Fighting Foreclosure: Using Contract Law to Enforce the Home Affordable Modification Program (HAMP)

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In 2009, the Secretary of the Treasury and the Obama Administration unveiled the Making Home Affordable Program (“MHA”) to slow the foreclosure crisis and stabilize the economy. A key component of the MHA is the Home Affordable Modification Program (“HAMP”), a seventy-five billion dollar program designed to incentivize loan servicers to modify loans for certain qualified borrowers. The Treasury estimated that HAMP would permanently modify three to four million mortgages by the end of 2012; however, HAMP has failed to meet its objective.

Under HAMP, if a borrower meets certain criteria, she will be placed on a three-month trial period plan (“TPP”) where she will pay a lowered mortgage payment equal to 31% of her gross monthly income. If the borrower makes this lowered payment for three months and meets other requirements, the servicer should extend a permanent modification with a reduced monthly payment. As written, however, the provision allows servicers to deny permanent modifications even if borrowers successfully meet their reduced mortgage payments.

Recently, borrowers began to bring common law breach of contract claims to enforce the TPP, arguing that the TPP is a binding contract that requires servicers to grant permanent loan modifications. Currently, there is controversy over the validity of the TPP-based breach of contract theory and a split amongst the federal courts. This Note provides an overview of the HAMP application process, examines the controversy and split amongst the federal courts, argues in favor of upholding the theory, and provides recommendations for national legislation.

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INTRODUCTION

The recent U.S. economic collapse triggered the worst recession since the
Great Depression.1 A significant contributor to the 2007 recession was
the mortgage foreclosure crisis.2 The numbers are staggering. From 2007 to

1. See Diana I. Gregg, World Is in Recession in 2009 in Wake of Financial Sector Crisis, BNA
   Bank’s assessment that the current financial crisis is the “most serious since the 1930s”); Ben S.
   is suffering through the worst financial crisis since the 1930s . . . .”).
2. See Kathleen C. Engel & Patricia A. McCoy, The Subprime Virus: Reckless Credit, Regulatory
   Failure and Next Steps (2011) (providing a thorough overview of the foreclosure crisis and its
   effects on the U.S. economy); John Rao & Geoff Walsh, Nat’l Consumer Law Ctr.,
   Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections 8 (2009), available at
   consequences of this foreclosure crisis are enormous, ripping through both Wall Street and Main
   Street.”); Jean Braucher, Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster
2011, foreclosures were initiated on 11 million properties. In an effort to slow the climbing foreclosure rates, President Bush signed into law H.R. 1424, the Emergency Economic Stabilization Act of 2008 (“the Act”). One goal of the Act was to restore market liquidity and stabilize the U.S. economy. Section 109 of the Act authorizes the Secretary of the Treasury (the “Secretary”) to create and implement a plan to decrease the rate of foreclosures. In the spring of 2009, the Secretary and the Obama Administration unveiled the Making Home Affordable Program (“MHA”).

A key component of the MHA is the Home Affordable Modification Program (“HAMP”), a program designed to encourage loan servicers to modify loans for certain qualified borrowers. One of the goals of HAMP is to reduce the rate of foreclosure by lowering borrowers’ monthly mortgage payments to 31% of their monthly gross income. HAMP


12 U.S.C. § 5201 (2008) (“The purposes of this chapter are (1) to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States; and (2) to ensure that such authority and such facilities are used in a manner that (A) protects home values, college funds, retirement accounts, and life savings; (B) preserves homeownership and promotes jobs and economic growth; (C) maximizes overall returns to the taxpayers of the United States; and (D) provides public accountability for the exercise of such authority.”).


A servicer is a financial institution that collects the borrower’s monthly mortgage payments and has responsibility for the management and accounting of the loan. It is possible that the owner of a mortgage also services it; however, many loans are owned by groups of investors who hire loan servicers to interact with homeowners on their behalf. A servicer primarily profits from late fees associated with late mortgage payments. Additionally, servicers, “unlike investors, generally recover all their hard costs after a foreclosure, even if the home sells for less than the mortgage loan balance. Servicers may even make money from foreclosures through charging borrowers and investors fees that are ultimately recouped from the loan pool.” See infra Part II; see also Diane E. Thompson, Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications, 86 Wash. L. Rev. 755, 765–68 (2011).

See HAMP Supplemental Directive, supra note 6 at 1.

Id. at 6 (“The borrower will only qualify for the HAMP if the verified income documentation confirms that the monthly mortgage payment ratio prior to the modification is greater than 31 percent. The ‘monthly mortgage payment ratio’ is the ratio of the borrower’s current monthly mortgage
allocated seventy-five billion dollars worth of incentives to encourage loan investors, servicers, and borrowers to work together to modify mortgages.\textsuperscript{10} The Treasury estimated that HAMP would permanently modify three to four million mortgages by the end of 2012.\textsuperscript{11} However, after its first year, HAMP’s shortfalls came to light as data showed that HAMP produced only 230,801 permanent modifications.\textsuperscript{12} It became apparent that at this rate, HAMP would not meet its projected goal.\textsuperscript{13} According to a recent report, “approximately 2.8 million borrowers had their HAMP loan modification application denied or their trial [period plan] canceled.”\textsuperscript{14}

While the intentions of the proposed legislation were noteworthy, loan servicers and financial institutions circumvented the program’s provisions to protect their own interests. This resulted in a lackluster program that incentivized servicers to modify loans but did very little to make those modifications permanent.\textsuperscript{15} As a result, a flurry of litigation ensued.\textsuperscript{16}

The most controversial provision of HAMP is its three-month Trial Period Plan (“TPP”).\textsuperscript{17} Under HAMP, if a borrower meets certain requirements, she will be placed on a TPP where she will pay a lowered mortgage payment equal to 31% of her gross monthly income.\textsuperscript{18} If the borrower makes this lowered payment for three months, the servicer should extend a permanent modification with a reduced monthly payment. As written, however, the provision allows servicers to deny permanent modifications even if borrowers successfully meet their reduced mortgage payments.\textsuperscript{19} For example, during the TPP, the servicer may request

\textsuperscript{10} See Braucher, supra note 2, at 729 (stating the cost of the program to be $75 billion and examining the disappointing first year of the HAMP program).


\textsuperscript{13} See October Oversight Report, supra note 11, at 43–71 (discussing the shortfalls of HAMP after six months of its inception).

\textsuperscript{14} See U.S. Gov’t Accountability Office, GAO-12-296, Foreclosure Mitigation: Agencies Could Improve Effectiveness of Federal Efforts with Additional Data Collection and Analysis 3 (2012) [hereinafter Foreclosure Mitigation].

\textsuperscript{15} See generally Thompson, supra note 7 (arguing that HAMP does not require servicers to modify loans but offers an incentive structure that is supposed to encourage loan modifications).


\textsuperscript{17} See Making Home Affordable Program: Handbook for Servicers of Non-GSE Mortgages 106–10 (version 4.0 2012) (outlining the TPP) [hereinafter HAMP Servicer Handbook].

\textsuperscript{18} Id. at 93.

