

Home Affordable Modification Program (HAMP) Update



Pennsylvania Legal Aid Network
Statewide Training Event
Mortgage Foreclosure Related Training
December 7, 2010

HAMP Materials

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Housing Counseling and the Home Affordable Modification Program

Dan Sullivan

ACTION-Housing, Inc.

The Counselor's Role

- Review the Homeowner's situation
- Determine the viability of homeownership
- Conceive an action plan
- Provide guidance to the homeowner

The Counselor's Role

- Review Affordability
- Negotiate with Lenders
- Recommend an exit strategy
- Refer client for legal assistance
- Refer for other services

Negotiated Outcomes

- Modification – Rate/Term/Product
- Forbearance
- Deed-In-Lieu of Foreclosure
- Short Sale
- Foreclosure
- Bring Current

Making Home Affordable

General Criteria

1. Primary Residence
2. First Mortgage \leq \$729,750
3. Borrower facing financial hardship
4. Mortgage Origination prior to 1/1/09
5. PITI $>$ 31% of gross household income.

Additional Eligibility Factors

1. Servicers may not require a borrower to waive legal rights as a condition of HAMP.
2. The servicer may not require a borrower to make any “good faith” payment or up-front cash contribution.
3. Borrowers in active litigation regarding the mortgage loan are eligible for HAMP

Making Home Affordable

■ Net Present Value Test

Servicer determines whether it makes more financial sense for the *Investor* to do a mod or foreclose.

NPV documents and guidelines can be found at:
www.hmpadmin.com/portal/programs/docs/hamp_servicer/npvoverview.pdf

Modification Waterfall

- **Capitalize Arrearages** – New Principal Balance
- **Interest Rate Reduction** – As low as 2%
- **Re-Amortization** – Up to 40 years.
- **Principal Forbearance** - Partial commensurate with 31% PITI

Modification Terms

- Interest Rate Floor 2%
- Modified Rate Effective for 5 years.
- After 5 years, rate increases 1% annually until it reaches the FNMA market rate at the time of the mod.
- Forbearance effective until sale, payoff or re-default (90 days)

Document Acknowledgment and Review

- Within 10 business days following receipt of an initial package, the servicer must acknowledge in writing the borrower's request for HAMP participation.
- Within 30 calendar days from the date the initial package is received, the servicer must review the documentation provided for completeness.

Document review continued

- If the package is complete, the servicer must evaluate the borrower's eligibility. There is no set time frame for this decision to be made per the MHA Handbook.
- Once a decision is made, the servicer must send the borrower a Trial Period Plan Notice or a Non-Approval Notice.

Document review continued

- If the documentation is incomplete, the servicer must send an Incomplete Information Notice that lists the additional documentation needed.
- The Incomplete Information Notice must give borrowers at least 30 calendar days to provide the missing documentation.

Incentives

Servicers –

\$1000 at modification

\$1000 yr up to three years for performing mods.

\$500 one-time for mods on current loans.

Lender/Investor

\$1500 one-time if mod meets DTI criteria.

Homeowner

\$1000 principal reduction annually for loan performance up to \$5000 (5 years).

Useful Contact Information

- Making Home Affordable:

www.makinghomeaffordable.gov

Fannie Mae

www.fanniemae.com/loanlookup

800.7fannie

Freddie Mac

www.freddiemac.com/mymortgage

800.freddie

HAMP information including access to the Handbook

www.hmpadmin.com

ACTION - Housing inc.

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HAMP Escalation Issues

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If you have a HAMP problem that you cannot resolve by going up the chain of command to senior management at the mortgage servicer, you should **ESCALATE** the issue immediately! You must first determine whether the loan is GSE-owned to determine who to contact to escalate the problem. Use the below table:

Investor	Determine if Loan is GSE-Owned	Contact Information
Fannie Mae Loans	www.FannieMae.com/LoanLookup	Phone: 1-800-7FANNIE resource_center@fanniemae.com
Freddie Mac Loans	www.FreddieMac.com/MyMortgage	Phone: 1-800-FREDDIE borrower_outreach@freddiemac.com
Non-GSE Loans	-	HAMP Solution Center Phone: 1-866-939-4469 Fax: 1-240-699-3883 escalations@hmpadmin.com

- **These materials focus on non-GSE loans & the HAMP Solution Center.** For information on GSE loans, see www.efanniemae.com (for Fannie Mae loans) or www.freddiemac.com (for Freddie Mac loans).
- Use the HAMP Solution Center (HSC) for help to ensure that eligible borrowers receive trial & permanent HAMP modifications in a timely manner and in accordance with Program Guidance.

Situations where Escalation May be Beneficial

- You believe that a borrower was not reviewed for HAMP.
- You believe that a borrower was improperly denied HAMP.
- The denial letter that borrower received is deficient; for example, the basis for denial is not a basis permitted under the Program.
- A borrower received a Trial Modification and complied with its requirements, but did not receive a permanent modification.
- A mortgage servicer filed a mortgage foreclosure court case without properly reviewing a borrower for HAMP or without making a decision on borrower's HAMP application.
- A borrower has applied for HAMP, but does not receive a decision or a request for additional information within the required timeframe (Handbook Secs. 1.2, 4.5-4.6).
- A servicer takes an action in violation of one of the foreclosure stops.
- Servicer charges up-front fees for the modification.
- Servicer tells the borrower to miss a payment.

- Servicer refuses to stop a scheduled foreclosure sale while the borrower is being reviewed for HAMP.
- Servicer claims that they are waiting for information or guidance from Treasury (i.e., Treasury is causing the delay).
- Servicer advises the borrower to intentionally misrepresent their personal/financial information

How to Escalate

- By phone: 866-939-4469, Option 2; or
- By e-mail: escalations@hmpadmin.com

What initial information is required to escalate a case?

- Initial information: to initiate an inquiry, the homeowner's advocate must provide the following information:
 - Homeowner's Name
 - Property address
 - Servicer Name
 - Servicer Loan Number
 - Scheduled Deadlines (if applicable)(including date foreclosure court case filed, any upcoming mediation conference dates, upcoming Sheriff's Sale date)
 - Counselor Name & Organization
 - Counselor E-mail
 - Counselor Phone
 - Counselor Relationship to Homeowner
- Additional information about the problem:
 - Give as much specific information as possible.
 - Include dates.
 - When possible, attach scanned documents relating to the problem (e.g., denial letters, proof Trial Plan payments, proof of income, proof of request for NPV input values).
 - Highlight any urgent deadlines (e.g., upcoming Sale or Sale already happened).
- Authorization: provide written authorization from the borrower that allows HSC *and* the mortgage servicer to share information about the borrower's loan account with you.

Tips for Escalating a Case

- Escalate AS SOON as you suspect there is a problem.
- Follow up with HSC often—we recommend once a week.
- If you speak with HSC by phone, send an e-mail confirming the substance of your call. Keep all written communications.

Escalation Foreclosure Stop

- A servicer may not sell the house at a foreclosure sale until the Escalated Case is resolved in accordance with HAMP Guidance (the Handbook and Supplemental Directives).
 - See Supplemental Directive 10-15, page 4 for discussion of "resolution."
- **For current information & resources on HAMP, go to www.hmpadmin.com**

Enforcing the HAMP Foreclosure Stops

Aisha Baruni, Esq.

Rachel Labush, Esq.

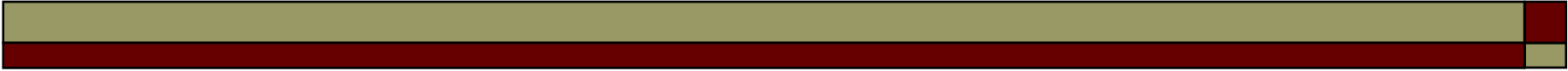
Community Legal Services, Inc.

Philadelphia, PA



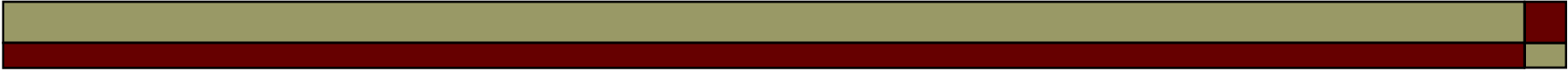
Summary of HAMP Foreclosure Stops

- ❑ 1. A servicer may not file a foreclosure case against a borrower or hold a foreclosure sale if a borrower has not been reviewed for HAMP.
- ❑ 2. A servicer must suspend a previously filed foreclosure action while a borrower is in a Trial Period Plan (TPP).
- ❑ 3. A servicer may not sell a house at foreclosure sale while an Escalated Case with HAMP Solution Center (HSC) is pending (effective 2/11).



Stop #1: No foreclosure action or sale until reviewed for HAMP

- Handbook Section 3.1
- A servicer may not **refer any loan to foreclosure OR conduct a scheduled foreclosure sale** unless one of the following circumstances exists:

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- ❑ The borrower is evaluated for HAMP and found ineligible; or
 - ❑ The borrower is offered a TPP, but doesn't make trial period payments as required; or
 - ❑ The servicer has met the Reasonable Effort solicitation standard (with or without establishing Right Party Contact) under Secs. 2.2.1-2.2.2. of the Handbook; or
 - ❑ The borrower or co-borrower says s/he is not interested in HAMP modification and servicer documents this statement in servicing system and/or mortgage file.

Suspension of Scheduled Foreclosure Sale (variation of Stop #1)

- Handbook Section 3.3
- Servicer must suspend scheduled Foreclosure Sale if:
 - A borrower applies for HAMP after foreclosure sale scheduled.
 - Servicer receives application “no later than midnight of the 7th business day before the foreclosure sale date.”



□ BUT, Servicer does not need to suspend Sale, if

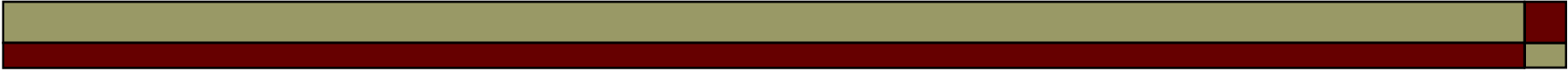
- Borrower already got a permanent modification and defaulted;
- Borrower received a Trial Plan and didn't make all payments; or
- Borrower already applied for HAMP and found ineligible.

Stop #2: Suspend foreclosure case if borrower in Trial Period Plan (TPP)

- Handbook Section 3.2
- If a borrower applies for HAMP after a foreclosure case has been filed and the borrower accepts a TPP based on verified income:
 - the Servicer must take action to “halt further activity and events in the foreclosure process” included but not limited to scheduling a sale or causing judgment to be entered.
- Effective for duration of TPP (arguably also includes time borrower waits for a decision on a permanent modification).

Stop #3: No sale if Escalated Case pending with HSC

- Supplemental Directive 10-15 at 4
 - “A servicer may not conduct a scheduled foreclosure sale unless and until the Escalated Case is resolved in accordance with the requirements of this Supplemental Directive, and all other MHA Program guidelines.”
- SD 10-15 is effective beginning Feb. 2011.
- Do not wait until right before the scheduled Sale date to escalate!

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- ❑ Servicer isn't in violation of this Section if it makes “reasonable efforts” to stop the Sale, but the Court of public official in charge of the Sale will not stop it.
 - ❑ If there are fewer than 30 days before sale, servicer may require HAMP application to be sent by express mail to servicer or foreclosure attorney. Check Servicer's website and letters to borrower for servicer-specific requirements!



If Servicer violates a stop

- ☐ **Escalate the case immediately!**
- ☐ **Give HSC information about the violation**
 - Highlight the violation of the foreclosure stop.
 - Explain why you believe there is a violation of a foreclosure stop.
 - Provide important dates (date foreclosure court action filed, date sale occurred, upcoming sale date).



If Servicer violates a stop (cont'd)

- ❑ Ask HSC to investigate the violation.**
- ❑ Follow up with HSC once a week.**
 - If you follow up by phone, confirm ALL communications in writing.**



If Servicer violates a stop (cont'd)

- Ask HSC to request that the servicer undo the action it took in violation of the stop (e.g., withdraw the foreclosure case, void the judgment, undo the sale).
- Ask HSC to request that the servicer remove any charges from the borrower's account that are associated with the action taken in violation of the stop
 - Attorney's fees and other costs associated with filing a foreclosure complaint
 - Fees & costs for scheduling a Sheriff's Sale
 - Fees & costs for holding a Sheriff's Sale



If Servicer violates a stop (cont'd)

- Ask HSC to provide you with a copy of its written recommendation to the mortgage servicer. (We aren't sure whether you will get this, but you can ask!)
 - A written recommendation from HSC may be useful for the borrower to show to a mediator or judge to support borrower's argument that the servicer took action that is not permitted under HAMP.
- Keep of copy of all HSC written communications. Confirm substance of by e-mail, especially of HSC tells you what action it recommended the servicer take.



Conclusion

- ❑ Familiarize yourself with the foreclosure stops.
- ❑ Escalate early if there is a potential violation of a foreclosure stop.
- ❑ Follow up often with HSC.
- ❑ Find Handbook, Supplemental Directives and up-to-date information about HAMP at www.hmpadmin.com.

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HAMP Issue: Delayed Conversion to Permanent Modification (for non-GSE loans)

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How conversion is supposed to work:

- Homeowners who successfully complete HAMP trial period plans (TPPs) should be given permanent modifications immediately afterwards if they qualify.
- The servicer is supposed to prepare the permanent modification documents so that the permanent modification can take effect the first day of the month following the three month trial period. (HAMP Handbook v2.0¹, § 9.1.)
- If the borrower makes the third trial payment late, but by the end of the month in which it is due, the servicer can make the permanent modification effective the second month following the third trial period month. No payment is due for the “interim” month. (Handbook § 9.2.)

What if the servicer doesn't give the borrower a timely permanent modification?

- If the borrower hasn't been converted after the three months and notifies the servicer, the servicer must make a determination as to eligibility and offer a permanent HAMP mod as soon as possible and no later than 60 days from being notified by the borrower. (§ 9.5)
- A borrower whose conversion to permanent mod has been delayed remains eligible for a permanent mod regardless of whether they made trial payments following the three month period. (§ 9.5)
- **The permanent mod must put the borrower in the same position as if it had become permanent on time.** (§ 9.5) In order to accomplish this:
 - The Modification Effective Date is the date the mod would have become permanent under the guidelines, and the interest rate cap must be calculated accordingly.
 - The initial unpaid balance of the mod should be the unpaid principal of the loan as of the Modification Effective Date plus all accrued but unpaid amounts allowed to be capitalized as of the Modification Effective Date. **This means the**

¹ The current version of the Handbook is available at www.hmpadmin.com.

borrower can't be charged fees incurred after the Modification Effective Date.

- Any payments made by the borrower after the Modification Effective Date and before conversion should be applied retroactively in accordance with the modified terms, but if there is any shortfall under the modified terms, the servicer must advance the payments, capitalize and defer them as a non-interest bearing balloon.
- The servicer must take the necessary steps to correct any credit reporting for the borrower since the Modification Effective Date.

Servicer not following the rules above? Escalate! escalations@hmpadmin.com

- Fannie Mae: See Servicing Guide Part VII § 610
- Freddie Mac: See Single Family Seller/Servicer Guide C65.7

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HAMP Update: Challenging NPV Denials

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The process for challenging NPV-based denials based on the Dodd-Frank NPV Notice Requirements has been changed by Supplemental Directive 10-15, issued November 3, 2010. These requirements become effective February 1, 2011.¹

Process for disputing denials based on the NPV test:

- When a borrower is turned down for a trial period plan or permanent modification after an NPV evaluation was performed, the Non-Approval notice must include NPV input values. (amending HAMP Handbook §§ 2.3.2 and 2.3.2.1)
- Borrower has 30 days from the date of the Non-Approval Notice to submit written evidence to the servicer (by email or mail to address in the notice) that one or more of the NPV values is inaccurate.
- Borrower has the option of contacting MHA Help (through the HOPE Hotline) or the HSC to see whether the disputed inputs would change the NPV outcome. MHA Help or HSC will give borrower the printed NPV result to share with the servicer.
- “If the borrower identifies material inaccuracies in the NPV input values, the servicer may not conduct a foreclosure sale until the inaccuracies are reconciled.”
- **But beware:**
 - The borrower must dispute NPV values in writing to the servicer within 30 days of the date of the denial notice even if borrower contacts MHA Help or HSC for help first.
 - If the borrower wants to dispute more than one NPV input, evidence disputing each input must all be provided to the servicer at the same time. If the re-evaluation by the servicer, MHA Help or HSC using borrower inputs still has a negative NPV result, the borrower can’t appeal other inputs.

(see reverse for disputing property value)

¹ Up to date HAMP information, including the HAMP Handbook, is available at www.hmpadmin.com.

