ENFORCING THE HOME AFFORDABLE MODIFICATION PROGRAM

*JONATHAN A. MARCANTEL**

ABSTRACT

In 2009 the Secretary of the Treasury (Secretary) implemented the Home Affordable Modification Program (HAMP), a program designed to minimize foreclosures by providing incentives to loan servicers who modify eligible mortgages. Notwithstanding both its design and goal, HAMP has largely failed to achieve its projected impact, due, at least in part, to servicer noncompliance with HAMP's mandates. Nevertheless mortgagors who are injured by servicer noncompliance lack legal remedies to compel servicer compliance, as HAMP lacks a private right of action. Furthermore, and notwithstanding an array of governmental reports specifically finding systemic servicer noncompliance, the Secretary has not exercised any available enforcement mechanisms. Consequently unnecessary foreclosures have continued to occur in derogation of HAMP's goals. As a remedy for both servicer noncompliance and the resulting, negative effect of unnecessary foreclosures, this Article argues that Congress should enact legislation that provides for a private right of action for violations of HAMP.

* Associate Professor of Law, Charleston School of Law. The author would like to thank the Southeastern Association of Law Schools (SEALS) for permitting him to present an earlier version of this Article at the New Scholars Workshop (2012). The author would also like to thank Professors Timothy A. Canova, William M. Janssen, Paul E. Lund, Richard E. Mendales, Sheila B. Scheuerman, Miller W. Shealy, Jr., William L. Want, and Nancy L. Zisk for their comments, criticisms, and helpful advice on an earlier version of this Article. Finally the author would like to thank Travis Anderson, Valencia Thurman, Julie Jackson-Bailey, Kevin DeAntonio, Lauren Wilson, Michael Gossett, Robert Crabtree, Sean Pearman, Matthew Craft, and Virginia Rogers for their invaluable research assistance.

INTRODUCTION

In 2008 the United States experienced a financial recession that was largely the result of toxic assets—mortgage-backed securities primarily composed of nonconventional loans—,[1] freezing the

1. This position is held by prominent economists. *See, e.g.*, Alan Greenspan, *The Crisis*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2010, at 201, 202 ("The

liquidity of the credit markets.[2] In response the U.S. Congress enacted the Emergency Economic Stabilization Act of 2008 (EESA).[3] The most significant, and perhaps most controversial, piece of the EESA was the Troubled Asset Relief Program (TARP),[4] a statutory scheme that granted the Secretary of the Treasury (Secretary) access to 700 billion dollars[5] of Treasury funds to purchase toxic assets from financial institutions and thus reestablish liquidity in credit markets.[6] That extraordinary grant of authority, however,

global proliferation of securitized, toxic U.S. subprime mortgages was the immediate trigger of the [2008 financial] crisis."). This position is additionally held by the primary drafter of the Emergency Economic Stabilization Act, Senator Dodd, as well as other congresspersons. *See, e.g.*, 154 CONG. REC. S10252 (daily ed. Oct. 1, 2008) (statement of Sen. Chris Dodd) (stating that the high delinquency and foreclosure rates due to "adjustable rate mortgages, ARMs, interest-only loans, and payment-option ARMs" were mainly responsible for the 2008 financial crisis); *see also* 154 CONG. REC. S10238–39 (daily ed. Oct. 1, 2008) (statement of Sen. Richard Shelby) (stating that the collapse of the mortgage-backed security market led to the 2008 financial crisis); 154 CONG. REC. H10801 (daily ed. Oct. 1, 2008) (statement of Rep. Jim Langevin) ("[The 2008 financial] crisis originated with faulty lending practices and the creation of subprime mortgages made to people who often could not afford to pay them back."). *See generally* STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, 112TH CONG., REP. ON WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 1 (Comm. Print 2011) (finding that high-risk mortgage lending contributed to the 2008 financial crisis). For purposes of this Article nonconventional loans shall refer to loans that are either Adjustable Rate Mortgages (ARM) or more generally to loans that originated or were sold on the subprime market.

2. *See* Greenspan, *supra* note 1, at 201.

3. Pub. L. No. 110-343, 122 Stat. 3765 (codified as amended at 12 U.S.C. §§ 5201-5261 (2012)).

4. *Id.* §§ 101–136, 122 Stat. 3767–3800 (codified as amended at 12 U.S.C. §§ 5211–5241 (2012)).

5. *Id.* § 115(a)(3), 122 Stat. 3780 (codified as amended at 12 U.S.C. § 5225(a)(3) (2012)). This amount was subsequently reduced to 698.741 billion dollars by the Public-Private Investment Program Improvement and Oversight Act of 2009, Pub. L. No. 111-22, § 402(f), 123 Stat. 1656, 1658 (codified as amended at 12 U.S.C. § 5225(a)(3) (2012)), and thereafter further reduced to 475 billion dollars by the Pay It Back Act of 2010, Pub. L. No. 111-203. § 1302(1)(A), 124 Stat. 2133, 2133 (codified at 12 U.S.C. § 5225(a)(3) (2012)).

6. Pub. L. No. 110-343, § 101, 122 Stat. 3765, 3767 (codified at 12 U.S.C. § 5211 (2012)). This section was initially subject to a December 31, 2009, sunset provision. *Id.* § 120(a), 122 Stat. 3788 (codified at 12 U.S.C. § 5230(a) (2012)). However, it was subsequently extended by the Pay it Back Act of 2010, Pub. L. No. 111-203, § 1302, 124 Stat. 2133, 2133 (codified at 12 U.S.C. § 5225 (2012)). Thereafter, under the Pay It Back Act of 2010, the Secretary was prohibited from incurring any additional obligations that were not initiated prior to June 25, 2010. *Id.* Nevertheless, portions of TARP—particularly those that focus on the foreclosure crisis—remain active, and thus "the Treasury could potentially disburse TARP

came with a number of conditions. Specifically, TARP charged the Secretary with creating mechanisms to minimize foreclosures of consumer mortgages[7]—a "priority" goal of the legislation.[8]

In conformity with the commands of TARP, in 2009 the Secretary unveiled the Making Home Affordable Program,[9] which included the Home Affordable Modification Program (HAMP).[10] In the most general sense, HAMP has two primary components. First, it requires any servicer of a loan guaranteed or owned by a government-sponsored entity or insured or guaranteed by a government agency (GSE Loan) to comply with HAMP's Supplemental Directives and Guidelines (HAMP's Guidelines).[11] Among other things

funds under [HAMP] for several more years." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-229, TROUBLED ASSET RELIEF PROGRAM: AS TREASURY CONTINUES TO EXIT PROGRAMS, OPPORTUNITIES TO ENHANCE COMMUNICATION ON COSTS EXIST 33 (2012). As of this writing, the HAMP application period has been extended through 2015. OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, SIGTARP QUARTERLY REPORT TO CONGRESS JULY 24, 2013, at 55 (2013), *available at* http://www.sigtarp.gov/Quarterly%20Reports/July_24_2013_Report_to_Congress.pdf. Thus "issues surrounding HAMP compliance are not likely to end anytime soon." Benjamin B. Klubes, Michelle L. Rogers & Katherine L. Halliday, *HAMP Risk on the Rise: A Complicated Regulatory Scheme Under the Spotlight*, BLOOMBERGLAW.COM (Oct. 16, 2014), http://about.bloomberglaw.com/practitioner-contributions/hamp-risk-on-the-rise-a-complicated-regulatory-scheme-under-the-spotlight/.

7. 12 U.S.C. §§ 5219–5220 (2012).

8. *E.g.*, 154 CONG. REC. S10252 (daily ed. Oct. 1, 2008) (statement of Sen. Reid); *see also id.* (statement of Sen. Dodd) (referring to foreclosure prevention as a "key reason" for the EESA); 154 CONG. REC. S10258 (daily ed. Oct. 1, 2008) (statement of Sen. Levin) (referring to the foreclosure crisis as "the core" of the problem); 154 CONG. REC. S10260 (daily ed. Oct. 1, 2008) (statement of Sen. Feingold) ("[The] housing crisis underlies much of the financial market collapse.").

9. HOME AFFORDABLE MODIFICATION PROGRAM, SUPPLEMENTAL DIRECTIVE 09-01, INTRODUCTION OF THE HOME AFFORDABLE MODIFICATION 1 (2009), *available at* http://www.hppinc.org/_uls/resources/Supplemental_Directive_09-0.pdf; U.S. DEP'T OF THE TREASURY, TROUBLED ASSET RELIEF PROGRAM: TWO YEAR RETROSPECTIVE 12 (2010), *available at* http://www.treasury.gov/press-cen-er/news/Documents/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf.

10. Although TARP included statutory language requiring the Secretary to engage in "Foreclosure Mitigation Efforts," TARP did not explicitly create HAMP. *See* 12 U.S.C. § 5219 (2012). Rather HAMP was a regulatory creation by the Secretary. *See* HOME AFFORDABLE MODIFICATION PROGRAM, *supra* note 9, at 1. Nevertheless on July 21, 2010, Congress codified disclosure requirements, among other things, for HAMP, effectively codifying portions of the program. *See* 12 U.S.C. § 5219a (2012).

11. Rathore v. Bank of American, N.A., No. 3:11CV136-HEH, 2011 WL 2077538 (E.D. Va. May 24, 2011) ("Although participation in HAMP is required for government-sponsored entities ('GSEs') such as Fannie Mae and Freddie Mac,

HAMP's Guidelines require institutions to review defaulting loans for modification eligibility prior to proceeding with foreclosure actions.[12] This portion of HAMP is mandatory and applies to all GSE Loans regardless of consent by the servicer.[13] Second, HAMP encourages the servicers of non-GSE loans (Participating Institutions) to execute Servicer Provider Agreements (SPA)—contracts that provide significant incentives to Participating Institutions but require them to comply with HAMP's Guidelines.[14]

HAMP participation is voluntary for non-GSEs."); *see also* FANNIE MAE, ANNOUNCEMENT 09-05R, REISSUANCE OF THE INTRODUCTION OF THE HOME AFFORDABLE MODIFICATION PROGRAM, HOMESAVER FORBEARANCE™, AND NEW WORKOUT HIERARCHY 1 (2009), *available at* https://www.fanniemae.com/content/announcement/0905.pdf ("All Fannie Mae-approved servicers must participate in the program for all eligible Fannie Mae portfolio mortgage loans and MBS pool mortgage loans guaranteed by Fannie Mae."); MAKING HOME AFFORDABLE, HOUSING COUNSELOR FREQUENTLY ASKED QUESTIONS 2 (2009), *available at* http://www.unionplus.org/statics/0000/3528/MHA_Frequently_Asked_Questions.pdf ("Servicer participation is mandatory for all loans owned or guaranteed by Fannie Mae or Freddie Mac (Government Sponsored Enterprises or GSEs)."); Lionel E. Bashore & Kevin S. Green, *Traversing the HAMP MAZE—Home Loan Modification Program*, YOUNG LAWYER, September 2010, at 1, 1, *available at* http://www.americanbar.org/content/dam/aba/publishing/young_lawyer/yld_tyl_sept10_hamp.authcheckdam.pdf ("Servicer participation is mandatory for all loans owned or guaranteed by Fannie Mae or Freddie Mac, which are Government Sponsored Enterprises (GSEs).").

12. *See* U.S. DEP'T OF THE TREASURY, MAKING HOME AFFORDABLE UPDATED DETAILED PROGRAM DESCRIPTION 7 (2009), *available at* http://www.ci.oakley.ca.us/UserFiles/File/Housing/Foreclosure/HUD-Obama%20-%20Making-Home-Affordable-Fact-Sheet.pdf ("The Treasury Department will require all Financial Stability Plan recipients going forward to participate in foreclosure mitigation plans consistent with Treasury's loan modification guidelines.").

13. *See* FANNIE MAE, *supra* note 11, at 16 ("To 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. *Servicers must use reasonable efforts to contact borrowers facing foreclosure to determine their eligibility for the HAMP, including in-person contacts at the servicer's discretion.* Servicers must not conduct foreclosure sales on mortgage loans previously referred to foreclosure *or refer new mortgage loans to foreclosure* during the 30-day period that the borrower has to submit documents evidencing an intent to accept the Trial Period Plan offer."); Bashore & Green, *supra* note 11 ("To ensure that a borrower currently at risk of foreclosure has the opportunity to apply for a modification under HAMP, participating servicers may not proceed with a foreclosure sale on an eligible loan until the borrower has been evaluated for HAMP and, if eligible, a trial modification offer has been made.").

14. *See* HOME AFFORDABLE MODIFICATION PROGRAM, *supra* note 9, at 23 (explaining how the Service Participation Agreement functions to cap the amount of funds servicers may receive as compensation).

Following the passage of HAMP, the Secretary distributed a total of 4.8 billion dollars of taxpayer money[15] to a total of 707 financial institutions.[16] Nevertheless the results of that taxpayer investment have not been impressive. For instance, while the stated purpose of HAMP was to prevent the foreclosure of three to four million houses,[17] during HAMP's first year of operation only 230,801 loans were modified pursuant to the Program.[18] Furthermore as of August 2013, only 1,423,728 permanent modifications had been started pursuant to HAMP[19]—still well below the targeted range.

Although political pundits have debated the merits of why HAMP has been less effective than expected,[20] the Government Accountability Office (GAO) has linked the lackluster results to non-

15. OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, *supra* note 6, at 58.

16. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-229, TROUBLED ASSET RELIEF PROGRAM: AS TREASURY CONTINUES TO EXIT PROGRAMS, OPPORTUNITIES TO ENHANCE COMMUNICATION ON COSTS EXIST 10 (2012), *available at* http://www.gao.gov/assets/590/587555.pdf (noting that 707 institutions had originally participated in the Capital Purchase Program, a program created to provide capital to financial institutions). By December 11, 2011, this number included 109 servicers that were still participating in HAMP. SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, SIGTARP 12-003, THE NET PRESENT VALUE TEST'S IMPACT ON THE HOME AFFORDABLE MODIFICATION PROGRAM 9 n.16 (2012), *available at* http://www.sigtarp.gov/Audit%20Reports/NPV_Report.pdf.

17. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 16, at 35 ("Treasury originally announced that up to 3 to 4 million borrowers would be helped under HAMP.").

18. MAKING HOME AFFORDABLE, SERVICER PERFORMANCE REPORT THROUGH MARCH 2010, at 4 (2010), *available at* http://www.makinghomeaffordable.gov/news/latest/Documents/Mar%20MHA%20Public%20041410%20TO%20CLEAR.PDF.

19. MAKING HOME AFFORDABLE, PROGRAM PERFORMANCE REPORT THROUGH AUGUST 2013, at 5 (2013); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 16, at 35 (stating that as of September 2011, only 856,974 permanent modifications had been started pursuant to HAMP).

20. *See, e.g.*, Arthur Delaney, *HAMP: Obama Administration Makes Anti-Foreclosure Program More Generous to Jobless*, HUFFINGTON POST (July 7, 2011), http://www.huffingtonpost.com/2011/07/07/hamp-obama-administration_n_892082.html (quoting former Special Inspector General for TARP as stating that "[c]ountless families needlessly missed out on the benefits of this common sense approach due to Treasury's intransigence and reflexive deference to the mortgage servicers' opposition to measures designed to improve the HAMP program"); Dunstan Prial, *Mortgage Programs Target Many, Help Few*, FOXBUSINESS.COM (May 2, 2012), http://www.foxbusiness.com/industries/2012/05/02/mortgage-programs-target-many-help-few/ (noting criticisms that HAMP's excessive complexity and reliance on an ill-suited means test have impaired the program's effectiveness).

compliance with HAMP's Guidelines.[21] Specifically the GAO has found that servicers are routinely failing to conduct eligibility reviews prior to instituting foreclosures,[22] in violation of the HAMP Guidelines.[23] Additionally the Department of the Treasury found that ten of the largest servicers had errors in their net present value calculations ranging from 6% to 33%.[24] Furthermore the Department reported that three of the ten largest servicers "ranked poorly on the second look metric. That is, borrowers who should have received a permanent mortgage modification were wrongly denied."[25]

As a result of these violations, beginning immediately after HAMP's implementation,[26] mortgagors began suing both GSEs and Participating Institutions, arguing they failed to comply with TARP and/or HAMP and, in the case of Participating Institutions, failed to comply with the mandatory provisions of the SPAs.[27] To date, the vast majority of these suits have failed on a variety of analytical grounds,[28] leaving mortgagors effectively remediless for even the most blatant abuses.[29] But notwithstanding the extraordinary number of cases filed since HAMP's implementation, few articles have discussed either those cases or the HAMP Program in general. Fur-

21. A number of issues involving noncompliance were found. For instance, the GAO found that fifteen out of the twenty largest servicers were not running the Net Present Value (NPV) test in compliance with the HAMP Guidelines. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-634, TROUBLED ASSET RELIEF PROGRAM: FURTHER ACTIONS NEEDED TO FULLY AND EQUITABLY IMPLEMENT FORECLOSURE MITIGATION PROGRAMS 20 (2010). Furthermore half of the sampled servicers reported at least a 20% error rate in income calculations. *Id.* at 21.

22. *Id.* at 23.

23. *See* U.S. DEP'T OF THE TREASURY, MAKING HOME AFFORDABLE PROGRAM HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES, at 89–90 (2014), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahand book_44.pdf.

24. SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, *supra* note 16, at 14.

25. *Id.* at 14–15. In March 2012 the Department found that seven of the ten largest servicers still needed moderate improvement, and three of the ten largest servicers still had gross income error rates ranging from 6% to 10%—above the Department's acceptable error rate. *Id.* at 15.

26. The first federal district court to rule on a plaintiff's claim pursuant to HAMP occurred on October 5, 2009. *See* Gaitan v. Mortg. Elec. Registration Sys., No. EDCV 09-1009 VAP (MANx), 2009 WL 3244729, at *3 (C.D. Cal. Oct. 5, 2009).

27. *See, e.g.*, Markle v. HSBC Mortg. Corp., 844 F. Supp. 2d 172, 175 (D. Mass. 2011) (alleging that defendant HSBC Mortgage Corpororation referred plaintiffs' home to foreclosure in violation of its obligations under the Home Affordable Modification Program).

28. *See infra* Part III.

29. *See infra* Part IV.

thermore the few articles that have addressed the HAMP Program have focused on describing the basis for HAMP's failure,[30] describing the Program and the lawsuits that have flowed from it,[31] proposing to modify the SPAs to provide contractual rights to homeowners,[32] proposing to extend a right to a property interest for purposes of the U.S. Constitution,[33] or proposing to more effectively manage alternative dispute resolution.[34] Thus, to date, no scholar has assessed the prudence of creating an explicit, legislative, private right of action for violations of HAMP.[35] This Article fills that gap and argues that the creation of an explicit, private right of action for enforcing HAMP is both justifiable and necessary for the effective enforcement of its provisions.

Beginning with the positive law, Part I discusses the creation of TARP and HAMP, their fundamental components, and the details regarding HAMP's five-step modification process. Part II then shifts

30. *E.g.*, Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1 (2011) (arguing that HAMP's inability to adequately address mortgage servicer incentive problems is a result of problems related to a principal-agent dynamic); Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 826 (2011) ("HAMP's failure is due in large part to the lack of accountability servicers face under HAMP.").

31. *E.g.*, Cushla E. Talbut, Note, *HAMPered Hopes for Homeowners: An Analysis of How Litigation Trends Have Exposed the Home Affordable Modification Program's Weaknesses*, 68 U. MIAMI L. REV. 295, 300 (2013) ("Various creative causes of action for HAMP violations have been brought in front of courts nationwide; these causes of action include due process violations, private right of actions, contractual remedies, consumer protection actions, and class actions."); Richard E. Gottlieb & Brett J. Natarelli, *Update on Loan Modification Program*, 66 BUS. LAW. 539 (2011) (describing the different patterns of litigation resulting from the HAMP).

32. *E.g.*, W. Justin Jacobs, Note, *Help or HAMP(er)?—The Court's Reluctance to Prove the Right to a Private Right of Action Under HAMP and Its Detrimental Effect on Homeowners*, 47 VAL. U. L. REV. 267, 309 (2012) (proposing to modify SPAs to explicitly recognize the standing of borrowers enrolled in the TPP programs to a private action based on SPAs where they have made their payments as required).