\textsuperscript{19} Id. at 110 (“A borrower in a TPP may receive a permanent modification as long as the servicer has received all required trial period payments timely and all other required documentation from the borrower, including a fully executed Modification Agreement. Servicers should not modify a mortgage loan if there is reasonable evidence indicating the borrower submitted information that is false or misleading or if the borrower otherwise engaged in fraud in connection with the modification.”).
enforcing hamp with contract law

additional income documentation to ensure that the borrower is eligible for a permanent modification.20 This tedious process and degree of discretion allows servicers to deny permanent modifications based on incomplete applications and insufficient income.21 Unfortunately, evidence of servicer misconduct is well chronicled: Borrowers complain that servicers lose their paperwork, make oral and written misrepresentations, engage in delay tactics, and fail to follow HAMP standards.22 To date, over 770,000 borrowers who entered TPPs were denied permanent modifications and had their TPPs cancelled.23

HAMP’s failures have caused borrowers to seek relief through the courts. Nevertheless, many borrowers have trouble surviving the pleading stage.24 Recently, borrowers began to bring common law breach of contract claims to enforce the TPP. They argue that the TPP is a binding contract that the servicer breaches when it refuses to grant a permanent loan modification despite borrower compliance.25 Currently, there is controversy over the validity of the TPP-based breach of contract theory and a split among federal courts.26 Cases are often dismissed on the theory that HAMP does not afford a private right of action,27 meaning borrowers cannot simply sue to enforce a particular HAMP provision. They reason that TPPs do not constitute valid, independent contracts, but are instead

20. See infra Part II.C.
21. See infra notes 22, 64, 106; see also TARP Quarterly Report, infra note 106.
24. See infra Part III.A.
26. See infra Part III.
part of the rubric of HAMP.\footnote{28} This rationale is partly based on constitutional preemption principles.\footnote{29}

Conversely, other courts disagree with this rationale and allow borrowers to assert contract claims to enforce TPPs, reasoning that while HAMP does not afford a private right of action, it does not preempt state common law.\footnote{30} This approach is more consistent with American jurisprudence, because courts generally allow plaintiffs to assert common law claims to enforce federal programs. Thus far, the Seventh Circuit Court of Appeals is the only appellate court that has addressed the validity of the theory, dismissing the preemption arguments and upholding the theory.\footnote{31} As a result, lower courts are mixed in applying the theory, and the result is inconsistent decisions.\footnote{32}

Part I of this Note provides an overview of the HAMP application process, with specific emphasis on the TPP. Part II first discusses the recent controversy around the TPP-based breach of contract theory and the split among federal courts. Part II then looks to the judicial treatment of analogous federal statutes and suggests that courts uphold the validity of the breach of contract theory and allow borrowers to attain foreclosure relief through the courts. This Note concludes by recommending several ideas for national legislation that can help achieve HAMP’s unmet goals.

I. THE MORTGAGE CRISIS

Several theories purport to explain the origins of the mortgage crisis. While there is disagreement among scholars, the general consensus is that subprime lending\footnote{33} and securitization of mortgages\footnote{34} were significant contributors to the mortgage crisis.\footnote{35} During the last forty years,
regulations on the mortgage market were loosened to encourage home ownership and fuel economic growth.\textsuperscript{36} For example, Congress eliminated interest rate caps on first-lien home mortgages and permitted financial products other than fixed-rate loans.\textsuperscript{37} These new products included adjustable rate mortgages\textsuperscript{38} (loans that start off with a low interest rate but are adjustable for the life of the loan), balloon payment loans,\textsuperscript{39} and reverse mortgages.\textsuperscript{40} Additionally, the emergence of securitization, a process that allowed note holders to bundle loans with many others, divide them, and sell them to investors who would then sell them on the securities market, significantly changed the mortgage market.\textsuperscript{41}

But increased home ownership came at a heavy price. Eventually, when interest rates increased and the U.S. economy faltered, borrowers could not afford inflated mortgage payments. Servicers began to issue foreclosure threats. At-risk borrowers were unable to refinance into more affordable loans and lost equity in their homes. In states that follow a judicial foreclosure model,\textsuperscript{42} lenders sought foreclosures through the
courts. In states that do not follow a judicial model, lenders did not need to involve the courts and completed foreclosures more swiftly. Borrowers in all states were often unable to attain foreclosure relief through the court system. As a result, subprime lending, increased homeownership, and economic instability led to an unprecedented home foreclosure crisis, causing millions of Americans to lose their homes.

Lawmakers scrambled to reach effective solutions.

II. THE GOVERNMENT’S RESPONSE: HAMP

Since 2009, the government has enacted various programs designed to help borrowers avoid foreclosure in response to the crisis—including the ambitious HAMP. The Treasury estimated that HAMP would modify three to four million mortgages by the end of 2012. To date, HAMP has only produced 1,076,747 permanent modifications, and “approximately 2.8 million borrowers had their HAMP loan modification application denied or their [TPP] canceled.” Moreover, HAMP does not require servicers to grant permanent loan modifications that are optimal to the borrower. As a result, permanent loan modifications often leave borrowers with a high debt-to-income ratio, contain an adjustable interest rate, do not reduce the loan principal, and include a future balloon payment—leaving Washington, West Virginia, Wyoming, and the District of Columbia.


43. See Rao & Walsh, supra note 2, at 3 (“[In non-judicial states], mortgage holders who allege that homeowners have fallen behind in their payments can bypass the courts and move directly to take away and auction off homes. This denies homeowners due process protection comparable to that given many tenants. It also places upon homeowners the heavy burden to get a judge to review the mortgage holder’s claims and stop the foreclosure.”).


45. See RealtyTrac: Year-End Report Shows Record 2.8 Million U.S. Properties, supra note 3 (documenting the rate of foreclosures).

46. For an account of the government’s response to the mortgage crisis, see generally David Wessel, In Fed We Trust (2009) (describing the government’s attempt to prevent an economic crisis).

47. Other MHA programs include: Principal Reduction Alternative SM (“PRA”), Second Lien Modification Program (“2MP”), FHA Home Affordable Modification Program (“FHA-HAMP”), USDA’s Special Loan Servicing, Veteran’s Affairs Home Affordable Modification (“VA-HAMP”), Home Affordable Foreclosure Alternatives Program (“HAF”), Second Lien Modification Program for Federal Housing Administration Loans (“FHA-2LP”), Home Affordable Refinance Program (HARP), FHA Refinance for Borrowers with Negative Equity (“FHA Short Refinance”), Home Affordable Unemployment Program (“UP”), and Housing Finance Agency Innovation Fund for the Hardest Hit Housing Markets (“HHF”). See View All Programs, Making Home Affordable, http://www.makinghomeaffordable.gov/programs/view-all-programs/Pages/default.aspx (last updated June 15, 2012). There are also a host of other non-MHA loan modification programs that may be available to borrowers.