Process for disputing property value used in NPV test (new Handbook § 2.3.4):

- If the borrower believes the property value used by the servicer was wrong as of the NPV date, the borrower must (again within 30 days) “provide the servicer with a recent estimate of the property value and a reasonable basis for that estimate.”
- The servicer must perform a preliminary NPV re-evaluation using the borrower’s property value estimate (as well as any other material disputed inputs).
- If the preliminary re-evaluation yields a positive NPV result, the borrower is entitled to an opportunity to request an appraisal of the property.
 - Borrower must make a \$200 deposit against the full cost of an appraisal within (the balance is added to borrower’s arrears).
 - Appraisal must be performed by an appraiser not affiliated with the servicer, licensed in the state where the property is located.
 - If the servicer’s original NPV input was based on such an appraisal, the servicer does not have to get a new appraisal but must give the borrower a copy of the appraisal they used.

Treasury is developing a web-based NPV calculator that should be available in the spring to check servicer calculations. Because it may not use exactly the same date, it will only provide an estimated outcome (new Handbook § 2.3.5)

What to Do When the Servicer Says the Investor Is Not Participating

1) Ask who the investor is.

- Servicers participate, not investors.
- You can do a 15 U.S.C. §1641(f)(2) request to the servicer to identify the holder, and the servicer is liable for statutory damages and attorney fee's if it doesn't answer you.
- After June 1, 2010, servicers must provide Fannie Mae with a list of investors who are not participating; this list could be obtained in discovery or FOIA'ed and cross-checked. HB Section 1.3 (p. 11-12), SD10-02.
- If the loan is a Freddie, Fannie, or FHA loan, the servicer has to review for HAMP and offer a Freddie, Fannie or FHA HAMP modification if the homeowner qualifies. (Freddie and Fannie are the "investors," and you can find out if they hold the loan from their websites; FHA is the mortgage guarantor and requires FHA HAMP participation).

2) If there is mortgage insurance on the loan, contact the mortgage insurance company.

- FHA-insured loans must be evaluated for FHA HAMP.
- Private mortgage insurers may be involved in evaluating loans for modification; unlike the servicer, they stand to lose money if the loan forecloses.

3) Ask the servicer to identify the document forbidding the servicer from offering a HAMP modification.

- Investors do not make these decisions on a case-by-case basis; the directive will likely be in a PSA. Few PSAs forbid all modifications.
- Even if there is a conflict between the PSA and a HAMP modification, HAMP allows the servicer to skip steps in the waterfall if required by the PSA or to substitute amortization extension for term extension. HB Section 6.3.6 (p. 39-40), Supp. FAQs 2301, 2304.

4) Ask the servicer what "reasonable efforts" they've taken to get the investor to waive the restrictions on HAMP mods in the PSA.

- Reasonable efforts are required by HB Section 6.5 (p. 40), SD09-01 (p.1).
- Effective June 1, 2010, the servicer must write to the investor requesting a waiver at least once. HB Section 6.5 (p. 40), SD10-02.

5) If the servicer won't answer those questions, escalate!

- Ask for the servicer's in-house escalation team.
- E-mail escalations@hmpadmin.com.
- Ask for Ken Hannold if escalation isn't satisfactory.

What to Do When the Servicer Says “No”

1) Get and review the denial notice

- Servicers must provide a denial notice with a reason, HB Section 2.2 (p. 15), SD09-08.
- The notice must have a toll-free number to reach a servicer representative who can provide more information.
- NPV values need not be provided in the denial notice, but must be provided if requested within 10 calendar days of a borrower's request within 30 calendar days of the denial notice. HB Section 2.3.2.1 (p. 24, 25).
- Dodd-Frank, P.L. 111-203, Section 1482, requires more NPV values to be provided to borrowers in the denial notice.

2) If the servicer got any of the NPV inputs wrong, provide information as to the correct inputs.

- The servicer must re-run the NPV if the correction “is accurate, material and likely to change the NPV outcome.” HB Section 2.3.2.1 (p. 25), SD09-08 (p. 3).
- Dodd-Frank, P.L. 111-203, Section 1482 requires a portal for use by borrowers to check the accuracy of the servicer's NPV calculation.
- The foreclosure sale must be suspended while the NPV is re-run. HB Section 2.3.2.1 (p. 25), SD09-08 (p. 3).

3) If the borrower was denied for any financial reason, including the NPV test or excessive forbearance, and the borrower has additional income to report, including additional income from a non-borrower, request reconsideration.

- A borrower remains eligible for HAMP if the denial is for any financial reason or because of basic eligibility considerations, and the borrower's circumstances change. HB Section 1.2 (p. 19), SD10-01 (p. 4).
- The borrower has until midnight of the seventh business day (typically 10 days) proceeding a scheduled foreclosure sale to request reconsideration. HB Section 3.3 (p. 26).

5) If the servicer won't review, escalate!

- Ask for the servicer's in-house escalation team.
- E-mail escalations@hmpadmin.com.
- Ask for Ken Hannold if escalation isn't satisfactory.

What to Do When the Servicer Denies Because They Re-ran the NPV Test

1. Ask when they ran it the first time

- The NPV test should be run before the trial plan offer is extended. HB Section 5 (p.31), SD09-01 (p. 4), HAMP Checklist for Verified Trial Period Plans (p. 7), FAQ 2314.
- Check what version of the NPV test was in effect at that time. The version used the first time they run the NPV test must be used for any subsequent runs of the NPV test. HB Section 7.6.1 (p. 45), FAQ 1808, 1809.

2. Ask why they re-ran the test

- HAMP only provides for the NPV test to be run twice: once, when there is a verbal request for a modification and once, when verified income is submitted. HB Section 7 (p. 43), HB Section 7.6 (p. 44-45), FAQ 2314.
- Servicers do not need to update property valuations or re-run the NPV test to account for updated property valuations. HB Section 6.8 (p. 42), FAQ 2100, SD09-07 (p. 6).
- Servicers do not need to re-run the NPV test if escrow amounts, including tax and insurance payments, change. HB Section 9.3.7.6 (p. 51), FAQ 2209.
- Servicers should not re-run the NPV test when approving the final, permanent modification; they should only re-visit the waterfall to determine the final payment, principal, and forbearance amounts. HB Section 6.6.1 (p. 40), FAQ 2314.
- Servicers cannot use the NPV test for other purposes, other than those specified in their contracts—which should mean that the NPV test cannot be re-run because an investor asks. HB Section 7.1 (p. 43), FAQ 1812.

3. Ask what version of the test they used and what inputs they held constant.

- The servicer can only change the following inputs and only if they were inaccurate when the servicer first ran the NPV test: association fees, insurance, taxes, income, and the post-modification terms determined by the income (the unpaid principal balance, monthly payment, principal forbearance amount, amortization term, and interest rate after modification). HB Section 7.6.1 (p. 45-46), FAQ 1810. Note that a change in the association fees, insurance, or taxes is not a reason to re-run the NPV test. HB Section 7.6.1 (p. 45-46), FAQ 2209.
- When the servicer re-runs the NPV test, they must use the same version of the NPV test. HB Section 7.6.1 (p. 45), FAQ 1808, 1809.

4. If the NPV test was run with inaccurate inputs, ask them to run it again.

- Servicers must re-run the test if the homeowner identifies inaccuracies in the inputs the servicer used, and the correct inputs would change the NPV result. HB Section 2.3.2.1 (p. 25), SD09-08, (p. 3).

5. Escalate!

- E-mail escalations@hmpadmin.com.
- Ask for Ken Hannold if escalations isn't satisfactory.

What to Do If the Servicer Refuses to Accept or Process a HAMP Application Because Client Is in an Active Bankruptcy Case?

1. Remind the servicer that a pending bankruptcy is not a basis for denial.

- HB Section 1.2 (p. 19), SD10-01 (p. 7).
- A debtor in an active chapter 7 or chapter 13 bankruptcy case must be considered for HAMP if the debtor submits a request to the servicer.
- A debtor in a trial period plan who later files bankruptcy may not be denied a permanent HAMP on the basis of the bankruptcy filing.

2. Inform servicer's bankruptcy counsel of the obligation to work with you to get court or trustee approval of the mod, if needed.

- HB Section 8.5 (p. 47), SD10-01 (p. 7-8).
- Trial period may be extended two months (resulting in total five-month trial period) to get court approval.

3. File an objection and seek sanctions if the servicer takes action in a chapter 13 case because the debtor is paying the trial plan payment rather than the regular, non-modified mortgage payment.

- HB Section 8.5 (p. 47), SD10-01 (p.8).
- Servicer must not object to plan confirmation, move for dismissal, or move for relief from the automatic stay on this basis.

4. Request that Trial Period Plan be waived if the debtor has already made sufficient payments.

- HB Section 8.6 (p. 48), SD10-01 (p. 8).
- Servicer may put debtor in a permanent mod without completing the trial period plan if the debtor has made all post-petition mortgage payments and at least three of them are equal to or greater than the proposed modified payment.
- Waiver of trial plan must be permitted under applicable investor guidelines.

5. Request that servicer use schedules and tax returns filed in chapter 7 or 13 case in lieu of RMA and Form 4506T-EZ.

- HB Section 5.2 (p. 34), SD10-01 (p. 8).
- Servicer may accept these documents if they are not more than 90 days old.
- Debtor must still provide executed Hardship Affidavit (or RMA).

6. If the servicer isn't complying, escalate!

- E-mail escalations@hmpadmin.com.
- Ask for Ken Hannold if escalations isn't satisfactory.

What to Do for Widows, Orphans, and Divorcees

- 1) Remind the servicer that the signatures of dead or divorced borrowers are not required on any of the modification documents.**
 - HB Ch. II, Section 5.7 (p. 35)
- 2) Provide the servicer with information documenting your client's right to assume the mortgage.**
 - Give the servicer a copy of Garn-St Germain Act, 12 U.S.C. §1701j-3(d), which requires lenders to allow surviving spouses,, children, and divorcees to assume outstanding mortgages.
 - The only limitation on assumability established by the regulations is the maintenance of mortgage insurance, if otherwise required, so underwriting should not be required. 12 C.F.R. § 591.5.
 - Give the servicer a copy of the divorce decree or death certificate.
 - Give the servicer a copy of any further documentation showing transfer into your client's name (see #3 & 4, below).
- 3) Clear title into the remaining homeowner's name in the divorce proceedings, if your client is getting divorced.**
 - Ask for a judicial quit claim deed, if the departing borrower has not executed a quit claim deed to the remaining spouse.
 - Consider asking for an order that the remaining spouse assumes the mortgage or that the mortgage is "assigned" to the remaining spouse.
- 4) Clear title into the surviving homeowner's name after a death.**
 - For heirs, if appropriate, prepare and file an affidavit of heirship, demonstrating that title passed to the surviving homeowner.
 - Consider opening probate and having the surviving homeowner named as the administrator of the estate.
 - Consider obtaining a court order naming the surviving heir as the personal representative of the estate for purposes of the mortgage.
- 5) If the servicer won't review, escalate!**
 - Ask for the servicer's in-house escalation team.
 - E-mail escalations@hmpadmin.com.
 - Ask for Ken Hannold if escalation isn't satisfactory.

**Pennsylvania Legal Aid Network
Statewide Training Event
Mortgage Foreclosure Related Training
December 7, 2010**

HAMP Litigation Update

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See attached materials developed by Beth Goodell, Esq. for a training at North Penn Legal Services on September 23, 2010

- I. When can you raise HAMP as a defense?
 - A. In foreclosure answer
 - B. In petition to open judgment
 - C. In motion to postpone or set aside sheriff sale
 - D. To compel modification

- II. How can you raise HAMP as a defense?
 - A. Equitable defense
 - i. Use FHA servicing defense as a model – servicer must review homeowner for HAMP before foreclosing or selling house
 - ii. Equitable or Promissory Estoppel
 - iii. Unclean hands

 - B. Contract defense:
 - i. Breach of contract based on offer and acceptance of trial period plan (TPP)
 - ii. Third party beneficiary of servicer participation agreement (SPA)

- III. HAMP affirmative claims:
 - A. Third party beneficiary of SPA
 - B. Due process
 - C. Breach of contract

Recent Opinions:

Breach of Contract and Promissory Estoppel:

Khast v. Washington Mutual Bank, et al., (S.D. Cal. Order October 26, 2010)

- Case involves loan modification enforcement, not specifically addressing HAMP
- Court finds basis for promissory estoppel when servicer promised to modify loan if borrower stopped making payments and then failed to modify loan as promised, and stopping sale of property.
- Court grants temporary restraining order against sale of property

Durmic v. J.P. Morgan Chase Bank, NA, (D. Mass. Memorandum and Order November 24, 2010)

- Class action filed by homeowners who passed the NPV test and were given TPPs which they signed and returned to Chase, but who did not receive permanent modifications
- Court denies Chase's motion to dismiss claims for breach of contract, breach of implied covenant of good faith and fair dealing, and promissory estoppel.
- Court denies plaintiffs' motion for preliminary injunction on behalf of putative class enjoining all Chase foreclosures as overbroad.

In re: Bank of America Home Affordable Modification Program (HAMP) Contract Litigation (U.S. Multidistrict Litigation Transfer Order October 8, 2010)

- Eight putative class actions against Bank of America for failing to comply with HAMP, breaching contracts with plaintiffs and/or breaching contract to which plaintiffs are intended third-party beneficiaries.
- Order transfers and centralizes all eight class actions to Judge Zobel in the District of Massachusetts
- Two Pennsylvania class actions are now part of the multidistrict litigation:
 - Haber et al v. Bank of America, 2:10-cv-03524 (transferred in 10/8/10 order)
 - Lightman et al v. Bank of America, 2:10-cv-05109 (transferred on 11/15/10)

HAMP is Valid Affirmative Defense:

U.S. Bank v. Bleckinger et al, (Case #10-CV-0095, Common Pleas Court of Seneca County, Ohio, filed 10/13/10)

- Court reviews cases and concludes that although a majority of federal district court cases have found that there is no third-party or citizen-suit provision within HAMP to support an affirmative suit, the majority of state common pleas courts have found that HAMP requires servicers to evaluate borrowers for HAMP before foreclosing
- Court finds that there is a HAMP affirmative defense, and the court may stay foreclosure until HAMP eligibility can be determined.
- Court denies bank summary judgment

Affirmative Negligence Claim – Servicer Owes Duty of Care in Reviewing for Mod:

Garcia v. OCWEN Loan Servicing, LLC, (N.D. Cal., Order May 10, 2010)

- Homeowner applied for loan modification and Ocwen postponed sale twice
- Ocwen misplaced documents homeowner submitted, and homeowner couldn't get through on the phone to find out what was missing.
- Meanwhile, house was sold at a trustee sale.
- Court denies Ocwen's motion to dismiss homeowner's negligence claim finding that Ocwen "arguably owed plaintiff a duty of care in processing Plaintiff's loan modification application"
- Court finds that claim for injunctive relief is not moot even though house has been sold, because Ocwen acquired it and could be enjoined from evicting or removing Plaintiff.

Bad Faith:

BAC Home Loans Servicing v. Westervelt, 2010 NY Slip Op 51992 (N.Y Supreme Court, Dutchess County November 18, 2010)

- Because of disagreements between parties about income, expenses and proper parties to foreclosure (related to homeowner's divorce), court had issued an order directing bank representative with authority to settle the case to appear at the next settlement conference.
- Bank and its attorney failed to appear for the conference.
- Court found dismissal of the foreclosure "technically warranted" because of failure to appear, but declined to dismiss because it would hurt homeowner who was attempting to obtain a modification.
- Court finds that the Bank has not acted in good faith in negotiating a settlement with the homeowner, especially in failing to reexamine her income as it was required to do under HAMP.
- Court orders that:
 - bank can't collect any arrears, interest or late fees from date of HAMP denial until after homeowner is reviewed for all possible modifications and the case is released from settlement;
 - any modification fees are to be waived or refunded to homeowner;
 - any attorneys fee claim from date of default until date of this order is severed and must be submitted to court for independent reasonableness review
 - that law firm and bank representative with authority to settle must appear at next conference
 - separate hearing regarding sanctions against law firm will be held

Wells Fargo Bank, N.A. v. Meyers, (No. 34632-09 New York Law Journal, Decision and Order November 10, 2010):

- Bad faith hearing based on plaintiff's conduct in mandatory settlement conferences
- Court finds bad faith in Wells Fargo's conduct offering two trial modifications, initiating foreclosure during trial period, and then denying permanent modification because of mysterious calculation of debt-to-income ration
- Court orders lender "to execute a final modification based upon the terms of the original modification proposal" and dismisses the foreclosure action.