33. *E.g.*, Nicholas T. Maxwell, Note, *The 75 Billion Dollar Question: Why is HAMP not an Entitlement Program?*, 97 IOWA L. REV. 1305 (2012).

34. *E.g.*, Lydia Nussbaum, *ADR's Place in Foreclosure: Remedying the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889 (2013).

35. As of the date of publication one article has summarily suggested that a legislative, private right of action could solve HAMP's enforcement problems. *See* Arsen Sarapinian, Note, *Fighting Foreclosure: Using Contract Law to Enforce the Home Affordable Modification Program (HAMP)*, 64 HASTINGS L.J. 905, 931 (2013). However, this suggestion was provided within the context of resolving the circuit split for TPP agreements. *See id.* (suggesting that creating litigants with a legislative, private right of action would further the goal "prevent[ing] judicial inconsistences and circuit splits"). Furthermore the suggestion comprised one sentence of the article and did not provide any normative argument to support it. *See id.* ("It should afford litigants with a private right of action to sue under HAMP.").

the discussion to the claims that have arisen as a result of that five-step process and discusses those claims in five categorical Subparts that provide a comprehensive discussion of HAMP claims. With that background in mind, Part III discusses both the systematic noncompliance with HAMP's mandates and the Secretary's failure to exercise enforcement mechanisms to remedy noncompliance. Finally, Part IV discusses this Article's proposal, the justifications for that proposal, and the elemental requirements necessary to implement it.

I.
A BRIEF DISCUSSION OF THE STATUTORY SCHEME

Unlike most statutory schemes, the EESA did not begin as a congressional bill. Rather it originated as a bill from the White House.[36] Nevertheless within days of its introduction in Congress, both houses roundly rejected the measure.[37] Over the course of the subsequent twelve days, however, a bipartisan group of congresspersons drafted the EESA.[38] On October 1, 2008, Sens. Chris Dodd, Judd Gregg, and Harry Reid introduced the EESA for the express purpose of, among other things, "protect[ing] home values . . . [and] preserv[ing] homeownership . . . ."[39] The "centerpiece" of the EESA is TARP.[40]

Broadly conceived TARP permitted the Secretary of the Treasury to enter into contracts with financial institutions to purchase 700 billion dollars of failing assets.[41] In addition TARP required the Secretary to establish mechanisms and guidelines to both facilitate the purchase of those assets[42] and preserve homeownership by the American public.[43] In that vein, TARP instructed the Secretary to

36. OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, INITIAL REPORT TO THE CONGRESS FEBRUARY 6, 2009, at 29 (2009), *available at* http://www.sigtarp.gov/Quarterly%20Reports/SIGTARP_Initial_Report_to_the_Congress.pdf.

37. *Id.* at 30.

38. 154 CONG. REC. S10223-24 (daily ed. Oct. 1, 2008) (statement of Sen. Chris Dodd).

39. Pub. L. No. 110-343, 122 Stat. 3765, 3766 (codified at 12 U.S.C. § 5201 (2012)). In addition to the statutory language itself, these goals are additionally stated as a primary purpose of the statutory scheme in the legislative history. *See* 154 CONG. REC. S10220–83 (daily ed. Oct. 1, 2008).

40. 12 U.S.C. §§ 5211–5241 (2012); *see also* Wigod v. Wells Fargo Bank, 673 F.3d 547, 556 (2012) (characterizing TARP as the "centerpiece" of EESA).

41. 12 U.S.C. §§ 5201, 5211, 5217 (2012).

42. *Id.* § 5211(a)(1).

43. *Id.* § 5213(3).

implement foreclosure mitigation efforts using TARP funding to incentivize financial institutions to participate.[44] Using this authority, in February 2009, the Secretary, in combination with the Federal Housing Finance Agency, Fannie Mae, and Freddie Mac, created the Making Homes Affordable Program (MHA)[45]—a program that consists of, among other things, HAMP.[46]

In the most basic sense, the purpose of HAMP is to assist defaulting or struggling homeowners in acquiring loan modifications.[47] To achieve this purpose the Secretary instituted a bifurcated system for HAMP's applicability. First, HAMP automatically applies to any and all GSE Loans.[48] Second, HAMP applies to Participating Institutions—institutions that executed a SPA in exchange for the incentives available under HAMP.[49]

In the latter instance HAMP provides two primary incentives to participate. First, participation in HAMP—and execution of an SPA—makes an institution eligible for TARP funding.[50] Second, the Treasury provides incentive payments to Participating Institutions that modify eligible loans in accordance with the HAMP Guidelines and the SPA.[51] Thus, for instance, financial institutions receive a $1,600 incentive payment for each successful, permanent modification of a loan that was equal to or less than 120 days delin-

44. *Id.* § 5219.

45. U.S. DEP'T OF THE TREASURY, MAKING HOME AFFORDABLE PROGRAM HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES, at 14 (2013).

46. For information regarding other MHA programs, see generally *View All Programs*, MAKINGHOMEAFFORDABLE.GOV, http://www.makinghomeaffordable.gov/programs/view-all-programs/Pages/default.aspx (last updated Mar. 8, 2013).

47. *See* HOME AFFORDABLE MODIFICATION PROGRAM, SUPPLEMENTAL DIRECTIVE 10-02, HOME AFFORDABLE MODIFICATION PROGRAM—BORROWER OUTREACH AND COMMUNICATION 1 (2010), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1002.pdf ("Under HAMP, servicers apply a uniform loan modification process to provide eligible borrowers with sustainable monthly payments for their first lien mortgage loans.").

48. *Id.* The Guidelines for GSE Loans are not identical to the Guidelines for non-GSE Loans. *See* Thomas v. U.S. Bank Nat'l Ass'n, 474 B.R. 450, 454–55 (D.N.J. 2012). The remainder of Part I will focus on the Guidelines peculiar to Participating Institutions. Nevertheless Part II will analyze claims both against GSEs and against Participating Institutions.

49. *View All Programs*, MAKINGHOMEAFFORDABLE.GOV, *supra* note 46.

50. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-288, TROUBLED ASSET RELIEF PROGRAM: TREASURY CONTINUES TO FACE IMPLEMENTATION CHALLENGES AND DATA WEAKNESSES IN ITS MAKING HOME AFFORDABLE PROGRAM 6 (2011).

51. U.S. DEP'T OF THE TREASURY, *supra* note 45, at 140. In addition to the two examples provided here, a variety of incentives are available. *E.g.*, *id.* at 140-41 (offering pay-for-success fees of $1,000 per year for three years); *id.* at 196 (offering successful modifications of second liens).

quent.[52] Additionally, the Treasury shares the costs of reducing the borrowers' monthly payments.[53]

While participation is not mandatory, once a financial institution agrees to participate, it is bound by HAMP's Guidelines[54] and

52. HOME AFFORDABLE MODIFICATION PROGRAM, SUPPLEMENTAL DIRECTIVE 11-06, MAKING HOME AFFORDABLE PROGRAM—UPDATES TO SERVICER INCENTIVES 1 (2011), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1106.pdf. Initially Treasury paid $1,000.00 for each permanent modification. HOME AFFORDABLE MODIFICATION PROGRAM, *supra* note 9, at 23. And a servicer was eligible for an additional $500.00 incentive payment for permanently modifying loans that were current at the time of the modification. *Id.*

53. *See* HOME AFFORDABLE MODIFICATION PROGRAM, *supra* note 9, at 23–24 (explaining when servicers and borrowers may receive a "pay for success" fee or a "pay for performance" principal reduction payment when borrowers' monthly payments are reduced).

54. *See id.* at 1 ("The guidelines set forth in this [Supplemental Directive] apply to all eligible mortgage loans secured by one-to four-unit owner-occupied single family properties."). Even these mandatory provisions, however, are not absolute. For instance, following the origination of a loan, many loans are sold in large aggregates—called pools—to trusts who then issue shares to investors. THE BOND MARKET ASSOCIATION, AN INVESTOR'S GUIDE TO PASS-THROUGH AND COLLATERALIZED MORTGAGE SECURITIES 1 (2002), *available at* http://www.freddiemac.com/mbs/docs/about_MBS.pdf ("Mortgage securities represent an ownership interest in mortgage loans made by financial institutions (savings and loans, commercial banks or mortgage companies) to finance the borrower's purchase of a home or other real estate. Mortgage securities are created when these loans are packaged, or 'pooled' by issuers or servicers for sale to investors."); James Vickery & Joshua Wright, *TBA Trading and Liquidity in the Agency MBS Market*, FRNBY ECON. POL'Y REV., May 2013, at 1, 2, *available at* http://www.newyorkfed.org/research/epr/2013/1212vick.pdf ("Most residential mortgages in the United States are *securitized*, rather than held as whole loans by the original lender. Securitized loans are pooled in a separate legal trust, which then issues the MBS and passes on mortgage payments to the MBS investors after deducting mortgage servicing fees and other expenses. These MBS are actively traded and held by a wide range of fixed-income investors."). *See generally* FANNIE MAE, THE BASICS OF FANNIE MAE SINGLE-FAMILY MBS (2013), *available at* http://www.fanniemae.com/resources/file/mbs/pdf/basics-sf-mbs.pdf. Simultaneously the trusts hire a servicing institution to monitor and administer the loans in the pool. Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 765–68 (2011) (describing the relationship between servicers and trusts as well as describing the purpose of pooling and servicing agreements).

The related agreement that governs the relationships between the trust, the investors, and the servicer is called a Pooling and Servicing Agreement (PSA). *See Our Servicing Process*, FREDDIE MAC, http://www.freddiemac.com/multifamily/about/our_servicing_process.html (last visited May 12, 2014) ("After securitization, Servicers refer to the applicable . . . Pooling and Servicing Agreements (PSA) to determine their servicing steps and procedures."). Many PSAs limit the servicer's ability to modify loans in the pool. U.S. DEP'T OF HOUS. & URBAN DEV., REPORT TO CONGRESS ON THE ROOT CAUSES OF THE FINANCIAL CRISIS 47 (2010). And to the extent the PSA does prohibit modification of a particular loan—for the contractual provisions of the SPA.[55] HAMP's Guidelines have a five-tiered, chronological structure for implementing loan modifications: (1) eligibility determination, (2) Standard Modification Waterfall (Waterfall), (3) Net Present Value (NPV) Analysis, (4) creation of a Trial Period Plan (TPP) agreement, and (5) permanent loan modification.[56]

First, Participating Institutions are required to review and determine program eligibility for loans that are either in default[57] or loans that are in imminent danger of default prior to instituting foreclosure proceedings.[58] Furthermore, once the process begins, Participating Institutions are prohibited from pursuing foreclosure until the process terminates.[59]

Second, the Participating Institution is required to conduct a Standard Modification Waterfall.[60] The Waterfall details a set of alterations that must be applied to a loan chronologically until the mortgagor's monthly payment is reduced as close as possible to

---

whatever reason—neither the HAMP Guidelines nor the SPA require a servicer to violate those provisions; rather, a specific safe harbor exists for these circumstances. *See* HOME AFFORDABLE MODIFICATION PROGRAM, *supra* note 9, at 1 ("[P]articipating servicers are required to consider all eligible mortgage loans unless prohibited by the rules of the applicable PSA . . . ."). But even in these circumstances, Participating Institutions "are required to use reasonable efforts to remove any prohibitions and obtain waivers or approvals from all necessary parties in order to carry out any modification under HAMP." *Id.*

55. HOME AFFORDABLE MODIFICATION PROGRAM, MHA 09-08, BORROW NOTICES 1 (2009).

56. Kelly Volkar, Note, *The TPP & Its Broken Promises*, 47 U.C. DAVIS L. REV. 1417, 1421–22 (2014).

57. HOME AFFORDABLE MODIFICATION PROGRAM, *supra* note 9, at 14 ("To 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. Servicers must use reasonable efforts to contact borrowers facing foreclosure to determine their eligibility for the HAMP, including inperson contacts at the servicer's discretion.").

58. *Id.* at 13 ("If the servicer concludes a current borrower is in danger of imminent default, the servicer must consider an HAMP modification.").

59. HOME AFFORDABLE MODIFICATION PROGRAM, *supra* note 47, at 5 (describing the circumstances that must exist before a Participating Institution may pursue a foreclosure).

60. Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 556–57 (7th Cir. 2012). In 2010 Treasury added the Alternative Modification Waterfall (Alternative Waterfall). HOME AFFORDABLE MODIFICATION PROGRAM, *supra* note 47, at 2. Participating Institutions are required to apply both the Standard Waterfall and the Alternative Waterfall if the loan has a mark-to-market loan-to-value ratio greater than 115%. *Id.*

31% of the mortgagor's gross monthly income.[61] Third, Participating Institutions are required to conduct an NPV Analysis on eligible loans.[62] The NPV Analysis attempts to discern whether the loan would provide a greater cash flow to the holder of the note if the loan were modified.[63] If, after applying the calculus, the modified loan would be *less profitable* than the nonmodified loan, the Participating Institution is *not required* to modify the loan.[64] But if the modified loan would be *more* profitable than the nonmodified loan, the Participating Institution is then required to offer a TPP agreement using the modifications from the NPV Analysis.[65] TPP agreements are literally intended to be a test run for permanent modifications.[66] That is, TPPs are only active for a three-month period[67] and are intended to determine whether a borrower can legitimately make the payments if the loan were permanently modified.[68] In that vein, TPP agreements are not permanent loan modifications.[69] Rather a borrower is only entitled to a permanent loan modification upon timely, complete payments under the TPP agreement.[70] Finally, assuming successful completion of the TPP, Participating Institutions are required to permanently modify the loan.[71]

61. *Wigod*, 673 F.3d at 557. Under HAMP Tier 2 the Standard Waterfall will be applied until the debt-to-income ratio (DTI) is no less than 25% but no more than 42% and the monthly principal-and-interest (P&I) payment is reduced by at least 10% when compared to the premodification P&I. HOME AFFORDABLE MODIFICATION PROGRAM, SUPPLEMENTAL DIRECTIVE 12-02, MAKING HOME AFFORDABLE PROGRAM: MHA EXTENSION AND EXPANSION 13 (2012).

62. *Wigod*, 673 F.3d at 557.

63. HOME AFFORDABLE MODIFICATION PROGRAM, *supra* note 9, at 4.

64. *Id.*

65. *Id.*

66. *Id.* at 17.

67. *Id.* In some circumstances, TPP agreements can be active for a longer duration, if that longer duration is "necessary to comply with applicable contractual obligations." U.S. DEP'T OF THE TREASURY, MAKING HOME AFFORDABLE PROGRAM HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES 89 (2011), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_34.pdf.

68. *See* U.S. DEP'T OF THE TREASURY, *supra* note 67 ("Borrowers who make all trial period payments timely and who satisfy all other trial period requirements will be offered a permanent modification.").

69. HOME AFFORDABLE MODIFICATION PROGRAM, *supra* note 9, at 17 ("The trial period is three months in duration (or longer if necessary to comply with applicable contractual obligations). The borrower must be current under the terms of the Trial Period Plan at the end of the trial period to receive a permanent loan modification.").

70. *Id.*

71. *Id.* at 14–19.

This modification process has spawned litigation primarily during the eligibility and permanent modification phases. At the eligibility phase, borrowers have alleged that financial institutions—both GSEs and Participating Institutions—have failed to accurately assess—or even attempt to assess—borrowers' eligibility.[72] At the permanent modification phase borrowers have alleged that Participating Institutions failed to extend a permanent loan modification following the borrowers' successful completion of the TPP agreement.[73] As discussed in the next Part, however, all of these claims have almost uniformly failed.

II.
TARP CLAIMS BASED ON FEDERAL LAW AND THEIR RECEPTION IN THE COURTS

Although the impetus for plaintiffs' claims can be reduced to a dichotomy, the mechanisms plaintiffs have attempted to use to recover for their losses have taken four forms. First, plaintiffs have argued that implied rights of action exist pursuant to either TARP or HAMP, and thus violations of the provisions of either TARP or HAMP are actionable. Second, plaintiffs have attempted to designate themselves as third-party beneficiaries of the SPAs, thereby providing them with standing to sue for violation of those contracts. Third, plaintiffs have alleged due process claims by virtue of servicers' failure to consider their eligibility for modifications. Finally, plaintiffs have asserted that servicers violated the TPP agreements by failing to permanently modify loans following successful completion of a trial period.

A. *Rights of Action Pursuant to the Statutory Scheme*

The most prevalent mechanism plaintiffs have attempted to use to vindicate alleged violations of TARP or HAMP has been the statutory scheme itself. However, neither TARP nor HAMP provides an explicit enforcement mechanism for private parties against plan participants. Instead plaintiffs have argued that an enforcement mechanism exists by virtue of an implied right of action.[74]

72. *E.g.*, Markle v. HSBC Mortg. Corp. (USA), 844 F. Supp. 2d 172, 184 (D. Mass. 2011); Nguyen v. BAC Home Loan Servs., No. C-10-01712 RMW, 2010 WL 3894986, at *3 (N.D. Cal. Oct. 1, 2010).

73. *E.g.*, Bosque v. Wells Fargo Bank, N.A., 762 F. Supp. 2d 342, 349 (D. Mass. 2011).

74. *E.g.*, Marks v. Bank of Am., No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988, at *6–7 (D. Ariz. June 22, 2010) (rejecting plaintiff's assertion of an implied right of action under HAMP).

In the most basic sense the doctrine of implied rights of action creates a framework of interpretation for courts to identify and define private statutory rights of action that are not explicit within a statutory scheme.[75] Within the context of TARP and/or HAMP claims, plaintiffs have alleged implied rights arise in one of two main contexts. First, plaintiffs have argued that the textual language of either ESSA or TARP provides an implied private right of action.[76] Second, plaintiffs have alleged that the regulatory requirements of HAMP create an implied private right of action.[77] Irrespective of these categories, however, these arguments have uniformly failed on the basis of one or more of the *Cort* factors.[78]

In *Cort v. Ash*, the U.S. Supreme Court created a four-part test to analyze whether a private right of action exists.[79] First, federal courts are required to determine whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted."[80] Second, courts must determine whether any implicit or explicit congressional intent exists to extend or deny a private right of action.[81] Assuming the analysis for the first two factors weighs in favor of creating an implied right, courts must then discern whether creating that right would be consistent with the purposes of the statutory scheme.[82] Lastly, courts must decide whether the alleged implied right governs conduct that is traditionally relegated to the states.[83]

Applying those factors to TARP's scheme, the federal courts have held that none of the factors weigh in favor of creating an implied right.[84] Thus, for instance, in reference to the first factor,

75. *See* Jonathan A. Marcantel, *Abolishing Implied Private Rights of Action Pursuant to Federal Statutes*, 39 J. LEGIS. 251, 255, 257–58 (2013). The doctrine of implied rights of action first originated in *Texas & Pacific Railway Company v. Rigsby*, 241 U.S. 33 (1916).

76. *See, e.g.*, Nelson v. Bank of Am., 446 F. App'x 158, 159 (11th Cir. 2011) (holding that "nothing express or implied in HAMP gives borrowers a private right of action").

77. *See, e.g.*, Rutolo v. Fannie Mae, 933 F. Supp. 2d 512, 523 (S.D.N.Y. 2013); Hoffman v. Bank of Am., N.A., No. C 10-2171 SI, 2010 WL 2635773, at *5 (N.D. Cal. June 30, 2010).

78. *See, e.g.*, Hall v. Wells Fargo Bank, N.A., No. 7:11-cv-63 (HL), 2011 WL 4345190 (M.D. Ga. Sept. 15, 2011); Warren v. Bank of Am., N.A., No. 4:11-cv-70, 2011 WL 2116407 (S.D. Ga. May 24, 2011); *Marks*, 2010 WL 2572988.

79. Cort v. Ash, 422 U.S. 66, 78 (1975).

80. *Id.* (quoting *Rigsby*, 241 U.S. at 39).