48. October Oversight Report, supra note 11, at 38.

49. See August 2012 Performance Report, supra note 23, at 3.

50. See Foreclosure Mitigation, supra note 14, at 2.

51. See Braucher, supra note 2, at 764 (discussing the likelihood of a high re-default rate).
borrowers at risk for re-default and foreclosure. Even at the outset, the Treasury estimated that 40% of the borrowers who received permanent loan modifications would re-default within only five years.52

Part of HAMP’s poor success rate is due to the fact that loan servicers, not lenders or investors, have vast discretion in modifying loans.53 A servicer is neither a lender nor investor but is often a third-party financial institution that is hired by investors to manage and account for the loan.54 In other words, a servicer is tasked with interacting with borrowers and collecting and managing the borrower’s monthly mortgage payments.55 Servicers primarily profit from a monthly servicing fee, which is a fixed percentage of the outstanding principal balance,56 but when a loan becomes delinquent, the amount and nature of servicing changes.57 A servicer can profit from assigning late fees to borrowers for making late mortgage payments,58 and servicers can also make more money by making temporary, unsustainable payment agreements than they can by making long-term, sustainable modifications.59 Consequently, servicers have a track record of extending TPPs but failing to extend permanent modifications.60 Additionally, it is the servicer that decides whether to foreclose or modify a loan.61 In some cases, a servicer can make a greater profit from initiating foreclosure than from granting a permanent loan modification.62 As a result of this structure, servicers often do not modify, choose modifications that financially benefit themselves, or initiate foreclosure proceedings, harming both homeowners and investors.63

Legislators, consumer advocates, oversight bodies, and the Treasury agree that servicer negligence and misconduct exacerbate HAMP’s poor success rate.64 Common problems include loss of borrower paperwork,

54. See Thompson, supra note 7, at 765.
55. Id.
56. Id. at 767.
57. Id. at 765.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id. at 771–72 (“[S]ervicers can make more money from foreclosing than from modifying . . . .”)
63. Id. at 772.
64. See TARP Quarterly Report, supra note 22, at 12.
failure to follow program standards, and unnecessary delays that harm borrowers while financially benefiting servicers. Despite these abuses, the Treasury has yet to penalize or restrict funding to a single servicer for any failure other than to provide data. According to the Office of the Special Inspector General for the Troubled Asset Relief Program, a congressionally created watchdog agency, the Treasury’s lack of enforcement stems from a fear of alienating servicers from participating in HAMP. The Treasury recently explained that because participation by the servicers is voluntary, “‘our abilities to enforce specific performance are extremely limited’ and ‘aggressive enforcement [is] difficult.”

Despite calls by the Office of the Special Inspector General and other oversight bodies for the Treasury to get tough on servicers, the Treasury gives servicers vast discretion in the modification process and instead continues to devise new financial incentives for servicers to participate in HAMP. The Treasury has issued dozens of revisions (“supplemental directives”) to HAMP in an effort to encourage more loan modifications. Although these directives increased the rate of loan modifications, lenders granted only a total of 1,076,747 permanent modifications—as compared with the projected three to four million—while canceling 770,829 TPPs. Thousands of other borrowers are in a state of limbo—making monthly payments in hope of attaining permanent loan modifications. The poor success rate, coupled with the high risk of re-default attributed to subprime loan modifications, indicates that HAMP has not met its objective of helping borrowers hold on to their homes. Unsurprisingly, borrowers have sought relief through the courts.

A. Who Participates in HAMP?

Initially, only servicers of loans that were owned or guaranteed by Fannie Mae or Freddie Mac were required to participate in HAMP; however, due to governmental pressure and incentives, most loan servicers currently participate in the program. Currently, over one hundred servicers participate in HAMP. To participate in HAMP, a servicer must execute a Servicer Participation Agreement with Fannie Mae, which acts

65. Id.
66. Id.
67. Id.
68. Id. at 13 (alteration in original).
69. Id.
70. See August 2012 Performance Report, supra note 23, at 3.
71. See Chiles & Mitchell, supra note 16, at 195 (“Servicers of loans that are owned or guaranteed by Fannie Mae or Freddie Mac are required to participate in HAMP. For all other servicers, participation is voluntary. With monetary incentives and old fashioned arm-twisting, however, the Treasury Department has successfully coaxed many of these servicers to participate as well.”).
72. For a complete list of participating servicers, see Contact Your Mortgage Company, Making Home Affordable, http://www.makinghomeaffordable.gov/get-assistance/contact-mortgage/Pages/default.aspx (last updated Aug. 4, 2011).
as a financial agent for the U.S. government.\textsuperscript{73} HAMP is an economic-based incentive program that encourages servicers to modify mortgages for certain qualified borrowers. For example, prior to HAMP, a loan modification was estimated to cost a servicer around $500–$600 in processing costs.\textsuperscript{74} Through HAMP, a servicer may be paid up to $4,000 in incentives over the course of three years for completing a permanent loan modification.\textsuperscript{75} HAMP also provides additional incentives to borrowers and investors, depending on certain criteria.\textsuperscript{76}

\section*{B. HAMP Eligibility Requirements}

To become eligible for HAMP, a borrower must meet certain “pre-screen” criteria.\textsuperscript{77} The most significant criteria require that (1) the mortgage loan is a first lien mortgage loan that was originated on or before January 1, 2009; (2) the mortgage loan is secured by a one-to-four-unit property, one unit of which is the mortgagor’s principal residence; (3) the property securing the mortgage loan is not vacant or condemned; (4) the unpaid principal balance on the mortgage loan is less than $729,750 for a one-unit property, $934,200 for a two-unit property, $1,129,250 for a three-unit property, or $1,403,400 for a four-unit property; and (5) the mortgage loan has not been previously modified under HAMP.\textsuperscript{78} Interestingly, most borrowers who apply to HAMP meet these criteria. According to the most

\begin{itemize}
\item \textsuperscript{73} HAMP Supplemental Directive, supra note 6, at 1.
\item \textsuperscript{74} Joseph R. Mason, Mortgage Loan Modification: Promises and Pitfalls 7 (Oct. 3, 2007), available at \url{http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027470} (citing $500–$600 as the cost per loan modification).
\item \textsuperscript{75} A servicer may receive the following financial incentives for completing a permanent loan modification: (1) a “Completed Modification Incentive” in the amount of $1,600, $1,200, or $400, depending on the number of days the borrower is delinquent at the TPP Effective Date. For example, if the borrower is 120 or fewer days delinquent (150 days from Last Paid Installment (“LPI”)), the servicer will receive $1,600. If the borrower is 121 to 210 days delinquent (151 to 240 days from LPI), the servicer will receive $1,200. If the borrower is more than 210 days delinquent (more than 240 days from LPI), the servicer will receive $400; (2) an annual “Pay for Success” incentive in the amount of $1,000 per year for a period of three years. The “pay for success” payment will be payable annually for each of the first three years after the anniversary of the month in which the TPP Effective Date occurred, as long as the loan is in good standing and has not been paid in full at the time the incentive is paid; (3) an annual “Pay for Performance” principal balance reduction. Certain borrowers whose monthly mortgage payment is reduced by 6% or more and who make timely monthly payments will earn this reduction equal to the lesser of $1,000 ($83.33/month) or one-half of the reduction in the borrower’s annualized monthly payment for each month a timely payment is made. The payment will be payable annually for each of the first five years after the anniversary of the month in which the TPP Effective Date occurred, as long as the loan is in good standing and has not been paid in full at the time the incentive is paid. “This payment will be paid to the mortgage servicer to be applied first towards reducing the interest bearing UPB on the mortgage loan and then to any principal forbearance amount (if applicable).” See HAMP Servicer Handbook, supra note 17, at 123–25.
\item \textsuperscript{76} For a description of additional investor and borrower incentives, see id. at 125–28.
\item \textsuperscript{77} For a complete list of criteria, see HAMP Supplemental Directive, supra note 6, at 2.
\item \textsuperscript{78} Chiles & Mitchell, supra note 16, at 195.
recent HAMP records, 1,912,439 HAMP borrowers met these criteria and were offered a TPP.79