Recent Trial Court Decisions on HAMP Enforceability as Foreclosure Defense

Available on the NCLC Website:

<http://www.nclc.org/issues/recent-trial-court-decisions-on-hamp-enforceability-as-foreclosure-defense.html>

- BAC Home Loans Servicing (f.k.a. Countrywide Home Loans Servicing) v. Bates (Ohio C.P. Butler County Mar. 8, 2010)
- Deutsche Bank National Trust v. Hass (Macomb County Michigan Circuit Court Sept. 30, 2009)
- Huxtable v. Geithner, et al. (S.D. Cal. Dec. 23, 2009)
- Reyes v. Saxon Mortgage Services, Inc. (S.D. Cal. Nov. 5, 2009)
- Wells Fargo v. Small (N.Y. Feb. 16, 2010)
- GMAC Mortgage, LLC v. Riley, (Franklin County Superior Court (Vermont) Order march 5, 2010)
- Faulkner v. Onewest Bank, FSB (N.D.W.Va. Order June 16, 2010)
- Citimortgage, Inc v. Moores (Iowa District Court of Linn County, Ruling August 4, 2010)
- Marques v. Wells Fargo Home Mortgage, Inc. (S.D. Cal. Order August 12, 2010)
- In re: Bank of America Home Affordable Modification Program (HAMP) Contract Litigation (U.S. Multidistrict Litigation Transfer Order October 8, 2010)
- Garcia v. OCWEN Loan Servicing, LLC, (N.D. Cal., Order May 10, 2010)
- Khast v. Washington Mutual Bank, et al., (S.D. Cal. Order October 26, 2010) (loan modification enforcement, not specifically addressing HAMP)
- Wells Fargo Bank, N.A. v. Meyers, (No. 34632 New York Law Journal, Decision and Order November 10, 2010)
- BAC Home Loans Servicing v. Westervelt, 2010 NY Slip Op 51992 (N.Y Supreme Court, Dutchess County November 18, 2010)
- Durmic v. J.P. Morgan Chase Bank, NA, (D. Mass. Memorandum and Order November 24, 2010)

North Penn Legal Services
Consumer Law Advocates Training
September 23, 2010

Litigating HAMP Issues

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HAMP rules are now found in:

Making Home Affordable Handbook for Servicers of Non-GSE Mortgages
https://www.hmpadmin.com/portal/docs/hamp_servicer/mhahandbook.pdf

I. Raising HAMP in Foreclosure Defense

A. Prevent judgment

BAC v. Bates (CCP Butler Co., OH, 3/8/10)
Deutsche Bank National Trust Co. v. Hass (MI, Macomb Co.)

Tip: Plead & provide evidence of defendant's eligibility (make a prima facie case)

B. Prevent sale & set aside sale

Aurora Loan Services v. (Redacted) (Sample motion & memo of law)

C. Compel modification of loan

HSBC v. Searles (WI Waushara Co. 7/27/10)

D. Damages

II. Legal Theories

A. **HAMP as a new equitable defense**

- FHA servicing defense as a model

F.N.M.A. v. Smith, 530 A.2d 919 (Pa.Super.1987)
(Cited in Memo of Law, Auroa Loan Services v. (redacted))

“Merely rubber-stamping mortgagees' foreclosure actions, when they have acted barely within the formal legal bounds of these loosely defined housing programs, will contribute further to the needless loss of homes and to the creation of virtual ghost areas within our inner cities. Foreclosure courts need not woodenly perpetuate the national tragedy surrounding quick foreclosures.”
At 923.

- Is 3rd party beneficiary status necessary?

BAC v. Bates & Deutsche Bank v. Hass

Defense allowed, 3rd party beneficiary seems irrelevant

U.S. Bank v. McKee, Iowa District Court, Osceola Co., 7/29/10

Defense not allowed bec defendant not 3rd party beneficiary

CitiMortgage v. Moores, Iowa District Court, Linn Co., 8/4/10

Defense allowed, maybe defendant is 3rd party beneficiary

Plaintiff does not dispute that it is a participant in the HAMP pursuant to Plaintiff's participation in the Commitment to Purchase Financial Instrument and Servicer Participation Agreement for the Home Affordable Modification Program under the Emergency Stabilization Act. *See, Plaintiff's Reply Brief*, p. 2. Plaintiff argues that Defendants, who are not parties to the Agreement, have no right to enforce the agreement to their benefit. The Court disagrees. The HAMP language clearly states that servicers must use reasonable efforts to contact borrowers facing foreclosure to determine their eligibility for the HAMP. This language places the burden on the servicer (Plaintiff in this case), and it is apparent to the Court that the HAMP language is intended to benefit parties such as Defendants who are facing foreclosure proceedings. The Court finds Defendants are not barred from relying on the provisions of HAMP to defend against a pending foreclosure.

- Basis for many decisions denying summary judgment

Mack & Parady article, FN 12, 14, 15 & text

BAC v. Bates (CCP Butler Co., OH, 3/8/10)

Deutsche Bank National Trust Co. v. Hass (MI, Macomb Co.)

B. Common law equitable defenses

1. Estoppel (equitable, promissory)

Reliance-based theories

(1) Misleading words, conduct or silence by the party against whom the estoppel is asserted, (2) reasonable reliance on the misrepresentation by the party seeking to assert the estoppel, and (3) no duty of inquiry on the party seeking to assert estoppel. Stolarick v. Stolarick, 241 Pa.Super. 498, 509, 363 A.2d 793, 799 (1976).

2. Unclean hands

Party seeking relief has committed an unconscionable act immediately related to the equity the party seeks in respect to the litigation; egregious misconduct; fraud, unconscionability, or bad faith on the part of the plaintiff. (PA cases)

C. Third-party beneficiary

See below under affirmative claims

D. Statutory defenses

- UDAP

IV. Affirmative claims/Class Actions

A. Third-party beneficiary

Rejected by many courts.
Mack & Parady article, p. 139

Some courts have rejected forecl defense on grounds that defendant is not a 3rd-party beneficiary. U.S. Bank v. McKee (IA Dist Ct., Oseola Co., 7/27/10); Wells Fargo v. Small (NY Queens Co. 2/18/10); Williams v. Geithner (U.S. D. MN, 11/9/09)

Some courts have accepted
Marques v. Wells Fargo (U.S. S.D. Fla., 8/12/10)

B. Due process

Must show a property interest

Rejected in Williams v. Geithner (U.S. D. MN)
Surviving in Huxtable v. Geithner (U.S. S.D. Cal.)

Mack & Parady article, p. 139, FN 25

C. Breach of contract

After trial-period approval

Mack & Parady article, p. 140
Matthews v. BAC Home Loans Servicing (C.D. Cal.) (complaint)

V. Misc. HAMP Issues

A. **Challenging purported results of the NPV test**

1. Handbook, pg. 24

- Requires servicers to notify applicant of denial in writing
 1. Notice must be sent within 10 days of determination.
 2. Notice must state reason for denial.
 3. If denied because of NPV, notice must state homeowner

can request values used (does not include value of the property); homeowner must make the request within 30 days; servicer must provide values w/in 10 days; if homeowner has reason to challenge the values used, can provide evidence of correct value, servicer must re-do NPV calculation; foreclosure sale must be put on hold while this occurs.

2. Discovery or RESPA QWR to obtain details

3. Obtain an appraisal if property value used is too high.

4. Dodd-Frank provisions

B. **HAMP for heirs**

Garn-St. Garmain Depository Act of 1982, 12 U.S.C. §1701j-3

Handbook, pg. 35, "Borrower Signature", "Unless a borrower or co-borrower is deceased or a borrower and a co-borrower are divorced, all parties who signed the original loan documents or their duly authorized representative(s) must execute the HMP documents."

C. **"The investor won't agree to modify the loan."**

Handbook, pg. 11

Servicer must make reasonable efforts to obtain permission

Home Affordable Modification Program Enforcement Through the Courts*

The Home Affordable Modification Program (HAMP), announced in March 2009 as part of President Obama's Making Home Affordable Initiative, was intended to modify 3 to 4 million mortgages by the end of 2012. As of March 2010, fewer than 230,000 final HAMP loan modifications were in place.¹ The program's failure to provide homeowners with sorely needed assistance has been well documented.² Increasingly, advocates have turned to the courts to interpret and apply the program's governing directives to revive its goal of providing "help for the hardest hit."³

This article discusses both defensive and affirmative litigation around the country. The increase in litigation seeking to enforce HAMP is a reflection of the program's disappointing performance, with both servicer compliance and government oversight halfhearted at best.⁴ Given the program's aspirations and its importance to our communities and our national economic wellbeing, it is alarming to consider that the cases discussed herein represent the last resort for most homeowners.

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¹See Making Home Affordable Program—Servicer Performance Report through March 2010 at 1, <http://www.makinghomeaffordable.gov/docs/Mar%20MHA%20Public%20041410%20TO%20CLEAR.PDF>.

²Government oversight panels agree that the program has been hobbled by constant revisions and a lack of meaningful enforcement mechanisms. See, e.g., Office of the Special Inspector General for the Troubled Asset Relief Program, Factors Affecting Implementation of the Home Affordable Modification Program 22-29 (Mar. 25, 2010) [hereinafter SIGTARP Report], http://www.sig tarp.gov/reports/audit/2010/Factors_Affecting_Implementation_of_the_Home_Affordable_Modification_Program.pdf (identifying "changing documentation requirements," "repeated changes and clarifications in net present value models," "lack of guidance on other HAMP implementation issues," "servicer capacity and training issues" and "issues related to HAMP marketing efforts" as the major causes of the program's slow start); Congressional Oversight Panel, An Assessment of Foreclosure Mitigation Efforts After Six Months at 111-12 (Oct. 9, 2009) [hereinafter "Warren Report"], <http://cop.senate.gov/documents/cop-100909-report.pdf> (recommending improvements to the transparency of the program and the accountability of participating servicers). Because of these handicaps or deeper structural reasons, there have been substantial delays in finalizing modifications. See SIGTARP Report at 8-14; Warren Report at 48-55. Even more troubling, recent congressional testimony supports the strong anecdotal sense among advocates that erroneous denials have been widespread. See Warren Report at 62.

³Making Home Affordable, <http://www.makinghomeaffordable.gov/>.

⁴See note 1, *supra*.

Program History and Structure

To understand the litigation currently underway around the country, a brief overview of the program's structure is in order.⁵ Homeowners may be eligible for a HAMP modification in one of two situations: if a Government Sponsored Entity (GSE)⁶ owns the mortgage, or if the mortgage servicer has signed a Servicer Participation Agreement (SPA) with Fannie Mae, acting as fiscal agent for the U.S. Department of the Treasury.⁷ By signing an SPA contract, servicers agree to evaluate all eligible homeowners for a modification pursuant to Treasury-issued HAMP directives, and to grant modifications to all eligible homeowners who pass a "net present value" test,⁸ in exchange for incentive payments from Treasury. Homeowners who qualify are to be offered a three-month "trial period" at the modified payment level and, if payments are made successfully, a permanent loan modification.

Because the foreclosure process differs by state, the arenas in which advocates raise HAMP compliance issues vary greatly. In some states, foreclosure is a judicial process; in others, it is carried out by a private sale without

⁵The HAMP program has been described in greater detail in past issues of the *Bulletin*. See Jane Bowman & Mark Ireland, *Home Affordable Modification Program: Help for Homeowners or Another Dead End?*, 39 Hous. L. Bull. 230, 230-31 (Sept. 2009); Holly E. Snow, *Hope for HAMP: One Step Back, But Two Steps Forward?*, 40 Hous. L. Bull. 12, 12-13 (Jan. 2010). Subsequent supplemental directives have changed some program terms. Most notably, starting on June 1, 2010, (1) oral offers of trial period plans based on verbal statements of homeowner financials are no longer permissible; (2) servicers may not deny program participation to homeowners in any stage of bankruptcy; (3) foreclosure actions (rather than merely foreclosure filings and sales) are frozen when homeowners are performing under trial period plans; and (4) clearer and stricter documentation requirements apply throughout the process, including as prerequisites to foreclosure. See Supplemental Directive 10-01, Home Affordable Modification Program—Program Update and Resolution of Active Trial Modifications (Jan. 28, 2010), https://www.hmpadmin.com/portal/docs/hamp_servicer/sd1001.pdf; Supplemental Directive 10-02, Home Affordable Modification Program—Borrower Outreach and Communication (Mar. 24, 2010), https://www.hmpadmin.com/portal/docs/hamp_servicer/sd1002.pdf.

⁶The GSEs are Federal Home Loan Mortgage Corporation (Freddie Mac) and Federal National Mortgage Association (Fannie Mae). Loans owned by these entities may be serviced by a wide variety of servicers who contract with them, including some who participate in HAMP independently and some who do not.

⁷Currently, 109 mortgage servicers, servicing roughly 89% of first-lien mortgages when combined with GSE-owned mortgages, have signed an SPA and agreed to participate in HAMP. Most of the largest mortgage servicers are program participants, with some exceptions, including HSBC/Beneficial and Suntrust. All program contracts may be viewed at http://financialstability.gov/impact/contracts_list.htm.

⁸The objective of this test is to determine whether foreclosure, or a modification under the terms of the program, will ultimately be more profitable to the investor that owns the mortgage debt. Several recent articles have chronicled the servicer's incentives to foreclose, given the great deal of discretion most servicers have under the pooling and servicing agreements setting forth their duties as servicers. For further discussion of this mismatched incentive structure, see Diane E. Thompson, *Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior*, Nat'l Consumer L. Ctr. (Oct. 2009), http://www.nclc.org/issues/mortgage_servicing/content/Servicer-Report1009.pdf.

court supervision.⁹ Additionally, many states and localities have implemented mediation programs designed to help facilitate non-foreclosure resolutions to mortgage default.¹⁰ As a result of this variety, advocates' approach and judicial response to HAMP enforcement have been wide ranging. (The most comprehensive response to date has occurred in South Carolina, where the state Supreme Court responded to an unusual *ex parte* motion filed by Fannie Mae by issuing an administrative order requiring an affidavit of HAMP applicability and compliance as a prerequisite to foreclosure.)¹¹ Finally, the program itself has changed a great deal since it was first launched.

HAMP Noncompliance as a Foreclosure Defense

Servicer failure to comply with HAMP has provided a successful defense to foreclosure in both judicial and non-judicial foreclosure states. These successes suggest strategies for advocates to postpone foreclosure where the HAMP directives have been violated, giving clients time to continue seeking a modification. HAMP violations may implicate traditional legal and equitable defenses such as waiver, estoppel and unclean hands. Courts may enforce HAMP without relying upon a specific state-law defense, instead relying loosely upon the equitable powers they retain in the foreclosure process.

Judicial Foreclosure States

The judicial foreclosure process presents a procedural opportunity to raise defenses and educate the court. Judges in these proceedings have shown a willingness to take noncompliance seriously and to employ their equitable powers in a commonsense fashion. In Iowa, for example, several judges have denied summary judgment to foreclosing lenders when borrowers had not been completely or correctly reviewed for a HAMP modification.¹² (Of course,

where summary judgment is denied, a lender must then prove HAMP compliance as a factual matter before the sale process can go ahead.) Although the Iowa orders treat the necessity of HAMP compliance as self-evident, the underlying pleadings reveal a wide variety of arguments and include causes of action that could be raised affirmatively (such as the third-party beneficiary theory discussed below) and pure defenses (such as unclean hands).¹³

An Ohio court similarly held that summary judgment must be denied because the homeowner's mortgage was GSE-owned and the borrower was "entitled to be evaluated under the HAMP eligibility criteria" and "ha[d] clearly not been evaluated, provided a loan modification plan, or provided a trial period".¹⁴ In Vermont, in the course of dismissing a foreclosure complaint for lack of standing, a judge held that upon refiled the action, "Plaintiff will be required to demonstrate its efforts to comply with its HAMP obligations."¹⁵ Remarkably, the defendant in the Vermont case had not raised HAMP noncompliance, but the judge did so *sua sponte*, relying upon the equitable nature of foreclosure proceedings. This result, in particular, underscores the importance of educating the court about HAMP and its requirements.

Plaintiff complied with the HAMP requirements"); *Waterfall Victoria Master Fund Ltd. v. Hansen*, No. EQCV007412 (Iowa Dist. Ct. Benton County Mar. 31, 2010) (denying summary judgment because of "the existence of fact issues concerning . . . Plaintiff's efforts to determine whether Defendants Hansen are eligible for HAMP" and noting that an affidavit generally asserting HAMP compliance was insufficient to resolve factual dispute); *HSBC Bank, U.S.A. Nat'l Ass'n v. Garcia*, No. EQCV027408 (Iowa Dist. Ct. Buena Vista County Nov. 12, 2009) (denying summary judgment because "the Defendants contend their loan is subject to the Home Affordable Modification Program [and] that [Plaintiff] is contractually bound to the United States Treasury to fulfill all requirements of the . . . Program[, which] may also be an issue of fact for trial"); *Nat'l City Real Estate Servs., LLC v. Metzger*, No. EQCV065878 (Iowa Dist. Ct. Linn County Oct. 9, 2009) (denying summary judgment because "there appears to be a dispute regarding the level of negotiations the parties have had with respect to loan modification and whether Plaintiff has complied with TARP directives regarding loss mitigation").