81. *Id.*

82. *Id.*

83. *Id.*

84. *See, e.g.*, Warren v. Bank of Am., N.A., No. 4:11-cv-70, 2011 WL 2116407 (S.D. Ga. May 24, 2011); Marks v. Bank of Am., N.A., No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988 (D. Ariz. June 22, 2010).

courts have held that both ESSA and HAMP were designed to "provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States."[85] Thus those courts hold that neither ESSA nor TARP was created for the especial benefit of homeowners.[86] As to the second factor, courts have held that neither the statute nor its legislative history indicates a legislative intent to create an implied right of action.[87] Rather both the scheme and the legislative history are silent in this regard.[88] As to the third factor courts have held that implying a right of action would discourage lenders from participating in the program and thus compromise HAMP's purpose.[89] Finally, as to the fourth factor, courts have held that alleged actions arising from TARP and HAMP sound in either contract or real property law—areas typically within the domain of state law.[90]

While these "full *Cort* analysis" cases have uniformly yielded negative results, the vast majority of federal courts have arrived at similar conclusions even without reviewing each of the factors. Thus, for instance, federal courts have reached the same result by holding that Congress delegated enforcement authority exclusively to Freddie Mac; accordingly, enforcement by private parties would be inconsistent with the overall purpose of the statute[91]—an implicit nod to the third factor in *Cort*.[92] Similarly courts have held

85. Miller v. Chase Home Fin., LLC, 677 F.3d 1113, 1116 (11th Cir. 2012) (quoting 12 U.S.C. § 5201(1)(2012)).

86. *E.g.*, *id.*

87. *E.g.*, *id.*

88. *E.g.*, *id.* (finding no discernable legislative intent that a private right of action exists under HAMP).

89. *E.g.*, *id.* ("[P]roviding a private right of action against mortgage servicers contravenes the purpose of HAMP—to encourage servicers to modify loans—because it would likely chill servicer participation based on fear of exposure to litigation.").

90. *E.g.*, *id.*

91. Brecker v. 1st Republic Mortg. Bankers, Inc., No. 13-5646, 2013 WL 5729783 (D.N.J. Oct. 21, 2013) (citations omitted) ("Similarly, HAMP was 'designed to prevent avoidable home foreclosures by incentivizing loan servicers to reduce the required monthly mortgage payments for certain struggling homeowners.' Its provisions empower the Secretary of the Treasury to restore liquidity and stability to the financial system. The legislature gave the Secretary of the Treasury the right to initiate a cause of action, and did not expressly provide any cause of action for any private citizens. Indeed, to provide a private cause of action would be counterproductive to the goal of increasing lender participation in loan modification, rather than being consistent with the intent of HAMP.").

92. *See* Marks v. Bank of Am., N.A., No. 03:10-cv-08039-PXH-JAT, 2010 WL 2572988, at *6 (D. Ariz. June 22, 2010) (holding that express delegation of compliance authority to Freddie Mac implies congressional intent to forbid a private

that the enacting language of TARP explicitly prohibits private rights of action through the statutory construction doctrine of *expressio unius est exclusio alterius*[93]—an implicit nod to both the second and the third factors of *Cort*. More specifically those courts have held that Congress' explicit creation of a right of action against the Department of the Treasury, without any additional explicit right in favor of other suits, indicates Congress did not intend to create a right of action in favor of private parties against mortgagees.[94] Finally, the majority of cases in this category have simply held that TARP does not possess the rights-creating language necessary to indicate a congressional intent to create a right of action.[95] That is, the text contained within ESSA and TARP focuses on the regulated entity rather than the person to be protected.[96] Thus the text does not disclose a congressional intent to create an implied right of action.[97]

B. Third-Party Beneficiary Claims

Given the insurmountable challenge of successfully alleging an implied right of action pursuant to the statutory scheme, many plaintiffs have turned away from the statutory text and instead focused on the contractual language of the SPAs.[98] Specifically plaintiffs have alleged that Participating Institutions violated the

cause of action under HAMP), *accord* Phipps v. Wells Fargo Bank, No. CV F 10-2025 LJO SKO, 2011 WL 302803, at *9 (E.D. Cal. Jan. 27, 2011).

93. The doctrine provides that the express mention of one thing excludes all others. Chevron U.S.A., Inc. v. Echazabel, 536 U.S. 73, 80 (2002). For examples of cases in which courts have relied on this doctrine to find that the text of TARP explicitly prohibits private rights of action, see, for example, *Manabat v. Sierra Pacific Mortgage Co.*, No. CV F 10-1018 LJO JLT, 2010 WL 2574161, at *11 (E.D. Cal. June 25, 2010), *Pennington v. PNC Mortgage*, No. 2:10cv361, 2010 WL 8741958, at *4 (E.D. Va. Aug. 11, 2010), *Regions Bank v. Homes by Williamscraft, Inc.*, No. 1:09-CV-91-TWT, 2009 WL 3753585, at *2 (N.D. Ga. Nov. 6, 2009), *Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177, 1185 (N.D. Cal. 2009).

94. *E.g.*, Thomas v. Pentagon Fed. Credit Union, 393 F. App'x 635, 638 (11th Cir. 2010); *see also, e.g.*, *Phipps*, 2011 WL 302803, at *9 (quoting *Marks*, 2010 WL 2572988, at *6) ("Congressional intent expressly indicates that compliance authority was delegated solely to Freddie Mac.").

95. *See, e.g.*, Robinson v. Wells Fargo Bank, N.A., No. CV 09-2066-PHX-JAT, 2010 WL 2534192 (June 18, 2010).

96. *See Pantoja*, 640 F. Supp. 2d at 1185 (finding that the statutory text "shows Congress' intent to limit private action under TARP solely to actions against the Secretary . . . and not extend and obligations or liabilities to those receiving TARP funds")

97. *Id.*

98. Although the impetus for the two types of claims is similar, the claims themselves are distinct. More specifically, claims that are premised upon breach of

provisions of the SPAs, exposing them to liability for breach of contract.[99] The fundamental problem with the argument, however, is that mortgagors lack privity, as they are not parties to the SPAs.[100] Thus these claims are dependent upon plaintiffs proving they were intended third-party beneficiaries of the SPAs. While the federal courts have been nearly unanimous in their holdings that the SPAs do not create third-party beneficiary status in mortgagors,[101] the bases for reaching that conclusion have taken two different primary forms. Each of those bases is briefly discussed below.

1. The Absence of Clear Intent

The most common basis for denying mortgagors' third-party beneficiary status is that the SPAs do not demonstrate that mortgagors are intended beneficiaries.[102] Although demonstrating third-party beneficiary status is typically a rigorous hurdle for plaintiffs, in the context of government contracts[103] it is significantly more difficult, as the presumption is that mortgagors are only incidental ben-

---

contract—as opposed to breach of the statute—are not governed by implied-rights analysis.

99. *See, e.g.*, Edwards v. Aurora Loan Servs., LLC, 791 F. Supp. 2d 144, 150-52 (D.D.C. 2011); Alpino v. JPMorgan Chase Bank, N.A., Civil No. 1:10-12040-PBS, 2011 WL 1564114, at *3–5 (D. Mass. Apr. 21, 2011) (plaintiffs arguing third-party beneficiary status under HAMP).

100. *See, e.g.*, *Edwards*, 791 F. Supp. 2d at 150–54 (setting out the presumption that mortgagors under HAMP are mere "incidental beneficiaries"); *Alpino*, 2011 WL 1564114 at *3 ("Of the number of federal courts to have considered this issue, the majority have held that homeowners are not the intended beneficiaries of these agreements and, thus, do not have a claim for breach of contract arising from lenders' or servicers' failures to abide by the terms of HAMP in considering inquiries related to mortgage modifications."); Speleos v. BAC Home Loans Servicing, L.P., 755 F. Supp. 2d 304, 308–10 (D. Mass. 2010) (explaining that even if a party is meant to benefit from a contract, that party is not necessarily a third-party beneficiary).

101. *See, e.g.*, Thomas v. JPMorgan Chase & Co., 811 F. Supp. 2d 781, 797 (S.D.N.Y. 2011); *Edwards*, 791 F. Supp. 2d at 151 ("[T]he SPA specifically identifies the contemplated beneficiaries of the agreement, a recitation that does not include Plaintiffs."); *see also, e.g.*, Wigod v. Wells Fargo Bank, 673 F.3d 547, 559 n.4 (7th Cir. 2012) (stating in dicta the SPAs do not give rise to third-party beneficiary rights in mortgagors). *Contra* Marques v. Wells Fargo Home Mortg., Inc., No. 09-cv-1985-L(RBB), 2010 WL 3212131, at *6–7 (S.D. Cal. Aug. 12, 2010) (allowing plaintiff borrower to state a third-party claim against defendant mortgagee).

102. *Speleos*, 755 F. Supp. 2d at 308–09.

103. The SPAs are both governmental contracts and subject to federal law for purposes of analyzing third-party beneficiary status. *See, e.g.*, Simmons v. Countrywide Home Loans, Inc., No. 09cv1245 JAH(JMA), 2010 WL 2635220, at *2 (S.D. Cal. June 29, 2010) ("[D]emonstrating third-party beneficiary status in the context of a government contract is a comparatively difficult task.").

eficiaries.[104] This presumption can be overcome through contractual language indicating a "clear intent" that the third party is an intended beneficiary,[105] but a party cannot demonstrate the requisite clear intent through contractual language that merely enumerates interested constituencies or simply states general goals or purposes that happen to benefit the third party.[106] Rather to overcome the presumption, a plaintiff must prove that the parties to the contract intended both to confer a benefit upon the plaintiff and to grant the plaintiff enforceable rights.[107]

Within the context of TARP/HAMP claims pursuant to the SPAs, mortgagors have not had difficulty demonstrating that the SPAs were at least tangentially intended to confer a benefit upon them.[108] Indeed the language of the underlying statutory scheme,[109] in combination with the regulatory language in the HAMP Guidelines[110] and the language of the SPAs,[111] explicitly contemplates some benefit would be conferred upon mortgagors. Plaintiffs, however, have been unable to prove that the parties to the SPAs intended to confer *enforceable* rights on mortgagors.[112]

More specifically the federal courts have ruled that the text and purpose of the SPAs do not indicate an intent to confer enforceable rights on the basis of three types of analyses. First, courts have denied plaintiffs' claims upon finding an absence of textual

104. *See, e.g.*, Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1211 (9th Cir. 2000) (incidental beneficiaries are those who benefit from the existence of the contract, but the parties nonetheless did not intend to confer a benefit upon them).

105. *See, e.g.*, *id.* ("The intended beneficiary . . . must fall within a class clearly intended by the parties to benefit from the contract.").

106. *See, e.g.*, Smith v. Cen. Ariz. Water Conservation Distr., 418 F.3d 1028, 1035–36 (9th Cir. 2005).

107. *See, e.g.*, *Speleos*, 755 F. Supp. 2d at 308–09 ("[S]ection 313(2)(a) of the Restatement (Second) of Contracts is inapplicable and the Court will analyze the Plaintiffs' claim under section 313(2)(b). Section 313(2)(b) requires a showing that the Plaintiffs were intended to benefit from the contract and that third-party beneficiary claims are consistent with the terms of the contract and the policy underlying it.").

108. *Klamath Water Users Protective Ass'n*, 204 F.3d at 1211 (holding that there is a clear intent to enforce the contract with the mortgagors, which makes them more than incidental beneficiaries).

109. Davis v. United Air Lines, Inc., 575 F. Supp. 677, 680 (E.D.N.Y. 1983).

110. *Speleos*, 755 F. Supp. at 309.

111. Edwards v. Aurora Loan Servs., 791 F. Supp. 2d 144, 152 (D.D.C. 2011).

112. *See id.* (collecting cases in which courts have found that plaintiffs lacked standing to enforce the terms of HAMP SPAs as third-party beneficiaries); *see also* Picini v. Chase Home Fin., 854 F. Supp. 2d 266, 272 (E.D.N.Y. 2012) (explaining that SPAs were intended to benefit the public, but not to confer individual rights).

language indicating the intent to confer rights.[113] This analysis is premised upon the absence of affirmative evidence indicating that intent. Second, courts have held that the language within the SPAs constitutes precatory language that does not give rise to enforceable lawsuits.[114] Finally, courts have held that the SPAs explicitly intend to prevent third-party beneficiary claims.[115] More specifically, the SPAs provide that the contract "shall inure to the benefit of . . . the parties to the Agreement and their permitted successors-in-interest."[116] Courts have read this clause as operating as a rule of both inclusion and exclusion.[117] As to the former, the clause explicitly

113. *See, e.g.*, *Edwards*, 791 F. Supp. 2d at 151 (explaining that in order for plaintiffs to establish standing to enforce the terms of the challenged SPA, "the precise language of the contract must demonstrate a *clear intent* to rebut the presumption that the third parties are merely incidental beneficiaries"); *In re* Cruz, 446 B.R. 1, at *4 (Bankr. D. Mass. 2011) (citing *Speleos*, 755 F. Supp. 2d at 308) ("[O]ne must look to a contract itself to determine whether the parties intended to give rights to third party beneficiaries."); *Speleos*, 755 F. Supp. 2d at 308 ("Neither the HAMP Guidelines nor the Servicer Agreement states any intent to give borrowers a right to enforce a servicer's obligations.").

114. *See, e.g.*, Kennedy v. Bank of Am., No. 12-CV-952 YGR, 2012 WL 2711034, at *5 (N.D. Cal. July 6, 2012) (quoting Hoffman v. Bank of Am., N.A., C 10-2171 SI, 2010 WL 2635773, at *4 (N.D. Cal. June 30, 2010)) ("[I]t would be unreasonable for a qualified borrower seeking a loan modification to rely on the HAMP servicer's agreement as granting him enforceable rights since the agreement does not actually require that the servicer modify all eligible loans, nor does any of the other language of the contract demonstrate that the borrowers are intended beneficiaries."); Gorbaty v. Wells Fargo Bank, Nos. 10-CV-3291 (NGG) (SMG), 10-CV-3354 (NGG)(SMG), 2012 WL 1372260, at *15–16 (E.D.N.Y. Apr. 18, 2012) (citations and alterations omitted) ("Clear intent is not satisfied by a contract's recitation of interested constituencies, vague hortatory pronouncements, statements of purpose, explicit reference to a third party, or even a showing that the contract operates to the third parties' benefit and was entered with them in mind. . . . [T]he significant discretion built into the SPA and the HAMP Guidelines precludes a finding that [the Plaintiff[could have reasonably relied on receiving a loan modification.").

115. *See, e.g.*, Thomas v. JPMorgan Chase & Co., 811 F. Supp. 2d 781, 797 (S.D.N.Y. 2011) ("Allowing plaintiffs to enforce the SPA would contradict the express terms of the agreement . . . ."). In a similar vein at least one court has held that third-party beneficiary claims are explicitly barred by provisions of Fannie Mae's Mortgage Selling and Servicing Contract. Markle v. HSBC Mortg. Corp. (USA), 844 F. Supp. 2d 172, 181-83 (D. Mass. 2011).

116. *Edwards*, 791 F. Supp. 2d at 151; Martinez v. Bank of Am., N.A., No. 3:10-cv-00287-RCJ-RAM, 2010 WL 4290921, at *9 (D. Nev. Oct. 20, 2010) (quoting Escobedo v. Countrywide Home Loans, Inc., No. 09cv1557 BTM (BLM), 2009 WL 4981618, at *2 (S.D. Cal. Dec. 15, 2009)).

117. Gorbaty v. Wells Fargo Bank, Nos. 10-CV-3291 (NGG) (SMG), 10-CV-3354 (NGG)(SMG), 2012 WL 1372260, at *16 (E.D.N.Y. Apr. 18, 2012) (citations omitted) ("[A]lthough it is clear (and undisputed) that the SPA was intended to operate to the *benefit* of third-party borrowers, Gorbaty does not identify any lan-

defines the beneficiaries of the agreement. As to the latter, the clause excludes all others from acquiring a legal beneficiary status.

2. In the Wake of *Astra*

Although the first basis discussed above accounts for the vast majority of federal courts who have ruled on this issue, a minority of federal courts have held that the argument is controlled by the holding in *Astra USA, Inc. v. Santa Clara County*.[118] In that case Astra USA, Inc. and other pharmaceutical companies (Pharmaceutical Companies) entered into pharmaceutical pricing agreements (PPA) with the Health Resources and Services Administration (HRSA) pursuant to the Public Health Services Act.[119] These PPAs were opt-in agreements that virtually mirrored the statutory language contained in the Public Health Services Act (PHSA).[120] By their terms the PPAs imposed price ceilings on the amount the Pharmaceutical Companies could charge qualifying entities—known as 340B entities—for pharmaceuticals covered under the PPAs.[121] After the Pharmaceutical Companies executed PPAs, Santa Clara County, the operator of several 340B entities, sued the Pharmaceutical Companies. Santa Clara alleged that the Pharmaceutical Companies breached their PPAs with HRSA by charging prices in

guage in the SPA that evidences an intent to permit borrowers to *enforce* the agreement against Wells Fargo. To the contrary, the SPA states that '[t]he Agreement shall inure to the benefit of and be binding upon *the parties to the Agreement* and their permitted successors-in-interest.' Moreover, the SPA details the remedies specifically available to Fannie Mae alone in the event of default by Wells Fargo. These provisions strongly suggest that the parties to the SPA did not intend for borrowers to enforce the contract."); *Edwards*, 791 F. Supp. 2d at 151 ("Plaintiffs have not established that clear intent here. Although the Aurora SPA was entered into as a means of assisting distressed homeowners, the contract does not evince an intent to establish the right to enforce the contract on the part of eligible borrowers. To the contrary, the SPA specifically identifies the contemplated beneficiaries of the agreement, a recitation that does not include Plaintiffs. Instead, the SPA states that it 'shall inure to the benefit of . . . the parties to the Agreement and their permitted successors-in-interest.'").

118. 131 S. Ct. 1342 (2011). *See also, e.g.*, Allen v. CitiMortgage, Inc., No. CCB-10-2740, 2011 WL 3425665, at *7-8 (D. Md. Aug. 4, 2011); *In re* Bank of Am. Home Affordable Modification Program Contract Lit., No. 10–md–02193–RWZ, 2011 WL 2637222, at *3 (D. Mass. July 6, 2011); Warner v. Wells Fargo Bank, No. SACV 11-00480 DOC (PLAx), 2011 WL 2470923, at *3 (C.D. Cal. June 21, 2011); Turbeville v. JPMorgan Chase Bank, No. SA CV 10-01464 DOC (JCGx), 2011 WL 7163111, at *5 (C.D. Cal. Apr. 4, 2011) (relying on *Astra* for a third party beneficiary claim).

119. *Astra*, 131 S. Ct. at 1347.

120. *Id.* at 1345

121. *Id.* at 1343.

excess of the amounts permitted in the PPAs.[122] Although neither Santa Clara nor the 340B entities it operates had privity, Santa Clara nevertheless argued that it had standing to maintain the lawsuit based on its status as a third-party beneficiary of the PPAs.[123]

At the trial level the district court dismissed the County's Complaint, ruling Santa Clara was not a third-party beneficiary of the PPAs.[124] The Ninth Circuit subsequently reversed, holding that 340B entities are third-party beneficiaries of the PPAs.[125] The Supreme Court thereafter reversed the Ninth Circuit's ruling, holding that extension of third-party beneficiary status to 340B entities under the PPAs was incompatible with the PHSA.[126]

Specifically, the Court stated that Congress did not intend to create a private right of action in the PHSA.[127] Moreover, it stated the PPAs were merely opt-in agreements that mimic the language of the statute.[128] Thus if private parties were permitted to advance third-party beneficiary theories for violation of the PPAs, "[t]he absence of a private right of action to enforce the statutory ceiling price obligations would be rendered meaningless."[129] Stated differently, where the opt-in agreement merely parrots the statutory language, "suits to enforce [the statute] and suits to enforce [the opt-in agreements] are in substance one and the same. Their treatment, therefore, must be the same, '[n]o matter the clothing in which [the plaintiffs] dress their claims.'"[130]

While the fit between the *Astra* ruling and HAMP claims is somewhat tenuous,[131] courts applying the *Astra* holding to HAMP claims have attempted to track the analytical structure of *Astra* as closely as possible.[132] Thus these courts have held that, as an initial matter, neither TARP nor HAMP create a private right of action.[133]

122. *Id.* at 1347.