Congress and the Treasury intended HAMP to be inclusive so that it could meet its target of modifying three to four million mortgages. Unfortunately, the most problematic area for borrowers occurs during an economic evaluation process after a TPP is initiated, but before a permanent loan modification is granted. As a result, of the 1,912,439 HAMP applicants who were offered a TPP, only 1,076,747 were granted a permanent modification.80

C. THE APPLICATION PROCESS

The HAMP application process consists of several components. If a loan is two or more payments delinquent and meets each of the “pre-screen” criteria listed above, the servicer should make a “reasonable effort” to “solicit” the borrower to complete a HAMP modification application.81 This process requires servicers to send borrowers an “initial package,” which is essentially a HAMP loan modification application.82 Alternatively, if the borrower proactively contacts her servicer and requests a loan modification, the servicer should work with the borrower to determine whether she is at risk of imminent default and meets the HAMP criteria.83 If the borrower meets the initial package criteria, she will be offered a TPP.84 Finally, if the borrower makes all of the TPP payments, she should be offered a permanent loan modification.85

1. The Initial Criteria

The HAMP application consists of “initial package” documents. These documents include a Request for Modification Affidavit form,86 a

80. Id.
81. See Chiles & Mitchell, supra note 16, at 195 (“A servicer is deemed to have made a ‘Reasonable Effort’ to solicit a mortgagor under HAMP if over a period of thirty calendar days: (1) The servicer makes a minimum of four telephone calls to the mortgagor’s last known telephone numbers of record, at different times of the day; and (2) the servicer sends two written notices to the mortgagor’s last address of record, one letter via certified/express mail or via overnight delivery service with return receipt/delivery confirmation and one letter via regular mail. If the servicer has documented evidence that it satisfied this Reasonable Effort requirement without successfully communicating with the mortgagor, then continued solicitation is not necessary. Successful efforts by a servicer to communicate with a mortgagor are referred to as ‘Right Party Contacts’ under HAMP. If Right Party Contact is established and a mortgagor expresses an interest in HAMP, then the servicer must send a written communication to the mortgagor which contains and describes the documents a mortgagor is required to submit in order to be evaluated for a modification.”).
82. See infra notes 86–87 and accompanying text.
83. HAMP Supplemental Directive, supra note 6, at 13.
84. See infra notes 86–88 and accompanying text.
85. See infra notes 100–104 and accompanying text.
86. See Chiles & Mitchell, supra note 16, at 195–96 (“The RMA is a standard form which seeks general information about the mortgagor, the mortgagor’s finances, and the property secured by the mortgage loan. Included in the RMA is a Hardship Affidavit. Every borrower seeking a modification,
copy of the borrower’s most recently filed federal income tax return, IRS Form 4506-T or 4506T-EZ, and copies of two recent pay stubs.87 Once this information is submitted, the servicer has thirty days to evaluate the borrower’s HAMP eligibility.88

During the evaluation process, HAMP requires servicers to reduce the borrowers’ monthly mortgage payment to 31% of their monthly gross income.89 To achieve this, HAMP requires capitalization of accrued interest,90 interest rate reduction,91 loan term extension,92 and principal forbearance.93 Servicers are not required to reduce or set aside loan principal but have discretion to do so.94 Even if borrowers meet these criteria, they can be denied a modification based upon a net present value (“NPV”) test.95 The NPV test is a formula that determines whether it would be more profitable for servicers and the loan’s investors to approve a modification or to foreclose on the property.96 If the NPV result is higher for a modification than it is for a foreclosure, then the

regardless of delinquency status, must sign a Hardship Affidavit attesting that he/she is unable to continue making full mortgage payments and describing one or more acceptable hardships as the reason therefore.”).

87. See HAMP SUPPLEMENTAL DIRECTIVE, supra note 6, at 7 (listing financial form requirements).
89. Id.
90. Id. (“[T]he servicer must capitalize accrued interest, out-of-pocket escrow advances to third parties, and any required advances that will be paid to third parties by the servicer. In addition, the servicer must capitalize servicing advances that are made for costs and expenses incurred in performing servicing obligations, such as those related to preservation and protection of the security property and the enforcement of the mortgage.”).
91. Id. (“If necessary, in the second step, the servicer must reduce the starting interest rate in increments of 0.125 percent to get as close as possible to the target monthly mortgage payment ratio. The interest rate floor under this step is 2.0 percent. If the mortgagor has an Adjustable Rate Mortgage (ARM) loan or interest-only mortgage, the existing interest rate will convert to a fixed interest rate, fully-amortizing loan.”).
92. Id. (“If necessary, in the third step, the servicer must extend the term and re-amortize the mortgage loan by up to 480 months from the Modification Effective Date, which is the due date for the first payment under the permanent modification.”).
93. Id. (“If necessary, in the fourth step, the servicer must provide for principal forbearance. The principal forbearance amount is non-interest bearing and non-amortizing. The principal forbearance amount will be fully due and payable in the form of a balloon payment upon the earliest of the mortgagor’s transfer of the mortgage property, payoff of the interest-bearing Unpaid Principal Balance (UPB), or at maturity of the mortgage loan.”).
94. HAMP SUPPLEMENTAL DIRECTIVE, supra note 6, at 9 (“There is no requirement to forgive principal under the HMP. However, servicers may forgive principal to achieve the target monthly mortgage payment ratio on a standalone basis or before any step in the standard waterfall process set forth above. If principal is forgiven and the interest rate is not reduced, the existing rate will be fixed and treated as the modified rate for the purposes of the Interest Rate Cap.”).
96. Id. (“This NPV formula takes into account various foreclosure factors such as the current property value, foreclosure costs, and the expected resale time, and compares them with various modification factors such as the value of the modified monthly payment and the risk of a repeat default.”); see HAMP SUPPLEMENTAL DIRECTIVE, supra note 6, at 4–5 (describing the NPV test); HAMP SERVICER HANDBOOK, supra note 17, at 102–03.
servicer “must approve the qualifying mortgagor’s modification as long as all other requirements are met.” However, if the NPV result is higher for a foreclosure than it is for a modification, then the servicer may deny modification. If the borrower does not meet all of the eligibility criteria, the servicer should explore alternatives to foreclosure prior to initiating foreclosure proceedings.

2. The Trial Period Plan (TPP) and Permanent Loan Modification

If a borrower meets the initial criteria discussed above, the servicer will offer the borrower a TPP, where for three months the borrower must make monthly mortgage payments that are no greater than 31% of her gross monthly income. The TPP is initiated once a borrower pays the first month’s reduced mortgage payment. The borrower must then pay the remaining monthly TPP payments on time to remain eligible for a permanent modification. The HAMP guidelines provide that borrowers “who make all trial period payments timely and who satisfy all other trial period requirements will be offered permanent modification.”

