Clearinghouse REVIEW

Journal of Poverty Law and Policy

November–December 2010
Volume 44, Numbers 7–8

TOWARD HEALTH INSURANCE COVERAGE FOR ALL AMERICANS

SHRIVER CENTER
Sargent Shriver National Center on Poverty Law

Enforcing the Home Affordable Modification Program Through the Courts

By Rebekah Cook-Mack and Sarah Parady

[**Editor's Note:** This article is an adaptation of Rebekah Cook-Mack & Sarah Parady, *Home Modification Program Enforcement Through the Courts*, 40 National Housing Law Project Bulletin 136 (2010).]

Rebekah Cook-Mack
Staff Attorney

Foreclosure Prevention Project
South Brooklyn Legal Services
105 Court St. 3d Floor
Brooklyn, NY 11201
718.237.5549
rebekahcm@sbls.org

Sarah Parady
Skadden Fellow

Colorado Legal Services
1905 Sherman St. Suite 400
Denver, CO 80203
303.866.9372
sparady@colegalserv.org

President Obama announced the Home Affordable Modification Program (HAMP) in March 2009 as part of his Making Home Affordable Initiative. Originating in the Financial Stability Act of 2009, the same legislation that created the much-maligned TARP (Troubled Asset Relief Program), HAMP was intended to modify three to four million mortgages by the end of 2012. As of July 2010, fewer than 440,000 final loan modifications under the program were in place.[1] The program's failure to give homeowners the assistance that they sorely need has been well documented.[2] Advocates have turned to the courts to interpret and apply the program's governing directives to revive its goal of "help[ing] the hardest hit."[3]

HAMP enforcement litigation reflects the program's disappointing performance, with loan servicer compliance and government oversight halfhearted at best. That homeowners, as a last resort, must turn to the courts to force loan servicers to adhere to the program's guidelines is alarming in light of the program's aspirations and its importance to our communities and national economic well-being.

Homeowners may be eligible for a HAMP modification in one of two situations: if a government-sponsored entity—Fannie Mae or Freddie Mac—owns the mortgage or if the mortgage servicer signs a servicer participation agreement with Fannie Mae, which acts as fiscal agent for the U.S. Department of the Treasury. Participating servicers agree, in exchange for incentive payments from the Treasury, to evaluate homeowners for loan modification pursuant to Treasury-issued program documentation and to grant modifications to eligible homeowners who pass a "net present value" test.[4] Net present value is a formula used to determine which outcome will ultimately be more profitable to the holder of the mortgage: sale after foreclosure (taking related costs into account) or loan modification under HAMP terms. Homeowners who qualify

[1]See Making Home Affordable, Making Home Affordable Program: Servicer Performance Report Through July 2010, at 2 (n.d.), http://bit.ly/b31Wla.

[2]See, e.g., Office of the Special Inspector General for the Troubled Asset Relief Program, SIGTARP-10-005, Factors Affecting Implementation of the Home Affordable Modification Program (March 25, 2010), http://bit.ly/91UVql; Congressional Oversight Panel, October Oversight Report: An Assessment of Foreclosure Mitigation Efforts After Six Months (2009), http://bit.ly/aOQ5Cy.

[3]See Making Home Affordable Program, Handbook for Services of Non-GSE Mortgages (Sept. 22, 2010), http://bit.ly/c3Ouz4.

[4]Section 1(A) of each servicer participation agreement provides that the U.S. Department of the Treasury will periodically issue program guidelines, denoted "program documentation." The "supplemental directives" in the program documentation are now largely incorporated into and superseded by the Making Home Affordable (MHA) Handbook. All program documentation is available at http://bit.ly/9kHXb6.

Join the HAMP Enforcement E-Mail List for Pleadings and Decisions

Rebekah Cook-Mack & Sarah Parady administer an e-mail list dedicated to tracking and discussing Home Affordable Modification Program–related litigation, and they encourage advocates to join the list by e-mailing Sarah Parady (sparady@colegalserv.org). List members have access to a repository of case pleadings and court decisions such as those cited here (Rebekah Cook-Mack & Sarah Parady, *Enforcing the Home Affordable Modification Program Through the Courts*, 44 Clearinghouse Review 371 (Nov.–Dec. 2010)).

for modification must be offered a three-month trial-period plan; if they make regular timely payments, their loans must be modified permanently by reducing the interest rate, extending the loan term, and forbearing principal, as needed.