123. *Id.*

124. *Id.*

125. *Astra*, 131 S. Ct. at 1347.

126. *Id.* at 1350.

127. This particular statement does not actually appear to be a holding. Rather the parties in *Astra* "conceded that Congress authorized no private right of action under 340B for covered entities who claim they have been charged prices exceeding the statutory ceiling." *Id.* at 1345.

128. *Id.*

129. *Id.* at 1348.

130. *Id.* at 1345 (citing *Tenet v. Doe*, 544 U.S. 1, 8 (2005)).

131. *See* Sutcliffe v. Wells Fargo Bank, 283 F.R.D. 553, 554 (N.D. Cal. 2012) (stating *Astra* is inapposite within the context of state law claims).

132. *E.g.*, Turbeville v. JPMorgan Chase Bank, No. SA CV 10-01464 DOC (JCGx), 2011 WL 7163111, at *5 (C.D. Cal. Apr. 4, 2011).

133. *Id.*

Furthermore, like the PPAs, the SPAs are opt-in agreements.[134] Thus permitting private parties to advance third-party beneficiary claims for violation of the SPAs would amount to the same type of "backdoor" prohibited by *Astra*.[135] Accordingly, and in alignment with the Court's holding in *Astra*, a minority of courts hold that third-party claims for violation of the SPAs are incompatible with the statutory regime and are prohibited.[136]

C. Due Process Claims

In terms of due process claims, plaintiffs have attempted to recast procedural violations of the HAMP Guidelines as violations of the Fifth and Fourteenth Amendments. For instance plaintiffs have alleged that defendants failed to provide required notification of their decisions to grant or deny modifications,[137] to properly review eligibility for modification,[138] and to provide an appeals process for negative modification decisions.[139] These claims have all been dismissed on one of two grounds. First, courts have found that no state action occurred and thus no due process violation could exist.[140]

---

134. *See id.* (explaining that banks "opt-in to the TARP and HAMP statutory scheme by signing [SPAs] with the United States Treasury," just as "pharmaceutical companies opt-in to PHSA's statutory scheme" by entering into PPAs with the United State Department of Health and Human Services). Although this is true, HAMP is required for GSE Loans. *See supra* notes 11–14 and accompanying text.

135. *See Turbeville*, 2011 WL 7163111, at *5 (quoting *Astra*, 131 S. Ct. at 1345) ("'Allowing the Plaintiffs to enforce the SPA under a third-party beneficiary theory would open a 'backdoor' to a private right of action to enforce HAMP, in contravention of Congress' wishes. As the Supreme Court held in *Astra*, this kind of third party beneficiary is 'incompatible with the statutory regime.'").

136. *E.g.*, *id.*

137. *E.g.*, Gorbaty v. Wells Fargo Bank, Nos. 10-CV-3291 (NGG) (SMG), 10-CV-3354 (NGG)(SMG), 2012 WL 1372260, at *17 (E.D.N.Y. Apr. 18, 2012); Nguyen v. BAC Home Loan Servs., No. C-10-01712 RMW, 2010 WL 3894986, at *3 (N.D. Cal. Oct. 1, 2010); Williams v. Geithner, No. 09-1959 ADM/JJG, 2009 WL 3757380, at *4 (D. Minn. Nov. 9, 2009).

138. *E.g.*, Orcilla v. Bank of Am., No. C10-03931 HRL, 2010 WL 5211507, at *3 (N.D. Cal. Dec. 16, 2010).

139. *E.g.*, *Gorbaty*, 2012 WL 1372260, at *17; *Nguyen*, 2010 WL 3894986, at *3. In rare, early cases a few plaintiffs survived motions to dismiss by arguing the defendants failed to adopt procedures consistent with the HAMP Guidelines; however, those decisions were all premised upon the peculiarities and nuances of those specific cases. *See, e.g.*, Huxtable v. Geithner, No. 09cv1846 BTM, 2009 WL 5199333, at *3 (S.D. Cal. Dec. 23, 2009) (denying defendant's motion to dismiss, as insufficient evidence existed indicating whether state action occurred).

140. *E.g.*, Fannie Mae v. Mandry, No. 12-13236, 2013 WL 687056, at *3–4 (E.D. Mich. Feb. 26, 2013) (holding that Fannie Mae is not a governmental actor); Fed. Home Loan Mortg. Co. v. Matthews-Gaines, No. 12-12131, 2013 WL 423777,

Second, courts have found that TARP, HAMP, and the SPAs do not provide plaintiffs with a protected property interest.[141]

As to the first of those grounds, the Due Process Clause of the U.S. Constitution does not regulate the activities of nongovernmental actors.[142] To date the vast majority of lawsuits alleging due process violations from HAMP violations have been brought against nongovernmental actors.[143] In response courts have held that a variety of institutions are not governmental actors such that due process violations cannot lie. For instance, courts have held that neither Fannie Mae nor Freddie Mac is a governmental actor.[144] Furthermore courts have held that the acceptance of TARP funding, without more, is insufficient to transform a private actor into a governmental actor.[145] Consequently a variety of financial institutions, notwithstanding their acceptance of TARP funding, are also not governmental actors.[146]

Although that threshold analysis has been sufficient to dispense with the majority of these claims, a number of courts have premised their decisions on a more substantive basis. Specifically they have held that nothing within TARP, HAMP, or the SPAs limits governmental action in such a way as to deprive plaintiffs of an enti-

---

at *3 (E.D. Mich. Feb. 4, 2013) (holding that Freddie Mac is not a governmental actor).

141. *E.g.*, Edwards v. Aurora Loan Servs. 791 F. Supp. 2d 144, 153 (D.D.C. 2011); McInroy v. BAC Home Loan Servicing, No. CIV 10-4342 DSD/SER, 2011 WL 1770947, at *2 (D. Miss. May 9, 2011); *Nguyen*, 2010 WL 3894986, at *4.

142. *See generally* 16C C.J.S. *Constitutional Law* § 1449 (2014) ("The Fifth Amendment is not directed against, and does not limit, the actions of individuals, or private entities, unless the entity's actions can be fairly attributed to the federal government.").

143. *E.g.*, *Mandry*, 2013 WL 687056 (bringing suit against FHFA and Fannie Mae); *Matthews-Gaines*, 2013 WL 423777; *Edwards*, 791 F. Supp. 144 (bringing suit against Fannie Mae); *McInroy*, 2011 WL 1770947 (bringing suit against a private loan servicer); *Nguyen*, 2010 WL 3894986 (bringing suit against a private loan servicer).

144. *E.g.*, *Mandry*, 2013 WL 687056, at *4 (holding that Fannie Mae is not a state actor); *Matthews-Gaines*, 2013 WL 423777, at *3 (holding Freddie Mac is not a state actor); Herron v. Fannie Mae, 857 F. Supp. 2d 87, 92 (D.D.C. 2012) (holding that Fannie Mae is not a state actor.).

145. *See, e.g.*, Springs v. Mayer Brown LP, No. 11-CV-13518, 2013 WL 1122485, at *4 (E.D. Mich. Mar. 18, 2013) (finding the plaintiff's allegation that "the federal government loaned money to or invested in [the defendant] through [TARP]" to be insufficient to support a finding of state action).

146. *See, e.g.*, Lopezlena v. Litton Loan Serv., LP, No. 3:12-cv-05313, 2012 WL 4479580, at *4 (W.D. Wash. Sept. 28, 2012) (holding that Ocwen is not a governmental actor); Ike v. Quantum Servicing Corp., No. 11-02914, 2012 WL 3727132, at *6 (W.D. Tenn. Aug. 27, 2012) (holding that Quantum Servicing is not a governmental actor).

tlement.[147] On repeated occasions the Supreme Court has held that the Due Process Clause only protects legitimate claims to entitlements and does not create a protected property interest in everything that could be reasonably described as a benefit.[148] Accordingly laws that benefit a party or group of persons will not rise to protect property interests where a governmental official may grant or deny the benefit by the exercise of her discretion.[149] In the context of TARP and HAMP, then, courts have noted that "the Treasury was not required to create HAMP, retains discretion to modify HAMP as it sees fit, and may end HAMP at any time."[150] Furthermore servicers are not required to participate in HAMP, can "opt out of the Program if the HAMP guidelines are changed,"[151] and possess discretion to alter eligibility variables according to their discretion.[152] Taken together the discretion available to both the Treasury and servicers "renders any borrower's expectation and entitlement to a modification too uncertain to warrant protection under the Due Process Clause."[153] Accordingly even though HAMP generates the potential of some articulable benefit to mortgagors, that benefit is insufficient to rise to an entitlement worthy of constitutional due process protection.[154]

147. *See, e.g.*, *Edwards*, 791 F. Supp. 2d at 153 (finding that the "Plaintiffs cannot establish a legitimate claim of entitlement to HAMP modifications" given that EESA merely encourages the government to make loan modifications, instead of requiring them).

148. *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)) ("'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'").

149. *See id.* ("Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it at their discretion.").

150. Gorbaty v. Wells Fargo Bank, Nos. 10-CV-3291 (NGG) (SMG), 10-CV-3354 (NGG)(SMG), 2012 WL 1372260, at *18 (E.D.N.Y. Apr. 18, 2012) (quotation marks and citation omitted).

151. *Id.* (citation omitted). This statement is only partially true, however. As discussed in the Introduction, servicers of GSE Loans are required to participate. *See supra* notes 11–14 and accompanying text. All other servicers participate, if at all, voluntarily. *Id.*

152. *Gorbaty*, 2012 WL 1372260, at *18 (citation omitted).

153. *Id.* (quoting Edwards v. Aurora Loan Servs., L.L.C., 791 F. Supp. 2d 144, 155 (D.D.C. 2011)).

154. *See id.* (declining to recognize a protected property interest and dismissing the plaintiffs' due process claim).

Finally, courts have held that the procedural benefits generated by HAMP are not available as a result of positive law.[155] Instead HAMP's benefits are based upon policies of the Secretary of the Treasury[156] and are per se insufficient to give rise to constitutional due process protections.[157] The crux of this analysis lies in the distinction between the Constitution and statutes on the one hand and mere policies of an administrative body on the other.[158]

With regard to the Constitution and statutes, due process claims are at least theoretically available.[159] With regard to administrative policies, though, they are per se unavailable because administrative policies can be altered quickly and without legislative, executive, or popular input.[160] Accordingly administrative policies lack the finite quality necessary for characterization as an entitlement.[161]

155. *See, e.g.*, *Edwards*, 791 F. Supp. 2d at 154 ("HAMP eligibility requirements are neither codified by Congress nor promulgated by Treasury thorugh notice-and-comment-rulemaking.").

156. *See, e.g.*, *id.* (explaining that "Treasury retains full discretion to end HAMP at any time").

157. *See, e.g.*, *id.* (noting that the discretion of Treasury precludes the finding of entitlement necessary to create a constitutionally protected property right).

158. The court in *Edwards* lumps administrative regulations into its grouping of positive law. *See id.* at 154 (distinguishing between statutes and regulations on the one hand, and "administrative rules or understanding existing wholly apart from legislation or regulations" on the other). While this Article expresses no opinion on whether the result would be different if HAMP protections were re-framed as administrative regulations, at least some Supreme Court precedent indicates that HAMP benefits, even if re-classed as administrative regulations, would still be insufficient to generate a cognizable due process claim. *Cf.* Alexander v. Sandoval, 532 U.S. 275, 289 (2001) (holding that administrative regulations, standing alone, are insufficient to give rise to private rights of action).

159. The *Edwards* court, for example, did entertain the possibility that EESA could support the plaintiffs' due process claim in theory, though it ultimately rejected this argument. *See Edwards*, 791 F. Supp. 2d at 153 (suggesting that EESA could support a due process claim only if it required mandatory loan modifications instead of merely encouraging them).

160. *See* Wash. Legal Clinic for the Homeless v. Barry, 107 F.3d 32, 36-37 (D.C. Cir. 1997) ("Where . . . the legislature leaves final determination of which eligible individual receive benefits to the 'unfettered discretion' of administrators, no constitutionally protected property interest exists.").

161. *See Edwards*, 791 F. Supp. 2d at 154 ("Treasury retains full discretion to end HAMP at any time, and, as the agency has as the agency already has done, to modify the program as it sees fit. This discretion precludes a finding of entitlement.").

D. TPP Claims

Although the previous categories have received nearly uniform treatment in the federal courts, breach of contract claims arising from TPP agreements have resulted in mixed success for plaintiffs.[162] At the most basic level plaintiffs have alleged breach of contract claims on the theory that TPP agreements are contracts in their own right and that defendants are liable for breach by failing to execute a permanent loan modification.[163] Courts that have dismissed these claims have done so on three analytical bases.[164] First, they have denied state law TPP claims on the basis that TPP con-

162. *Compare* Corvello v. Wells Fargo Bank, 728 F.3d 878, 885 (9th Cir. 2013) (holding that TPP agreements contain enforceable promises), Young v. Wells Fargo Bank, 717 F.3d 224, 226 (1st Cir. 2013) (same), Wigod v. Wells Fargo Bank, 673 F.3d 547, 565 (2012) (finding that a TPP agreement may support a breach of contract claim), Yates v. U.S. Bank Nat'l Ass'n, 912 F. Supp. 2d 478, 488 (E.D. Mich. Dec. 10, 2012) (same), *and* Darcy v. CitiFinancial, Inc., No. 1:10-cv-848, 2011 WL 3758805, at *5 (W.D. Mich. Aug. 25, 2011) (same), *with* Pandit v. Saxon Mortg. Servs., Inc., No. 11-CV-3935(JS)(GRB), 2012 WL 4174888, at *5 (E.D.N.Y. Sept. 17, 2012) (holding no cause of action for breach of a TPP agreement exists, as TPP agreements are not contracts), Stovall v. SunTrust Mortg., Inc., No. RDC-10-2836, 2011 WL 4402680, at *11–12 (D. Md. Sept 20, 2011) (same), Lucia v. Wells Fargo Bank, 798 F. Supp. 2d 1059, 1066–68 (N.D. Cal. 2011) (same), Grill v. BAC Home Loans Servicing, No. 10-CV-03057-FCD/GGH, 2011 WL 127891, at *3–4 (E.D. Cal. Jan. 14, 2011) (same), *and* Prasad v. BAC Home Loans Servicing, No. 2:10-CV-2343-FCD/KJN, 2010 WL 5090331, at *3–9 (E.D. Cal. Dec. 7, 2010) (same).

163. *See, e.g.*, *Corvello*, 728 F.3d at 882 ("[The plaintiffs] alleged that because they complied with the obligations of their TPPs by submitting accurate documentation and making trial payments, there was an enforceable contract that bound the servicer . . . to offer permanent modifications."). As articulated by the court in *Wigod*, plaintiffs claiming breach of TPP agreements have avoided the specter of *Astra*, as they allege rights arising from privity as opposed to third-party beneficiary status. *Wigod*, 673 F.3d at 559.

164. Other more ancillary bases exist. For instance, a number of jurisdictions have granted summary dispositions on the basis that the plaintiff could not demonstrate compliance with the statute of frauds. *E.g.*, CitiMortgage, Inc. v. Crawford, 934 F. Supp. 2d 942 (S.D. Ohio 2013); Rummell v. Vantium Capital, Inc., No. 12-10952, 2012 WL 2564846, at *6 (E.D. Mich. July 2, 2012). In a related vein, a number of courts have held that the language of the TPP agreement itself prevents its operation as an enforceable contract. Specifically these courts hold that, by the strict language of the TPP agreement, it is not enforceable until both parties sign it. Thus in those instances where the financial institution has not signed the document, courts have held that the TPP is unenforceable because it fails to indicate an intent to be bound. *E.g.*, Pennington v. HSBC Bank USA, N.A., 493 F. App'x 548, 555 (5th Cir. 2012). Finally, courts have held that plaintiffs have failed to state a claim for breach of contract because the plaintiffs were unable to plead and prove that they made timely payments pursuant to the TPP. *E.g.*, Deschaine v. IndyMac Mortg. Servs., No. CIV. 2:13-1991 WBS CKD, 2013 WL 6054456, at *5 (E.D. Cal. Nov. 15, 2013). Nevertheless those bases for decision are particular to specific

tract claims are not independent of HAMP claims.[165] Second, they have denied the claims on the basis that TPPs are illusory.[166] Third, courts have denied the claims on the basis that TPP agreements lack consideration.[167]

With regard to the first of these bases—independence—courts have dismissed plaintiffs' state law breach of contract claims on the ground that these claims ultimately arise under HAMP.[168] In a more substantive vein, jurisdictions that have dismissed TPP claims on the basis of illusoriness have held that those agreements are not contracts, and that, therefore, state law breach of contract actions cannot arise from their nonperformance.[169] The fundamental position behind these rulings is that the TPP's language does not constitute an enforceable promise in contract.[170] Specifically the standard language for TPP agreements provides in pertinent part:

> If prior to the Modification Effective Date, (i) the lender does not provide me with a fully executed copy of this Plan and the Modification Agreement, (ii) I have not made the Trial Period payments required under Section 2 of this Plan, or (iii) the Lender determines that my representations in Section 1 are no longer true and correct, the Loan Documents will not be modified and the Plan will terminate.[171]

Relying on the strict force of this language, these courts have held that transmittal of a permanent modification is within the discretion of the servicer.[172] Thus even if the language were sufficient to

transactions, as opposed to generalized attacks on the enforceability of TPP agreements. Accordingly those bases are outside the scope of this Article.

165. *E.g.*, Bourdelais v. J.P. Morgan Chase Bank, No. 3:10CV670-HEH, 2011 WL 1306311, at *3–6 (E.D. Va. Apr. 1, 2011).

166. *E.g.*, *Pandit*, 2012 WL 4174888, at *4-5; *Pennington*, 493 F. App'x at 556.

167. *E.g.*, *Crawford*, 934 F. Supp. 2d at 948.

168. *E.g.*, Vida v. OneWest Bank, Civ. No. 10-987-AC, 2010 WL 5148473, at *3–7 (D. Or. Dec. 13, 2010). *But see Wigod*, 673 F.3d at 581 ("The end-run theory is built on the novel assumption that where Congress does not create a private right of action for violation of a federal law, no right of action may exist under state law, either.").

169. *E.g.*, *Vida*, 2010 WL 5148475, at *5.

170. *E.g.*, White v. JPMorgan Chase Bank, No. 3:11–CV–3337–L20, 2013 WL 3071894, at *3-4 (D. Md. June 17, 2013); *Vida*, 2010 WL 5148475, at *5.

171. Geske v. Wells Fargo Bank, N.A., No. 3:11-cv-3337-L, 2012 WL 1231835, at *6 (N.D. Tex. Apr. 12, 2012) (emphases omitted).

172. *E.g.*, *id.*

give rise to a promise, the promise is illusory.[173] On that basis these courts have concluded that TPP agreements are not contracts.[174]

Finally, courts have denied TPP claims on the ground that TPP agreements lack consideration[175] and are thus not contracts.[176] At common law, consideration is a requisite element for contract formation.[177] Thus, at common law, courts regularly required successful compliance with the benefit/detriment test.[178] Central to that test is the notion that a plaintiff must claim that she passed some legal benefit to the other party in exchange for accepting some legal detriment.[179] In the context of TPP agreements the purpose behind a TPP modification is to *lower* a mortgagor's existing loan commitment.[180] Thus even assuming the language of the TPP constituted a legal promise, these courts have held that the mortgagor has not sustained a legal detriment.[181] Rather the mortgagor has simply promised to do that which the law already required—albeit to a lesser extent.[182] And on the other side of the transaction the mortgagee has not sustained a legal benefit because if the TPP agreement is successfully completed, the mortgagee will get paid *less* than that which the mortgagee was entitled to under the origi-

173. *Id. But see, e.g.*, Wigod v. Wells Fargo Bank, 673 F.3d 547, 563 (7th Cir. 2012) (holding TPP agreements are not illusory because the language of the TPP agreement provided that the servicer would provide the permanent modification and would send the permanent modification, if the terms of the TPP were successfully completed).