Performance statistics indicate that this process is problematic. Of the 1,912,439 offered TPPs, over 770,000 were canceled and never became permanent modifications. Servicers often claim that cancellations are due to insufficient income or documentation on the part of the borrower, while borrowers contend that servicers claim to lose their paperwork and make misrepresentations. Consequently, many borrowers file breach of contract claims against their servicers to enforce the TPP agreements.

98. HAMP SUPPLEMENTAL DIRECTIVE, supra note 6, at 4.
99. Id. at 18.
100. Id. The TPP could be longer if necessary to comply with applicable contractual obligations. Id.
101. Id. at 8, 17–18.
103. HAMP SUPPLEMENTAL DIRECTIVE, supra note 6, at 17.
104. HAMP Servicer Handbook, supra note 17, at 106.
105. See AUGUST 2012 PERFORMANCE REPORT, supra note 23, at 3.
106. See TARP QUARTERLY REPORT, supra note 22, at 12 (“One of the great frustrations with HAMP, as expressed by legislators, consumer advocates, oversight bodies, and even Treasury itself, has been the abysmal performance of loan servicers, which not only operate as the point of contact for distressed homeowners seeking to participate in the program but also administer the loans on behalf of investors. Anecdotal evidence of their failures has been well chronicled. From the repeated loss of borrower paperwork, to blatant failure to follow program standards, to unnecessary delays that severely harm borrowers while benefiting servicers themselves, stories of servicer negligence and misconduct are legion, and the servicers’ conflicts of interest in administering HAMP—they too often have financial interests that don’t align with those of either borrowers or investors—have been described both by SIGTARP and COP.”); see also Arthur Delaney, HAMP: Obama Administration Lets Banks out of Doghouse for Bad Mortgage Servicing, HUFFINGTON POST (Mar. 2, 2012, 4:24 PM), http://www.huffingtonpost.com/2012/03/02/hamp-mortgage-barackobama_n_1316873.html?ref=business&ir=Business (“The most common reason for cancellations is insufficient documentation, according to Treasury. But homeowners say the real problem is banks losing paperwork.”).
III. THE TPP-BASED BREACH OF CONTRACT THEORY

Most district courts hold that HAMP does not afford a private right of action. Nonetheless, borrowers may be able to succeed by asserting common law claims on a TPP-based breach of contract theory. Under this theory, borrowers who had a TPP but did not receive a permanent loan modification argue that the TPP constitutes a formed contract between the borrower and the servicer. They contend that the servicer breached the contract by refusing to grant a permanent loan modification. Borrowers propose that the initial TPP solicitation is an offer, the borrower’s signature on the TPP contract indicates acceptance, and the trial payments and submission of other financial materials constitute consideration. The number of TPP-based breach of contract claims continues to grow, and courts are divided as to the validity of the legal theory. Most commonly, servicers are able to persuade courts that federal law either conflicts with or preempts state common law. To date, only one appellate decision—from the Seventh Circuit—has addressed this issue; as such, the dearth of controlling case law has led to inconsistent decisions among lower courts as to the validity of the TPP-based breach of contract theory.

A. THE VIDA RATIONALE: BREACH OF CONTRACT CLAIMS REQUIRE INDEPENDENCE FROM HAMP

HAMP affords no private right of action, and courts are not in agreement on whether borrowers can assert common law claims to enforce HAMP provisions. In December 2010, a district court in Oregon rejected the TPP-based breach of contract theory in Vida v. OneWest Bank, F.S.B. The Vida court explained that state common law claims cannot be used to enforce federal program provisions. In Vida, a borrower argued that she formed a valid contract with her lender when her lender offered her a loan modification and she accepted the offer, entered a TPP, and performed all required conditions. The borrower argued that the lender

107. See cases cited supra note 27.
109. See, e.g., Picini, 854 F. Supp. 2d at 273 (holding that plaintiffs met the contract formation requirements); Bosque, 762 F. Supp. 2d at 351–52 (finding that plaintiffs met the offer, acceptance, and consideration requirements).
110. See supra notes 107–109. Compare cases discussed infra note 27 (dismissing the theory), with cases discussed infra note 112 (upholding the theory).
111. Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547 (7th Cir. 2012).
113. Id. at *5.
114. Id. at *1.
breached the agreement by denying her a permanent modification and initiating foreclosure proceedings. Under the TPP agreement, the borrower agreed: “If I am in compliance with [the TPP] and my representations . . . continue to be true in all material respects, then the Lender will provide me with a Home Affordable Modification Agreement . . . that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage.”

The lender moved to dismiss the case on the basis that the borrower could not bring a TPP-based breach of contract claim because HAMP does not provide a private cause of action and her claims were not independent of HAMP. The borrower responded that, although her claim was premised on representations made during the course of the HAMP approval process, it was “not premised on an entitlement arising under HAMP and, thus, [did] not depend on a private right of action arising under HAMP.” Instead, the borrower argued that the claim was based on the common law of contract. In other words, “representations made by [her servicer] . . . themselves amounted to an enforceable promise to modify her contract and refrain from initiating foreclosure.”

The Vida court, relying on several district court decisions in the Ninth Circuit, disagreed and held that the facts and allegations in the complaint were “premised chiefly on the terms and procedures set forth via HAMP and [were] not sufficiently independent to state a separate state law cause of action for breach of contract.”

Interestingly, the Vida court stated that servicers were not “wholly immunized for their conduct so long as the subject transaction is associated with HAMP.” This assertion implies that a common law breach of contract theory could succeed if it is properly pled as a separate cause of action. However, the Vida court did not articulate what is necessary to assert a contract claim that is sufficiently independent of HAMP. The implication of Vida is that borrowers are foreclosed from enforcing

115. Id. The borrower also asserted a fraud claim, alleging that she detrimentally relied on her servicer’s oral and verbal statements that her “modification was underway” and “that no foreclosure sale would take place.” Id.

116. Id. at *5.

117. Id. at *3.

118. Id. at *5.

119. Id.

120. Id.


123. Id.
HAMP provisions if their claims are at all based on HAMP. Courts continue to agree with *Vida* and prevent borrowers from asserting TPP-based breach of contract claims.\(^{124}\)

*Vida* raises a question: Why can’t a borrower assert a common law claim that relates to, or arises out of, HAMP or any other federal program? Does HAMP conflict with or preempt state law? While the court did not expressly rely on preemption principles, its dismissal of the suit for lack of standing implies that HAMP conflicts with or preempts state law. As the case law demonstrates, courts continue to wrestle with preemption principles in the HAMP context.\(^{125}\) While some courts follow *Vida*, other courts reject *Vida* and uphold TPP-based breach of contract claims.\(^{126}\)

**B. Does HAMP Conflict with or Preempt State Law?**

Courts are reluctant to allow borrowers to assert breach of contract claims to enforce HAMP because of constitutional preemption concerns. The Supremacy Clause states that “the Laws of the United States . . . shall be the supreme Law of the Land.”\(^{127}\) Thus, “state laws that interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution are invalid.”\(^{128}\) There are three forms of preemption: express preemption, field preemption, and conflict preemption. In all forms of preemption, it is presumed that federal law shall not supersede state law unless it is the “clear and manifest purpose of Congress.”\(^{129}\) This is referred to as the presumption against preemption.\(^{130}\)

Express preemption occurs when a federal statute expressly states that it intends to override state or local law.\(^{131}\) In such a case, the intent of Congress is explicit. Because there is no explicit statement of preemption in HAMP, no one argues that it expressly preempts state law.