The foreclosure process in which HAMP enforcement can be raised by advocates varies widely. In some states the process is judicial, while in others it is carried out without court supervision. Many states and localities have implemented mediation programs designed to help facilitate nonforeclosure resolutions to mortgage default. Some state judiciaries and legislatures have even created procedural requirements specific to the program: the South Carolina and Connecticut court systems have responded to the program's failure by issuing administrative orders requiring an affidavit of compliance with the program as a prerequisite to foreclosure, and an Illinois statute requires judges to set aside foreclosure sales if a mortgagor proves that a program review was not completed before the sale occurred.[5]

HAMP Noncompliance as a Foreclosure Defense

Servicers' failure to comply with HAMP has been the basis for successful defense to foreclosure in both judicial and nonjudicial foreclosure states. Where program directives have been violated, these successful defenses suggest strategies to forestall foreclosure actions and give clients time to obtain a modification.[6] Program violations implicate traditional legal and equitable defenses such as waiver, estoppel, and unclean hands. Because foreclosure is an action in equity, courts also have broad authority to enforce the program through their equitable powers, without relying on a specific state-law defense.[7]

Judicial Foreclosure Proceedings. A judicial foreclosure presents a procedural opportunity to raise defenses before sale. Judges in these equitable proceedings have shown a willingness to take noncompliance seriously and to apply common sense. Courts have denied foreclosing lenders' motions for summary judgment when lenders did not completely or correctly assess borrowers' eligibility for a HAMP modification.[8] The pleadings in these cases reveal that borrowers may raise program noncompliance through a wide variety of defenses and counterclaims.

In a few instances courts have even stayed postsale eviction proceedings due

[5]Re: Mortgage Foreclosures and the Home Affordable Modification Program (HMP), Admin. Order No. 2009-05-22-01 (S.C. Sup. Ct. May 22, 2009), http://bit.ly/bhPwk6; Mortgage Foreclosure Standing Order, Federal Loss Mitigation Programs, Admin. Order No. JD-CV-117 (Conn. Super. Ct. Aug. 4, 2010), http://bit.ly/cdl8xM; 735 Ill. Comp. Stat. 5/15-1508(d-5) (2010).

[6]Under Section 3 of the MHA Handbook, foreclosure actions must be halted entirely once a borrower enters a trial-period plan; in such cases advocates should move to delay hearings or dismiss servicer filings as premature.

[7]See David A. Super, *Defending Mortgage Foreclosures: Seeking a Role for Equity*, 43 Clearinghouse Review 104 (July–August 2009).

[8]See *U.S. Bank National Association North Dakota v. Peterman*, No. EQCV067378 (Iowa Dist. Ct. Linn County April 21, 2010); *Deutsche Bank National Trust Company v. Kane*, No. EQCV067273 (Iowa Dist. Ct. Linn County March 31, 2010); *Waterfall Victoria Master Fund Limited v. Hansen*, No. EQCV007412 (Iowa Dist. Ct. Benton County March 31, 2010); *HSBC Bank U.S.A. National Association v. Garcia*, No. EQCV027408 (Iowa Dist. Ct. Buena Vista County Nov. 12, 2009); *National City Real Estate Services Limited Liability Company v. Metzger*, No. EQCV065878 (Iowa Dist. Ct. Linn County Oct. 9, 2009); *BAC Home Loans Servicing Limited Partnership. v. Bates*, No. CV2009 06 2801 (Ohio Ct. Com. Pl. Butler County March 8, 2010); see also *HSBC v. Searls*, No. 08CV328 (Wis. Cir. Ct. Waushara County July 27, 2010) (ordering hearing on Home Affordable Modification Program (HAMP) compliance before sale could proceed). But see *Wells Fargo v. Small*, No. 8887/08 (N.Y. Sup. Ct. Queens County Feb. 16, 2010); *CitiMortgage v. Johnson*, No. CI20094421 (Ohio Ct. Com. Pl. Lucas County July 7, 2010).

to servicers' noncompliance.[9] Although asserting HAMP noncompliance post-sale may be difficult under many states' laws, some servicers may voluntarily rescind a sale if the foreclosed homeowner is program-eligible and an eviction answer or an affirmative lawsuit draws the servicer's attention to its error.

Advocates' pursuit of HAMP defenses has also laid the groundwork for successful *pro se* representation.[10] One Vermont judge raised HAMP noncompliance *sua sponte* in the course of dismissing a foreclosure complaint for lack of standing; the judge held that, upon refiling the action, "[p]laintiff will be required to demonstrate its efforts to comply with its HAMP obligations."[11] These developments underscore the importance of educating courts about the program and its requirements.