174. *E.g.*, Pennington v. HSBC Bank USA, 493 F. App'x 548, 555 (5th Cir. 2012).

175. *E.g.*, James v. Wells Fargo Bank, 533 F. App'x 444, 447 (5th Cir. 2013); Neil v. Wells Fargo Bank, No. 1:13-cv-644, 2013 WL 4782030, at *2 (E.D. Va. Sept. 4, 2013); CitiMortgage, Inc. v. Crawford, 934 F. Supp. 2d 942, 948 (S.D. Ohio 2013). *But see, e.g.*, *Wigod,* 673 F.3d at 564 (holding consideration existed because the TPP required the mortgagor "to open new escrow accounts, to undergo credit counseling (if asked), and to provide and vouch for the truth of her financial information"—all actions that were not required under the original note and mortgage).

176. *E.g.*, *Crawford*, 934 F. Supp. 2d at 948–49.

177. Spaulding v. Wells Fargo Bank, 714 F.3d 769, 777 (4th Cir. 2013).

178. *Wigod*, 673 F.3d at 563–64.

179. *Id.*

180. White v. JPMorgan Chase Bank, No. GLR-12-3591, 2013 WL 3071894, at *1 n.2 (D. Md. June 17, 2013).

181. *E.g.*, *Crawford*, 934 F. Supp. at 948; Neil v. Wells Fargo Bank, No. 1:13-cv-644, 2013 WL 4782030, at *2 (E.D. Va. Sept. 4, 2013).

182. *See, e.g.*, Vida v. OneWest Bank, Civ. No. 10-987-AC, 2010 WL 5148473, at *7 (D. Or. Dec. 13, 2010) (finding that "payments made during a loan modification trial period did not qualify as consideration" because they were no more than what the Plaintiff was required to do already under terms of the loan); *Crawford*, 934 F. Supp. 2d at 948.

nal note and mortgage.[183] Thus at least in terms of the modifications themselves, these courts have held that no consideration exists for contract formation.[184]

Noting the possible failure of arguments that allege consideration based solely upon modification of the note and mortgage, plaintiffs have also attempted to argue that submission of documents pursuant to the TPP agreements constitutes a sufficient, independent legal consideration.[185] In the general sense all TPP agreements require that mortgagors submit a variety of documents to the mortgagee.[186] In an attempt to allege both a benefit and a detriment for purposes of contract formation, mortgagors have argued that nothing within the original note and mortgage requires submission of those documents, and thus the mortgagor sustains a legal detriment by agreeing to submit those documents.[187] Furthermore mortgagors have argued that the mortgagees were not entitled to those documents pursuant to the original note and mortgage, and thus mortgagees receive a legal benefit when they receive those documents pursuant to the TPP agreement.[188] In response to this argument, the prevailing position was aptly summed up by the District Court of the Southern District of Ohio, which held that if submission of documents were sufficient as consideration then "'each would-be barista not hired after filling out an application at Starbucks and handing it to a Starbucks employee'

183. *E.g.*, *Crawford*, 934 F. Supp. 2d at 948 (explaining that in the Defendant's loan documents, the Plaintiff can "accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights").

184. *E.g.*, *id.*

185. *See e.g.*, *id.* ("[The mortgagors] have not adequately alleged consideration, as neither the TPP payments nor [the mortgagors] submission of documents are sufficient.").

186. U.S. DEP'T OF THE TREASURY, MAKING HOME AFFORDABLE PROGRAM HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES, 18–30 (2011). For instance, the NPV evaluations that work to establish a borrower's eligibility for a TPP agreement require that the mortgagor send to the mortgagee any borrower income verification forms, evidence of application of each step to the modification waterfall plan under HAMP (including any variations), and any and all documents or information listed in the TPP Notice received by the mortgagor, among other documents. *See id.* at 37.

187. *E.g., In re* Bank of America Home Affordable Modification Program (HAMP) Contract Litig., No. 10–md–02193–RWZ, 2011 WL 2637222, at *4 (D. Mass. July 6, 2011) (finding that plaintiff adequately alleged sufficient consideration under this theory).

188. *See* Durmic v. J.P. Morgan Chase Bank, No. 10-CV-10380-RGS, 2010 WL 4825632, at *12 (D. Mass. Nov. 24, 2010).

could claim consideration."[189] Or, stated differently, documents transmitted from the mortgagor to the mortgagee for the purpose of applying for the HAMP program are inherently insufficient to constitute a consideration.

III.
CLAIMS BASED ON STATE LAW AND THEIR RECEPTION IN THE COURTS

Given the failure of most claims—and the mixed success with TPP claims—the recent trend in HAMP litigation has been to "backdoor" HAMP claims as state law claims and thus circumvent the courts' resistance to HAMP actions. In this regard plaintiffs' claims can be generally categorized in one of three manners: (1) claims based on contract theory, (2) claims based on tort theory, and (3) claims based on violations of state statutory schemes. With limited exceptions, these theories have been unsuccessful.

A. *Actions Based in Contract Theory*

For purposes of this discussion, contract-based claims have much in common with TPP claims. Specifically, contract-based claims are largely premised upon the same temporal moment as TPP claims—step four of the modification process. Nevertheless they are distinct from TPP claims in two principal ways. First, contract-based claims, in contrast with TPP claims, have proven largely unsuccessful. Second, they are not premised upon breach of the explicit language of the TPP agreement. Rather, contract-based claims are premised upon two other facets of contract law—promissory estoppel[190] and the implied duty of good faith and fair dealing.

1. Actions Based upon Promissory Estoppel

In the context of HAMP and TPP claims, plaintiffs attempt to use promissory estoppel in two primary ways. First, plaintiffs attempt to use promissory estoppel as a cause of action in its own right to enforce promises allegedly made by the mortgagee to the

189. *Crawford*, 934 F. Supp. 2d at 949 (quoting Banaga v. Taylor Bean Mortg. Co., No. 11-4007 (JSC), 2011 WL 5056985, at *4 (N.D. Cal. Oct. 24, 2011)). *But see, e.g.*, Stagikas v. Saxon Mortg. Servs. Inc., 795 F. Supp. 2d 129, 136 (D. Mass. 2011) ("These conditions of the TPP all constitute new legal detriments to plaintiff that flowed from his acceptance of the TPP. . . . Accordingly, plaintiff has made sufficient allegations that the TPP was supported by consideration.").

190. Promissory estoppel is an equitable principle ordinarily used as a mechanism to overcome the absence of contract formation.

mortgagor.[191] Thus in the most common circumstance, plaintiffs have alleged promissory estoppel as a sword, where the plaintiff alleges the mortgagee promised to modify the mortgagor's mortgage and in reliance on that promise the mortgagor ceased paying the underlying note,[192] made the TPP payments,[193] or forewent other opportunities to clear the arrearage on the underlying note.[194] Second, plaintiffs attempt to use promissory estoppel as a shield to a shield—a defense to a defense—to overcome an otherwise legitimate statute of frauds defense.[195]

In both circumstances, plaintiffs have almost always failed based on one of three bases.[196] First, their actions have failed because promissory estoppel is only available as a cause of action in the absence of a legally enforceable contract.[197] Courts that have ruled on this basis have held that the existence of the underlying note and mortgage—the underlying contracts—prevents the operation of promissory estoppel. They have also dismissed claims under the statute of frauds, holding that the alleged promises made by the mortgagees, even if true, are barred, as the plaintiff failed to produce a signed writing to support the promises.[198] Finally, courts

191. *E.g.*, Brisbin v. Aurora Loan Servs., LLC, 679 F.3d 748, 752 (8th Cir. 2012).

192. *E.g.*, Pennington v. HSBC Bank USA, 493 F. App'x 548, 556 (5th Cir. 2012).

193. *E.g.*, Wigod v. Wells Fargo Bank 673 F.3d 547, 566 (7th. Cir. 2012).

194. *E.g.*, Hubbard v. PNC Bank, No. 13-337(MJD/JSM), 2013 WL 4781023, at *11 (D. Minn. Sept. 5, 2013).

195. *E.g.*, Gamez v. Wells Fargo Bank, No. 4:11-CV-919, 2013 WL 960464, at *2–3 (S.D. Tex. Mar. 12, 2013).

196. *E.g.*, *id.*; *see also, e.g.*, *Pennington,* 493 F. App'x at 556 (finding no promise from mortgagee upon which promissory estoppel could be supported nor any reliance damages upon which reliance could be found); *Brisbin*, 679 F.3d at 752–53 (finding that a state statute "prohibit[ed] the enforcement of an oral promise to postpone a foreclosure sale and that the lender was entitled to summary judgment on [the mortgagor's] promissory estoppel claim"); *Hubbard*, 2013 WL 4781023, at *11–12. *But see, e.g.*, *Wigod*, 673 F.3d at 566 (holding the plaintiff sufficiently alleged a claim for promissory estoppel); Agho v. Bank of America, No. 3:12cv617–DPJ–FKB, 2013 WL 3471466, at *5 (S.D. Miss. July 10, 2013) (same); Harvey v. Bank of America, 906 F. Supp. 2d 982, 993–94 (N.D. Cal. 2012) (same).

197. *See, e.g.*, LeBlanc v. Bank of Am., No. 2:13-cv-02001-JPM-tmp, 2013 WL 3146829, at *15 (W.D. Tenn. June 18, 2013); *Hubbard*, 2013 WL 4781023, at *11 ("Equitable estoppel applies only where no contract exists.").

198. *See, e.g.*, Martins v. BAC Home Loans Servicing, LP, 722 F.3d 249, 256–57 (5th Cir. 2013) ("Promissory estoppel may overcome the statute-of-frauds requirement . . . but 'there must have been a promise to sign a written contract which had been prepared and which would satisfy the requirements of the statute of frauds.'"); *Brisbin*, 679 F.3d at 753 (finding that borrowers cannot "enforce unwritten agreements" under the applicable state statute).

have dismissed promissory estoppel claims on the ground that the plaintiff did not allege or prove one or more of the requisite elements of the claim.[199] The first two bases for dismissal are procedural in nature and warrant little further comment. Accordingly the remainder of this discussion will focus on the third basis.

While it can generally be said that the courts are resistant to plaintiffs using promissory estoppel in the context of HAMP cases, little further generalizations can be made. Rather, while the vast majority of courts have reached a similar result—holding that promissory estoppel claims are generally nonactionable—the courts have reached that conclusion for dramatically different reasons. More specifically courts have attacked the use of promissory estoppel on each of the doctrine's elemental requirements: (1) the defendant made a promise to the plaintiff, (2) the plaintiff subjectively relied on that promise, (3) the plaintiff objectively relied on that promise, (4) the defendant could have reasonably expected that the plaintiff would rely in the manner that she did, and (5) injustice would result from nonenforcement of the promise.[200] With regard to the first of these elements—the existence of a promise—some courts have held that alleged HAMP promises are, as a matter of law, nonactionable because they are promises to consider engaging in conduct in the future.[201] Similarly other courts have held that the alleged promises are too uncertain and vague to constitute enforceable promises.[202] This is particularly true where, by the plaintiff's own admission, the defendant never provided a definitive, clear, or consistent response regarding the plaintiff's loan status.[203] Finally, some courts have held that the TPP language clearly indicates that the mortgagee is not offering a permanent modifica-

199. *See, e.g.*, Freitas v. Wells Fargo Home Mortg., Inc., 703 F.3d 436, 440 (8th Cir. 2013) (holding that the plaintiff cannot establish the existence of a promise); *Pennington*, 493 F. App'x at 556 (holding the promisor could not reasonably expect the promisee to rely in the manner that she did); Deschaine v. IndyMac Mortg. Servs., No. CIV. 2:13-1991 WBS CKD, 2013 WL 6054456, at *5 (E.D. Cal. Nov. 15, 2013) (holding the plaintiff cannot establish damages); *Hubbard*, 2013 WL 4781023, at *11 (holding the plaintiff cannot establish subjective reliance).

200. *See Freitas*, 703 F.3d at 440 (describing the elements of a promissory estoppel claim under Missouri law).

201. *See, e.g.*, Watts v. JPMorgan Chase Bank, No. 1:13-CV-00866-RWS, 2013 WL 3779152, at *3 (N.D. Ga. July 17, 2013) ("[A] promise to consider doing something is illusory, and thus unenforceable.").

202. *See, e.g.*, *Freitas*, 703 F.3d at 440–41; *Watts*, 2013 WL 3779152, at *4 (finding a "promise that 'help is on the way'" to be insufficient to support a promissory estoppel claim); Reitz v. Nationstar Mortg., LLC, 954 F. Supp. 2d 870, 890 (E.D. Mo. June 27, 2013).

203. *Freitas*, 703 F.3d at 441.

tion.[204] Accordingly no promise exists to provide a basis for reasonable reliance.

In reference to the second element of promissory estoppel—subjective reliance—courts have held that plaintiffs are unable to prove any actual reliance on the promise.[205] More specifically, claims of subjective reliance are almost always based on the notion that the mortgagor ceased making regular loan payments in reliance on the promise,[206] made TPP payments as a result of the promise,[207] or forewent opportunities to clear the default in reliance on the promise.[208] In each of these three instances courts have held allegations of subjective reliance to be insufficient. Thus they have held that where the plaintiff had allegedly ceased making pay-

204. *See, e.g.*, CitiMortgage, Inc. v. Crawford, 934 F. Supp. 2d 942, 949 (S.D. Ohio 2013) (internal quotation marks omitted) ("[T]he TPP Agreement does not make a clear and unambiguous promise that Plaintiff would permanently modify Defendants' loan."); Rummell v. Vantium Capital, Inc., No. 12-10952, 2012 WL 2564846, at *8 (E.D. Mich. July 2, 2012) (finding that Defendant CitiMortgage "never made a clear and definite promise to permanently modify Plaintiffs' loan," meaning that the Plaintiffs' reliance was unreasonable); Thomas v. JPMorgan Chase & Co., 811 F. Supp. 2d 781, 798 (S.D.N.Y. 2011).

205. *See, e.g.*, Burr v. JPMorgan Chase Bank, No. 4:11-CV-03519, 2012 WL 1059043, at *5 (S.D. Tex. Mar. 28, 2012). In somewhat similar circumstances courts have held that, while plaintiffs may have alleged subjective reliance, the actions the plaintiffs took in alleged reliance on the promise could not have reasonably been expected by the mortgagee. As a result, no claim for promissory estoppels could lie. *E.g.*, Pennington v. HSBC Bank USA, 493 F. App'x 548, 556–57 (5th Cir. 2012) (holding the mortgage company could not reasonably expect the mortgagor to renovate her house, given that the HAMP program is intended for those in dire financial straits).

206. *See, e.g.*, *Pennington*, 493 F. App'x at 551 ("[The mortgagor] alleges that if she had never entered the loan modification process, she would not have missed a payment.").

207. *See, e.g.*, Cade v. BAC Home Loans Servicing, LP, No. H-10-4224, 2011 WL 2470733, at *5 (S.D. Tex. June 20, 2011) ("The [mortgagors] assert that they made payments [after receving an alleged promise to consider a loan], but they do not allege that this continuation of payment was conditioned on approval for a HAMP modification.").

208. *See, e.g.*, Deschaine v. IndyMac Mortg. Servs., No. CIV. 2:13-1991 WBS CKD, 2013 WL 6054456, at *3–4 (E.D. Cal. Nov. 15, 2013) (requiring that the plaintiff demonstrate what other options were foregone in order to state a claim); Grill v. BAC Home Loans Servicing LP, No. 10-CV-03057, 2011 WL 127891, at *7–8 (E.D. Cal. Jan. 14, 2011) ("Plaintiff alleges that his reliance on [the defendant's] alleged promise to modify his loan was to his detriment because he lost the opportunity . . . to deal with his default and avoid foreclosure."); Hubbard v. PNC Bank, No. 13-337(MJD/JSM), 2013 WL 4781023, at *11 (D. Minn. Sept. 5, 2013) (internal quotation marks omitted) ("Plaintiffs pled vaguely that they gave up opportunities for addressing their financial cicumstances and the status of [their loan] that they may have had at the time.").

ments on the underlying mortgage as a result of the promise, the mortgagor would have never been eligible for HAMP in the first instance, as HAMP is only available to mortgagors who are incapable of making their existing mortgage payments.[209] Courts have similarly rejected claims of subjective reliance premised on the notion that mortgagors made TPP payments in reliance on the promises. Under their reasoning the underlying note and mortgage required the mortgagors to make payments that were in fact *larger* than those the TPP agreements had required.[210] Finally, courts have held that plaintiffs cannot premise their subjective reliance claims on foregone opportunities without providing evidence indicating that other opportunities existed and the plaintiff was willing to exercise those opportunities.[211] To date, courts have dismissed as merely speculative nearly all of the claims alleging foregone opportunities.[212]

Continuing on the reliance theme, some courts have also held that plaintiffs are unable to prove objective reliance.[213] These courts have held that the TPP documents themselves explicitly state that any permanent modification would be subject to qualifica-

209. *E.g.*, *Pennington*, 493 F. App'x at 556–57 (holding that the plaintiff did not satisfy the reliance requirement of promissory estoppel, because the bank would not have foreseen that a borrower who qualified for HAMP would have been able to afford its mortgage payments).

210. *E.g.*, *Cade*, 2011 WL 2470733, at *4. In a related vein, plaintiffs have also attempted to establish claims for unjust enrichment on the basis that the mortgagee accepted TPP payments but then did not issue a permanent modification. Those claims have been denied on the basis that the TPP payments—by definition—are less than the payments due and owing under the underlying note and mortgage. Because the mortgagor is already contractually obligated to make greater payments, a mortgagee cannot be unjustly enriched by agreeing to accept less than what is due. *E.g.*, Biltcliffe v. CitiMortgage, Inc., 952 F. Supp. 2d 371, 380 (D. Mass. 2013).

211. *See, e.g.*, Burton v. Nationstar Mortg. LLC, No. CV F 13-0307 LJO GSA, 2013 WL 2355524, at *10 (E.D. Cal. May 29, 2013) (holding that a plaintiff could not maintain an action for promissory estoppels premised upon forgoing other opportunities to preclude foreclosure absent evidence indicating the plaintiff both had other opportunities and was willing to exercise them).

212. *See, e.g.*, *Burton*, 2013 WL 2355524; Reitz v. Nationstar, Mortg., LLC, 954 F. Supp. 2d 870, 890 (E.D. Mo. 2013). *But see* Wigod, v. Wells Fargo Bank, 673 F.3d 547, 566 (7th Cir. 2012) (finding that "defendant could not reasonably foresee that plaintiff would forgo "alternative avenues of resolution" in reliance upon a "promise of a permanent loan modification").

213. *E.g.*, DeLuca v. CitiMortgage, 543 F. App'x 194, 197 (3d. Cir. 2013) (finding that any assertion of reasonable reliance was negated by the specification in the plaintiffs' mortgage documents that any offer for permanent modification was subject to qualification).

tions.[214] Thus even assuming the oral promises occurred, no reasonable person would have relied upon them.[215]

Lastly, courts have held that, even assuming the other elements of promissory estoppel are met, plaintiffs are unable to demonstrate the existence of damages.[216] Rather the only damages alleged by the plaintiffs were foreclosure, and contrary to the plaintiff's assertions those damages, if any, were based upon the plaintiff's failure to make timely mortgage payments—not on the mortgagor's promise of a loan modification.[217] Accordingly, courts have held that plaintiffs are unable to demonstrate a causal link between the alleged promise and the alleged damages.[218]

2. Actions Based upon Breach of the Implied Duty of Good Faith and Fair Dealing

Plaintiffs have premised claims alleging a violation of the implied duty of good faith and fair dealing on two broad types of breaches. First, they have argued that the mortgagee breached the implied duty *contained within the underlying note and mortgage* by refusing to modify the loan.[219] These claims ordinarily allege that the mortgagee acted in bad faith by (1) failing to process or review a plaintiff's HAMP application in good faith,[220] (2) failing to provide the mortgagor with foreclosure alternatives,[221] (3) proceeding with foreclosure while a HAMP application was pending,[222] (4) making

214. *E.g.*, *id.*

215. *E.g.*, *id.*

216. *E.g.*, Deschaine v. IndyMac Mortg. Servs., No. CIV 2:13-1991 WBS CKD, 2013 WL 6054456, at *5 (E.D. Cal. Nov. 15, 2013).