¹³It is worth noting that in every one of these cases, the defendant raised multiple foreclosure defenses and summary judgment was denied until several factual issues, including but not limited to HAMP compliance, could be resolved. This may be coincidental, or may suggest additional willingness to inquire into HAMP compliance when there are other flaws underlying a foreclosure.

¹⁴*B.A.C. Home Loans Servicing, L.P. v. Bates*, No. CV2009 06 2801 (Ohio Ct. of Common Pleas Butler County Mar. 8, 2010). Note that, where the basis for HAMP review is GSE ownership of the mortgage, a third-party beneficiary to contract claim (discussed below) is unavailable. This is because provisions in the contracts between Fannie Mae and Freddie Mac and their servicers explicitly disclaim any intended beneficiaries, and both GSEs have implemented HAMP through amendments to those contracts. See, e.g., *Fannie Mae 2010 Single Family Selling Guide A2-1-01* ("No borrower or other third party is intended to be a legal beneficiary of the MSSC or the Selling Guide or Servicing Guide or to obtain any rights or entitlements through Fannie Mae's lender communications or contracts."). Thus, framing HAMP noncompliance as a defense is particularly important in cases involving foreclosure on a GSE-owned loan.

¹⁵*GMAC Mortgage, LLC v. Riley*, No. 500-09 Fc (Vermont Super. Ct. Franklin County Mar. 5, 2010).

⁹For a list of judicial and non-judicial foreclosure states, see John Rao and Geoff Walsh, *Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections*, Nat'l Consumer L. Ctr. (Feb. 2009), <http://www.nclc.org/issues/foreclosure/content/FORE-Report0209.pdf>.

¹⁰See Geoff Walsh, *State and Local Foreclosure Mediation Programs: Updates and New Developments*, Nat'l Consumer L. Ctr. (Jan. 2010), http://www.consumerlaw.org/issues/foreclosure_mediation/content/ReportS-UpdateJan10.pdf.

¹¹RE: Mortgage Foreclosures and the Home Affordable Modification Program (HMP), Admin Order No. 2009-05-22-01 (S.C. Sup. Ct.) (May 22, 2009), <http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=2009-05-22-01>. Fannie Mae had sought an injunction only as to those mortgages owned by itself or Freddie Mac, but the court applied its resulting order to all mortgages.

¹²See *U.S. Bank Nat'l Ass'n ND v. Peterman*, No. EQCV067378 (Iowa Dist. Ct. Linn County Apr. 21, 2010) (denying summary judgment because "there is no information in the file regarding what steps Plaintiff took to determine Defendants' eligibility for the Making Home Affordable Program, and there is a genuine issue of material fact on this issue"); *Deutsche Bank Nat'l Trust Co. v. Kane*, No. EQCV067273 (Iowa Dist. Ct. Linn County Mar. 31, 2010) (denying summary judgment because plaintiff had "offered no information . . . showing what steps were taken, if any, to determine whether Mr. Kane is eligible for a loan modification" and thus, "there is a genuine issue of material fact as to whether

During Mediation

Another opportunity to raise HAMP noncompliance as a defense to foreclosure may arise in states—both judicial and non-judicial—that have instituted a mandatory pre-foreclosure mediation process.¹⁶ Some mediation statutes place a specific duty on lenders to negotiate in good faith with the borrower regarding a non-foreclosure resolution.¹⁷ Where such a requirement exists, HAMP noncompliance can be raised as evidence of bad faith negotiations in support of a motion to dismiss the foreclosure action or, at the least, prolong negotiations. Advocates in New York have obtained orders requiring proof of HAMP compliance before a case could be positively reported out of mediation and back into the foreclosure process.¹⁸ Indeed, the Kings' County Supreme Court rules now require a HAMP "status report" from plaintiff's counsel in all cases involving a HAMP participating servicer, including a "specific written justification with supporting details" if the homeowner is denied a HAMP modification.¹⁹

Non-Judicial Foreclosure States

In non-judicial foreclosure states without mediation programs, there may be no procedural opportunity for advocates to raise HAMP or other defenses. For advocates in those states, an affirmative suit may provide the only opportunity to prevent an improper foreclosure sale from going forward in violation of the HAMP directives.

In some non-judicial states, however, limited opportunities to raise noncompliance defenses prior to sale may exist. For example, in Colorado the foreclosure process includes a single hearing, limited by statute to the issue of whether the borrower has defaulted. If the court finds default has occurred, an order authorizing sale issues.²⁰ The Colorado Supreme Court has slightly expanded this hearing to allow homeowners to raise certain defenses to default.²¹ Advocates have successfully argued that a

servicer's participation in HAMP represents a waiver of the right to foreclose until HAMP directives have been complied with and/or that a borrower's request for a HAMP application and reliance thereon should result in estoppel. This argument has resulted in orders authorizing sale with the condition that HAMP must first be complied with.²²

It is fitting that courts sitting in equity have proven themselves unwilling partners in the processing of avoidable foreclosures. As judges across the country confront the rampant noncompliance with HAMP directives, this trend is likely to gain momentum.

Affirmative Litigation Seeking HAMP Compliance

Servicers' failure to comply with the HAMP supplemental directives, coupled with inadequate government oversight, has led to a range of affirmative lawsuits. These suits highlight many of the troubling aspects of the program. HAMP itself provides no private right of action, as it exists in contracts rather than in statute or regulation.²³ Suits premised on HAMP violations must therefore begin by identifying a cause of action allowing for suit.²⁴ Complaints filed thus far assert a wide variety of causes of action, including:

- breach of the SPA contract, which borrowers may enforce as intended third-party beneficiaries;
- breach of a contract—such as a signed Trial Period Plan—between the borrower and servicer;

¹⁶Some 26 states and localities currently have mediation programs in place. See Nat'l Consumer Law Ctr., Summary of Programs, http://www.consumerlaw.org/issues/foreclosure_mediation/content/SummaryOfPrograms.pdf.

¹⁷Jurisdictions with a good-faith requirement include Maine, the First Judicial District of New Mexico, New York, Oregon and Providence, Rhode Island. See *id.* Other mediation plans may not have specific good faith language, but may make evaluation for a modification a prerequisite of foreclosure, which would have much the same effect if meaningfully enforced.

¹⁸See, e.g., *Wells Fargo Bank, N.A. v. Lewis*, No. 130421/2009 (Richmond County N.Y. Sup. Ct. Feb. 25, 2010) (in N.Y. Civ. Prac. L. & R. § 3408 pre-foreclosure mediation proceeding, ordering Wells Fargo to "produce to [borrower] documentation of efforts it has taken, pursuant to HAMP, to remove any restrictions or impediments to modification"); *Wells Fargo Bank, N.A. v. Gonzalez*, No. 100982/2008 (Richmond County N.Y. Sup. Ct. May 6, 2009) (in a Settlement Conference held pursuant to N.Y. Civ. Prac. L. & R. § 3408, ordering Wells Fargo "to delineate reasons why [borrowers] do not qualify for HAMP").

¹⁹See Kings County Sup. Ct. Civ. R. G(6).

²⁰See Colo. R. Civ. P. 120.

²¹*Goodwin v. Dist. Ct. for the Sixteenth Jud. Dist.*, 779 P.2d 837, 843-44 (Colo. 1989).

²²See, e.g., *In re Application of U.S. Bank Nat'l Ass'n for an Order Authorizing Sale*, No. 2010CV-200944 (Colo. Dist. Ct. Arapahoe County Mar. 22, 2010). The court conditionally authorized the foreclosure sale but stated that "the sale is not to proceed until borrower has been evaluated for the HAMP and her eligibility determined." *Id.* The court cited Supplemental Directives 09-01, 09-08, and 10-01. See also *In re Application of Wells Fargo Finan. Colo., Inc. for an Order Authorizing Sale*, No. 2009CV10991 (Colo. Dist. Ct. Adams County Mar. 12, 2010). The court granted the motion authorizing sale but barred Wells Fargo from selling the property at a foreclosure sale unless the borrowers were determined to be ineligible for modification or other foreclosure alternative. Beyond referencing the supplemental directives themselves, these orders do not give a rationale for their conditional nature. Since no further order is needed before sale may proceed, these conditions may prove challenging to enforce—an inherent difficulty of an essentially non-judicial process. Enforcement options include motions for contempt of court should a sale proceed.

²³Section 101 of the Emergency Economic Stabilization Act of 2009, which created the Troubled Asset Relief Program, granted Treasury the authority to promulgate programs to prevent foreclosure. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101, 122 Stat. 3765 (Oct. 3, 2008). No part of the Act includes a private cause of action, and no other legislation governs HAMP.

²⁴One litigant in a very early case succeeded in persuading a judge to directly enforce HAMP without discussing what cause of action made this possible. *Deutsche Bank Nat'l Trust Co. v. Hass*, No. 2009-2627-AV, slip op. at 5-9 (Mich. Cir. Ct. Macomb County Sept. 30, 2009) (remanding for factual determination of whether Wells Fargo was the servicer of the foreclosed loan and, if so, set-aside of foreclosure sale was warranted due to breaches of Wells Fargo's HAMP Servicer Participation Agreement); see also Snow, *supra* note 5, at 13-14.

- breach of the contractual duty of good faith and fair dealing in either of these contracts or the original mortgage;
- a variety of other common law claims; and
- state statutory claims.²⁵

The Third-Party Beneficiary Hurdle

Of these possible causes of action, third-party beneficiary challenges pose the most fundamental challenge to the program. Success on a third-party beneficiary claim would have the effect of making both the SPA and the supplemental directives (which are imported as binding contract terms by § 1(A) of each SPA) fully enforceable. Third-party beneficiary claims are particularly important in the early stages of the HAMP review process, before a servicer has interacted extensively with the borrower, because at this stage, common law tort and contract claims are less likely to arise. Thus, advocates have attempted to certify class actions raising third-party beneficiary claims to assist borrowers early on in the HAMP process and to effect systemic change to improve the process for all.

Edwards v. Aurora Loan Servs. LLC,²⁶ currently before the U.S. District Court for the District of Columbia, challenges the HAMP review process and seeks both preliminary and permanent injunctions designed to address both the servicer's failure to follow the HAMP directives and Treasury's lack of enforcement thereof. The *Edwards* case, filed six months into the program's rollout,²⁷ represents the first wave of HAMP litigation based on servicer failure to review homeowners for HAMP eligibility. It relies primarily on a third-party beneficiary theory.²⁸ Plaintiffs contend that Aurora Loan Services failed even to consider them for HAMP modifications, including sending some

plaintiffs into foreclosure without HAMP analysis, thus violating the contractually required HAMP process at its earliest stages.²⁹

Defendants' motions for dismissal and summary judgment are currently pending before the court. Since *Edwards* was filed, three motions for summary judgment in HAMP third-party beneficiary cases have been decided in the U.S. District Court for the Southern District of California. One was denied³⁰ and two were granted.³¹ Outcomes in these cases depend largely³² on whether the court accepts that homeowners are "intended" beneficiaries of the SPA. Thus, advocates would be well advised to brief this claim with care, drawing on the considerable evidence in the public record that HAMP was created precisely to aid struggling homeowners. Plaintiffs' memorandum of law in opposition to dismissal in *Edwards*³³ provides an excellent template for this argument.

Near simultaneously with the *Edwards* filing, a similar class action was filed in Utah against multiple servicers, alleging that each had failed to offer trial period plans to qualified borrowers and had mistakenly rejected them or failed to process their applications.³⁴ The case has not proceeded past the complaint stage, perhaps indicating that negotiations are occurring.³⁵

²⁵Another possibility is to raise a due process challenge to the sufficiency of Treasury's implementing procedures (and/or to the procedures used by the servicers, on the theory that they are acting under color of federal law). However, because due process claims challenge the structure of the program rather than compliance with it, we do not review these claims here. A prior *Bulletin* article discussed *Williams v. Geithner*, which raised a due process challenge that was dismissed by a federal district court. *Bowman & Ireland*, *supra* note 5, at 231-33; *Snow*, *supra* note 5, at 12-13. Given the early stage at which *Williams* was sua sponte dismissed and the broad injunctive remedy it sought, it should not be read as a death knell for challenges based in due process. Indeed, another case seeking relief for an individual homeowner and asserting due process, among other claims, has since survived a motion to dismiss. *Huxtable v. Geithner*, No. 09cv1846, 2009 WL 5199333 (S.D. Cal. Dec. 23, 2009).

²⁶*Compl.*, *Edwards v. Aurora Loan Servs., LLC*, No. 09cv2100 (D.D.C. filed Nov. 9, 2009).

²⁷This lawsuit was filed shortly after SD 09-08 was issued. This directive establishes (1) a requirement that servicers provide borrowers with denial letters giving the reason for the denial, and (2) a timeframe for borrowers to contest denials that are based in part upon borrower-provided information. See Supplemental Directive 09-08, Home Affordable Modification Program – Borrower Notices (Nov. 3, 2009), https://www.hmpadmin.com/portal/docs/hamp_servicer/sd0908.pdf.

²⁸Plaintiffs also assert due process violations not discussed herein. See note 25, *supra*.

²⁹The introductory summary of plaintiffs' claims states: "Aurora has (a) wrongfully denied Plaintiffs access to the benefits of HAMP by refusing to evaluate their non-GSE loans for modification, even when Plaintiffs approached Aurora with specific requests to be considered under HAMP; (b) instituted, failed to suspend, or threatened to institute foreclosure proceedings against certain Plaintiffs who asked to be considered under HAMP; and (c) offered Plaintiffs, in some instances, forbearance agreements that violate the HAMP program guidelines by not lowering Plaintiffs' monthly payments, requiring Plaintiffs to waive substantial legal rights, and not guaranteeing a modification even if the Plaintiff fully complies with the terms of the forbearance agreement." *Compl.*, *supra* note 26, at 4-5.

³⁰*Reyes v. Saxon Mortgage Servs., Inc.*, 2009 WL 3738177 (S.D. Cal. Nov. 5, 2009) (denying defendant Saxon Mortgage Services' motion to dismiss plaintiffs' claim that Saxon had breached its HAMP SPA and finding that plaintiffs had alleged sufficient facts to support the third-party beneficiary claim).

³¹*Escobedo v. Countrywide Home Loans, Inc.*, 2009 WL 4981618 (S.D. Cal. Dec. 15, 2009) (dismissing plaintiff's claim premised on Bank of America/Countrywide's breach of its HAMP SPA because plaintiff could not prove that he was an intended beneficiary of that agreement); *Villa v. Wells Fargo Bank, N.A.* No. 10cv81, 2010 WL 935680 (S.D. Cal. Mar. 15, 2010) (same).

³²An alternate basis for the court's decision in *Escobedo* should be more easily refuted. The court accepted defendant Countrywide's argument that, because HAMP does not guarantee a modification to any particular borrower, borrowers are not intended beneficiaries under the SPA. Properly viewed, however, the benefit secured to borrowers by the SPAs is the opportunity to be fairly evaluated for the program—or, viewed differently, the program intends to benefit those borrowers who objectively qualify for a modification under its assorted criteria.

³³Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss or in the Alternative for Summary Judgment, *Edwards v. Aurora Loan Servs.*, No. 09cv2100 (S.D. Cal. filed Mar. 5, 2010).

³⁴Class Action Complaint, *Reese v. Citi Mortgage*, No. 09cv1031 (D. Utah) (filed Nov. 18, 2009).

³⁵Some non-class complaints have raised third-party beneficiary claims regarding a servicer's failure to analyze a borrower's HAMP

Direct Enforcement of Trial Period Plan Contracts

More recently, widespread servicer failure to convert trial period plans into permanent modifications has become a significant hurdle to the program's success. This has led to a second wave of HAMP enforcement litigation seeking to end the purgatory and cost of endless trial period plans. Advocates seeking conversion from a trial period to a final modification can sue for breach of contract without having to prevail on a third-party beneficiary claim. Their contract claims are premised on breaches of the trial period plan entered into by each individual borrower. Until recent program changes in supplemental directive 10-01, the trial period plan borrowers signed and returned to accept a three-month trial period contained specific provisions regarding when and how it would convert to a permanent modification.³⁶ Currently, however, trial periods are initiated by a brief announcement sent to the borrower and accepted via payment rather than signature. This announcement states only that "[a]fter all trial period payments are timely made and you have submitted all the required documents, your mortgage would then be permanently modified."³⁷ Given its lack of specificity, this language does less to support a breach of contract claim for failure to convert by a certain date, but does not totally remove such a claim from the arsenal.³⁸ Advocates have also augmented breach of trial period plan contract claims with breach of good faith and fair dealing and promissory estoppel claims.