Nonjudicial Foreclosure Proceedings. In nonjudicial foreclosure states without mediation programs, advocates may have no procedural opportunity to raise HAMP or other defenses; an affirmative suit becomes the only opportunity to prevent an improper foreclosure sale from going forward. However, limited opportunities to raise defenses prior to sale may exist. For example, in Colorado the foreclosure process consists of a single hearing, limited by statute to the issue of whether the borrower has defaulted. The Colorado Supreme Court has expanded this hearing to allow homeowners to raise certain defenses to default. Advocates have succeeded in obtaining orders that authorize sale only if program requirements are met.[12]

Preforeclosure Mediation. HAMP noncompliance can be raised as a defense where preforeclosure mediation programs are in place.[13] Some mediation programs, among them those in Maine, the First Judicial District of New Mexico, New York, Oregon, and Providence, Rhode Island, impose a specific duty on lenders to negotiate in good faith with the borrower to reach a nonforeclosure resolution.[14] Advocates can raise program noncompliance as evidence of bad faith in support of a motion to dismiss the foreclosure action or, at a minimum, to forestall sale until the servicer complies.

In New York the Kings County Supreme Court rules now require a HAMP "status report" from plaintiff's counsel in all cases involving a program modification.[15] Servicer delay can be costly to homeowners, and mediators have begun issuing a wide range of directives to facilitate resolution. In one case, during the course of mediation, the unpaid principal balance grew by $140,000. The judicial hearing officer ultimately recommended dismissal for failure to comply

[9]*Huntington National Bank v. Reed*, No. 9018/2009 (N.Y. Sup. Ct. Saratoga County April 8, 2010) (staying eviction proceedings based on HAMP defense, although sale was subsequently permitted to proceed); *Mortgage Electronic Registration Systems Incorporated v. Petrella*, No. 2008-0425 (N.Y. Sup. Ct. Tompkins County Feb. 3, 2010) (denying writ of removal in eviction proceeding because plaintiff had not proven it conducted a HAMP review before sale); *IndyMac Mortgage FSB v. Dow*, No. CV2008 921 30404 (Wis. Circuit Ct. Outagamie County June 30, 2010) (refusing to approve completed sheriff's sale where homeowner did not receive a written denial letter). See also Motion to Set Aside Sale, *BankUnited FSB v. Tentler*, No. 09 CH 11760 (Illinois Cir. Ct. Cook County filed April 20, 2010).

[10]See, e.g., *BAC Home Loans Servicing Limited Partnership v. Murphy*, No. EQCV68414 (Iowa Dist. Ct. Linn County April 26, 2010).

[11]*GMAC Mortgage Limited Liability Company v. Riley*, No. 500-09 Fc (Vt. Super. Ct. Franklin County March 5, 2010).

[12]Colo. R. Civ. P. 120. See, e.g., *In re Application of U.S. Bank National Association for an Order Authorizing Sale*, No. 2010CV200944 (Colo. Dist. Ct. Arapahoe County March 22, 2010); *In re Application of Wells Fargo Financial Colorado Incorporated for an Order Authorizing Sale*, No. 2009CV10991 (Colo. Dist. Ct. Adams County March 12, 2010). But see *In re Application of JPMorgan Chase Bank National Association for an Order Authorizing Sale*, No. 2010 CV 2939 (Colo. Dist. Ct. Denver County Aug. 2, 2010) (finding HAMP issues to be outside scope of hearing and issuing unconditional order authorizing sale).

[13]Some twenty-six states and localities have mediation programs (see National Consumer Law Center, Summary of Programs (n.d.), http://bit.ly/c6PCMh; Geoff Walsh, *Foreclosure Mediations—Can They Make a Difference?*, 43 Clearinghouse Review 355 (Nov.–Dec. 2009)).

[14]*See* National Consumer Law Center, *supra* note 13. Other mediation plans make evaluation for a modification a prerequisite of foreclosure, which would have a similar effect if meaningfully enforced.

[15]Kings County, N.Y., Sup. Ct. Unif. Civ. Term R. G(6), http://bit.ly/96mnxN.

with "a precondition to foreclosure" (the program guidelines) and failure to negotiate in good faith.[16] Among the orders issued to facilitate settlement, mediators in New York have imposed schedules for accomplishing the tasks associated with a program application to avoid delay and have required servicer representatives to attend in person.[17] Mediators have tolled the accrual of interest pending action by servicers on long-delayed modifications.[18] Mediators have also required written denial letters consistent with the Treasury's Supplemental Directive 09-08.[19] Indeed, even before the supplemental directives required servicers to document investor restrictions on modifications, New York mediators used their equitable powers to require disclosure of such restrictions, which servicers frequently claim limit their authority to modify loans.[20] Similarly, while the values and formulas of the test for net present value remain shrouded in secrecy, during conferences courts have regularly obtained the input data that the servicers use to determine net present value.[21] The consequences of disobeying such orders range from delay of a servicer's ability to foreclose, to possible sanctions and dismissal with prejudice. As jurisdictions across the country adopt mediation programs, judges can be expected to respond similarly to the delays and improper denials that have become hallmarks of the program.

