicing, LP,*[24] the plaintiff asserted several claims against a mortgage servicer, including allegations related to HAMP.[25] One of the claims in the plaintiff's complaint was that the defendant had committed "negligence per se" by failing to comply with HAMP requirements. The court rejected the notion that "some sort of federal tort arising from HAMP" existed and dismissed the negligence allegation as a HAMP claim "in a different shade of clothing."[26] This is a result consistent with the near universal agreement around the country that HAMP does not create a private cause of action in favor of borrowers.

Equal Credit Opportunity Act Claims

Plaintiffs have also claimed that a mortgage servicer's failure to offer a loan modification may constitute a violation of the Equal Credit Opportunity Act (ECOA).[27] For example, in *Willis v Countrywide Home Loans Servicing, LP,*[28] the borrower alleged that his loan modification application was treated less favorably than nonminority applications.[29] The court rejected the argument and noted that the plaintiff had failed to allege how any nonminority applicant received better treatment, concluding as follows: "Countrywide's eligibility criteria for its loan modification programs… appear to have been based on race-neutral criteria, such as payment history, employment status, and whether a borrower had previously participated in a loan modification program."[30]

Constitutional Challenges

Borrowers have also raised their challenges to a mortgage servicer's compliance with HAMP to constitutional levels. For example, in *Williams v Geithner,*[31] the court rejected the claim of a borrower against the Secretary and other parties that HAMP gave borrowers a protected property interest under the Due Process Clause.[32] The court concluded that "the regulations at issue…did not intend to create a property interest in loan modifications for mortgages in default."[33]

Decisions of the Eastern and Western Districts of Michigan

Judges in the United States District Courts for the Eastern and Western Districts of Michigan, consistent with the majority of

HAMP'S EFFECTIVENESS HAS BEEN MODEST BECAUSE IT IS BASED ON A FAULTY PREMISE—THAT A SIGNIFICANT NUMBER OF STRUGGLING BORROWERS ARE ONLY A FEW DOLLARS AWAY FROM BEING ABLE TO MAKE THEIR MORTGAGE PAYMENTS. THAT OFTEN IS NOT THE CASE.

courts around the country, have held that HAMP does not create a direct private cause of action in favor of borrowers. In an Eastern District case, *LaSalle Bank NA v Ray,*[34] the counterplaintiffs brought a counterclaim against the servicer of the loan and the bank that purchased the property at a foreclosure sale.[35] Count IV of the counterclaim was for violating the Housing and Economic Recovery Act of 2008 (HERA),[36] and count VI was for violating the Federal Home Affordable Modification Program. Judge Avern Cohn dismissed both claims, stating that "even assuming the [counterplaintiffs] were eligible for modification and assuming the statutes impose a duty on [defendant loan servicer] to modify their mortgage, the statutes 'do not create a private right of action under which Plaintiff may seek relief.' Accordingly, the [counterplaintiffs'] claims under HERA and HAMP fail."[37] Similarly, in a Western District case, *Brown v Bank of New York Mellon,*[38] the court dismissed the borrower's claim for "Breach of Contract (HAMP)," concluding that "[a]ll of the district courts that have considered the issue have held that homeowners do not have a private right of action under HAMP for denial of a loan modification."[39]

On the other hand, the court in *Bolone v Wells Fargo Home Mortgage, Inc,*[40] an Eastern District case, recently denied summary judgment relating to a borrower's breach of contract claim concerning a TPP. The court acknowledged that HAMP "does not create a private cause of action to enforce its regulations," but held that HAMP did not preempt a state-law breach of contract claim relating to a TPP.[41] The court denied the defendants' motion for summary judgment because it found that a genuine issue of material fact existed regarding whether the borrower satisfied the preliminary conditions of the TPP.

Recent decisions in the Eastern District of Michigan have rejected borrowers' ECOA and constitutional claims. In *Adams v United States Bank,*[42] the court dismissed an ECOA claim because the plaintiff had failed to allege sufficient facts supporting that claim.[43] Furthermore, in *Sparks v Fed Nat'l Mtg Ass'n,*[44] the court rejected a Fourteenth Amendment claim by the borrower relating to the defendants' denial of a HAMP loan modification.[45]

Conclusion

Litigation under HAMP is bound to continue while the program is in effect, particularly here in Michigan where homeowners have been especially hard-hit by turbulent economic times. Many borrowers are frustrated because they misunderstand the nature of the program and are underwater on their loans. Mortgage servicers are frustrated because many borrowers are using HAMP as a justification for filing suit and requesting principal modifications down to the current market value of their properties. HAMP's effectiveness has been modest because it is based on a faulty premise—that a significant number of struggling borrowers are only a few dollars away from being able to make their mortgage payments. That often is not the case, as many borrowers struggling to avoid foreclosure have suffered a dramatic loss of income, which is a situation that HAMP is not equipped to address. Suits by unqualified borrowers seeking to compel loan modifications under HAMP are not the answer. HAMP is designed to encourage mortgage servicers to enter into loan modification agreements with qualified borrowers, and suits by unqualified borrowers solely to stall the foreclosure process discourage mortgage servicers and thwart the intent of the program. ■