217. *Id.*

218. *Id.*

219. *See, e.g.*, *In re* Hinson, 481 B.R. 364, 371 (Bankr. E.D.N.C. 2012) (alleging "an implied duty to act in good faith in the performance of the [mortgage] contract between the parties").

220. *See, e.g.*, Bowers v. Bank of Am., 905 F. Supp. 2d 697, 702 (D. Md. 2012); De Vera v. Bank of Am., No. 2:12cv17, 2012 WL 2400627, at *3 (E.D. Va. June 25, 2012); Akintunji v. Chase Home Fin., LLC, No. H-11-389, 2011 WL 2470709, at *4 (S.D. Tex. June 20, 2011).

221. *See, e.g.*, Larivaux v. Bank of Am., No. 12-11172-FDS, 2013 WL 2467752, at *4 (D. Mass. June 6, 2013) (alleging a failure to negotiate in good faith by neglecting to proved foreclosure alternatives as required by HAMP).

222. *See, e.g.*, Ruivo v. Wells Fargo Bank, No. 11-cv-466-PB, 2012 WL 5845452, at *3-4 (D.N.H. Nov. 19, 2012); Orozco v. GMAC Mortg., L.L.C., No. 11-11135-FDS, 2012 WL 4581092, at *6 (D. Mass. Oct. 1, 2012); Alvarez v. U.S. Bank, No. 11-12324-FDS, 2012 WL 2394680, at *5–6 (D. Mass. June 22, 2012); Kilaita v. Wells Fargo Home Mortg., No. CV11-00079, 2011 WL 6153148, at *8 (N.D. Cal. Dec. 12, 2011).

misrepresentations to the plaintiff regarding the plaintiff's loan,[223] (5) repetitively seeking information that it had already received,[224] (6) imposing unnecessary fees,[225] (7) failing to timely communicate with the mortgagor and respond to the mortgagor's requests,[226] or (8) intentionally forcing the mortgagor into foreclosure through an articulable scheme.[227] Second, plaintiffs have argued that the mortgagee breached the implied duty *contained within the TPP agreement* by failing to permanently modify the loan,[228] failing to review or process a HAMP application in good faith,[229] and repetitively seeking information that was already produced.[230] These claims argue that the TPP agreement is a contract, and the mortgagee breached the implied duty contained within that contract by failing to issue a permanent loan modification after the mortgagor successfully completed the trial period.[231] Both positions have largely failed.[232]

223. *E.g.*, Mcinnis v. BAC Home Loan Servicing, LP, No. 2:11cv468, 2012 WL 383590, at *8 (E.D. Va. Jan. 13, 2012); *In re Hinson*, 481 B.R. at 371 (alleging that "defendants breached those [implied] duties [of good faith] by making false representations").

224. *E.g.*, Gorbaty v. Wells Fargo Bank, Nos. 10-CV-3291 (NGG) (SMG), 10-CV-3354 (NGG)(SMG), 2012 WL 1372260, at *20 (E.D.N.Y. Apr. 18, 2012).

225. *E.g.*, *In re Hinson*, 481 B.R. at 371.

226. *E.g.*, Velasco v. Aurora Loan Servs., No. 2:11-cv-04784-JHN-RZx, 2012 WL 569582, at *2 (C.D. Cal. Feb. 21, 2012).

227. *E.g.*, Jones v. CitiMortgage, Inc., No. CV F 12-2067 LJO SMS, 2013 WL 504761, at *8–9 (E.D. Cal. Feb. 8, 2013) (discussing plaintiffs' claim that defendants misrepresented the amount necessary for escrow payments and then citing those insufficient payments as an excuse to stop accepting HAMP modified loan payment amounts, thus "engineer[ing]" plaintiffs' default); *In re Hinson*, 481 B.R. at 371 ("The plaintiffs allege that these defendants breached those [implied] duties [of good faith] by . . . willfully acting in a way reasonably calculated to result in foreclosure of the plaintiffs' home.").

228. *E.g.*, Senter v. JPMorgan Chase Bank, N.A., 810 F. Supp. 2d 1339 (S.D. Fla. 2011).

229. *E.g.*, Reitz v. Nationstar Mortg., 954 F. Supp. 2d 870, 891-92 (E.D. Mo. 2013) (claiming a failure to make accurate calculations and determinations when assessing plaintiff's eligibility for HAMP).

230. *E.g.*, *id.*

231. *E.g.*, Markle v. HSBC Mortg. Corp., 844 F. Supp. 2d 172, 182-83 (D. Mass. 2011).

232. *But see*, *e.g.*, Robinson v. Deutsche Bank Nat'l Trust Co., No. 5:12-CV-590-F, 2013 WL 1452933, at *13 (E.D.N.C. Apr. 9, 2013) (claiming both a breach of fiduciary duty and liability for constructive fraud); Orozco v. GMAC Mortg., No. 11-11135-FDS, 2012 WL 4581092, at *6 (D. Mass. Oct. 1, 2012); Cave v. Saxon Mortg. Servs., Inc., No. 11-4586, 2012 WL 1957588, at *8 (E.D. Pa. May 30, 2012) (claiming that the defendant "breached the implied covenant of good faith and fair dealing by acting in bad faith with respect to fulfilling its obligations under the TPP"); Acuna v. Chase Home Fin., No. 3:10-CV-905, 2011 WL 1883089, at *6 (E.D. Va. May 17, 2011) (claiming that the defendant "breached the implied covenant of

In terms of the first type of claims, courts have dismissed those claims on four bases. First, courts have dismissed those claims by holding that the implied duty of good faith and fair dealing can only arise when the express provisions of the contract provide a contractual obligation of some kind. Within the context of HAMP transactions, however, the underlying note and mortgage do not provide a contractual obligation for the mortgagee to modify the loan.[233] Furthermore the terms of the underlying note and mortgage do not require the mortgagee to consider or offer foreclosure alternatives.[234] Accordingly claims alleging breach of the implied duty cannot lie.

Second, and in a closely related line of cases, courts have dismissed implied duty claims on the basis that the underlying note and mortgage explicitly permit mortgagees to foreclose. Thus claims premised upon breach of the implied duty as a result of advancing or maintaining a foreclosure action are uncognizable, as the implied duty cannot be used to create obligations that are inconsistent with the explicit terms within the contract.[235] Third, courts have dismissed these claims on the basis that they are simply attempts to impermissibly reclothe HAMP actions as state common law actions to circumvent the absence of a private right of action under HAMP.[236] Finally, courts have dismissed these claims on the basis that the mortgagor and mortgagee lack a relationship of spe-

good faith and fair dealing"); *see also* Young v. Wells Fargo Bank, 717 F.3d 224, 234 n. 4 (1st Cir. 2013) (stating claims were theoretically possible but not on the facts alleged in the complaint).

233. *E.g.*, Miller v. Chase Home Fin., 677 F.3d 1113, 1117 (11th Cir. 2012); Pugh v. Bank of Am., No. 13-2020, 2013 WL 3349649, at *12 (W.D. Tenn. July 2, 2013); De Vera v. Bank of Am., No. 2:12cv17, 2012 WL 2400627, at *3 (E.D. Va. June 25, 2012); McInnis v. BAC Home Loan Servicing, No. 2:11cv468, 2012 WL 383590, at *8 (E.D. Va. Jan. 13, 2012); McInroy v. BAC Home Loan Servicing, No. CIV.10-4342 DSD/SER, 2011 WL 1770947, at *4 (D. Minn. May 9, 2011).

234. *E.g.*, Larivaux v. Bank of Am., No. 12-11172-FDS, 2013 WL 2467752, at *4 (D. Mass. June 6, 2013); Dearaujo v. PNC Bank, No. 2:12-cv-00981-MMD-PAL, 2012 WL 5818131, at *4 (D. Nev. Nov. 15, 2012).

235. *E.g.*, Kilaita v. Wells Fargo Home Mortg., No. CV11-00079 EJD, 2011 WL 6153148, at *9 (N.D. Cal. Dec. 12, 2011); Soto v. Wells Fargo Bank, No. 11-14064, 2012 WL 113534, at *5 (E.D. Mich. Jan. 13, 2012).

236. *E.g.*, Magno v. U.S. Bank, No. 3:11-cv-00332-MO, 2013 WL 1636074, at *5 (D. Or. Apr. 16, 2013); Keosseian v. Bank of Am., No. 11-3478 (JAP), 2012 WL 458470, at *2 (D.N.J. Feb. 10, 2012); Akintunji v. Chase Home Fin., No. H-11-389, 2011 WL 2470709, at *4 (S.D. Tex. June 20, 2011); Nash v. GMAC Mortg., No. CS 10-493 S, 2011 WL 2470645, at *10 (D.R.I. May 18, 2011); Singh v. Wells Fargo Bank, No. 1:10-CV-1659 AWI SMS, 2011 WL 66167, at *7 (E.D. Cal. Jan. 7, 2011).

cial trust. Without such a relationship actions pursuant to the implied duty are unactionable.[237]

With regard to claims alleging breach of the implied duty contained within TPP agreements, courts have almost always dismissed these claims on two analytical bases. The first and most prominent basis for dismissing these claims is grounded in a simple syllogism. By operation of law the implied duty of good faith and fair dealing enters into a contract at the moment of formation.[238] But if contract formation fails, then no implied duty can exist.[239] Because courts have ruled that TPP agreements are not contracts,[240] courts have also ruled that plaintiffs cannot state claims for breach of the implied duty of good faith and fair dealing based either on nonperformance of the TPP or bad faith performance of the TPP.[241] Outside of this syllogism courts have premised their rulings on one other ground: the absence of a special relationship between the parties. This ground, identical to its counterpart discussed above, simply provides that the ordinary relationship between a lender and a debtor does not invoke a special relationship of trust and thus no implied duty claim can lie.[242]

B. Actions Based in Tort Theory

Plaintiffs have attempted a wide range of claims based on negligence and intentional torts. In terms of negligence-based claims,

237. Nguyen v. BAC Home Loan Servs., No. C-10-01712 RMW, 2010 WL 3894986, at *6 (N.D. Cal. Oct. 1, 2010).

238. *E.g,*. Young v. Wells Fargo Bank, 717 F.3d 224, 237 (1st Cir. 2013).

239. *E.g.*, Senter v. JPMorgan Chase Bank, 810 F. Supp. 2d. 1339, 1361–62 (S.D. Fla. 2011).

240. *See supra* Part II.D.

241. *E.g.*, Hubbard v. PNC Bank, No. 13-337(MJD/JSM), 2013 WL 4781023, at *8 (D. Minn. Sept. 5, 2013); Pugh v. Bank of Am., No. 13-2020, 2013 WL 3349649, at *12 (W.D. Tenn. July 2, 2013); Reitz v. Nationstar Mortg., 954 F. Supp. 2d 870, 891–92 (E.D. Mo. 2013); CitiMortgage, Inc. v. Crawford, 934 F. Supp. 2d 942, 949 (S.D. Ohio 2013); *Senter*, 810 F. Supp. 2d at 1362; Grill v. BAC Home Loans Servicing, No. 10-CV-03057-FCD/GGH, 2011 WL 127891, at *4–5 (E.D. Cal. Jan. 14, 2011). *See also, e.g.*, Hunter v. CitiMortgage, Inc., no. CV 11-01549-PHX-FJM, 2011 WL 4625973, at *3 (D. Ariz. Oct. 5, 2011) (ruling plaintiffs cannot state a claim by alleging breach of the duty in the context of modification negotiations because breach of implied duty claims are only actionable where a contract exists); *accord* Reynolds v. Bank of Am., No. 3:12-CV-1420-L, 2013 WL 1904090, at *3 (N.D. Tex. May 8, 2013).

242. *E.g.*, Scott v. Wells Fargo Bank, No. 4:11-CV-600, 2013 WL 5450600, at *4 (E.D. Tex. Sept. 30, 2013); Jones v. CitiMortgage, Inc., No. CV F 12-2067 LJO SMS, 2013 WL 504761, at *8 (E.D. Cal. Feb. 8, 2013).

plaintiffs have asserted claims for negligence,[243] negligent misrepresentation,[244] negligent supervision,[245] negligent undertaking,[246] and negligent infliction of emotional distress.[247] In terms of intentional torts, plaintiffs have alleged fraudulent concealment,[248] fraud,[249] fraudulent misrepresentation,[250] intentional infliction of emotional distress,[251] wrongful foreclosure,[252] and slander of title.[253] All of these theories, however, have generally failed.[254]

243. *E.g.*, Deschaine v. IndyMac Mortg. Servs., No. CIV 2:13-1991 WBS CKD, 2013 WL 6054456, at *3 (E.D. Cal. Nov. 15, 2013); Weber v. Bank of Am., No. 0:13-cv-01999-JFA, 2013 WL 4820446, at *2 (D.S.C. Sept. 10, 2013); Bezmenova v. Ocwen Fin. Corp., No. 8:13-cv-00003-AW, 2013 WL 3863948, at *7 (D. Md. July 23, 2013); Watts v. JPMorgan Chase Bank, No. 1:13-CV-00866-RWS, 2013 WL 3779152, at *4 (N.D. Ga. July 17, 2013); Wivell v. Wells Fargo Bank, No. 12-3457-CV-S-DGK, 2013 WL 3665529, at *6 (W.D. Mo. July 12, 2013), *aff'd in part, vacated and remanded in part*, 773 F.3d 887 (8th Cir. 2014).

244. *E.g.*, James v. Wells Fargo Bank, 533 F. App'x 444, 448 (5th Cir. 2013); Wigod v. Wells Fargo Bank, 673 F.3d 547, 573 (7th Cir. 2012).

245. *E.g.*, *Wigod*, 673 F.3d at 567.

246. *E.g.*, *James*, 533 F. App'x at 444.

247. *E.g.*, Young v. Wells Fargo Bank, 717 F.3d 224, 239–40 (1st Cir. 2013); Davis v. Bank of Am. Corp., No. CV 12-01059-PHX-NVW, 2012 WL 3637903, at *7–8 (D. Ariz. Aug. 23, 2012).

248. *E.g.*, *Wigod*, 673 F.3d at 555.

249. *E.g.*, *James*, 533 F. App'x at 444; Campos-Riedel v. JPMorgan Chase, No. 2:12-cv-2819 TLN DAD PS, 2013 WL 6070432, at *6 (E.D. Cal. Nov. 13, 2013); Deutsche Bank Trust Co. Ams. v. Garst, 989 F. Supp. 2d 1194, 1204 (N.D. Ala. 2013); Hubbard v. PNC Bank, No. 13-337(MJD/JSM), 2013 WL 4781023, at *9 (D. Minn. Sept. 5, 2013); Watts v. JPMorgan Chase Bank, No. 1:13-CV-00866, 2013 WL 3779152, at *2 (N.D. Ga. July 17, 2013); Agho v. Bank of Am., No. 3:12cv617-DPJ-FKB, 2013 WL 3471466, at *4 (S.D. Miss. July 10, 2013).

250. *E.g.*, Freitas v. Wells Fargo Home Mortg., Inc., 703 F.3d 436, 439 (8th Cir. 2013); Deschaine v. IndyMac Mortg. Servs., No. CIV 2:13-1991, 2013 WL 6054456, at *3 (E.D. Cal. Nov. 15, 2013); Wivell v. Wells Fargo Bank, No. 12-3457-CV-S-DGK, 2013 WL 3665529, at *4 (W.D. Mo. July 12, 2013), *aff'd in part, vacated and remanded in part*, 773 F.3d 887 (8th Cir. 2014). *But see* Wigod v. Wells Fargo Bank, 673 F.3d 547, 569 (7th Cir. 2012) (holding fraudulent misrepresentation claim survives dismissal, where the plaintiff pled a scheme to defraud).

251. *E.g.*, *Young*, 717 F.3d at 239–40; *Campos-Riedel*, 2013 WL 6070432, at *7; *Agho*, 2013 WL 3471466, at *6.

252. *E.g.*, *Deschaine*, 2013 WL 6054456, at *10; *Wivell*, 2013 WL 3665529, at *3.

253. *E.g.*, *Garst*, 989 F. Supp. 2d at 1205; Neil v. Wells Fargo Bank, No. 1:13-cv-644, 2013 WL 4782030, at *2 (E.D. Va. Sept. 4, 2013).

254. *But see, e.g.*, *Wigod*, 673 F.3d at 570–71 (denying a motion to dismiss for fraudulent misrepresentation); Dill v. Am. Home Mortg. Servicing, Inc., 935 F. Supp. 2d 299, 304–05 (D. Mass. 2013) (denying a motion to dismiss for negligent misrepresentation and promissory estoppel claims); Fassina v. CitiMortgage, Inc., No. 2:11-CV-2901-RDP, 2012 WL 2577608, at *12 (N.D. Ala. July 2, 2012) (denying a motion to dismiss for negligent undertaking and negligent supervision).

1. Negligence-Based Claims

In terms of negligence-based claims, plaintiffs have generally alleged that mortgagees (1) failed to properly process their HAMP application,[255] (2) negligently continued to proceed with foreclosure while a proper HAMP application was pending,[256] (3) failed to properly review mortgagors for eligibility for HAMP,[257] (4) failed to properly apply payments to the underlying loan,[258] (5) failed to properly notify the mortgagor of the foreclosure sale,[259] (6) misrepresented that the foreclosure would be postponed,[260] (7) misrepresented its intent to review the mortgagor's loan for modification,[261] (8) misrepresented that the mortgagee would modify the loan,[262] (9) misrepresented that the mortgagee had authority to foreclose on the loan,[263] (10) misrepresented that the loan was eligible for modification,[264] (11) misrepresented the eligibility criteria for modification,[265] and (12) failed to adequately train or supervise its employees.[266] Courts have dismissed these claims on both procedural and substantive grounds.

---

255. *E.g.*, Spaulding v. Wells Fargo Bank, 714 F.3d 769, 776 (4th Cir. 2013); McGarvey v. JPMorgan Chase Bank, No. 2:13-cv-01099-KJM-EFB, 2013 WL 5597148, at *5 (E.D. Cal. Oct. 11, 2013); Bijeau-Seitz v. Atl. Coast Mortg. Servs. Inc., No. 12-6372 (RBK/AMD), 2013 WL 3285979, at *6 (D.N.J. June 28, 2013); Juarez v. Suntrust Mortg., Inc., No. CV F 13-0485 LJO SAB, 2013 WL 1983111, at *10 (E.D. Cal. May 13, 2013).

256. *E.g.*, Fed. Nat'l Mortg. Ass'n v. Carr, No. 3:12-cv-1295, 2013 WL 5755083, at *3 (M.D. Tenn. Oct. 23, 2013).

257. *E.g.*, Watts v. JPMorgan Chase Bank, No. 1:13-CV-00866-RWS, 2013 WL 3779152, at *4 (N.D. Ga. July 17, 2013).

258. *E.g.*, McDevitt v. Wells Fargo Bank, 946 F. Supp. 2d 160, 171 (D.D.C. 2013).

259. *E.g.*, *id.* at 165.

260. *E.g.*, James v. Wells Fargo Bank, 533 F. App'x 444, 448 (5th Cir. 2013); Keen v. SunTrust Mortg., Inc., No. 1:10–CV–733, 2013 WL 1181451, at *4 (E.D. Tex. Mar. 19, 2013).

261. *E.g.*, Maltbie v. Bank of Am., No. 1:12-CV-1002, 2013 WL 6078945, at *5 (W.D. Mich. Nov. 19, 2013); Moore v. Mortg. Elec. Registration Sys., Inc., No. 10-cv-241-JL, 2013 WL 1773647, at *7 (D.N.H. Apr. 25, 2013).

262. *E.g.*, Wigod v. Wells Fargo Bank, 673 F.3d 547, 563 (7th Cir. 2012).

263. *E.g.*, Omrazeti v. Aurora Bank, No. SA:12-CV-00730-DAE, 2013 WL 3242520, at *7 (W.D. Tex. June 25, 2013).