Affirmative Litigation Seeking HAMP Compliance

Servicers' failure to comply with the Treasury's program documentation requirements, coupled with inadequate government oversight, has forced many borrowers to file affirmative lawsuits that highlight HAMP's troubling aspects and the skyrocketing costs of its continued failure.[22] The program itself, because it

[16]*Bank of America v. [Redacted]* (N.Y. Sup. Ct. Kings County July 9, 2010). While these directives are part of the public record, they are not published decisions and were redacted out of concern for the privacy of the homeowners.

[17]New York settlement proceedings may be facilitated, depending on the county, by a judicial hearing officer, referee, or judge. In some counties judges are not available to issue orders; thus orders from different counties may be substantively similar but carry different weight (see, e.g., *Wells Fargo v. [Redacted]* (N.Y. Sup. Ct. Kings County May 17, 2010) (directing Wells Fargo to complete HAMP review and make a "knowledgeable agent" available at the next conference); *Wells Fargo v. [Redacted*] (N.Y. Sup. Ct. Kings County July 20, 2010) (requiring that claimed investor restrictions be produced in writing and that "a lawyer in Wells Fargo's in-house legal department and an underwriter from the executive response department" appear).

[18]See, e.g., *OneWest Bank v. [Redacted]* (N.Y. Sup. Ct. Richmond County March 24, 2010) (tolling interest "until a final HAMP modification or denial is delivered to defendant"); *U.S. Bank National Association v. [Redacted]* (N.Y. Sup. Ct. Richmond County July 21, 2010) (ordering servicer to explain "with specificity" why defendant did not qualify for HAMP, tolling interest, and ordering that defendant be reviewed for a non-HAMP modification); *BAC Home Loans ServicingLimited Partnership v. [Redacted]* (Conn. Super. Ct. Tolland County July 15, 2010) (tolling interest until "there is a disposition of the matter" where servicer was unavailable for consecutive mediation sessions).

[19]Supplemental Directive 09-08 is now incorporated into the MHA Handbook (see note 3 *supra*). Regarding the requirement of written denial letters, see, e.g., *JP Morgan Chase Bank v. [Redacted]* (N.Y. Sup. Ct. Richmond County June 3, 2010) (suspending and tolling interest and attorney fees where after HAMP denial Fannie Mae failed to offer an "alternate modification" and finding that plaintiff "has not dealt in good faith … and may be held in contempt of court"); *Wells Fargo v. [Redacted]* (N.Y. Sup. Ct. Richmond County Feb. 25, 2010) (ordering Wells Fargo to produce "documentation of efforts it has taken, pursuant to HAMP, to remove any restrictions or impediments to modification"); *Wells Fargo v. [Redacted]* (N.Y. Sup. Ct. Richmond County May 6, 2009) (ordering Wells Fargo "to delineate reasons why [borrowers] do not qualify for HAMP").

[20]See, e.g., *Wells Fargo v. [Redacted]* (N.Y. Sup. Ct. Richmond County Feb. 24, 2010) (ordering plaintiff to produce documentation of any applicable investor restriction on modification and its efforts to seek a waiver, and tolling interest through March 26, 2010). When the servicer had yet to comply with the prior order by the date of the conference, the court ordered a "Wells Fargo representative with full settlement authority to personally appear."

[21]In the recent financial reform legislation, the Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1482, 124 Stat. 1376 (2010), Congress required the secretary of the treasury to make the net-present-value test public. Regarding courts obtaining the net-present-value formula, see, e.g., *HSBC v. [Redacted]* (N.Y. Sup. Ct. Kings County May 3, 2010) (ordering HSBC to produce "all [net-present-value] inputs including property valuation," "any and all investor restrictions [and] requests for waivers," "a written explanation of why defendant's … income is insufficient," "copies of the income documents on which it relied," and "the name and contact information of the person who made the determination that the borrower is ineligible").