When Congress does not express its preemptive intent, two situations might exist that can imply congressional intent of preemption: (1) field


\(^{125}\). See infra Part III.B–C.


\(^{127}\). U.S. Const. art. VI, cl. 2.


preemption and (2) conflict preemption. Field preemption exists “if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.” In several cases, servicers have argued that Congress or the Treasury intended to occupy the HAMP field by deciding not to afford borrowers with a private right of action—thereby displacing state common law suits. Conflict preemption exists if it would be “impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Commentators argue that conflict preemption is problematic because it has the “potential to be broadly applied,” since interpreting federal and state objectives can be a subjective process. In Wigod, the Seventh Circuit rejected a conflict preemption argument in the HAMP context.

Some observers have advanced a new rule that would function as a “true default rule” that creates a presumption against preemption. Such a rule would automatically apply in the absence of clear and manifest congressional intent to preempt. This proposed rule is “less rigid” and “more forgiving in implied preemption cases,” giving breathing room to the definition of actual conflict while maintaining focus on articulated congressional objectives. While preemption law is well-defined in theory, courts are often inconsistent in applying preemption principles.

C. A Better Approach: Upholding TPP-Based Contract Claims

Courts continue to wrestle with preemption concerns in the HAMP context. In February 2012, the Eastern District of New York rejected the Vida rationale in Picini v. Chase Home Financing LLC and did not find that HAMP preempts state law. The court could not identify a single rule that requires state common law claims to be wholly independent of federal

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132. See Davis, supra note 130, at 1221.
137. Wigod, 673 F.3d at 578.
138. See, e.g., Davis, supra note 130, at 1217–20 (arguing for courts to consistently apply the presumption against preemption).
139. Id. at 1217.
140. Id. (discussing the uncertain role of preemption doctrine in American jurisprudence).
142. Id. at 274.
In *Picini*, borrowers sued their servicer under several breach of contract theories. The plaintiffs argued that they made all of their TPP payments on time but were not offered a permanent modification because the servicer engaged in “deny and delay tactics.” Soon after, the defendant moved to dismiss the lawsuit using the *Vida* rationale, arguing that there is no private right of action under HAMP, that the claim was not sufficiently independent of HAMP, and that the plaintiffs’ claim was “simply a HAMP claim in disguise.” The *Picini* court considered the argument but did not find it persuasive. Instead, the court found that the defendant failed to identify a source of law that provides “where a state common law theory provides for liability for conduct that is also violative of federal law, a suit under state common law is prohibited so long as the federal law does not provide for a private right of action.” In denying the defendant’s motion to dismiss, the *Picini* court implied that HAMP would not preempt the TPP-based breach of contract theory.

Likewise, in *Bosque v. Wells Fargo Bank, N.A.*, the court suggested that the only justification for the *Vida* rationale would be federal preemption of state law. In *Bosque*, borrowers brought a TPP-based breach of contract claim against their servicer. Similarly, the defendant moved to dismiss the lawsuit on *Vida* grounds, arguing that the plaintiffs were trying to “use state law as an indirect means to enforce HAMP.” The court noted that the defendant did not prove that HAMP preempted a state law claim, which implies that the only justification for the *Vida* rationale would be a federal preemption of state law. Ruling in favor of the plaintiffs, the court stated that the “fact that a TPP has a relationship to a federal statute and regulations does not require the dismissal of any state-law claims that arise under a TPP. Nor does the fact that the TPP is a form contract created by the government change that analysis.”

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143. *Id.*
144. *Id.* at 271.
145. *Id.* at 270 (internal quotation marks omitted). Plaintiffs alleged that their servicer gave them conflicting instructions: While Plaintiffs were on a TPP, they were told by a servicer representative that a permanent modification would be “pretty definite;” later, a servicer representative told them that the loan modification was backed up and advised them to continue making payments after the three-month period ended. *Id.* The Plaintiffs made payments for another seven months before they were contacted by their servicer and told that they were being dropped from the TPP and that the foreclosure action would resume. *Id.* at 270–71.
146. *Id.* at 273 (citation omitted).
147. *Id.* at 274.
148. *Id.*
150. Fletcher v. OneWest Bank, FSB, 798 F. Supp. 2d 925, 931 (N.D. Ill. 2011) (agreeing with the *Bosque* rationale).
152. *Id.* at 350.
153. *Id.* at 351.
154. *Id.*
*Bosque* court went on to note that if a “TPP is properly construed as a contract between the parties in this case, then plaintiffs have standing to bring suit in order to recover for any breach of that contract.”

*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. In *Wigod*, the Seventh Circuit rejected a servicer’s preemption arguments and reversed the district court’s decision to dismiss a TPP-based breach of contract claim. There, a borrower executed a TPP with her servicer that stated in part, “If I am in compliance with this Loan Trial Period and my representations... continue to be true in all material respects, then the [servicer] will provide me with a... Loan Modification Agreement.” The borrower made all four monthly TPP payments on time but was, nonetheless, denied a permanent modification. The borrower brought a class action complaint against her servicer, alleging that the TPP was a formed contract between the parties and that the servicer breached the contract. The servicer moved to dismiss the suit, and the district court, citing *Vida*, held that HAMP does not afford a private right of action and that common law claims must be independent of HAMP.

On appeal, the servicer argued that, even though the common law claims were not expressly preempted, field preemption and conflict preemption precluded the plaintiff from bringing a common law claim. The servicer made a field preemption argument that the Home Owners Loan Act (“HOLA”) occupies the relevant mortgage field. HOLA was enacted “to provide emergency relief from massive home loan defaults during the Great Depression.” It empowers the Office of Thrift Supervision (“OTS”) in the Treasury Department to authorize and regulate federal savings and loan associations and to preempt conflicting state law by its regulations. Indeed, in one of its regulations, the OTS declared that it “hereby occupies the entire field of lending regulation for federal savings associations.” The *Wigod* court noted, however, that a savings clause within the same regulation states that “tort, contract, and commercial laws are ‘not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or

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155. Id.
156. 673 F.3d 547 (7th Cir. 2012).
157. Id. at 575, 586.
158. Id. at 558.
159. Id.
160. Id. at 559.
161. Id.
162. Id. at 576.
163. Id.
164. Id.
165. Id.
166. Id. at 577 (quoting 12 C.F.R. § 560.2(a) (2011)).
are otherwise consistent with the purposes of paragraph (a) of this section.”167 The Wigod court dismissed the servicer’s field preemption argument, stating that because “OTS ‘has no power to adjudicate disputes between [savings and loan associations] and their customers,’ and ‘HOLA creates no private right to sue to enforce the provisions of the statute or the OTS’s regulations,’” common law suits by “persons harmed by the wrongful act of savings and loan associations” are not preempted.168 The Wigod case demonstrates that neither HOLA, nor OTS regulations, occupy the relevant field in HAMP cases.