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FOOTNOTES

1. 12 USC 5201.
2. *Id.*
3. 12 USC 5211(a)(1).
4. The other components of the Making Home Affordable program are beyond the scope of this article.
5. Treasury Dep't Supplemental Directive 09-01, April 6, 2009, p 1, available at <http://www.hppinc.org/_uls/resources/Supplemental_Directive_09-0.pdf>. Note that the Treasury has issued a comprehensive handbook for servicers that incorporates and supersedes certain supplemental directives, including Supplemental Directive 09-01. Lawyers should advise their servicing clients to refer to the most recent version of the handbook, which currently can be found at <https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_33.pdf>. All websites cited in this article were accessed May 23, 2012.
6. See *Marks v Bank of America, NA,* unpublished opinion of the US District Court of Arizona, issued June 22, 2010 (Case No. 10-CV-08039); 2010 WL 2572988.
7. The standard servicer participation agreement (Agreement) can be found at <https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/servicerparticipationagreement.pdf>.
8. See *Villa v Wells Fargo Bank, NA,* unpublished opinion of the US District Court for the Southern District of California, issued March 15, 2010 (Case No. 10-CV-81).
9. See Agreement, n *7 supra.*
10. *Id.* at § 1.B.
11. *Id.* at § 6.B.
12. See *Marks,* unpublished opinion at *3 ("Even Fannie Mae, which has rights under the Agreement, cannot force a participating servicer to make a particular loan modification.").
13. *Zendejas v GMAC Wholesale Mortg Corp,* unpublished opinion of the US District Court for the Southern District of California, issued June 29, 2010 (No. 10-CV-00184); 2010 WL 2629899 at *3.
14. 12 USC 5229.
15. See 15 USC 1681n (expressly providing for civil liability for willful noncompliance with the Fair Credit Reporting Act). No similar provision appears in the Act.
16. Agreement, p 12.
17. E.g., *Valtierra v Wells Fargo Bank, NA,* unpublished opinion of the US District Court for the Eastern District of California, issued February 10, 2011 (Case No. 10-0849); 2011 WL 590596 at *4; *Ording v BAC Home Loans Servicing, LP,* unpublished opinion of the US District Court for the District of Massachusetts, issued January 10, 2011 (Case No. 10-10670); 2011 WL 99016 at *7; *Zeller v Aurora Loan Servs., LLC,* unpublished opinion of the US District Court for the Western District of Virginia, issued August 10, 2010 (Case No. 10-CV-00044); 2010 WL 3219134 at *1.
18. See, e.g., *Speleos v BAC Home Loans,* 755 F Supp 2d 304, 308–309 (D Mass, 2010); *Benito v Indymac Mortg Servs,* unpublished opinion of the US District Court for the District of Nevada, issued May 21, 2010 (Case No. 09-CV-001218); 2010 WL 2130648 at *7; *Wright v Bank of Am, NA,* unpublished opinion of the US District Court for the Northern District of California, issued July 22, 2010 (Case No. 10-01723); 2010 WL 2889117.
19. *Wigod v Wells Fargo Bank, NA,* 673 F3d 547, 566 (CA 7, 2012).
20. *Lonberg v Freddie Mac,* 776 F Supp 2d 1202, 1209 (D Or, 2011) ("However, every court that has reviewed this issue has unanimously agreed that a defendant's failure to provide a permanent loan modification solely on the basis of the existence of a TPP does not sufficiently state a breach of contract claim.").
21. *Miller v Chase Home Fin, LLC,* ___ F3d ___; 2012 WL 1345834 (CA 11, April 19, 2012, Case No. 11-15166).
22. *Id.* at *2.
23. See *Parks v BAC Home Loan Servicing, LP,* 825 F Supp 2d 713, 716 (ED Va, 2011); *Stolba v Wells Fargo & Co,* unpublished opinion of the US District Court for the District of New Jersey, issued August 8, 2011 (Case No. 10-CV-6014); 2011 WL 3444078 at *5 (dismissing claim of negligent processing of application under HAMP).
24. *Parks,* 825 F Supp 2d 713.
25. *Id.* at 714.
26. *Id.* at 716.
27. See 15 USC 1691.
28. *Willis v Countrywide Home Loans Servicing, LP,* unpublished opinion of the US District Court for the District of Maryland, issued December 23, 2009 (Case No. 09-1455); 2009 WL 5206475.
29. *Id.* at *7–8.
30. *Id.* at *8.
31. *Williams v Geithner,* unpublished opinion of the US District Court for the District of Minnesota, issued November 9, 2009 (Case No. 09-1959); 2009 WL 3757380.
32. *Id.* at *7.
33. *Id.* at *6.
34. *LaSalle Bank NA v Ray,* unpublished opinion of the US District Court for the Eastern District of Michigan, issued February 9, 2011 (Case No. 09-13526); 2011 WL 576661.
35. *Id.* at *1.
36. *Id.*
37. *Id.* at *5 (citations omitted).
38. *Brown v Bank of New York Mellon,* unpublished opinion of the US District Court for the Western District of Michigan, issued January 21, 2011 (Case No. 10-CV-550); 2011 WL 206124 at *2.
39. *Id.* at *2.
40. *Bolone v Wells Fargo Home Mortgage, Inc,* ___ F Supp 2d ___; 2012 WL 882894 (ED Mich, March 14, 2012, Case No. 11-10633).
41. In discussing the preemption issue, Judge Lawrence Zatkoff discussed an unpublished opinion from the Western District of Michigan: *Darcy v Citifinancial, Inc,* unpublished opinion of the US District Court for the Western District of Michigan, issued August 25, 2011 (Case No. 10-CV-848), at *4. In *Darcy,* the court held that HAMP did not preempt a borrower's claim for a breach of contract relating to a TPP and denied the defendant's motion for summary judgment after finding that the provisions of the TPP at issue in that case were ambiguous.
42. *Adams v US Bank,* unpublished opinion of the US District Court for the Eastern District of Michigan, issued July 1, 2010 (Case No. 10-10567); 2010 WL 2670702 at *3.
43. *Id.* at *3.
44. *Sparks v Fed Nat'l Mtg Ass'n,* unpublished opinion of the US District Court for the Eastern District of Michigan, issued March 24, 2011 (Case No. 10-13241); 2011 WL 1118719 at *4.
45. *Id.* at *5.