[22]The cases we discuss here focus on violations that prevent a final modification. However, final modifications themselves often contain basic mathematical errors or capitalize impermissible fees or both. Resolving such errors or subsequent errors in credit reporting may also require litigation.

is contractual rather than statutory, provides no private right of action.[23] Suits premised on program violations have identified a wide range of causes of action, among them:[24]

- breach of the servicer participation agreement, which borrowers may enforce as intended third-party beneficiaries;
- breach of a signed trial-payment plan contract between the borrower and servicer;
- breach of the contractual duty of good faith and fair dealing in either of these contracts or the original mortgage;
- other common-law claims (e.g., breach of the duty of good faith and fair dealing, promissory estoppel, misrepresentation, negligence, fraud, infliction of emotional distress);[25] and
- state and federal statutory claims.[26]

A third-party beneficiary claim poses the most direct challenge to servicers' failure to comply with HAMP since success would make the servicer participation agreement and all program documentation requirements (imported as binding contract terms by Section 1(A) of the agreement) fully enforceable. Advocates in several jurisdictions have raised third-party beneficiary claims in both class actions and individual cases.[27]

Only in the Ninth Circuit have federal district courts ruled on a significant number of these claims.[28] Initial decisions, relying heavily on *Escobedo v. Countrywide Home Loans*, tended to reject third-party beneficiary claims summarily.[29] The *Escobedo* decision, from the Southern District of California, was premised on two alternate (and erroneous) conclusions: (1) that modification is purely discretionary under the servicer participation agreement (which states that the servicer "shall" modify loans that meet specific criteria when a modification meets the net-present-value test) and (2) that Ninth Circuit precedent requires third-party beneficiaries to show

[23]Section 101 of the Emergency Economic Stabilization Act of 2009, which created the Troubled Asset Relief Program, granted the Treasury the authority to promulgate programs to prevent foreclosure (Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101, 122 Stat. 3765 (2008)). No part of the Act creates a private right of action.

[24]The court in one case enforced HAMP directly without identifying a cause of action (*Deutsche Bank National Trust Company v. Hass*, No. 2009-2627-AV, slip op. at 5–9 (Mich. Cir. Ct. Macomb County Sept. 30, 2009) (remanding for determination of whether Wells Fargo was servicer of foreclosed loan and, if so, for set-aside of foreclosure sale due to breaches of servicer participation agreement)).

[25]See, e.g., class action complaints in *Follmer v. Bank of America*, No. 2010cv01435 (D. Ariz. filed July 7, 2010), and *Brewer v. Bank of America*, No. CV-10-1884 (N.D. Cal. filed April 30, 2010); complaints in *Begum v. JP Morgan Chase Bank*, No. 10cv2014 (E.D.N.Y. filed May 4, 2010), *Ponder v. Bank of America*, No. 10cv81 (S.D. Ohio filed Feb. 10, 2010), *Hausam v. Homecomings Finance*, No. 09cv1437 (D. Or. filed Dec. 4, 2009), *Harryman v. BAC Home Loans Servicing Limited Partnership*, No. 10cv00051 (S.D. Tex. filed June 29, 2010); second amended complaints in *Simpson v. American Home Servicing, Incorporated*, No. 09C97 (N.D. W. Va. filed Dec. 16, 2009), and *Romero v. OneWest*, No. C 09-03122 (Cal. Super. Ct. Contra Costa County filed June 18, 2010); and amended verified complaint in *Rudan v. Metlife Bank*, No. CV OC 1006520 (Idaho D. Ct. Ada County filed June 1, 2010). One complaint raising good faith and fair dealing and promissory estoppel recently survived a motion to dismiss: *Akins v. Wells Fargo Bank*, No. CI 201002723 (Ohio Ct. Com. Pl. Lucas County Aug. 13, 2010).

[26]See, e.g., *Follmer*, No. 2010cv01435; *Romero*, No. C 09-03122; and *Simpson*, No. 09C97; and the complaint in *Kaczmarczyk v. Select Portfolio Servicing Incorporated*, No. 2010 CA 000937 CI (Fla. Cir. Ct. Osceola County filed Feb. 5, 2010). As large-scale servicing transfers continue, advocates should consider whether claims arise under the Fair Debt Collections Practices Act, particularly where a homeowner is referred to foreclosure in violation of the program documentation (see, e.g., *Romero*, No. C 09-03122).

[27]*Follmer*, No. 2010cv01435, and *Brewer*, No. CV-10-1884; class action complaints in *Matthews v. BAC Home Loans Servicing Limited Partnership* (C.D. Cal. filed July 26, 2010), and *Reese v. Citi Mortgage* (D. Utah filed Nov. 18, 2009); complaints in *Edwards v. Aurora Loan Services Limited Liability Company* (D.D.C. filed Nov. 9, 2009), *Kahlo v. Bank of America* (W.D. Wash. filed March 22, 2010), and *Willms v. LNV Corporation* (Colo. D. Ct. Adams County filed Oct. 27, 2009); *Hausam*, No. 09cv1437; *Romero*, No. C 09-03122.