In Massachusetts, consumer advocates recently filed class actions against a number of the largest HAMP servicers for failure to convert trial period plans into permanent modifications. In separate class actions, these advocates have sued BAC Home Loans Servicing, J.P. Morgan Chase, Wells Fargo, and IndyMac for their

comprehensive failure to convert trial period plans into permanent modifications.³⁹ Similar cases have been filed in Washington and California.⁴⁰ These class actions seek injunctive relief to forestall foreclosure, specific performance of defendant's contractual obligations (that is, offering final modifications), and injunctions to systemically change the way in which each servicer trains its staff and implements the program. While these suits do not require the court to reach the question of whether homeowners are intended third-party beneficiaries under SPAs, they do require the court to interpret the supplemental directives insofar as these are reflected in and referenced by the trial period plans. Accordingly, they present an opportunity to achieve systemic change in the program as well as protecting the rights of individual trial period participants.⁴¹

Additional Common Law and State Statutory Claims

As program documentation develops and homeowners who are further along in the HAMP process find their way to advocates, possibilities for affirmative litigation expand. Advocates have increasingly asserted a wide range of common law claims against loan servicers for failure to convert trial period plans into final modifications and other HAMP violations. These include breach of the contractual duty of good faith and fair dealing (arising from the SPA, a trial period plan, or the original mortgage), promissory estoppel, misrepresentation, negligence, fraud and infliction of emotional distress.⁴² In addition,

application. Compl., *Hausam v. Homecomings Fin., LLC*, No. 09cv1437 (D. Or. filed Dec. 4, 2009); Verified Compl., *Willms v. LNV Corp.*, No. 09cv1925 (Colo. D. Ct. Adams County filed Oct. 27, 2009); First Am. Compl., *Romero v. Onewest Bank Group, LLC*, No. C 09-03122 (Cal. Super. Ct. Contra Costa County filed Feb. 1, 2010).

³⁶The last version of the model trial period plan drafted by Treasury, which servicers were not to modify except in respects not relevant here, provided, "If I comply with the requirements in Section 2 and my representations in Section 1 continue to be true in all material respects, the Lender will send me a Modification Agreement for my signature which will modify my Loan Documents as necessary to reflect this new payment amount and waive any unpaid late charges accrued to date." It also defined the "Modification Effective Date" as "the first day of the month following the month in which the last Trial Period Payment is due."

³⁷Trial Period Plan Notice – Stated Income, https://www.hmpadmin.com/portal/docs/hamp_borrower/hampstatedincome.doc, and Trial Period Plan Notice – Verified Income, https://www.hmpadmin.com/portal/docs/hamp_borrower/hampverifiedincome.doc; see also Supplemental Directive 10-01, Home Affordable Modification Program – Program Update and Resolution of Active Trial Modifications at 3 (Jan. 28, 2010).

³⁸Moreover, it is worth bearing in mind that if current statistics are any guide, it will be some time before the many borrowers already offered trial period plan contracts manage to obtain final modifications, leaving many of these old contracts available as grounds for suit.

³⁹See Compl., *Durmic v. J.P. Morgan Chase Bank, NA*, No. 10cv10380 (D. Mass. filed Mar. 3, 2010); Am. Compl., *Johnson v. BAC Home Loans Servicing, LP*, No. 10cv10316 (D. Mass. filed Apr. 30, 2010); Compl., *Reyes v. IndyMac Mortgage Servs., FSB*, No. 10cv10389 (D. Mass. filed Mar. 4, 2010); Compl., *Bosque v. Wells Fargo Bank, N.A.*, No. 10cv10311 (D. Mass. filed Feb. 23, 2010).

⁴⁰Compl., *Bayramian v. Bank of America*, No. 10cv1458 (N.D. Cal. filed Apr. 6, 2010); Compl., *Kahlo v. Bank of Am.*, No. 10cv488 (W.D. Wash. filed Mar. 22, 2010).

⁴¹Of course, non-class suits have raised breaches of trial period plan contracts as well. See, e.g., Compl., *Begum v. J.P. Morgan Chase Bank, N.A.*, No. 10cv2014 (E.D.N.Y. filed May 4, 2010); Compl., *Kaczmarczyk v. Select Portfolio Servicing, Inc.*, No. 2010 CA 000937 CI (Fla. Cir. Ct. Osceola County filed Feb. 5, 2010); Verified Compl., *Rudan v. Metlife Bank, N.A.*, No. CV OC 1006520 (Idaho D. Ct. Ada County filed Apr. 6, 2010); Compl., *Akins v. Wells Fargo Bank, N.A.*, No. CI 201002723 (Ohio Ct. of Common Pleas Lucas County filed Mar. 15, 2010).

⁴²See, e.g., *Rudan*, No. CV OC 1006520 (raising, in addition to a breach of trial period plan claim and accompanying breach of good faith and fair dealing claim, claims of promissory estoppel and fraud); *Begum*, No. CV10-2014 (raising, in addition to breach of trial period plan contract claim, a claim of breach of the accompanying duty of good faith and fair dealing, alternate claims of promissory estoppel and breach of implied contract, and fraud and negligent misrepresentation claims); Compl., *Ponder v. Bank of Am., N.A.*, No. 10cv81 (S.D. Ohio filed Feb. 10, 2010) (where multiple homeowners were promised modifications at a Bank of America event and these did not materialize, raising claims of misrepresentation, promissory estoppel, breach of fiduciary duty, breach of the duty of good faith and fair dealing arising from the SPA, negligence, defamation in credit reporting and infliction of emotional distress); *Hausam*, No. 09cv1437 (raising, in addition to third-party beneficiary

some state laws, such as unfair and deceptive practices statutes, may apply.⁴³ Unlike third-party beneficiary theories, these claims are not structured to address the full range of HAMP violations. Rather, they rely on careful parsing of facts specific to the individual homeowner. Not surprisingly, these claims lend themselves to individual rather than class plaintiffs. In newer cases where a trial period was offered through a notice of trial period plan, these claims will take on increasing importance.

HAMP Compliance as a Basis for Rescission of Sale

Even after sale, homeowner claims that a servicer failed to properly follow the HAMP directives remain relevant. In these cases, the question becomes whether rescission of sale (rather than damages) is a possible remedy under state law. In many states, obtaining this remedy may be an uphill battle.⁴⁴ A related and highly state-specific issue is whether HAMP violations (or a simultaneous affirmative suit alleging such violations) provide a defense to post-foreclosure eviction proceedings. Advocates in New York have obtained stays of at least two evictions based on HAMP violations underlying the foreclosure sale.⁴⁵ Even if post-sale cases prove to be difficult to win in court, ser-

claim, claims of breach of implied and oral contracts arising from a HAMP offer made by phone, promissory and equitable estoppel, and breach of the duty of good faith and fair dealing arising from the oral contract); *Second Am. Compl., Simpson v. Am. Home Servicing, Inc.*, No. 09-C-97 (N.D.W. Va. filed Dec. 16, 2009) (raising a claim of breach of the duty of good faith and fair dealing in the original mortgage); *Romero*, No. C 09-03122 (raising, in addition to third-party beneficiary claim, claims of breach of the duty of good faith and fair dealing in the original mortgage, negligence, and negligent and intentional infliction of emotional distress); *Akins*, No. CI 201002723 (raising, in addition to a breach of trial period plan claim and accompanying breach of good faith and fair dealing claim, a claim of promissory estoppel).

⁴³See, e.g., *Romero*, No. C 09-03122 (raising claims of violations of the California Finance Code, Fair Debt Collection Practices Act and Unfair Competition Law); *Kaczmarczyk*, No. 2010 CA 000937 CI (raising unfair or deceptive acts or practices claims); *Simpson*, No. 09-C-97 (raising violations of West Virginia statutes regarding illegal debt collection and illegal return of payments).

⁴⁴Hass, *supra* note 24, was a post-sale case. As noted above, in that case the judge was willing to rescind the foreclosure sale if the plaintiffs proved the violations they alleged. Of the pending complaints cited in note 41, *supra*, at least one—*Rudan*—was filed post-sale. A complaint filed in Colorado also requested rescission and damages after a homeowner was foreclosed after a successful HAMP trial period without being offered a final modification. *Verified Compl., Svecar v. Fed. Nat'l Mortgage Ass'n*, No. 2010CV192 (Colo. Dist. Ct. Boulder County filed Feb. 21, 2010).

⁴⁵*Huntington Nat'l Bank v. Reed*, No. 9018/2009 (N.Y. Sup. Ct. Saratoga County) (staying eviction proceedings based on an order to show cause brought to vacate a foreclosure sale based on the meritorious defense that the homeowner had been attempting to obtain a HAMP modification at the time the sale was conducted); *Mortgage Electronic Registration Systems, Inc. v. Petrella*, No. 2008-0425 (N.Y. Sup. Ct. Tompkins County Feb. 3, 2010) (denying writ of removal in eviction proceeding "on the grounds that the plaintiff has failed to furnish proof of a 'HAMP' review or any analysis with regard to the defendant[s] eligibility for a loan modification").

vicers may be willing to voluntarily rescind sales if the foreclosed homeowner is genuinely HAMP-eligible, and a suit may draw the servicer's attention to this possibility.

Lessons from Existing Litigation

Given the dearth of meaningful oversight and enforcement of the HAMP program, litigation has offered a promising avenue for advocates to protect client homes and avoid irresponsible foreclosures. Favorable decisions in these cases have been more easily obtained where non-compliance was raised as a defense to foreclosure. Courts' greater willingness to enforce HAMP in such cases is likely due to a combination of factors. First and foremost, the hurdle of finding an applicable cause of action is not present, since the party raising HAMP noncompliance is the defendant. Moreover, judges who routinely decide foreclosure cases are well versed in the responsibilities inherent in sitting as a court of equity.

An additional reason for the limited number of decisions in affirmative suits is unrelated to judicial receptiveness: affirmative litigation captures servicer attention and can motivate action where previous efforts to negotiate were met with inattention. Ultimately, this reality combined with the cost of delay suggests that for many clients, individual, fact-specific filings may present the best strategy for enforcing HAMP and gaining sorely needed relief from high monthly payments.

The Coming Wave of HAMP Litigation

As HAMP is modified, litigation strategies will change accordingly. The next wave of litigation will likely focus on the documentation requirements of recent supplemental directives (09-08, 10-01, and 10-02), which add a powerful resource for HAMP enforcement.⁴⁶

The new directives set forth requirements covering both documentation of the individual borrower's HAMP process and documentation of internal HAMP policies and procedures, all of which must be on file with the loan servicer before foreclosure may proceed.⁴⁷ Of particular

⁴⁶In addition, the new directives provide that borrowers in active bankruptcy must be considered for HAMP, and will give rise to HAMP challenges in a new judicial context. In *re Roderick*, No. 09-22866-C-7 (Bankr. E.D. Cal. Mar. 8, 2010), gives a preview of the kind of issues that may arise. The bankruptcy court interpreted the Federal Rules of Bankruptcy Procedure to allow extension of the automatic stay and deferment of the discharge as long as the servicer and homeowner wished to continue negotiations regarding a modification. The court explained that it chose to do so to preserve the possibility of a reaffirmation of personal liability in a modification and forestall foreclosure.

⁴⁷See Supplemental Directive 10-02, Home Affordable Modification Program – Borrower Outreach and Communication 10 (Mar. 24, 2010), https://www.hmpadmin.com/portal/docs/hamp_servicer/sd1002.pdf. Prefacing a specific list of required documentation, the directive states that "Servicers are required to maintain appropriate documentary evidence of their HAMP-related activities, and to provide that documentary evidence upon request to Freddie Mac as the Compliance Agent for Treasury. . . . Servicers must maintain documentation in

relevance to future litigation, before proceeding with foreclosure, servicers must certify to their local foreclosure counsel that HAMP has been complied with.⁴⁸ This pre-foreclosure documentation requirement presents an opportunity for discovery requests and, potentially, Fair Debt Collection Practices Act claims against local "foreclosure mills."

The new directives should also bolster the use of HAMP noncompliance as a defense to foreclosure. Under these directives, foreclosure actions must be frozen completely once a borrower enters a trial period plan. Once the court has halted sale pending proof of the outcome of the trial period, it can use the newly required documentation to measure compliance.

Undoubtedly, advocates will have to educate the judiciary to ensure that compliance with the new directives is meaningful. The trend is clear, however: HAMP noncompliance presents a meaningful defense to foreclosure for homeowners. By working together to build authority for reference and citation,⁴⁹ advocates can build judicial knowledge and create enforcement momentum, aiding homeowners well beyond those they are able to represent. ■

well-documented servicer system notes or in loan files for all HAMP activities addressed in this Supplemental Directive."

⁴⁸"Servicers must develop and implement written procedures applicable to all loans that are potentially eligible for HAMP . . . that require the servicer to provide to the foreclosure attorney/trustee a written certification that (i) one of the five circumstances under the 'Prohibition on Referral and Sale' section of this Supplemental Directive exists, and (ii) all other available loss mitigation alternatives have been exhausted and a non-foreclosure outcome could not be reached. This certification must be provided no sooner than seven business days prior to the scheduled foreclosure sale date (the Deadline) or any extension thereof." *Id.* at 7.

⁴⁹To help build this momentum, please email authors (see email addresses *supra* note 1) with any new pleadings or decisions.

NHLP Testifies on Public Housing One-for-One Replacement

At the request of the House Subcommittee on Housing and Community Opportunity, the National Housing Law Project (NHLP) presented testimony on a discussion draft of a bill titled "The Public Housing One-for-One Replacement and Tenant Protection Act."¹ The discussion draft is focused on revising and improving Section 18, the public housing demolition and disposition provisions of the United States Housing Act. The discussion draft contains a number of principles that NHLP supports, including:

- One-for-one replacement of any units that are approved for demolition or disposition will be required.
- The replacement housing must be comparable to public housing and affordable to the lowest-income families.
- A sufficient number of units must be located in the original neighborhood for all who wish to remain in that community.
- Residents who are displaced must be allowed to return without rescreening.
- Any displacement and/or multiple involuntary relocations should be minimized.
- Residents will play an active and effective role in the development of any plan for demolition or disposition and implementation of the plan for the replacement housing.
- Residents will receive counseling and services for relocation and mobility.
- Plans for demolition or disposition must be consistent with a housing authority's duty to affirmatively further fair housing, and residents have rights to enforce this duty.
- Stricter preconditions for demolition or dispossession will be imposed.

In addition, NHLP suggested that the discussion draft could be improved if the following provisions were added or changed:

1. The one-for-one replacement requirement must state that the replacement units must be *rental* units.

¹The testimony is available at NHLP's homepage at www.nhlp.org. The testimony will be archived on the Public Housing Demolition and Disposition webpage at NHLP's Attorney/Advocate Resource Center at <http://nhlp.org/resourcecenter?tid=38>.

THIRD PARTY BENEFICIARY CLAIMS

Reyes v. Saxon Mortgage Services, Inc., 2009 WL 3738177 (S.D. Cal. Nov. 5, 2009) (Sabraw, J.)
(defendant's motion to dismiss denied)

but see cases finding borrowers are NOT third party or intended beneficiaries:

Villa v. Wells Fargo Bank, N.A., 2010 WL 935680, (S.D. Cal. March 15, 2010) (Sabraw, J.) (same judge as Reyes)

Escobedo v. Countrywide, 2009 WL 4981618 (S. D. Cal. Dec. 15, 2009) (Moskowitz, J.)

Burtzos v. Countrywide Home Loans, 2010 WL 2196068 (S.D. Cal. 2010)

Hoffman v. Bank of America, N.A., 2010 WL 2635773 (N.D. Cal. 2010)

Marks v. Bank of America, N.A., 2010 WL 2572988 (D. Ariz. 2010)

Simmons v. Countrywide Home Loans, Inc., 2010 WL 2635220 (S.D. Cal. 2010)

Still Pending:

Edwards, et al. v. Aurora Loan Services, LLC et al., No. 1:09-cv-02100-HHK (Filed Nov. 9, 2009 in DC)
Class Action Suit, bringing 3pb claims and procedural due process claim that Defendant failed to provide "a viable procedure to contest Defendant's denial of a borrower's access to HAMP benefits before an impartial decision-maker." Defendants have moved to dismiss for failure to state a claim

WRONGFUL FORECLOSURE

Deutsche Bank National Trust v. Hass, Case No. 2009-2627-AV (Macomb Co. Michigan Circuit Court Sept. 30, 2009) (Miller, J.)

- Individual appeal from a judgment of possession.
- Court finds that if Wells Fargo is found on remand to be the actual loan servicer, "it therefore breached its contractual duty by failing to offer relief to Appellants pursuant to the prevailing federal authority," and the foreclosure proceedings should never have commenced.

BAC Home Loan Servicing, L.P. F/K/A Countrywide Home Loans Servicing, L.P. v. Bates, et al., Case no. CV-2009-06-2801 (Butler Co. Ct. of Common Pleas March 8, 2010) (Pater, J.)

- Individual suit, defensive posture, contending that since BAC's loan is guaranteed by Freddie Mac, Defendant is eligible for HAMP modification and BAC is legally and equitably required to consider her for a loan modification under that program.
- BAC's motion for Summary Judgment denied.