In Wigod, the servicer also argued for conflict preemption.169 Conflict preemption exists if it would be either impossible for a party to comply with both local and federal requirements or if local law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.170 The servicer conceded that it is possible for a party to comply with both state and federal law, but argued that common law “would ‘substantially interfere with [its] ability to service residential mortgage loans’ in accordance with HOLA and OTS regulations” and “would ‘frustrate Congressional objectives in enacting [the 2008 Act] . . . to stabilize the economy and provide a program to mitigate ‘avoidable’ foreclosures.’”171 The Wigod court rejected this argument, explaining that a breach of contract claim does not place additional duties or obstacles upon servicers in the HOLA context or in the HAMP context, but instead compliments those statutes by requiring servicers to honor agreements with borrowers.172

It is unlikely that allowing borrowers to assert breach of contract claims would prevent servicers from servicing residential loans. From the borrowers’ perspective, contract law encourages servicers to enforce a TPP or a loan under HOLA; it does not conflict with their ability to service loans. Moreover, “a state cause of action that seeks to enforce a federal requirement does not impose a requirement that is different from, or in addition to, requirements under federal law.”173 This is particularly true in the context of a breach of contract claim—where the claim is premised on enforcing a formed TPP contract that was drafted by the servicer. The breach of contract claim does not obligate servicers to comply with additional, conflicting state laws, but merely acts as an enforcement mechanism to hold servicers accountable for their promises and formed TPP agreements. Coupled with HAMP’s poor success rate and complaints of servicer misconduct, courts should be inclined to afford borrowers

167. Id. (quoting 12 C.F.R. § 560.2(c)).
168. Id. (alteration in original).
169. Id. at 576.
171. Wigod, 673 F.3d at 578 (alterations in original).
172. Id. at 578-80.
access to state-based remedies and allow TPP-based breach of contract claims to move forward.

More importantly, TPP-based contract claims are consistent with congressional intent. The purpose of the Act that authorized HAMP was to "stabilize the economy and provide a program to mitigate ‘avoidable’ foreclosures." Providing an enforcement mechanism aligns with congressional intent to modify loans and prevent foreclosures. While servicers may argue that they should have discretion to modify loans and not be obligated under contract law to modify loans for unqualified borrowers, whether the person qualifies for a loan should be a question of fact, not a question to be addressed at the pleading stage. The issue is whether a borrower may assert a TPP-based breach of contract claim and have such a claim survive the pleading stage. Courts should follow Wigod and answer in the affirmative.

D. LOOKING TO OTHER FEDERAL LAW AND PROGRAMS BY ANALOGY

District courts should allow TPP-based breach of contract claims in the same way that courts allow plaintiffs to assert common law claims based on other federal laws and regulations. Such examples include HOLA and OTS regulations, as well as the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). These statutes are similar to HAMP in that they are comprehensive federal statutes that neither provide a right of action to injured parties nor expressly preempt state law. Nonetheless, courts allow plaintiffs to assert common law claims based on these statutes and regulations.

1. Contract Claims Are Allowed Under HOLA and OTS

HOLA and OTS regulations are examples of federal statutory schemes that can be enforced through state common law. In In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation, Judge Posner explained that, although HOLA gave OTS “exclusive authority to regulate the savings and loan industry . . . [by] prescribing certain terms in mortgages,” it did not grant the OTS power to “adjudicate disputes between [savings and loans associations] and their customers.” Further, HOLA did not create a “private right to sue to enforce provisions of the statute or the OTS’s regulations.” Judge Posner went on to explain that HOLA did not preempt common law remedies for people harmed by savings and loans associations because it “would be surprising for a

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174. Wigod, 673 F.3d at 578.
175. See infra Part III.D.2.
176. Id.
177. Id.
178. 491 F.3d 638, 643 (7th Cir. 2007).
179. Id.
180. Id. at 643.
federal regulation to forbid the homeowner’s defense based on the mortgagee’s breach of contract.”

This same reasoning should apply to the HAMP context: Courts should allow borrowers to bring breach of contract claims to enforce TPP agreements and avoid foreclosure.

In Fletcher v. OneWest Bank, FSB, the Northern District of Illinois adopted the Ocwen reasoning in the HAMP context and allowed a borrower to assert a TPP-based breach of contract claim. Applying Ocwen by analogy, the Fletcher court stated that since OTS-based mortgages could be enforced by contract law, it would be “logical” that the TPP—which fits the definition of a contract—could provide a basis for a breach of contract suit “even if its terms are prescribed by the federal government.”

In the HOLA and OTS context, Congress did not grant borrowers a private right of action and did not grant OTS the power to adjudicate claims between savings and loans associations. Nonetheless, borrowers are allowed to assert HOLA- and OTS-related breach of contract claims in federal court. Likewise, HAMP does not afford a private right of action and does not offer any adjudicatory scheme for borrowers to bring suit. Accordingly, courts should be consistent and allow borrowers to assert TPP-based breach of contract claims.

2. Common Law Claims Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

Plaintiffs may assert common law claims related to other federal statutes, including FIFRA. FIFRA provides for federal control over the distribution, sale, and use of pesticides. It requires that all pesticides used in the United States be registered (licensed) by the Environmental Protection Agency and be properly labeled so that they do not cause unreasonable harm to the environment. As in the HAMP context, FIFRA is a federal statute that does not afford plaintiffs a private right of action, yet the Supreme Court has held that it does not preempt or preclude plaintiffs from asserting common law claims to enforce its

181. Id. at 643–44.
182. 798 F. Supp. 2d 925 (N.D. Ill. 2011).
183. Id. at 930–31 (allowing plaintiff to bring a TPP breach of contract claim under HAMP).
184. Id. at 931.
185. In re Ocwen Loan Servicing, 491 F.3d at 643.
186. Id. at 643–44.
187. Id.
188. See cases cited supra note 27.
192. Id. § 136a.
provisions. In *Bates v. Dow Agrosciences LLC*, a group of Texas peanut farmers alleged that a pesticide manufactured by the defendant severely damaged their crops, partly because the pesticide was mislabeled under FIFRA. The plaintiffs brought claims of strict product liability, negligence, fraud, breach of warranty, and violation of the Texas Deceptive Trade Practices Act—essentially arguing that the pesticide’s warning label violated of Texas common law. The district court granted summary judgment for the defendant on preemption grounds, citing 7 U.S.C. § 136v(b), which provides that such “State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.”