[28]Under a standard clause in all servicer participation agreements, federal common law governs interpretation of the contract and the District Court of the District of Columbia is the forum for contract challenges. The effect of this clause is outside the scope of this article, but at least one court has refused to transfer to the District of Columbia (*Marques v. Wells Fargo*, No. 09cv1985, 2010 U.S. Dist. LEXIS 81879 (S.D. Cal. Aug. 12, 2010)).

[29]*Escobedo v. Countrywide Home Loans Incorporated*, 2009 WL 4981618 (S.D. Cal. Dec. 15, 2009).

that the parties *intended* the contract to be enforceable by the third party, not just that the contract *benefit* the third party. However, courts are now split. A recent decision from California's southern district rejected *Escobedo* and its progeny in no uncertain terms. After a painstaking analysis of the program documentation the court concluded:

> Upon a fair reading of the Agreement in its entirety and in the context of its enabling legislation, it is difficult to discern any substantial purpose other than to provide loan modification services to eligible borrowers …. The Agreement on its face expresses a clear intent to directly benefit the eligible borrowers.[30]

Thus the court held that the servicer participation agreement supports a third-party beneficiary claim under the Ninth Circuit standard requiring the underlying government contract to show a "clear intent to benefit" that party.[31] At least two state courts have also accepted borrowers' right to enforce the program.[32] Advocates should not shy away from tackling the "clear intent" standard and cite the considerable evidence in the public record and the program documentation that HAMP was created precisely to aid struggling homeowners.[33]

Direct Enforcement of Trial-Period Plan Contracts

Widespread servicer failure to convert trial-period plans into permanent modifications remains a significant hurdle for homeowners. Borrowers' lawsuits have attempted to enforce these plans as free-standing contracts that entitle homeowners to permanent modifications.[34]

Until recently trial-period plans were standard boilerplate agreements that were drafted by the Treasury and signed by the borrower and that governed how and when the trial would convert to a permanent modification. Now, under the Making Home Affordable (MHA) Handbook, trial-period plans are commenced by a notice stating:

> To accept this offer, you must make your first monthly "trial period payment." To qualify for a permanent modification, you must make the following trial period payments in a timely

[30] *Marques*, 2010 U.S. Dist. LEXIS 81879, at *6.

[31] *See Klamath Water Users Protective Association v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999); *County of Santa Clara v. Astra USA Incorporated*, 540 F.3d 1094, 1246 (9th Cir. 2008) (clarifying that "clear intent" can be present without specific mention of benefited party, if contracting entity "undertook a specific responsibility" to that party). Other circuits have varying third-party beneficiary standards and some have little case law on the topic. For general guidance, begin with the Restatement (Second) of Contracts (1979).

[32] *CitiMortgage v. Moores,* No. EQCV063490 (Iowa Dist. Ct. Linn County Aug. 4, 2010) (denying summary judgment, finding borrower had right to enforce HAMP as intended third-party beneficiary); see also *JPMorgan Chase*, No. 2010 CV 2939 (stating in dicta that "[t]here is certainly a basis upon which the Court could find that homeowners who are at risk for foreclosure are intended beneficiaries of the Servicer Participation Agreement, in that the specific purpose of Treasury's program is to assist such homeowners"). In both of these cases HAMP noncompliance was fully briefed as a defense to a foreclosure action.

[33] For well-briefed responses to servicers' standard arguments against third-party beneficiary claim, see Plaintiff's Response to Motion to Dismiss in *Kahlo* (W.D. Wash. filed March 22, 2010) and Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss in *Edwards* (D.D.C. filed Nov. 9, 2009).