264. *E.g.*, Galvin v. EMC Mortg., Corp., No. 12-cv-320-JL, 2013 WL 1386614, at *9–10 (D.N.H. Apr. 4, 2013).

265. *E.g.*, Dill v. Am. Home Mortg. Servicing, Inc., 935 F. Supp. 2d 299, 306 (D. Mass. 2013); Steidl v. BSI Fin. Servs., No. H-12-3324, 2013 WL 1290132, at *9–10 (S.D. Tex. Mar. 26, 2013).

266. *E.g.*, Montgomery v. CitiMortgage, Inc., 955 F. Supp. 2d 640, 652 (S.D. Miss. 2013).

In terms of procedural deficiencies, courts have dismissed negligence-based claims because they either did not comply with the statute of frauds[267] or did not meet the jurisdictional pleading requirements for the tort[268]—with the latter confined to negligent misrepresentation claims. In terms of substantive deficiencies, the most common substantive deficiency relates to the element of duty itself.[269] The fundamental problem with negligence-based HAMP claims is that the relationship between mortgagor and mortgagee does not ordinarily give rise to a legal duty in tort.[270] Instead, absent unusual conduct, persons whose relationships arise and exist

267. *E.g.*, Wivell v. Wells Fargo Bank., 773 F.3d 887, 900 (8th Cir. 2014) (holding claims alleging negligent misrepresentation were barred by the statute of frauds).

268. *E.g.*, Watts v. JPMorgan Chase Bank, No. 1:13-CV-00866-RWS, 2013 WL 3779152, at *2–3 (N.D. Ga. July 17, 2013) (dismissing claims alleging negligent misrepresentation on the basis that the plaintiff failed to plead the claims with particularity); Pugh v. Bank of Am., No. 13-2020, 2013 WL 3349649, at *13 (W.D. Tenn. July 2, 2013) (same); LeBlanc v. Bank of Am., No. 2:13-cv-02001-JPM-tmp, 2013 WL 3146829, at *16–17 (W.D. Tenn. June 18, 2013) (same).

269. *See, e.g.*, U.S. Bank v. Phillips, 318 Ga. App. 819, 825–26 (2012) (dismissing a negligence claim under HAMP after noting that "[t]he provisions of HAMP do not plainly impose a legal duty intended to benefit homeowners" and finding that a statutory provision authorizing negligence claims even in the absence of an express cause of action does not apply in the absence of a legal duty).

270. For cases where negligence claims fail, see, for example, *Spaulding v. Wells Fargo Bank*, 714 F.3d 769, 780 (4th Cir. 2013), *Milton v. U.S. Bank National Ass'n*, 508 F. App'x 326, 329 (5th Cir. 2013), *Fed. National Ass'n v. Carr*, No. 3:12-cv-1295, 2013 WL 5755083, at *4 (M.D. Tenn. Oct. 23, 2013), *Bezmenova v. Ocwen Financial Corp.*, No. 8:13-cv-00003-AW, 2013 WL 3863948, at *7 (D. Md. July 23, 2013), *Watts v. JPMorgan Chase Bank*, 1:13-CV-00866-RWS, 2013 WL 3779152, at *5 (N.D. Ga. July 17, 2013), *Bijeau-Seitz v. Atlantic Coast Mortgage Services Inc.*, No. 12-6372 (RBK/AMD), 2013 WL 3285979, at *6 (D.N.J. June 28, 2013), *Graybill v. Wells Fargo Bank*, 953 F. Supp. 2d 1091, 1108 (N.D. Cal. 2013), *Juarez v. Suntrust Mortgage, Inc.*, No. CV F 12-0485 LJO SAB, 2013 WL 1983111, *13 (E.D. Cal. May 13, 2013), *Dooley v. Well Fargo Bank*, 941 F. Supp. 2d 862, 867 (S.D. Ohio 2013), *Whitfield v. Bank of America*, No. 12-cv-1485, 2013 WL 1506588, at *8 (E.D. Mich. Apr. 12, 2013), *Galvin v. EMC Mortgage Corp.*, No. 12-cv-320-JL, 2013 WL 1386614, at *10-11 (D.N.H. Apr. 4, 2013), *Moore v. Mortgage Electronic Registration Systems, Inc.*, 848 F. Supp. 2d 107, 133-34 (D.N.H. 2012). For cases where negligent misrepresentation claims fail, see, e.g., *Spaulding*, 714 F.3d at 781–82, *James v. Wells Fargo Bank*, 533 F. App'x 444, 448 (5th Cir. 2013), *Davis v. Bank of America Corp.*, No. CV 12-01059-PXH-NVW, 2012 WL 3637903, at *8–9 (D. Ariz. Aug. 23, 2012). For cases where negligent infliction of emotional distress claims fail, see, e.g., *McDevitt v. Wells Fargo Bank*, 946 F. Supp. 2d 160, 171–72 (D.D.C. 2013), *Topchian v. JPMorgan Chase Bank*, No. 12-0910-CV-W-ODS, 2013 WL 1628525, at *3 (W.D. Mo. Apr. 16, 2013), *Moore*, 848 F. Supp. 2d at 136. For cases where gross negligence claims fail, see, e.g., *Milton v. U.S. Bank National Ass'n*, 508 F. App'x 326, 329 (5th Cir. 2013), *Robinson v. Deutsche Bank National Trust Co.*, No. 5:12-CV-590-F, 2013 WL 1452933, at *18 (E.D.N.C. Apr. 9, 2013).

solely in contract are limited to contractual remedies.[271] As a result the vast majority of negligence-based HAMP claims have failed.[272]

A large minority of federal courts has also held that negligence-based HAMP claims are barred by the economic loss doctrine.[273] The economic loss doctrine prohibits tort-based claims that arise solely from contractual relationships and result in purely economic injuries.[274] Within the context of negligence-based HAMP claims, both of those facets are mainstays and are arguably always present. As a result many HAMP claims are dismissed.

Although the first two substantive deficiencies account for nearly all of the cases addressing negligence-based HAMP claims, a small minority of courts has taken a more dispersed approach, at least with respect to negligent misrepresentation, negligent undertaking, and negligent infliction of emotional distress claims. For instance, negligent misrepresentation claims have been dismissed on the basis that the alleged oral promises were only promises of future conduct,[275] thereby rendering the claims unactionable as a matter of law. Alternatively, negligent misrepresentation claims have been dismissed[276] because plaintiffs were unable to demonstrate subjective reliance,[277] objective reliance,[278] or damages.[279]

271. *See, e.g.*, Alejandre v. Bull, 153 P.3d 864, 869 (Wash. 2007).

272. *But see, e.g.*, McGarvey v. JPMorgan Chase Bank, No. 2:13-cv-01099-KJM-EFB, 2013 WL 5597148, at *6–7 (E.D. Cal. Oct. 11, 2013) (permitting claims for negligence); Gerbery v. Wells Fargo Bank, No. 13-CV-614-MMA(DHB), 2013 WL 3946065, at *11–13 (S.D. Cal. July 31, 2013) (permitting claims for negligence); Montgomery v. CitiMortgage, Inc., 955 F. Supp. 2d 640, 652 (S.D. Miss. 2013) (permitting negligence and gross negligence).

273. *E.g*, Wigod v. Wells Fargo Bank, 673 F.3d 547, 567 (7th Cir. 2012) (holding claims alleging negligent misrepresentation, negligent hiring and supervision, and concealment were barred by the economic loss rule); Hutchinson v. Bank of Am., No. H-12-3422, 2013 WL 5657822, at *7 (S.D. Tex. Oct. 16, 2013) (barring negligence); Scott v. Wells Fargo Bank, No. 4:11-CV-600, 2013 WL 5450600, at *9 (E.D. Tex. Sept. 30, 2013) (barring negligent misrepresentation); *Dooley*, 941 F. Supp. 2d at 869 (barring negligence); Brockbank v. JPMorgan Chase Bank, No. 2:11CV671DAK, 2012 WL 1142933, at *5 (D. Utah Apr. 4, 2012) (barring negligence misrepresentation, negligent infliction of emotional distress, and gross negligence); Dill v. America Home Mortg. Servicing, Inc., 935 F. Supp. 2d 299, 303 (D. Mass. 2013) (barring negligence).

274. *E.g.*, MINN. STATE ANN. § 604.10 (West 2012).

275. Massey v. EMC Mortg. Corp., 546 F. App'x 447, 482 (5th Cir. 2013); James v. Wells Fargo Bank, 533 F. App'x 444, 448 (5th Cir. 2013); *Milton*, 508 F. App'x at 329; *Scott*, 2013 WL 5450600, at *9.

276. *But see, e.g.*, *Dill*, 935 F. Supp. 2d at 303–04 (allowing a claim for negligent misrepresentation to survive because reliance and damages were demonstrated).

277. *E.g.*, Brisbin v. Aurora Loan Servs., 679 F.3d 748, 754 (8th Cir. 2012) (holding the plaintiff's self-serving affidavit that she would have taken out loans

Similarly, courts have granted dispositive motions on negligent infliction of emotional distress claims and negligent undertaking claims by virtue of the plaintiff's failure to allege or prove either the existence[280] or risk of a physical harm.[281] Finally, courts have dismissed claims alleging negligent infliction of emotional distress on the basis that the plaintiff could not allege or prove outrageous conduct, an element of the tort.[282]

2. Intentional Tort-Based Claims

In terms of intentional tort-based claims, plaintiffs have generally alleged that mortgagees intentionally misrepresented facts to the mortgagors,[283] intentionally concealed material facts from the

with friends if not for the mortgagee's misrepresentations was insufficient to survive summary judgment); Deschaine v. IndyMac Mortg. Servs., No. CIV 2:13-1991 WBS CKD, 2013 WL 6054456, at *3 (E.D. Cal. Nov. 15, 2013) (holding the plaintiff failed to demonstrate subjective reliance, where the only evidence of reliance was the plaintiff's own statement that she would have sought other financing options but for the mortgagee's misrepresentations).

278. *E.g.*, Keen v. SunTrust Mortg., Inc., No. 1:10-CV-733, 2013 WL 1181451, at *7 (E.D. Tex. Mar. 19, 2013) (holding reliance on oral representations unreasonable as a matter of law, where the oral representations are inconsistent with the written agreement).

279. *E.g.*, Pennington v. HSBC Bank USA, 493 F. App'x 548, 556 (5th Cir. 2012) (holding the plaintiff could not prove pecuniary loss, where the only alleged loss was continued accrual of interest and fines, and the interest and fines would have accrued in any event as a result of the underlying default).

280. *E.g.*, *James*, 533 F. App'x at 448 (dismissing the plaintiff's negligent undertaking claim on the basis that there was no allegation of physical harm); Baeza v. Bank of Am., No. 3:11-cv-767-RCJ-VPC, 2012 WL 4062809, at *5 (D. Nev. Sept. 14, 2012) (finding the plaintiff did not raise cognizable allegations of physical harm or serious illness); Davis v. Bank of Am., Corp., No. CV 12-01059-PHX-NVW, 2012 WL 3637903, at *7–8 (D. Ariz. Aug. 23, 2012) (same); Rymal v. Bank of Am., No. 10-00280 DAE-BMK, 2011 WL 6100979, at *13 (D. Haw. Dec. 6, 2011) (same); *see also, e.g.*, Montgomery v. CitiMortgage, Inc., 955 F. Supp. 2d 640, 653–55 (S.D. Miss. 2013) (granting summary judgment on the basis that the plaintiff failed to prove a demonstrable injury); Ming'ate v. Bank of Am., No. 11-1787 ADM/TNL, 2011 WL 4590431, at *6 (D. Minn. Sept. 30, 2011) (dismissing the plaintiff's claim on the basis that the plaintiff failed to allege that the injury manifested into physical symptoms).

281. *E.g.*, Mbaku v. Bank of Am., No. 12-cv-00190-PAB-KLM, 2013 WL 425981, at *8 (D. Colo. Feb. 1, 2013).

282. *E.g.*, Simon v. Bank of Am., No. 10-cv-00300-GMN-LRL, 2010 WL 2609436, at *12 (D. Nev. June 23, 2010).

283. *E.g.*, Nevada v. Bank of Am., Corp., 672 F.3d 661, 674–75 (9th Cir. 2012); Wigod v. Wells Fargo Bank, 673 F.3d 547, 569 (7th Cir. 2012); Campos-Riedel v. JPMorgan Chase, No. 2:12-cv-2819 TLN DAD PA, 2013 WL 6070432, at *6–7 (E.D. Cal. Nov. 13, 2013).

mortgagors,[284] intentionally caused delay for the purpose of exacting additional interest and fees from mortgagors,[285] intentionally failed to permit the mortgagor to reinstate the loan or cure the default,[286] and intentionally misrepresented facts concerning the mortgagor's loan to third parties.[287] Like their negligence-based counterparts, courts have dismissed intentional tort-based claims on both procedural and substantive grounds.

Procedurally, courts have dismissed claims because the plaintiff failed to meet the specialized pleading requirements for the cause of action. This ground is particularly common in claims for fraud,[288] fraudulent misrepresentation,[289] and fraudulent concealment,[290] where courts have held the plaintiff failed to plead the requisite "who, what, and where." Furthermore, in rare cases, courts have dismissed claims on the basis of preemption.[291] Specifically they have held that the Home Owners Loan Act (HOLA)[292] preempts wrongful foreclosure claims.[293] Lastly, and again in rare cases, courts have dismissed claims due to the plaintiff's failure to comply with the applicable statute of frauds.[294]

284. *E.g.*, Martinez-Bey v. Bank of Am., No. 3:12-CV-4986-G (BH), 2013 WL 3054000, at *10 (N.D. Tex. June 18, 2013).

285. *E.g.*, Berry v. Fed. Nat'l Mortg. Ass'n, No. 3:11-CV-1288-L, 2013 WL 1294008, at *13 (N.D. Tex. Mar. 29, 2013); Lyshorn v. JPMorgan Chase Bank, No. C 12-05490 JSW, 2013 WL 5913773, at *3–4 (N.D. Cal. Nov. 1, 2013).

286. *E.g.*, Richardson v. Wells Fargo Bank, 873 F. Supp. 2d 800, 814 (N.D. Tex. 2012).

287. *E.g.*, *Nevada*, 672 F.3d at 674.

288. *E.g.*, Spaulding v. Wells Fargo Bank, 714 F.3d 769, 782 (4th Cir. 2013); James v. Wells Fargo Bank 533 F. App'x 444, 448 (5th Cir. 2013). *But see* Choe v. Bank of Am., No. 3:13-CV-0120-D, 2013 WL 6159308, at *6 (N.D. Tex. Nov. 25, 2013) (holding the plaintiff sufficiently pled a cause of action for fraud).

289. *E.g.*, Freitas v. Wells Fargo Home Mortg., Inc., 703 F.3d 436, 440 (8th Cir. 2013) (dismissing the plaintiff's claims for fraudulent misrepresentation for failing to sufficiently plead the circumstances of the alleged misrepresentation); Wivell v. Wells Fargo Bank, 773 F.3d 887, 898–99 (8th Cir. 2014) (same); Dooley v. Well Fargo Bank, 941 F. Supp. 2d 862, 868 (S.D. Ohio 2013); Galvin v. EMC Mortg. Corp., No. 12-cv-320-JL, 2013 WL 1386614, at *13 (D.N.H. Apr. 4, 2013) (dismissing plaintiff's claims for fraud and negligence misrepresentation).

290. *E.g.*, Bergman v. Bank of Am., No. C-13-00741 JCS, 2013 WL 5863057, at *12, *27–28 (N.D. Cal. Oct. 23, 2013).

291. *E.g.*, Deschaine v. IndyMac Mortg. Servs., No. CIV 2:13-1991 WBS CKD, 2013 WL 6054456, at *8 (E.D. Cal. Nov. 15, 2013) (holding the plaintiff's wrongful foreclosure claim was preempted by HOLA).

292. 12 U.S.C. § 1461 (2012).

293. *Deschaine*, 2013 WL 6054456, at *8.

294. *E.g.*, Helmus v. Chase Home Fin., LLC 890 F. Supp. 2d 806, 813 (W.D. Mich. 2012); *James*, 533 F. App'x at 448; Casey v. Fed. Home Loan Mortg. Ass'n, No. H-3830, 2012 WL 1425138, at *6, (S.D. Tex. Apr. 23, 2012).

Substantively, and similar to their negligence-based counterparts, courts have granted dispositive motions for intentional tort-based claims where the mortgagee did not owe the mortgagor a duty in tort. This particular basis for dismissal is prominent in fraudulent concealment claims[295] and fraudulent misrepresentation claims[296] based on nondisclosure, where courts have held the mortgagee had no special relationship with the mortgagor that would give rise to a duty to disclose. Furthermore, and as a variation of the previous reason, courts have also dismissed intentional tort claims on the basis that they are barred by the economic loss rule.[297] Finally, courts have dismissed intentional tort claims where the plaintiff's allegations failed to meet one or more of the requisite elements of the cause of action. Although this last ground of dismissal is more widely dispersed than the previous two, some generalizations can be made. First, courts have routinely dismissed intentional infliction of emotional distress claims on the basis that the mortgagee's conduct, even if true, was insufficient to constitute outrageous conduct.[298] Thus, for instance, courts have held that, as a

295. *E.g.*, Wigod v. Wells Fargo Bank, 673 F.3d 547, 571 (7th Cir. 2012); Martinez-Bey v. Bank of Am., No. 3:12-CV-4986-G (BH), 2013 WL 3054000, at *10 (N.D. Tex. June 18, 2013); Buckentin v. SunTrust Mortg. Corp., 928 F. Supp. 2d 1273, 1285 (N.D. Ala. 2013); Loomis v. U.S. Bank Home Mortg., 912 F. Supp. 2d 848, 857 (D. Ariz. 2012); *In re* Mortg. Elec. Registration Sys. (MERS) Inc. Litig., No. MDL 09-2119-PHX-JAT, 2012 WL 1931522, at *7 (D. Ariz. May 25, 2012).

296. *E.g.*, Goss v. Bank of Am., 917 F. Supp. 2d 445, 452 (D. Md. 2013); Spaulding v. Wells Fargo Bank, 920 F. Supp. 2d 614, 621 (D. Md. 2012); Bowers v. Bank of Am., 905 F. Supp. 2d 697, 703 (D. Md. 2012).

297. *E.g.*, Sholiay v. Fed. Nat'l Mortg. Ass'n, No. CIV 2:13-00958, 2013 WL 5569988, at *6 (E.D. Cal. Oct. 9, 2013) (holding the plaintiff's claim for fraud was barred by the economic loss rule). *But see* Miller v. CitiMortgage, Inc., 970 F. Supp. 2d 568, 584 (N.D. Tex. 2013) (holding the economic loss rule is not applicable to fraud claims).

298. *E.g.*, Young v. Wells Fargo Bank, 717 F.3d 224, 240 (1st Cir. 2013) (holding inconvenience and agitation do not rise to outrageous conduct); Montgomery v. CitiMortgage, Inc., 955 F. Supp. 2d 640, 653 (S.D. Miss. 2013) (mishandling or mismanaging the loan modification process was not considered to be "outrageous" or "extreme"); Dooley v. Well Fargo Bank, 941 F. Supp. 2d 862, 868-69 (S.D. Ohio 2013) (holding allegations were not outrageous as a matter of law, where mortgagor alleged mortgagee made misrepresentations and intentionally prolonged the foreclosure process by failing to timely communicate); Topchian v. JPMorgan Chase Bank, No. 12-0910-CV-W-ODS, 2013 WL 1628525, *3 (W.D. Mo. Apr. 16, 2013) (holding allegations that the mortgagee misused its power were insufficient); Maltbie v. Bank of Am., No. 1:12-CV-1002, 2013 WL 6078945, at *7 (W.D. Mich. Nov. 19, 2013) (holding allegations were insufficient, where mortgagor alleged the mortgagee proceeded with the foreclosure process while the mortgagor's modification application was still pending); Payton v. Wells Fargo Bank, No. 12-11540-DJC., 2013 WL 782601, at *4 (D. Mass. Feb. 28, 2013) (holding failure to

matter of law, it is not outrageous conduct for a bank to promise to forebear on a loan but nonetheless institute foreclosure proceedings.[299] Furthermore, courts have ruled that it is not outrageous conduct for a bank to charge unwarranted fees and fabricate an arrearage on the loan.[300]

Second, courts have routinely dismissed common law unreasonable collection claims,[301] slander of title claims,[302] and fraud claims[303] on the basis that the plaintiff could not prove the requisite

properly consider a mortgagor for a modification is not outrageous conduct); Moore v. Mortg. Elec. Reg. Sys., Inc., 848 F. Supp. 2d 107, 135 (D.N.H. 2012) (holding that failing to properly consider or process a loan modification application is not outrageous conduct).