DUE PROCESS

Huxtable v. Geithner, et al., 2009 WL 5199333 (S.D. Cal. Dec. 23, 2009) (Moskowitz, J.)

- Individual suit for violation of procedural due process for failing to create rules implementing HAMP
- Court denied Defendant's motion to dismiss, holding that there are some circumstances where the Fifth Amendment does apply to private entities and not just State actors

Williams v. Geithner, 2009 WL 3757380 (D. Minn. Nov. 9, 2009) (Montgomery, J.)

- Class action suit for violation of Ps' constitutional right to procedural due process; specifically due to Defendant's failure to provide written notification of an adverse decision and an opportunity for appeal

- The Court denied Plaintiffs' motion for preliminary injunction because Plaintiffs "do not have a legitimate claim of entitlement to a loan modification. . . thus, HAMP does not provide Plaintiffs with a protected property interest," and there can be no due process violation.

Sendolo v. Geithner, United States District Court, District of Minnesota (filed July 28, 2009)

- Class action suit alleging that Ps' due process rights have been violated, and they seek to enjoin all foreclosures in Minnesota of mortgages owned by Fannie Mae or Freddie Mac, "or serviced by one of the mortgage loan servicers who have agreed to administer the HAMP program and provide loan modifications to the homeowners they service."

Direct Breach of Contract, Promissory Estoppel

Faulkner v. OneWest Bank, 2010 WL 2472275 (N.D.W.Va June 16, 2010) Breach of contract claim based on permanent HAMP modification agreement. Defendant's motion to dismiss denied.

Harryman v. BAC Home Loans Servicing, LP and Bank of America, N.A., Case: 6:10-cv-00051 (TX S.D. 2010)

- Class action suit for violation of RESPA; breach of contract under the loan modification agreement; breach of contract under forbearance agreement; breach of contract of the promissory note and deed of trust; violation of Texas property code; breach of contract-HAMP trial modification; unreasonable collection efforts; intentional misrepresentation; violations of the Texas Debt collection Act.
- Court found that there is no private right of action to enforce HAMP, and denied Plaintiffs' request for Preliminary Injunction

NCLC class actions against Chase, Wells Fargo, Bank of America, IndyMac and Litton filed in federal court in MA (complaints are available on the NCLC website). We have responded to motions to dismiss in Chase, Wells Fargo and BoA.

Kahlo v. BOA, class case in Western Dist. of WA filed 3/22/2010 (also includes 3PB claims)

Brewer et al v. BOA, class case in Northern Dist. of CA filed 4/30/2010 (also includes 3PB)

Akins v. Wells Fargo, Case No. CI-020100-2723, Lucas Co.Ct. of Common pleas, filed 3/15/2010

Begum, Lam and Williams v. Chase, filed in Fed. Ct. in Brooklyn 5/4/2010 (may include other claims)

OTHER

Simpson v. American Home Mortgage Servicing, Inc., Civ. Action No. 2:09-CV-120 (N.D.W. Va. Nov. 25, 2009) (Bailey, J.) (no private right of action in TARP)

- Individual suit for breach of contract under HAMP, illegal debt collection, and illegal return of payments in violation of W. Va. Code § 46A-2-115(c)
- The Court finds that TARP; HAMP do not have a private right of action, thus there is no breach of fiduciary duty. Also, WV law permits return of payments.

Ponder, et al. v. Bank of America, et al. Civ. Action No. 1:10-CV-081 (S.D. Oh. filed Feb. 10, 2010) (Barrett, J.)

- Plaintiffs bring suit after a "borrower outreach" event where Plaintiffs were promised loan modifications that did not materialize. Claims are misrepresentation, promissory estoppel, breach of fiduciary duty, breach of covenant of good faith and fair dealing, negligence, defamation, and infliction of emotional distress

THIRD PARTY BENEFICIARY CLAIMS

Reyes v. Saxon Mortgage Services, Inc., 2009 WL 3738177 (S.D. Cal. Nov. 5, 2009) (Sabraw, J.)
(defendant's motion to dismiss denied)

but see cases finding borrowers are NOT third party or intended beneficiaries:

Villa v. Wells Fargo Bank, N.A., 2010 WL 935680, (S.D. Cal. March 15, 2010) (Sabraw, J.) (same judge as Reyes)

Escobedo v. Countrywide, 2009 WL 4981618 (S. D. Cal. Dec. 15, 2009) (Moskowitz, J.)

Burtzos v. Countrywide Home Loans, 2010 WL 2196068 (S.D. Cal. 2010)

Hoffman v. Bank of America, N.A., 2010 WL 2635773 (N.D. Cal. 2010)

Marks v. Bank of America, N.A., 2010 WL 2572988 (D. Ariz. 2010)

Simmons v. Countrywide Home Loans, Inc., 2010 WL 2635220 (S.D. Cal. 2010)

Still Pending:

Edwards, et al. v. Aurora Loan Services, LLC et al., No. 1:09-cv-02100-HHK (Filed Nov. 9, 2009 in DC)
Class Action Suit, bringing 3pb claims and procedural due process claim that Defendant failed to provide "a viable procedure to contest Defendant's denial of a borrower's access to HAMP benefits before an impartial decision-maker." Defendants have moved to dismiss for failure to state a claim

WRONGFUL FORECLOSURE

Deutsche Bank National Trust v. Hass, Case No. 2009-2627-AV (Macomb Co. Michigan Circuit Court Sept. 30, 2009) (Miller, J.)

- Individual appeal from a judgment of possession.
- Court finds that if Wells Fargo is found on remand to be the actual loan servicer, "it therefore breached its contractual duty by failing to offer relief to Appellants pursuant to the prevailing federal authority," and the foreclosure proceedings should never have commenced.

BAC Home Loan Servicing, L.P. F/K/A Countrywide Home Loans Servicing, L.P. v. Bates, et al., Case no. CV-2009-06-2801 (Butler Co. Ct. of Common Pleas March 8, 2010) (Pater, J.)

- Individual suit, defensive posture, contending that since BAC's loan is guaranteed by Freddie Mac, Defendant is eligible for HAMP modification and BAC is legally and equitably required to consider her for a loan modification under that program.
- BAC's motion for Summary Judgment denied.

DUE PROCESS

Huxtable v. Geithner, et al., 2009 WL 5199333 (S.D. Cal. Dec. 23, 2009) (Moskowitz, J.)

- Individual suit for violation of procedural due process for failing to create rules implementing HAMP
- Court denied Defendant's motion to dismiss, holding that there are some circumstances where the Fifth Amendment does apply to private entities and not just State actors

Williams v. Geithner, 2009 WL 3757380 (D. Minn. Nov. 9, 2009) (Montgomery, J.)

- Class action suit for violation of Ps' constitutional right to procedural due process; specifically due to Defendant's failure to provide written notification of an adverse decision and an opportunity for appeal

STATE OF WISCONSIN

CIRCUIT COURT

WAUSHARA COUNTY

HSBC Bank USA, National Association
c/o Wells Fargo Bank, NA

FILED
JANE F. PUTSKEY

Case No. 08-CV-328

v.

JUL 27 2010

Peter W. Searls

CIRCUIT COURT
WAUSHARA CO. WIS.

**ORDER CONTINUING DEFENDANT'S MOTION FOR COMPLIANCE WITH
HOME AFFORDABLE MODIFICATION PROGRAM**

This matter came on for hearing before the Honorable Guy D. Dutcher, Circuit Court Judge for Waushara County on the 13th day of July, 2010 upon the motion of the Defendant, Peter W. Searls, to compel Wells Fargo (servicer for Plaintiff) to establish that it has complied with its obligations under the servicer participation agreement with the Department of Treasury under the Home Affordable Modification Program ("HAMP") and to establish that Wells Fargo has complied with the requirements set forth in the HAMP Supplemental Directives issued by the United States Department of Treasury in this case.

The Plaintiff, HSBC Bank USA, National Association c/o Wells Fargo Bank, NA, appeared by its attorneys, Gray & Associates, LLP, by Attorney Christopher Drout. The Defendant Peter W. Searls, appeared in person and by Attorney Christine Wolk;

The court, having reviewed the pleadings on file herein and having considered the arguments of counsel, hereby makes the following order:

IT IS HEREBY ORDERED:

1. The motion of Defendant Searls to compel Wells Fargo to comply with the Home Affordable Modification Program; to determine whether the court should order a permanent loan modification; and for other relief requested in his motion, is adjourned to September 15, 2010 at 1:00 p.m. for an evidentiary hearing to be held with all parties and witnesses to appear in person at the Waushara County Courthouse;
2. Wells Fargo shall produce a witness competent to testify as to the procedures taken in this case to determine eligibility for Peter Searls for HAMP; to explain why the successfully completed trial loan modification did not result in a permanent loan modification; and to explain the

determination of a negative Net Present Value (NPV) now claimed by Wells Fargo; and

3. Mr. Searls shall continue to make his monthly payments to Wells Fargo in the amount established in the trial loan modification of \$856.04.

Dated this 27th day of July, 2010.

BY THE COURT:

/s/ GUY D. DUTCHER

Hon. Guy D. Dutcher
Circuit Court Judge
Waushara County

IN THE COMMON PLEAS COURT OF SENECA COUNTY, OHIO

U.S. Bank N.A., as Trustee for the
registered holders of Structured Asset
Securities Corporation, mortgage Pass-
Through Certificates, Series 2005-SCI

Plaintiff,

vs

Elza K. Bleckinger, et al

Defendants.

Case #10-CV-0095

Judge Michael P. Kelbley

JUDGMENT ENTRY

MARY K. WARD
CLERK

10 OCT 13 PM 1:23

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO

This action was submitted to the Court and heard upon Plaintiff's Motion for Summary Judgment by Plaintiff U.S. Bank N.A., as Trustee for the registered holders of Structured Asset Securities Corporation, mortgage Pass- Through Certificates, Series 2005-SCI ("U.S. Bank"). Upon consideration of the Motion, the pleadings and the other matters of record herein, the Motion is **DENIED**.

This is a foreclosure action. Defendant Elza Bleckinger and her late husband, Richard Bleckinger, were granted by general warranty deed in August of 1983, the real property described in that instrument as follows:

Situated in the Village of Kansas, Township of Liberty, County of Seneca, State of Ohio, and described as follows: In lot number sixty-one (61) and twenty-seven (27) feet off the south side of inlot number sixty-two (62) in FOSTER'S ADDITION to the Village of Kansas, Liberty Township, Seneca County, Ohio.

The Bleckingers executed a mortgage and a promissory note on said real property, with listed address of 8471 State Route 635, Kansas, Ohio 44841, on October 12, 1999. The note and mortgage for the sum of \$68,000.00 were executed between the Bleckingers and AMRESO Residential Mortgage Corporation ("AMRESO"), a

Delaware corporation. The mortgage deed carried adjustable rate terms and was recorded in Seneca County, Ohio. AMRESO subsequently assigned the mortgage and note to OCWEN Federal Bank, FSB ("OCWEN") on May 11, 2001. The Mortgage and Note were again subsequently assigned by OCWEN to Plaintiff U.S. Bank on March 5, 2007. Richard Bleckinger passed away in November of 2007.

U.S. Bank initiated this action against Defendant Bleckinger in February of 2010 in two counts: default on Mortgage, and default on Note. According to the affidavit filed in support of U.S. Bank's Motion for Default Judgment, the note on said property is in default and there is presently due a principle balance of \$56,237.91 with interest thereon at a rate of 9.38% per annum from October 1, 2009. Other parties named as Defendants included John Doe, Unknown Spouse, if any, of Ms. Bleckinger and any Unknown Heirs at Law, Devisees, Legatees, Executors or Administrators of Richard Bleckinger, Deceased, as well as Seneca County, Ohio, and the State of Ohio, Real Estate Tax Division for property taxes owed on said property, as well as Great Seneca Financial as holder of a judgment lien against said property. This Court found all service upon all aforementioned Defendants to have been valid and proper. Defendant State of Ohio, Real Estate Tax Division, answered disclaiming interest to the property in dispute. Defendant Seneca County, Ohio, answered requesting that the real estate taxes and penalties be declared as valid first and prior lien against the property. No answer was received from Defendant Great Seneca Financial, nor any answer from any Heirs at law, etc., of Richard Bleckinger. Defendant Bleckinger stated in her answer that she has not remarried since the death of her late husband Richard Bleckinger.

In her answer, Bleckinger admitted that certain payments demanded by her loan servicer have not been paid due to financial hardship. However, she asserted, *inter alia*, the affirmative defense that Plaintiff's complaint is barred by Plaintiff's failure to evaluate Bleckinger's eligibility for a loan modification pursuant to the terms of the loan servicer's contract under the Federal Government's Home Affordable Modification Program ("HAMP"), to her detriment.

HAMP is part of the Making Home Affordable Program ("MHAP"), part of the United States Treasury Department's ("Treasury") Financial Stability Plan of 2009, created pursuant to provisions in Congress' Emergency Economic Stabilization Act of 2008 ("EESA"). Pub. L. 110-343, 122 Stat. 3765 (enacted October 3, 2008). According to the Treasury, under the Program, Mortgage loans serviced by Fannie Mae and Freddie Mac are subject to HAMP provisions. Subsequently, on April 6, 2009, the Treasury issued Supplemental Directive 09-01, which provides additional guidance to loan servicers beyond merely Fannie Mae and Freddie Mac that choose to participate in the HAMP program by signing a Servicer Participation Agreement. Treas. Supp. Dir. 09-01.

HAMP has been established to assist eligible homeowners with loan modifications on their home mortgage debt. This is primarily accomplished through the issuance of a trial period plan, which allows the homeowner to make reduced monthly payments temporarily while their application for permanent modification is fully evaluated by their loan servicer. If the homeowner's loan and income qualify them for relief under HAMP, and they successfully complete their trial period payments, then a

permanent modification plan may be entered into between the homeowner and the loan servicer. *Id.*

Loans serviced by any other financial institution may be subject to HAMP, if the loan servicer has opted to sign onto the program by signing a Servicer Participation Agreement ("SPA"). *Id.* Said agreement is a contract between the U.S. Treasury Department and the participating financial institution. Under the contract, financial institutions agree to participate in HAMP under the terms of the EESA, including provisions that require compliance with "any supplemental documentation...including, but not limited to...compliance requirements, performance requirements, and related remedies, issued by the Treasury." Treasury HAMP SPA at 2. In return for participation, the financial institution receives pecuniary compensation from the Treasury. *Id.* at 3. The Treasury has publicly announced both OCWEN and U.S. BANK as having signed an SPA.

In consideration of Bleckinger's HAMP-based defense, this Court finds the pertinent questions to be (1) Whether the affirmative defense of asserting Plaintiff's non-compliance with HAMP loan modification is a recognized affirmative defense to stay or dismiss a foreclosure action in Ohio, and if so, (2) Whether there is any relief that this Court may provide Defendant under this defense.

Upon investigation of the applicability of HAMP to foreclosure actions, this Court notes that there is significant split occurring between courts across the country in their determinations of how to interpret HAMP.

Many U.S. District courts have held that HAMP does not provide for a private right of action to be brought by an individual homeowner against a financial institution

that is their loan servicer, pointing to the fact that the HAMP SPA is a contract between the servicer and the U.S. Treasury and thus affords no rights to a third party to that contract to claim relief for its breach. See, e.g., *Benito v. Indymac Mortgage Services*, No. 2:09-CV-001218-PMP-PAL, 2010 U.S. Dist. LEXIS 51259 (D. Nev. May 21, 2010) (holding that HAMP is a contract between Federal Government and defendant loan servicer that does not grant plaintiff homeowner right to modification, nor does HAMP require the lender to modify the loan); *Williams v. Geithner*, No. 09-1959, 2009 U.S. Dist. LEXIS 104096 (D. Minn. Nov. 9, 2009) (holding that plaintiff homeowner who filed claim for injunctive relief did not to have a "protected property interest" and thus no remedy because the loan servicer was encouraged but not required to modify loan). At least one District court has held alternatively. See generally *Reyes v. Saxon Mortgage Services*, No. 09cv1366 DMS, 2009 U.S. Dist. LEXIS 12523 (S.D.Cal. Nov. 5, 2009). However, that opinion is in the definitive minority view among District court judgments on the subject.

The notable commonality of these aforementioned District Court cases is that they are cases in which the homeowner filed for relief under HAMP as plaintiff. These District cases, taken as a whole, suggest that there exists no third-party or citizen-suit provision within HAMP under which to premise a legal theory for relief.