[34] In 2010 Massachusetts consumer advocates filed, in federal district court, class actions against several HAMP servicers for failure to convert trial-period plans into permanent modifications (see *Durmic v. JP Morgan Chase Bank*, No. 10cv10380; *Johnson v. BAC Home Loans Servicing Limited Partnership*, No. 10cv10316; *Reyes v. IndyMac Mortgage Services*, No. 10cv10389 (voluntarily dismissed after named plaintiffs received modifications); *Bosque v. Wells Fargo Bank*, No. 10cv10311). Similar class actions were filed in Arizona (*Follmer*, No. 2010cv01435), California (*Brewer*, No. CV-10-1884; *Matthews* (C.D. Cal. filed July 26, 2010); *Bayramian v. Bank of America*, No. 10cv1458 (N.D. Cal. filed Apr. 6, 2010); and Washington (*Kahlo* (W.D. Wash. filed March 22, 2010))). For individual complaints, see, e.g., *Begum*, No. 10cv2014; *Ruplenas v. Bank of America*, No. 10CV50 (N.D. W.Va. filed Apr. 26, 2010); *Svejcar v. Federal National Mortgage Association*, No. 2010CV192 (Colo. Dist. Ct. Boulder County filed Feb. 21, 2010); *Kaczmarczyk*, No. 2010 CA 000937 CI; *Rudan*, No. CV OC 1006520; *[Redacted] v. Chase Home Finance* (Mich. Cir. Ct. Kent County filed Dec. 31, 2009); *Akins*, No. CI 201002723. Pursuant to 28 U.S.C. § 1407 several class actions brought against Bank of America have been consolidated for pretrial proceedings and transferred to the District of Massachusetts to be heard by Judge Rya Zobel as part of multidistrict litigation No. 2193 (*In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation*, No. 2193 (J.P.M.L. filed Aug. 4, 2010)).

> manner .... After all trial period payments are timely made and you have submitted all the required documents, your mortgage will be permanently modified.[35]

Accordingly borrowers now accept trial-period offers by performance rather than signature. Most suits to date have involved signed trial-period plans, but contract claims are equally available to enforce plans accepted under the new notice system.

Motions to dismiss in several of these suits cast light on likely servicer defenses. First, servicers point to a confusing provision in the boilerplate agreement stating that the plan "takes effect" only once a signed copy is returned to the borrower; servicers argue that the plan is thus an "agreement to agree" and not a contract.[36] This same paragraph requires servicers to return a signed copy if the borrower "qualifies" for a trial period, but servicers routinely fail to comply with this provision. Once a servicer accepts a borrower's trial-period payments, advocates should argue that the servicer has admitted that the borrower "qualifies" for the plan and a contract has formed. Servicers should not be allowed to rely on their own noncompliance with the signature requirement to escape basic principles of contract formation.

Servicers also argue that the trial-period plan is not a binding contract due to lack of consideration for the trial-period offer or that any consideration was already legally owed under another contract (the mortgage and note). This argument ignores the opportunity costs to a homeowner who, in pursuing a HAMP modification, forgoes other options such as making a larger portion of missed payments, selling the home, seeking an alternative arrangement with the servicer, pursuing outside assistance to bring the loan current, or simply walking away.[37] The homeowner's agreement to make predictable monthly payments and refrain from pursuing these other routes is of real benefit to the servicer. Furthermore, accepting a trial-period plan can carry costs—e.g., negative credit consequences and special fees incident upon preparing a modification, such as home inspection fees—beyond those that stem from default.

Servicers may raise a statute-of-frauds defense if one is available under state law. In many states, partial performance (i.e., the servicer's acceptance of trial-period payments) is an exception to the statute of frauds and can overcome this defense.[38] Even if this defense otherwise applies, the servicer may have signed and kept in its file (but never mailed) a copy of a borrower's trial-period plan, and this is a factual issue for discovery.

Assuming that an enforceable contract has formed, the trial-period plan's terms are clear: if borrower income has been verified and the net-present-value result is positive, the servicer *must* "send [the borrower] a Modification Agreement for [her] signature which will modify [her] Loan Documents as necessary to reflect this new payment amount and waive any unpaid late charges accrued to date."[39]

---

[35]Making Home Affordable, Home Affordable Modification Trial Period Plan Notice, http://bit.ly/a8NixA.

[36]"[A]fter I [the borrower] sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan if I qualify for the Offer or will send me written notice that I do not qualify for the Offer. This Plan will not take effect unless and until both the Lender and I sign it and Lender provides me with a copy of this Plan with the Lender's signature" (Home Affordable Modification Trial Period Plan, Fannie Mae/Freddie Mac Uniform Instrument Form 3156 ¶ 2).

[37]Countering this argument is particularly straightforward where a homeowner was current on mortgage payments when the homeowner accepted a trial period since a trial period leads to the accumulation of arrears and negative credit reporting even if the trial period is converted to a final modification.

[38]In West Virginia a federal judge recently held that plaintiffs' state-law breach-of-contract claim premised on a trial-period plan survived summary judgment; the judge rejected a statute-of-frauds defense because the servicer accepted the borrower's partial performance (*Faulkner v. OneWest Bank FSB*, No. 10CV12, slip op. at 15 n.4 (N.D. W. Va. June 16, 2010); see also *Hanson v. Wells Fargo,* No. 4:10-cv-00318-BSM (E.D. Ark. Aug. 18, 2010) (denying motion to dismiss trial-period plan claim based on statute of frauds).