On review, the Supreme Court overturned the district court’s decision, ruling that § 136v(b) only preempts “state-law labeling and packaging requirements that are ‘in addition to or different from’ the labeling and packaging requirements under FIFRA.” The *Bates* Court held that plaintiffs’ common law claims were not preempted because they were “equivalent to, and fully consistent with, FIFRA’s misbranding provisions.” In other words, the common law claims did not provide for additional or different labeling requirements, but instead afforded plaintiffs with a method of enforcing FIFRA guidelines. The Court reasoned that, although FIFRA is a comprehensive regulatory statute that sets out labeling requirements, it “does not provide a federal remedy to [parties] who are injured as a result of a manufacturer’s violation of FIFRA’s labeling requirements, [and] nothing in [the statute] precludes States from providing such a remedy.” The Court also considered that the “long history of tort litigation against manufacturers of poisonous substances add[ed] force to the basic presumption against pre-emption.” The Court added, “If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.”

Here, as in *Bates*, HAMP is a comprehensive program that does not provide a federal remedy. Moreover, there is no legislative intent that explicitly or implicitly calls for preemption of state common law claims. Considering the rich history of civil litigation in contract, banking, lending, and property disputes, it is unlikely that Congress and the Treasury meant to preempt state common law. Absent any statutory language or legislative

194. *Id.* at 448–52.
195. *Id.* at 434.
196. *Id.* at 435–36.
197. *Id.* at 436.
198. *Id.* at 447.
199. *Id.*
200. *Id.* at 448.
201. *Id.* at 449.
202. *Id.* at 449–50.
intent, courts should apply the presumption against preemption and uphold the TPP-based breach of contract theory.

Critics of this Note may argue that common law claims are simply an attempt to enforce HAMP. Because Congress affords no private right of action, no right of action can exist under state law. However, this argument blends two principles into an unsupported rule. It is true that HAMP affords no private right of action: Had Congress and/or the Treasury intended to create a private right of action, it could have done so by drafting that language. But it is inconsistent to assume that, because Congress does not afford a federal remedy, borrowers are barred from asserting state law claims that relate to federal statutes or programs. This theory conflicts with several constitutional principles of preemption, including the presumption against preemption. As demonstrated, Ocwen and Bates provide appropriate analogous examples of courts allowing plaintiffs to assert common law claims to enforce federal statutes and regulations that neither provide a right of action to injured parties nor preempt state law. Courts should be consistent, rely on these cases, and allow TPP-based breach of contract claims to enforce HAMP.

IV. Legislation

Further legislation is necessary to help HAMP meet its objective of slowing the foreclosure crisis. HAMP has many shortfalls: It has failed to reach its objective of modifying three to four million loans, and the data indicate that a significant number of borrowers encounter problems at the TPP stage. HAMP’s shortfalls have led borrowers to seek relief through the courts. While some borrowers have turned to the courts to enforce HAMP provisions, Congress and/or the Treasury should pass legislation to address the inconsistencies of court decisions.

The Treasury should start by amending the HAMP guidelines so that permanent loan modifications are optimal to the borrower. Currently, permanent loan modifications leave borrowers at risk for re-default because the loans are unstable—often containing an adjustable interest rate, not reducing loan principal, and including a future balloon payment. These very terms were included in the sub-prime loans that contributed to the foreclosure crisis. Loans that include such terms are unstable in that a borrower’s monthly mortgage payment amount may vary on a monthly basis. If Congress and the Treasury are serious about stabilizing the economy and the mortgage market, they should preclude servicers from drafting unstable loans. This process will reduce the risk of re-default and the possibility of another foreclosure crisis.

203. See supra Part II.B.
204. Id.
205. See supra Part III.
206. See supra notes 2, 52 (discussing the risk of re-default).
The Treasury should amend the HAMP guidelines so that servicers are held accountable to TPP agreements. The Treasury can do this by 
requiring servicers to grant permanent loan modifications to borrowers who make all of the TPP payments. If a servicer has a legitimate reason for not offering a permanent modification, it should have to explain the specific reason for denial in writing. Servicers should not be allowed to deny modifications for reasons such as missing documentation or incomplete applications and should instead be required to provide the borrower with an opportunity to respond to or amend any mistakes. This process will limit servicers to denying borrowers for strictly legitimate reasons.

Furthermore, the government should take an active role in the modification process by providing oversight. Currently, the servicer and the borrower are involved in most of the HAMP modification process, with little intervention from the Treasury or other governmental agencies. Instead, the Treasury should serve as an intermediary to ensure that servicers only deny borrowers for legitimate reasons. If a borrower is denied a permanent modification, she should have the right to file a complaint and appeal to the Treasury or other governmental agency. While a complaint or appeal is pending, the Treasury should temporarily freeze the foreclosure process until a decision is reached. The Treasury should have the authority to overturn a servicer’s decision and require a servicer to grant a permanent modification if the borrower meets the required HAMP criteria and terms of the TPP. Such a process would better ensure that servicers make a good faith effort in following HAMP guidelines and would allow borrowers to challenge servicer decisions. The Treasury has contemplated creating an appellate process, but it has yet to implement such a process. An appellate process could be administered by the Treasury, governmental oversight agencies, or, perhaps, administrative law judges. The Treasury and Congress should consider all of these options and promptly implement a review process.

In cases where the borrower refuses to respond to or amend her application, or if the financial information is indeed insufficient, the servicer could end the HAMP application process but be required to provide the borrower with other alternatives to foreclosure; servicers, for example, could direct borrowers to all other MHA programs. This approach is more consistent with the congressional intent of the Act—to stop foreclosures and stabilize the economy.

The legislation should also seek to prevent judicial inconsistencies and circuit splits. It should afford litigants with a private right of action to


208. See supra note 47.
sue under HAMP. Alternatively, it could explicitly grant borrowers the right to bring breach of contract claims to enforce TPP agreements. Such rights offer borrowers an opportunity to challenge servicer misconduct and provide them with a remedy in the foreclosure process. Additionally, the legislation should clearly indicate that HAMP does not preempt common law claims or defenses. This legislation would buttress the *Bosque*, *Picini*, *Wigod*, and *Fletcher* decisions, which uphold the validity of TPP-based breach of contract claims and provide borrowers access to the courts. Critics may argue that enacting these policies would further limit the chances for borrowers to attain loan modifications by dissuading servicers from participating in HAMP, but Congress could solve that problem by making HAMP participation mandatory. Enacting this legislation would better ensure that HAMP meet its objective of slowing the foreclosure crisis, allow borrowers not only to avoid foreclosure, but also to access sustainable loans, encourage loan servicers to adequately follow HAMP guidelines, allow borrowers to appeal modification denials, and provide borrowers with a private right of action to sue under HAMP.

**Conclusion**

HAMP has not met its expected goal of modifying three to four million mortgages. This failure caused borrowers to seek relief through the judicial system in order to keep their homes. The TPP-based breach of contract theory provides borrowers with one possible strategy to avoid foreclosure and receive a loan modification. Unfortunately, courts are inconsistent in determining the validity of such claims. Courts that follow the *Vida* rationale continue to preclude borrowers from asserting common law claims to enforce HAMP. As this Note has demonstrated, this approach is unfounded. Courts should instead follow the Seventh Circuit’s approach in upholding the validity of TPP-based breach of contract claims in the same way that courts allow common law claims that arise out of HOLA, OTS regulations, and FIFRA. To avoid future conflicts, Congress and the Treasury should enact legislation that amends the HAMP application process, requires more governmental oversight, and affords borrowers with a private right of action under HAMP.