Conversely, many states' county common pleas courts have also had the opportunity to rule on how this recent law affects homeowners defending against foreclosure actions. The majority of common pleas rulings on the subject have held that, in compliance with Treasury Supplemental Directive 09-01 section heading "Temporary Suspension of Foreclosure Proceedings", there is a requirement on the part

of the loan servicer to make "reasonable efforts" to evaluate the homeowner's HAMP eligibility prior to filing a foreclosure action and, if eligible, extend an offer to participate in HAMP. Treas. Supp. Dir. 09-01 at 14. If foreclosure actions have already been initiated, these state courts have largely been willing to deny Plaintiff financial institutions' motions for summary judgment if they have not shown in their pleadings any evidence (via affidavit or otherwise) that they have attempted to evaluate the borrower's eligibility for HAMP modification prior to foreclosure. See, e.g., *HSBC Bank USA c/o Wells Fargo v. Peter Searls*, Waushara County, Wisconsin, 08-CV-328 (July 27, 2010) (order continuing defendant's motion for compliance, adjourned until later date); *National City Bank v. Moore*, Linn County, Iowa, EQCV067462 (May 10, 2010) (holding Defendant overcame summary judgment motion because Plaintiff failed to show in affidavit that they had attempted to create a repayment plan); *Deutsche Bank National Trust v. Kane*, Linn County Iowa, EQCV067273 (Mar. 31, 2010) (holding Defendant overcame summary judgment because Plaintiff failed to show in affidavit that they had attempted to evaluate eligibility).

In at least one state court case, the judge has gone so far as to dismiss the Plaintiff financial institution's claim with leave to amend, in order to require the Plaintiff to show that they have attempted to contact the defendant and evaluate eligibility. See generally *GMAC Mortgage v. Riley*, Franklin County Vermont, 500-09 Fe (Mar. 5, 2010). In *GMAC*, the judge found that there is an inherent requirement in the SPA signed by the financial institution to comply with all of the requirements of HAMP and any Treasury Supplemental Directives. *Id* at 4, 5. The judge in *GMAC* further noted the binding language in the Commitment to Purchase Financial Instrument portion of the SPA

contract that a HAMP-participating financial institution signs along with their respective SPA. The pertinent language noted in the instrument states "Servicer covenants that...(ii) all Services will be offered to borrowers, fully documented and serviced, or otherwise performed, in accordance with the applicable Program Documentation." *Id.* at 5 (citing the HAMP financial instrument).

This Court finds that Defendant homeowners can reasonably be determined to have an affirmative defense in a foreclosure action when raising a loan servicer's non-compliance with HAMP, assuming the loan servicer has opted to sign a HAMP Servicer Participation Agreement. Furthermore, this Court finds that HAMP can reasonably be construed to provide a form of relief for homeowners who find themselves in foreclosure, by granting a stay of said foreclosure proceedings until HAMP loan modification eligibility can be determined. This defense and remedy are premised upon the fact, as discussed in *GMAC*, that the servicer has signed binding contracts by agreeing to the terms of the SPA and the financial instrument associated therewith. The SPA contract requires the servicer's compliance with HAMP supplemental documentation and compliance requirements, which certainly must be intended to include Treasury Supplemental Directive 09-01, as well as Supplemental Directive 10-02, which replaces and supersedes the "Temporary Suspension of Foreclosure Proceedings" section of SD 09-01 at 14 (and is subsequently incorporated into the Making Home Affordable Handbook) with essentially the same language. *Treas. Supp. Dir. 10-02* at 4, 5. As has been discussed, *supra*, these Directives include a provision for temporarily suspending foreclosure actions if "reasonable efforts" have not been made by the servicer to evaluate HAMP eligibility. *Id.* SD 10-02 goes even further then

SD 09-01, stating that the servicer cannot commence foreclosure "unless and until" the borrower is evaluated, a trial plan fails, reasonable efforts have been made to evaluate the borrower, or the borrower refuses a HAMP modification. Treas. Supp. Dir. 10-02 at 5. Bleckinger's assertion here that the servicer of her loan has failed to make reasonable efforts to evaluate her eligibility for HAMP loan modification therefore gives her defense merit by calling into question whether or not her servicer has evaluated her eligibility within the prescribed standard or reasonableness.

Having found that HAMP can provide Bleckinger a valid affirmative defense against a claim for foreclosure, and furthermore that HAMP affords Bleckinger an apparent avenue for relief should it be shown that her loan servicer has failed to reasonably attempt to evaluate her eligibility, this Court now turns to the question of Plaintiff's Motion for Summary Judgment in the present matter. Under well-established Ohio precedent, summary judgment is appropriate only when the following have been established: (1) that there is no genuine issue as to any material fact, (2) that the moving party is entitled to judgment as a matter of law, and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C). See also *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881. When ruling upon a motion for summary judgment, the court must construe the record and all inferences therefrom in the favor of the opposing party. *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531, 535, 629 N.E.2d 402. Further, the burden of showing that no genuine issue of material fact exists falls upon the party moving for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294, 662 N.E.2d 264, citing *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526

N.E.2d 798. When these principles are applied here, this Court finds that, construing the record and all inferences in favor of Defendant Bleckinger, genuine issues of material fact exist which can most decidedly cause reasonable minds to differ as to the legal conclusion to be reached.

Chief among the material facts at issue here is the controverted identity of the servicer of Bleckinger's mortgage. U.S. Bank contends that OCWEN, not U.S. Bank, is the loan servicer for Bleckinger's mortgage and that therefore U.S. Bank is not a party bound by a HAMP Servicer Participation Agreement to Bleckinger's mortgage loan. Certainly, if this position is accurate, it is a material fact of great importance because it would likely serve to bar Bleckinger's affirmative defense by eliminating any duty that U.S. Bank would have under HAMP to Bleckinger. However, Bleckinger disputes this position and thus this Court finds that the material fact of the identity of Bleckinger's loan servicer is genuinely at issue here.

At issue is the status of Bleckinger's application for loan modification under HAMP. The parties seem to agree that Bleckinger has applied for a HAMP modification, but each provides a different version of the answer that Bleckinger received. The current status of Bleckinger's application is therefore a material fact at issue here.

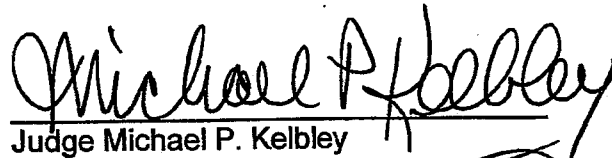
Additionally, construing the record and all inferences in favor of Bleckinger as this Court must, this Court finds that the relationship between U.S. Bank and OCWEN is not entirely clear from the facts – thus further putting the identity of the loan servicer here at issue. There appears in the record evidence that OCWEN and U.S. Bank have some nature of a relationship with each other as it relates to servicing Bleckinger's loan.

Perhaps most notably, there appear matching Florida business addresses listed for both the Plaintiff's agent that is identified as answering Defendant's interrogatories, and the business address of OCWEN listed on the mortgage assignment from OCWEN to U.S. Bank. Further, Plaintiff's denial that OCWEN is the loan servicer for Bleckinger's mortgage is cast into considerable doubt because it appears that Plaintiff misspelled "OCWEN" in said request for admission.

Alternatively, even if U.S. Bank's contended position as to the loan servicer is accurate and U.S. Bank is relieved of any duty to Bleckinger under Treasury Supplemental Directive 09-01, U.S. Bank as the trustee of the mortgage investor may still have some role to play under Treasury Supplemental Directive 10-02 before foreclosure can conclude. Directive 10-02 requires mortgage servicers to provide a list to Treasury of any investors not participating in HAMP and to contact said investors in writing to encourage participation. Treas. Supp. Dir. 10-02 at 9, 10. There is nothing in the record to suggest that the loan servicer here, whether OCWEN or U.S. Bank, has completed this requirement.

Ultimately, Plaintiff U.S. Bank carries the burden of proof in motioning for Summary Judgment here and could satisfy many, if not all, of the aforementioned issues of fact by simply providing evidence in support of Plaintiff's contentions. Plaintiff has failed to provide, however, evidence that it has made reasonable efforts to evaluate Defendant's HAMP eligibility, or that Plaintiff's HAMP application has been denied, or any similar factual evidence that would eliminate the genuine issues surrounding them. Viewing these issues in a light most favorable to Bleckinger, reasonable minds cannot reach but one conclusion. This Court finds that discovery is well warranted and indeed

necessary in this matter in order to shed light upon the aforementioned genuine issues of material facts that preclude this Court from granting U.S. Bank's Motion for Summary Judgment. Accordingly, Plaintiff's Motion for Summary Judgment is hereby **DENIED**.


Judge Michael P. Kelbley

TO THE CLERK: Please furnish a copy of the foregoing to the parties by regular U.S. Mail.

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
10 OCT 13 PM 1:23
MARY K. WARD
CLERK

BY: RACHEL LABUSH
rlabush@clsphila.org
I.D. NO: 200285
COMMUNITY LEGAL SERVICES
1424 CHESTNUT ST.
PHILADELPHIA, PA 19102
(215) 981-3739

ATTORNEY FOR DEFENDANT

ONEWEST BANK FSB
Plaintiff,

v.

ESTATE OF MR F, SR,
MS. F
Defendants,

: COURT OF COMMON PLEAS
: PHILADELPHIA COUNTY
:
:
:
:
:
:
:

NOTICE TO PLEAD

TO: OneWest Bank FSB, Plaintiff,

You are hereby notified to file a written response to the enclosed Answer and New Matter within twenty (20) days from the date of service hereof or a judgment may be entered against you.

Rachel Labush, Esq.
Attorney for Defendant Ms. F.

DEFENDANT MS. F'S ANSWER AND NEW MATTER

ANSWER

Defendant Ms. F. avers that she has a full, just and complete defense to the matters set out in the complaint, the nature of which is as follows:

1. Paragraph 1 is admitted
2. Paragraph 2 is admitted in part and denied in part. It is admitted that Mr. F., Sr. and Ms. F. were the real owners of the property at the time the mortgage was executed, but it is denied that Mr. F. Sr. is a real owner of the property now. Ms. F became sole owner of the

property upon Mr. F.'s death on February 3, 2010 because Defendants owned the property as tenants by the entireties with right of survivorship. A copy of the deed is attached hereto as Exhibit A, and a copy of Mr. F.'s death certificate is attached hereto as Exhibit B.

3. Paragraph 3 is admitted.

4. Paragraph 4 is admitted.

5. Paragraph 5 is admitted in part and denied in part. By way of further answer, Ms. F. admits in good faith to missing some monthly mortgage payments. However, it is denied as a conclusion of law, and by implication, for the reasons set forth below in New Matter and incorporated herein in full by reference, that the Mortgage is in default, or in the alternative, that it is in other than merely technical default. In summary, Plaintiff's right to foreclose on the mortgage is denied because Plaintiff refused to negotiate with Ms. F. after Mr. F.'s death, and did not review her eligibility for a loan modification as required under the federal Home Affordable Modification Program (HAMP) before accelerating the mortgage and commencing this foreclosure action.

6. Paragraph 6 is denied as a conclusion of law, and for the reasons set forth in paragraph 5 above and under New Matter, namely that it is denied that the amounts listed in this paragraph are due to Plaintiff on the Mortgage, including the attorneys fees and costs, because Plaintiff is not entitled to accelerate and foreclose on the mortgage without first reviewing Ms. F.'s eligibility for a loan modification under HAMP. Pursuant to Pa. R.C.P. 1019 (h) the allegations concerning the interest rate and monthly late charge amount are based on provisions of the underlying note, a writing which is not of record and cannot be incorporated under Rule 1019(g), and therefore is required to be attached to this pleading. Furthermore, the remaining principal balance, whether monthly late charges were in fact charged to the account, and costs of

suit and title search are also allegations to which Defendant cannot respond because these amounts are based on writings in the hands of third parties and Defendant does not have the knowledge, information or belief to respond. Finally, as a matter of law, Plaintiff is not entitled to late charges after acceleration of the debt, and the attorney's fees are not bona fide and reasonable based on the mortgage as explained in the response to paragraph 7.

7. Paragraph 7 is denied. For the reasons set forth above, no fee is due. In the alternative, the fees claimed are excessive.

8. The allegations of paragraph 8 of the complaint are denied as statements of Plaintiff's intent that do not require response.

9. Paragraph 9 is admitted.

WHEREFORE, Defendant Ms. F. requests that this Court enter judgment in her favor and against Plaintiff, dismissing the instant foreclosure action and disallowing all fees associated with the instant foreclosure.

NEW MATTER

In further answer to Plaintiff's complaint Defendant Ms. F. avers the following new matter:

10. The allegations, facts and averments contained in paragraphs 1-9, supra., are incorporated by reference pursuant to P.R.C.P. 1019(g).

11. Mr. and Mrs. F. lived at 100 Main Street ("the property") since 1990, when they moved in as renters.

12. Ms. F. purchased the property in 1999 for \$10,000 and she and Mr. F. spent over \$50,000 fixing up the house. The work included remodeling the kitchen, bathroom, living room,

and dining room, installing new windows, new roof, new wiring, and new heating system, and putting in wall to wall carpeting.

13. Ms. F. married Mr. F. on June 11, 2005 and added him to the deed so that they could obtain this mortgage.

14. Mr. and Ms. F. owned the property as tenants by the entirety with the common law rights of survivorship. A copy of the deed is attached hereto as Exhibit A.

15. Mr. F. passed away on February 3, 2010. A copy of the death certificate is attached hereto as Exhibit B.

16. Upon Mr. F.'s death, Ms. F. became the sole owner of the property.

17. The F.s experienced a loss of income during Mr. F.'s illness because he was unable to work and Ms. F.'s income was reduced while she cared for him.

18. Ms. F.'s sole source of income currently is Social Security of \$767 per month, but she has applied for a pension from the Veterans Administration which is likely to increase her income substantially.

19. Ms. F. contacted IndyMac Mortgage Services, servicer for Plaintiff OneWest Bank, FSB, attempting to get a forbearance agreement after Mr. F. passed away and the household income decreased.

20. Plaintiff refused to communicate with Ms. F. because it said she was not on the Note.

21. Ms. F. sought help from housing counselor Nancy Cruz at APM, and Plaintiff refused to communicate with Ms. Cruz because it would not accept an authorization from Ms. F..

**Equitable and Contractual Defense Based on Defendant's Rights Under
the Home Affordable Modification Program and Servicer Participation Agreement**

22. Defendant realleges and incorporates by reference all preceding paragraphs.

23. Plaintiff OneWest has entered into a Servicer Participation Agreement (“the Agreement”) in the Home Affordable Modification Program (“HAMP”). A copy of the Agreement is attached as Exhibit C and is also available at <http://www.financialstability.gov/docs/HAMP/OneWest%20Bank.pdf>.

24. HAMP was designed by the Obama Administration as a key component of its efforts to enable the recovery of the Nation’s economy, as well as to enable homeowners facing foreclosure to save their homes.

25. Under HAMP, OneWest is required to offer loan modifications to eligible borrowers, as provided in “supplemental directives,” “program documentation,” and other regulatory guidelines issued by the U.S. Department of the Treasury, Fannie Mae, and/or Freddie Mac. *See* Section 1(A) of the Agreement.

26. OneWest is required to perform the services agreed to in the Agreement for all the mortgage loans it services, including the loan underlying the instant matter. *See* Section 2(A) of the Agreement.

27. Ms. F. has made a request to OneWest for a loan modification pursuant to HAMP.

28. On information and belief, Ms. F. is eligible for a loan modification pursuant to HAMP.

29. OneWest has refused even to consider Ms. F. for a loan modification under HAMP because she allegedly is not on the Note.

30. Under HAMP, OneWest is not permitted to refer a mortgage to foreclosure or conduct a foreclosure sale without first making an effort to review the homeowner’s eligibility for a modification under HAMP, and is not permitted to foreclose if the homeowner is eligible

for HAMP. See HAMP Handbook § 3.1. The Handbook is available at https://www.hmpadmin.com/portal/docs/hamp_servicer/mhahandbook.pdf

31. Plaintiff is therefore prohibited from proceeding with this foreclosure action unless and until it reviews Ms. F.'s eligibility for a loan modification under HAMP and finds her to be ineligible.

32. HAMP guidance does not require the original borrower to sign modification documents if the borrower is deceased. See HAMP Handbook § 5.7.

33. In addition, the Garn-St. Germain Act, 12 U.S.C. § 1701j-3, forbids lenders from exercising due-on-sale clauses upon "a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety," "a transfer to a relative resulting from the death of a borrower" or "a transfer where the spouse or children of the borrower become an owner of the property." All of these situations apply in this case.

34. Plaintiff's refusal to deal with Ms. F. when she became sole owner of the property after Mr. F.'s death is a violation of 12 U.S.C. § 1701j-3.

35. Given the failure of Plaintiff to comply with the HAMP guidelines, it would be inequitable for the Court to allow foreclosure or to allow Ms. F. to lose her home.

36. Ms. F. is a third party beneficiary of the Agreement and is entitled to enforce its terms as applied to her mortgage loan.