[39]Making Home Affordable, *supra* note 35, § 3.

Servicers simply have no discretion to withhold a final modification.[40] Accordingly claims premised on breach of a trial-period payment plan are a promising means of enforcing a borrower's right to a final modification.

HAMP Litigation: Lessons and Trends

Servicer noncompliance and lax government oversight have been two constants in HAMP's evolution, disappointingly allowing irresponsible foreclosures to continue at a rapid clip. Litigation strategies will continue to evolve.

The relatively greater success thus far in cases where a homeowner is the defendant is likely due to a combination of factors, including lack of need for an affirmative cause of action and decision making by judges who routinely decide foreclosure cases and are well versed in their responsibilities as courts of equity. The limited number of decisions in affirmative suits should not discourage advocates from bringing these cases; many are in their early stages, and anecdotal evidence suggests that, even without a decision, affirmative litigation captures servicer attention and can motivate action on a modification that might otherwise languish for months.

New documentation requirements established in Supplemental Directives 09-08, 10-01, and 10-02 and incorporated into the MHA Handbook should prove a powerful resource for future HAMP enforcement litigation by creating discoverable proof of noncompliance. In addition to documenting their program processes better, servicers must now certify to their local foreclosure counsel that they have complied with the program. If a court were so inclined, these requirements could easily be adopted as a pleading requirement for foreclosure actions.

Educating the judiciary to ensure meaningful compliance and prevent avoidable foreclosures should be a priority for consumer advocates nationally. By working together to build authority for reference and citation, advocates can create enforcement momentum, aiding homeowners well beyond those they are able to represent.

Authors' Acknowledgment

We wrote an earlier version of this article published as Home Affordable Modification Program Enforcement Through the Courts, *40 National Housing Law Project Bulletin 136 (June 2010). Thanks to Kent Qian of the National Housing Law Project for suggesting that we write that article.*

[40]Advocates may nonetheless encounter situations where a borrower is offered a trial-period plan and is later told that the borrower failed the net-present-value test even though the borrower's income is unchanged. This situation should no longer arise because the servicer must now verify borrower income before offering a trial-period plan, and the net-present-value test will be run only at that point. However, for borrowers with older trial-period plans, servicers may run an initial net-present-value test based on stated income and then collect documents to verify the figures at some point between the trial offer and final modification. To protect borrowers in this circumstance, the Treasury requires that documented income be run through the same version of the net-present-value test as stated income; the only inputs that may change are those from the borrower. Noncompliance with this rule has been a major failing of the program.

Subscribe to Clearinghouse Review!

Clearinghouse Review: Journal of Poverty Law and Policy is the advocate's premier resource for analysis of legal developments, innovative strategies, and best practices in representing low-income clients. Each issue of the Review features in-depth, analytical articles, written by experts in their fields, on topics of interest to poor people's and public interest lawyers. The Review covers such substantive areas as civil rights, family law, disability, domestic violence, housing, elder law, health, and welfare reform.

Subscribe today!

We offer two ways to subscribe to Clearinghouse Review.

A **site license package** includes printed copies of each monthly issue of Clearinghouse Review and online access to our archive of articles published since 1967. With a site license your organization's entire staff will enjoy fully searchable access to a wealth of poverty law resources, without having to remember a username or password.

Annual site license package prices vary with your organization size and number of printed copies.

- Legal Services Corporation–funded programs: $170 and up
- Nonprofit organizations: $250 and up
- Law school libraries: $500

A **print subscription** includes one copy of each of six issues, published bimonthly. Annual rates for the print-only subscription package are as follows:

- Legal Services Corporation–funded programs: $105
- Nonprofit organizations: $250
- Individuals: $400

A print subscription for Legal Services Corporation–funded programs and nonprofit organizations does not include access to the online archive at www.povertylaw.org.

CUT HERE

Please fill out the following form to receive more information about subscribing to Clearinghouse Review.

Name _____

Organization _____

Street address _____ Floor, suite, or unit _____

City _____ State _____ Zip _____

E-mail _____

My organization is

- ☐ Funded by the Legal Services Corporation
- ☐ A nonprofit
- ☐ A law school library
- ☐ None of the above

What is the size of your organization?

- ☐ 100+ staff members
- ☐ 51–99 staff members
- ☐ 26–50 staff members
- ☐ 1–25 staff members
- ☐ Not applicable

Please e-mail this form to subscriptions@povertylaw.org.
Or fax this form to Ilze Hirsh at 312.263.3846.

Sargent Shriver National Center on Poverty Law
50 E. Washington St. Suite 500
Chicago, IL 60602