WHEREFORE, Defendant Ms. F. requests that the Court exercise its equitable powers to deny the foreclosure remedy to Plaintiff and compel Plaintiff to comply with the requirements of the Home Affordable Modification Program, or in the alternative compel Plaintiff to enter into a fair and equitable repayment arrangement with Defendant.

AURORA LOAN SERVICES, LLC
327 Inverness DR
Englewood, CO 80112

Plaintiff

v.

Defendant

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
CIVIL DIVISION

MOTION TO SET ASIDE SALE

Defendant through her above-named counsel, moves for this Honorable Court to set aside the sheriff's sale of her home held on October 6, 2009 and in support thereof avers:

1. Plaintiff/Respondent is Aurora Loan Services, LLC whose principal place of business is located at 327 Inverness DR, Englewood, Co 80112.
2. Defendant/Petitioner is
3. Ms. Defendant lost her job of 16 years and as a result, fell behind on her mortgage payments.
4. Aurora Loan Services, the Plaintiff/Respondent, is the servicer of the loan as well as the most recent assignee of record of the mortgage.
5. Aurora commenced this action in mortgage foreclosure on August 8, 2007.
6. A Default Judgment against Ms. Defendant was entered on February 14, 2008 in the amount of \$59,052.52.
7. A sheriff's sale was scheduled for May or June of 2008.
8. The May or June 2008 sheriff's sale was postponed by this Court's Residential Mortgage Foreclosure Diversion Program.
9. Ms. Defendant entered into a forbearance agreement with Aurora.

10. In a letter dated March 31, 2009, Aurora declared Ms. Defendant compliant with the terms of the forbearance agreement and offered her a permanent home retention option. See attached copy of the letter dated March 31, 2009 marked as Exhibit A.
11. Aurora offered Ms. Defendant a new forbearance agreement that would begin on May 15, 2009 and go through August 15, 2009. See attached of e-mail dated April 29, 2009 from Aurora's counsel marked as Exhibit B.
12. The terms of the agreement were above Ms. Defendant's means.
13. In March of 2009, the Home Affordable Modification Program (HAMP) became available. The rules and requirements of HAMP are set forth more fully below.
14. Ms. Defendant submitted an application for consideration under HAMP in June of 2009 and then, due to clerical error on the part of Aurora, had to re-submit the application on July 9, 2009.
15. The sheriff's sale of Ms. Defendant home was postponed by Aurora's attorney on several occasions throughout the foreclosure proceeding so long as Petition remained compliant with the terms of the forbearance agreement.
16. On September 30, 2009, Aurora's counsel in the instant foreclosure case acknowledged in an email to Ms. Defendant' housing counselor that Aurora had received Ms. Defendant' HAMP application and would review it. See Exhibit C.
17. Under HAMP guidelines, a loan servicer may not proceed with a foreclosure sale while a mortgagor is under consideration for HAMP.
18. Aurora proceeded with the sheriff's sale on October 6, 2009, less than a week after its attorney had acknowledging receipt of the HAMP application. See Exhibit D, copy of Writ.

19. Upon information and belief, the purchaser at Sheriff's Sale was Plaintiff/Aurora.
20. Upon information and belief, the Sheriff has not delivered the deed to Aurora pending review of Ms. Defendant's application for the HAMP.
21. Ms. Defendant argues that the Sheriff's Sale should be set aside based on the following facts and argument:

The Sheriff's Sale should be set aside because Aurora violated HAMP

22. The foregoing paragraphs are realleged and incorporated by reference.
23. HAMP is a federal program that modifies the mortgages of homeowners facing foreclosure in order to further its objective of recovering and maintaining stability in the currently depressed national economy.
24. HAMP is administered by the U.S Department of Treasury.
25. Aurora is a loan servicer participating in HAMP.
26. All loan servicers who agree to participate in HAMP for monetary consideration are contractually bound to modify loans in accordance with the guidelines determined by the U.S. Department of Treasury that were issued on March 4, 2009 and as amended and clarified through subsequent supplemental directives and other program documentation. See attached copy of HAMP guidelines, marked as Exhibit E.
27. According to the HAMP Supplemental Directive 09-1, servicers "should not proceed with a foreclosure sale until the borrower has been evaluated for the program and, if eligible, an offer to participate has been made" See Supplemental Directive 09-1 marked as Exhibit F, page 14.
28. Under HAMP, a mortgagor is eligible for a modification where:
 - a. the real property is her primary residence,

- b. the total mortgage amount on the property is less than \$729,750
- c. the monthly mortgage payment is higher than 31% of the mortgagor's gross income,
- d. the mortgagor is having trouble making payments due to a change in income or loan payment, or other hardship, and
- e. The mortgage was entered into prior to January 1, 2009.

29. Ms. Defendant, based on the above criteria, was eligible for a HAMP modification at the time of her application.

30. Furthermore, Ms. Defendant is now employed and able to make payments on a loan modification agreement compliant with HAMP or other foreclosure prevention options.

31. Aurora should have postponed the sheriff's sale of the property until Ms. Defendant, as a homeowner eligible for a loan modification under HAMP, had been fully and fairly considered for such a modification.

WHEREFORE, Defendant respectfully requests that this Honorable Court set aside the sheriff's sale of her home that occurred on October 6, 2009 pursuant to Pa. R Civ. P 3132.

Respectfully submitted,

COMMUNITY LEGAL SERVICES, INC.

Attorney for Defendant

AURORA LOAN SERVICES, LLC
327 Inverness DR
Englewood, CO 80112

Plaintiff

v.

Defendant

: COURT OF COMMON PLEAS
:
: PHILADELPHIA COUNTY
:
: CIVIL DIVISION
:
:
:
:
:

**DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SET
ASIDE A SHERIFF'S SALE**

I. MATTER BEFORE THE COURT

The matter before the Court is the Defendant's Motion to Set Aside a Sheriff's Sale. As set forth in the preceding Motion and discussed below, the Sheriff's sale should be set aside as invalid because Plaintiff, under its agreement with the U.S. Department of Treasury, should have postponed the mortgage foreclosure proceedings while considering Defendant for the Home Affordable Modification Program. Defendant, through above-named counsel, therefore, respectfully requests that this Court grant the Motion and issue an order setting aside the sheriff's sale of her home that occurred on October 6, 2009 and staying any further action on the judgment in this matter.

II. STATEMENT OF QUESTION INVOLVED

In a mortgage foreclosure action, should a Motion to Set Aside a Sheriff's Sale be granted pursuant to Pa. R. Civ. P. 3132 where Plaintiff failed to postpone mortgage foreclosure proceedings while considering Defendant for a loan modification contrary to Plaintiff's obligations under the Home Affordable Modification Program?

Proposed Answer: Yes.

III. STATEMENT OF FACTS

1. Plaintiff/Respondent is Aurora Loan Services, LLC whose principal place of business is located at 327 Inverness DR, Englewood, Co 80112.
2. Defendant/Petitioner is.
3. Ms. Defendant lost her job of 16 years with the Veterans Affairs Medical Center and, as a result, fell behind in her mortgage payments.
4. Aurora commenced an action in mortgage foreclosure on August 8, 2007.
5. A Default Judgment against Ms. Defendant was entered on February 14, 2008 in the amount of \$59,052.52.
6. Ms. Defendant's home was scheduled to be sold at sheriff's sale in May or June of 2008.
7. The May or June 2008 sheriff's sale was postponed by this Court's Residential Mortgage Foreclosure Diversion Program.
8. Ms. Defendant entered into a forbearance agreement with Aurora.
9. In a letter dated March 31, 2009, Aurora declared Petitioner to be compliant with the terms of her forbearance agreement and offered her a permanent home retention agreement. See Exhibit A.

10. Aurora offered Ms. Defendant a new forbearance agreement that would begin on May 15, 2009 and go through August 15, 2009. See Exhibit B.
11. The terms of the agreement were above Ms. Defendant's means.
12. In March of 2009, the Home Affordable Modification Program (HAMP) became available. The rules and requirements of HAMP are set forth more fully below.
13. Ms. Defendant submitted an application for consideration under HAMP in June of 2009 and then, due to clerical error on the part of Aurora, had to re-submit the application on July 9, 2009.
14. The sheriff's sale of Ms. Defendant's home was postponed by Aurora's attorney on several occasions throughout the foreclosure proceedings so long as Ms. Defendant remained compliant with her forbearance agreement.
15. It was Ms. Defendant's understanding, based on prior dealings and in accordance with HAMP guidelines, that Aurora had postponed the sheriff's sale scheduled for October 6, 2009 as well pending their consideration of her HAMP application.
16. Aurora filed for a writ of execution, which was entered in September of 2009. See a copy of Writ No. 260-321 marked as Exhibit D.
17. Ms. Defendant's housing counselor received an e-mail from Aurora's attorney of record on September 30, 2009 confirming that Ms. Defendant application had been received and was still under review for HAMP. See Exhibit C.
18. On October 6, 2009, Aurora proceeded with the sheriff's sale.
19. Upon information and belief, the purchaser at sheriff's sale is Aurora.
20. Upon information and belief, the Sheriff has not delivered the deed to Aurora pending review Ms. Defendant's application for a loan modification.

IV. ARGUMENT

Ms. Defendant's Petition to Set Aside a Sheriff's Sale should be granted and the sale deemed set aside because Aurora should not have proceeded with the sale while considering Ms. Defendant for a loan modification under the Home Affordable Modification Program, hereinafter referred to as "HAMP" or "the Program".

A sheriff's sale may be set aside upon petition of an interested party where "upon proper cause shown" the court deems it "just and proper under the circumstances" pursuant to Pa.R.Civ.P. 3132. The burden of proving circumstances warranting the exercise of the court's equitable powers is on the petitioner. Bornman v. Gordon, 363 Pa. Super. 607, 527 A.2d 109, 111 ([Pa. Super.] 1987). Courts have entertained petitions and granted relief where the validity of sale proceedings is challenged, or a deficiency pertaining to the notice of sale exists or where misconduct occurs in the bidding process. National Penn Bank v. Shaffer, 448 Pa. Super. 496, 672 A.2d 326 ([Pa. Super.] 1996). In addition, "oppressive and bad faith conduct" by the judgment creditor that results in "unfairness to the defendant" may justify the setting aside of the sale. Goodrich Amram 2d Sec. 3132:10, citing M.Barmann & Sons v. Dice, 74 Pa. D. & C.2d 608, 1976 WL 17415 (C.P. 1976).

In this case, Aurora, the judgment creditor, acted oppressively, ostensibly in bad faith, with a stunningly unfair result for Ms. Defendant. The sale clearly should not have taken place.

Congress created the Home Affordable Modification Program (HAMP) under the Emergency Economic Stabilization Act of 2008 as amended by the American Recovery and Reinvestment Act of 2009.. The objective of HAMP is to enable responsible

homeowners who are in imminent danger of or currently experiencing a change in financial circumstances resulting in economic hardship to save their homes. To be eligible for HAMP, (1) the real property must be the mortgagor's primary residence; (2) the total mortgage amount on the property must be less than \$729,750; (3) the monthly mortgage payments must be 31% or more of the mortgagor's gross income; and (4) the mortgage must have originated prior to January 1, 2009. Supplemental Directive 09-01.

In order to participate in the Program, loan servicers, such as Aurora, sign an agreement with the U.S. Department of Treasury to modify loans in accordance with program guidelines, supplemental directives, and other program documentation issued by the U.S. Department of the Treasury, Fannie Mae, and/or Freddie Mac. See Section 1 of the sample Servicer Participation Agreement, hereinafter referred to as "the Agreement" and marked as Exhibit X.

HAMP Supplemental Directive 09-1 (Exhibit x), at page 14, states "[t]o ensure that a borrower currently at risk of foreclosure has the opportunity to apply for the HAMP, servicers should not proceed with a foreclosure sale until the borrower has been evaluated for the program and, if eligible, an offer to participate in the HAMP has been made." Further, the HAMP "FAQs" (Frequently Asked Questions), in response to question #3, state, "Foreclosure actions (with the exception of those in Georgia, Hawaii, Missouri and Virginia), including initiation of new foreclosure actions, must be postponed for all borrowers that meet the minimum HAMP eligibility criteria." See Exhibit ????, Sup. Dir. 09-1 and HAMP FAQs.

A Michigan appellate court issued an opinion less than two months ago setting aside a sale in one of the first written opinions in the country applying HAMP in a

foreclosure case where an execution sale had already taken place. The opinion in Deutsche Bank National Trust Co. v. Hass, Case No. 2009-2627, was entered by Circuit Judge Donald G. Miller of the Macomb County, Michigan, Circuit Court, in favor of setting aside a sheriff's sale for failure of the loan servicer to comply with HAMP. See attached copy of the case marked as Exhibit H.

In Hass, husband and wife, Susan and Robert Hass fell behind on their mortgage payments when they both lost their jobs. The servicing agent for the foreclosure plaintiff (Wells Fargo) rejected a possible mortgage modification, commenced foreclosure proceedings, and, in July of 2008, conducted a foreclosure sale and purchased the property. During the redemption period, HAMP became available. The Hass' filed suit stating that HAMP had been violated and asking that the sale be set aside. The lower court denied the Hass' request, and they appealed to the Circuit Court. Judge Miller determined that Hass' were apparently eligible under HAMP and further held that upon remand "if it is ultimately found [by the District Court] that Wells Fargo [or Appellee as part of the Wells Fargo 'family'] is the servicer of the subject loan, then it is bound by the terms of its written agreement with the federal government" and the sale should be set aside.

Aurora in the instant matter is under an identical obligation under HAMP to fully and fairly consider homeowners for home mortgage modifications or other foreclosure prevention options.

Aurora's having conducted the sheriff sale less than a week after Ms. Defendant was notified that she was being considered for HAMP constitutes "oppressive" and "bad faith" conduct resulting in "unfairness to the defendant" which in turn constitutes

circumstances in which it is "just and proper" to set aside the sale, pursuant to Pa.R.Civ.P. 3132 and to the opinion in M.Barmann & Sons v. Dice, 74 Pa. D. & C.2d 08, 1976 WL 17415 (C.P. 1976).

Pennsylvania courts have long enforced federal foreclosure prevention programs as equitable defenses. In F.N.M.A. v. Smith, the Superior Court held that the failure of a mortgage servicer to follow federal mortgage servicing requirements is an equitable defense to foreclosure in Pennsylvania. F.N.M.A. v. Smith, 530 A.2d 919 (Pa.Super.1987); *See also* Commonwealth of PA School Employees Retirement Fund v. Terrell, 582 A. 2d 367 (Pa. Super 1990). Failure to comply with Veterans Administration mortgage servicing programs is also an equitable defense to foreclosure in Pennsylvania. Union National Bank of Little Rock v. Cobbs, 389 Pa.Super.509, 567 A.2d 719 (1989).

In Smith, the Superior Court found that the lower court erred in granting summary judgment for the plaintiff and stated:

[T]rial courts in Pennsylvania may exercise their equity powers to restrict a mortgagee who has not, within the reasonable expectations of good faith and fair dealing, followed or applied the forbearance provisions of the HUD regulations and Handbook. 530 A. 2d at 923.

The Superior Court went on to say in Smith:

Merely rubber-stamping mortgagees' foreclosure actions, when they have acted barely within the formal legal bounds of these loosely defined housing programs, will contribute further to the needless loss of homes and to the creation of virtual ghost areas within our inner cities. Foreclosure courts need not woodenly perpetuate the national tragedy surrounding quick foreclosures. Id. at 923.

The Superior Court in Smith enforced the federal mortgage rules as "sensible, equitable standards of conduct, consistent with, and issued in furtherance of, the national housing goals." Id. at 923.

Here, the Court should follow the example offered by the courts in Smith, Dice and Hass and set aside the sheriff sale conducted in violation of HAMP.

V. RELIEF SOUGHT

For the aforementioned reasons, Petitioner prays that this Court will grant the preceding Petition setting aside as invalid the sheriff's sale of Petitioner's home that occurred on October 6, 2009 and stay any further action on the judgment in this matter.

Respectfully submitted,

COMMUNITY LEGAL SERVICES, INC.

Attorney for Defendant

ORDER

AND NOW, this _____ day of _____, 2009, upon consideration of Defendant's Motion to Set Aside Sheriff Sale and a hearing on this matter held on _____, 2009, it is hereby ORDERED that completion of the sale of the property is prohibited until further order is entered by this Court.

It is further ORDERED that neither the Plaintiff, the Defendant, the Philadelphia Sheriff's Office, nor any other person or agency, shall take any steps to transfer or deliver the deed, tender or accept any further payment, record a deed or take any other steps to complete the sale of the property until further Order(s) are entered by the Court.

Further, Plaintiff is ORDERED to comply with the Home Affordable Modification Program ("the Program") guidelines and fully and fairly consider Defendant for the Program.

A status hearing on this matter is scheduled for _____, 2009 at _____ a.m. /p.m.

BY THE COURT:

J. _____