299. *E.g.*, Campos-Riedel v. JPMorgan Chase, No. 2:12-cv-2819, 2013 WL 6070432, at *7 (E.D. Cal. Nov. 13, 2013).

300. *E.g.*, Agho v. Bank of Am., No. 3:12cv617-DPJ-FKB, 2013 WL 3471466, at *6 (S.D. Miss. July 10, 2013).

301. *E.g.*, Massey v. EMC Mortg. . Corp., 546 F. App'x 477, 482–83 (5th Cir. 2013) (dismissing the unreasonable collection claim and holding the plaintiff failed to allege willful and wanton conduct); s*ee also* Everhart v. CitiMortgage, Inc., No. H-12-1338, 2013 WL 264436, at *6 (S.D. Tex. Jan. 22, 2013) (dismissing the unreasonable collection claim and holding the defendant's act of pursuing foreclosure, without more, was, as a matter of law, unactionable). *But see* McDonald v. Deutsche Bank Nat'l Trust Co., No. 3:11-CV-2691-B, 2012 WL 2122168, at *8 (N.D. Tex. June 11, 2012) (holding the plaintiff successfully alleged a claim for unreasonable collection, where the mortgagor alleged mortgagee repeatedly misrepresented the amount due on the loan, repeatedly misrepresented the status of the modification, and repeatedly sought information that had already been submitted).

302. *E.g.*, Deutsche Bank Trust Co. Ams. v. Garst, 989 F. Supp. 2d 1194, 1205 (N.D. Ala. 2013) (granting summary judgment to the defendant on a slander of title claim and holding the plaintiff failed to introduce evidence of malice); Buckentin v. SunTrust Mortg. Corp., 928 F. Supp. 2d 1273, 1290–92 (N.D. Ala. 2013) (dismissing a slander of title claim on the basis that the mortgagor failed to prove malice). Slander of title claims are also regularly dismissed on the basis that the alleged false statement regarding the property was in fact true. *E.g.*, Neil v. Wells Fargo Bank, No. 1:13-cv-644, 2013 WL 4782030, at *2 (E.D. Va. Sept. 4, 2013) (vacated on other grounds). Furthermore, a minority of courts have dismissed the claims on the basis that the plaintiff could not allege or prove the loss of a specific resale of the property as a result of the mortgagee's statements. *E.g.*, Northcutt v. CitiMortgage, Inc., No. H-12-646, 2013 WL 3280211, at *4 (S.D. Tex. June 27, 2013). Finally, courts have dismissed slander of title claims on the basis that the alleged false communications are privileged communications. *E.g.*, Burachek v. Chase Home Fin., No. CIV 2:12-1771 WBS CKD, 2012 WL 3778970, at *9 (E.D. Cal. Aug. 21, 2012) (holding the notice of sale and notice of default are privileged communications and thus cannot give rise to slander of title claims).

303. *E.g.*, Milton v. U.S. Bank Nat'l Ass'n, 508 F. App'x 326, 330 (5th Cir. 2013) (granting summary judgment where the plaintiff was unable to present any evidence outside of his own speculation to prove the mortgagee knowingly or recklessly made false statements).

level of intentional conduct. Third, courts have routinely dismissed both fraud[304] and fraudulent misrepresentation[305] claims on the ground that plaintiffs cannot prove objective reliance where the alleged oral representations that gave rise to the claim directly conflict with the loan or modification documents. That is, assuming the alleged oral misrepresentations had in fact occurred, these courts found the plaintiffs' reliance on them to have been unreasonable.[306] Fourth, courts have routinely granted dispositive motions for fraud[307] and fraudulent misrepresentation[308] claims on the basis that the plaintiff could not prove subjective reliance. Specifically, they have held that merely making payments pursuant to the TPP agreement is insufficient to demonstrate subjective reliance as the mortgagor was already contractually required to make greater payments pursuant to the underlying note and mortgage.[309] Furthermore, when faced with claims that the mortgagor would have pursued other methods of bringing the loan current but for the mortgagee's misrepresentations, courts have largely dismissed those allegations of subjective reliance on the basis of the mortgagor's

304. *E.g.*, DeLuca v. CitiMortgage, 543 F. App'x 194, 197 (3d Cir. 2013); *Milton*, 508 F. App'x at 330; Hubbard v. PNC Bank, No. 13-337(MJD/JSM), 2013 WL 4781023, at *9–10 (D. Minn. Sept. 5 2013).

305. *E.g.*, Goss v. Bank of Am., 917 F. Supp. 2d 445, 450 (D. Md. 2013).

306. *E.g.*, Poppelreiter v. GMAC Mortg., No. 1:11CV008-A-S, 2011 WL 6100440, at *4 (N.D. Miss. Dec. 7, 2011).

307. *E.g.*, Ortiz v. Am.'s Servicing Co., No. EDCV 12-191 CAS (SPx), 2012 WL 2160953, at *5 (C.D. Cal. June 11, 2012) (holding payment of reduced mortgage payments was, without more, insufficient to demonstrate subjective reliance, as the mortgagor was already required to make payments pursuant to the underlying note and mortgage).

308. *E.g.*, Brisbin v. Aurora Loan Servs., 679 F.3d 748, 753–54 (8th Cir. 2012) (holding plaintiff's claims that she would have secured another method of paying the arrearage on her loan if not for the mortgagee's misrepresentations were insufficient to demonstrate subjective reliance, where the only evidence of her reliance was her own self-serving affidavit indicating she would have sought other payment mechanisms if not for the promise and that she felt confident she could have gotten them); Morgan v. Aurora Loan Servs., No. CV 12-4350-CAS (MRWx), 2014 WL 47939, at *4 (C.D. Cal. Jan. 6, 2014) (holding the plaintiff failed to demonstrate subjective reliance, where the plaintiff's only claim of reliance was the payment of reduced mortgage payments); Deschaine v. IndyMac Mortg. Servs., No. CIV 2:13-1991 WBS CKD, 2013 WL 6054456, at *4 (E.D. Cal. Nov. 15, 2013) (holding naked statements that the mortgagor would have explored other payment options if not for the mortgagee's misrepresentations is, without more, insufficient to survive dispositive motions). *But see* Wigod v. Wells Fargo Bank, 673 F.3d 547, 569–71 (7th Cir. 2012) (permitting plaintiff's claims, where plaintiff alleged that she was a victim of a scheme to defraud).

309. *E.g.*, Pennington v. HSBC Bank USA, 493 F. App'x 548, 556 (5th Cir. 2012).

inability to demonstrate that she possessed the actual ability to secure some other method of payment at any given point.[310] Finally, courts have routinely dismissed fraud[311] and fraudulent misrepresentation[312] claims on the basis that the misrepresentations, even if made, are representations about future conduct and are thus unactionable as a matter of law.

C. *Actions Based on a State Statutory Scheme*

Claims based upon state statutory schemes can generally be categorized as claims premised upon a state's unfair trade practices statutes,[313] unfair debt collection statutes,[314] lending or servicing statutes,[315] unfair competition statutes,[316] and consumer protection statutes (State Consumer Statutes).[317] Like their common law counterparts, State Consumer Statutes have taken on a variety of forms.

Specifically, plaintiffs have alleged violations of State Consumer Statutes on the grounds that: (1) the interest and fees assessed for the foreclosure were excessive, false, or usurious;[318] (2) the communications provided by the mortgagee to the mortgagor were misrepresentations and thus deceptive;[319] (3) the mortgagee failed to properly institute the modification program or failed to properly review or process the plaintiff's modification applica-

310. *E.g.*, *Brisbin*, 679 F.3d at 753–54.

311. *E.g.*, Hubbard v. PNC Bank, No. 13-337(MJD/JSM), 2013 WL 4781023, at *10 (D. Minn. Sept. 5, 2013).

312. *E.g.*, Maltbie v. Bank of Am., No. 1:12-CV-1002, 2013 WL 6078945, at *5 (W.D. Mich. Nov. 19, 2013).

313. *E.g.*, Mejorado v. CitiMortgage, Inc., No. 2:12-CV-59-H, 2013 WL 3043480, at *4 (E.D.N.C. June 17, 2013).

314. *E.g.*, Massey v. EMC Mortg. 546 F. App'x 477, 480 (5th Cir. 2013).

315. *E.g.*, Piotrowski v. Wells Fargo Bank, No. DKC 11-3758, 2013 WL 247549, at *13 (D. Md. Jan. 22, 2013).

316. *E.g.*, Graybill v. Wells Fargo Bank, 953 F. Supp. 2d 1091, 1106 (N.D. Cal. 2013).

317. *E.g.*, Spaulding v. Wells Fargo Bank, 714 F.3d 769, 781 (4th Cir. 2013); Bezmenova v. Ocwen Fin. Corp., No. 8:13-cv-00003-AW, 2013 WL 3863948, at *5 (D. Md. July 23, 2013).

318. *E.g.*, Watson v. CitiMortgage, Inc., 530 F. App'x 322, 328 (5th Cir. 2013) (dismissing plaintiff's TDCPA claim for failure to allege a false representation or deceptive means to collect a debt); *In re* Residential Capital, LLC, 501 B.R. 531, 543 (Bankr. S.D.N.Y. 2013) (dismissing plaintiff's North Carolina usury claim where the amount of the loan exempted the claim under the statute).

319. *E.g.*, *Watson*, 530 F. App'x at 322 (plaintiff's TDCPA claim was dismissed, where plaintiff failed to allege any evidence of how defendants misrepresented any information about plaintiff's debt); *Bezmenova*, 2013 WL 3863948, at *5 (dismissing plaintiff's MCPA claim where plaintiff failed to allege with particularity the details of the statements upon which the fraud claim was based).

tion;[320] (4) the mortgagee failed to provide the mortgagor with statements of account;[321] and (5) the mortgagee failed to disclose the potential negative effects of applying for a modification.[322] Although these claims have been more successful than common law claims, a substantial number of them have failed on both categorical and noncategorical grounds.[323]

Categorically, and first focusing on the activities of the mortgagees, courts have held that foreclosure,[324] debt collection,[325] loan modifications,[326] residential mortgage transactions,[327] and mortgage servicing[328] are not activities protected by State Consumer Statutes. Courts have also held that failure to comply with HAMP's

320. *E.g.*, Weber v. Bank of Am., No. 0:13-cv-01999-JFA, 2013 WL 4820446, at *6 (D.S.C. Sept. 10, 2013) (dismissing plaintiff's SCUTPA claim where plaintiff failed to allege an unfair/deceptive act that affects the public interest); *Graybill*, 953 F. Supp. 2d at 1107 (dismissing plaintiff's UCL claim where plaintiff failed to allege a law that defendants violated).

321. *E.g.*, Patrick v. PPH Mortg. Corp., 937 F. Supp. 2d 773, 783 (N.D. Va. 2013) (upholding plaintiff's WVCCPA claim where plaintiffs alleged defendants failed to provide a monthly statement showing receipt of payment for the account).

322. *E.g.*, Loomis v. U.S. Bank Home Mortg., 912 F. Supp. 2d 848, 856–57 (D. Ariz. 2012) (dismissing plaintiff's ACFA claim where plaintiffs alleged defendants failed to disclose that mere inquiry into a loan modification program would negatively impact plaintiffs' credit score).

323. *See* cases cited *infra* notes 325–40. *But see* Young v. Wells Fargo Bank, 717 F.3d 224, 240–42 (1st Cir. 2013) (holding plaintiff's Chapter 93A claim survives dismissal where plaintiff sufficiently alleged that defendants' mistakes during loan processing caused economic damage); Wigod v. Wells Fargo Bank, 673 F.3d 547, 574–76 (7th Cir. 2012) (holding the plaintiff stated a claim pursuant to the state's unfair trade practices statute); Dawson v. Litton Loan Servicing, No. 12-cv-01334-CMA-KMT, 2013 WL 1283848, at *4–5 (D. Colo. Mar. 28, 2013) (holding plaintiff's CCPA claim survives dismissal, where plaintiffs sufficiently pled the elements); *In re* Hinson, 481 B.R. 364, 377 (Bankr. E.D.N.C. 2012) (holding plaintiff's UDTPA claim survives dismissal, where plaintiff's sufficiently alleged that defendant's mishandling of their loan application process qualified as "unfair" and resulted in damages).

324. *E.g.*, Pugh v. Bank of Am., No. 13-2020, 2013 WL 3349649, at *7 (W.D. Tenn. July 2, 2013).

325. *E.g.*, *id.*

326. *E.g.*, Hubbard v. PNC Bank, No. 13-337(MJD/JSM), 2013 WL 4781023, at *8 (D. Minn. Sept. 5, 2013).

327. *E.g.*, Perino v. Wells Fargo Bank, No. 12-cv-15182, 2013 WL 5340800, at *10 (E.D. Mich. Sept. 23, 2013).

328. *E.g.*, *id.*; Reitz v. Nationstar Mortg., 954 F. Supp. 2d 870, 894 (E.D. Mo. 2013) ("[A] 'loan servicer' who was not a party to the initial loan transaction and who may subsequently foreclose on that loan is not liable under the MMPA [Missouri Merchandising Practices Act].").

guidelines, without more, cannot serve as a predicate act.[329] Similarly, failure to comply with a contract between the mortgagor and the mortgagee has been found to be insufficient as a matter of law.[330] Finally, turning to financial institutions as a group, courts have held that financial institutions are categorically not regulated by State Consumer Statutes.[331] On the other side of the litigation equation, and now focusing on mortgagors, courts have held that mortgagors are not "consumers" within the definition contemplated by State Consumer Statutes, as modification agreements involve neither a "good" nor a "service" within the meaning of those statutes.[332]

Noncategorically, courts have dismissed claims on the basis that the plaintiff failed to plead the cause of action with the requisite level of particularity.[333] Indeed, where claims are premised upon alleged deceptive representations, they are subject to heightened pleading requirements.[334] For want of either ability or compliance, a substantial number of plaintiffs fail to adequately allege the "who, what, and where" of a representation-based statutory tort. Furthermore, and less specific to the deceptive representation claims, courts have dismissed claims on the basis that the plaintiffs failed to allege the existence of a public interest in the lawsuit, a requisite element for many unfair trade practice claims.[335] And even in instances where the plaintiffs are able to allege the elements of the claim, many claims nonetheless never proceed to a jury because plaintiffs are unable to prove the requisite elements of the specific statutory tort.[336] Thus for instance, courts have granted

329. *E.g.*, Graybill v. Wells Fargo Bank, 953 F. Supp. 2d 1091, 1107 (N.D. Cal. 2013).

330. *E.g.*, Cabrera v. Bank of Am., No. 5:11-CV-563-FL, 2013 WL 551697, at *6 (E.D.N.C. Feb. 12, 2013).

331. *E.g.*, Dooley v. Wells Fargo Bank, 941 F. Supp. 2d 862, 869 (S.D. Ohio 2013).

332. *E.g.*, James v. Wells Fargo Bank, 533 F. App'x 444, 447 (5th Cir. 2013). Courts have also held that defendants are not "debt collectors" within the context of the Fair Debt Collection Practices Act and thus are not subject to liability for its violation. *E.g.*, McDevitt v. Wells Fargo Bank, 946 F. Supp. 2d 160, 168 (D.D.C. 2013); Buckentin v. SunTrust Mortg. Corp., 928 F. Supp. 2d 1273, 1294 (N.D. Ala. 2013); Fenello v. Bank of Am., 926 F. Supp. 2d 1342, 1351 (N.D. Ga. 2013).

333. *E.g.*, Almaden v. Peninsula Mortg., Inc., No. 12-00390 HG-BMK, 2012 WL 6738512, at *3 (D. Haw. Dec. 31, 2012).

334. *Id.*

335. *E.g.*, Hubbard v. PNC Bank, No. 13-337(MJD/JSM), 2013 WL 4781023, at *8 (D. Minn. Sept. 5, 2013); Weber v. Bank of Am., No. 0:13-cv-01999-JFA, 2013 WL 4820446, at *6 (D.S.C. Sept. 10, 2013).

336. *Almaden*, 2012 WL 6738512.

dispositive motions on the basis that the plaintiff failed to allege or prove the requisite level of intent to satisfy the statute.[337] Additionally, courts have held that plaintiffs failed to prove the existence of a misrepresentation, thereby defeating the claim before it ever reached the jury.[338] Finally, as with common law misrepresentation claims, claims premised upon misrepresentations or deceptive conduct have often failed on the basis that the plaintiff could not demonstrate subjective reliance.[339]

IV. OVERSIGHT AND SYSTEMATIC NONCOMPLIANCE

Between 2010 and 2013, federal courts reported at least 1029 HAMP-based claims.[340] Given the sheer number of lawsuits associated with these claims, one would naturally wonder the extent and degree to which they had merit. Substantial evidence exists indicating that Participating Institutions are in fact regularly violating HAMP's mandates.[341] Additionally, the Treasury Department is aware of these violations[342] and has been criticized by bodies charged with TARP's oversight for failing to adequately prevent noncompliance.[343]

Due in large part to the amount of money involved in TARP, Congress had, from the beginning, envisioned significant oversight over the maintenance and distribution of TARP funds. As a result of this stance, four bodies have been formally charged with auditing compliance with HAMP's mandates—the Government Accountabil-

337. *E.g.*, Spaulding v. Wells Fargo Bank, 714 F.3d 769, 781 (4th Cir. 2013).

338. *E.g.*, *id.*; Watson v. CitiMortgage, Inc., 530 F. App'x 322, 328 (5th Cir. 2013). *Contra* Dill v. America Home Mortg. Servicing, Inc., 935 F. Supp. 2d 299, 306 (D. Mass. 2013).

339. *E.g.*, Green v. Wells Fargo Bank, 927 F. Supp. 2d 244, 255–56 (D. Md. 2013); Bezmenova v. Ocwen Fin. Corp., No. 8:13-cv-00003-AW, 2013 WL 3863948, at *6 (D. Md. July 23, 2013). *But see* Robinson v. Deutsche Bank Nat'l Trust Co., 2013 WL 1452933, at *20 (E.D.N.C. 2013) (holding the plaintiff sufficiently alleged subjective reliance, where the plaintiff alleged she forewent petitioning for bankruptcy).

340. This data is based on a search conducted on WestLaw on December 11, 2013 using the search term: "ALLFEDS: home /3 affordable /3 modification /3 program & da (aft 01/01/2010)."

341. *E.g.*, SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, *supra* note 16, at 16; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 16, at 21.

342. SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, *supra* note 16, at 15.

343. *E.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 16, at 21.

ity Office (the GAO),[344] the Congressional Oversight Panel (the COP),[345] the Office of Financial Stability (the OFS),[346] and the Office of the Special Inspector General for the Troubled Asset Relief Program (the SIGTARP).[347] Collectively, these bodies have found systematic compliance failures with HAMP's mandates.[348] Indeed, "[a]lmost every official evaluation of HAMP has noted poor servicer compliance."[349]

While the idea of "poor servicer compliance" admittedly does not by itself shock the conscience, the reality is much more disturbing. For instance, the GAO reported that, as of June 2010, "15

344. The GAO was established in 1921 by Congress, and remains a vital component of the federal government. *See* 31 U.S.C. § 702 (2012). The GAO's general powers and duties include investigating the use of public monies allocated by Congress; conducting audits of other federal offices and agencies, such as the FEIC, the FDIC, the Federal Reserve Bank, the Federal Reserve subsidiary banks, and the Office of the Comptroller of the Currency; and evaluating effectiveness of programs established by Congress. *See* 31 U.S.C. §§ 712, 714, 717 (2012). For information about the GAO's mission generally, see *Strategic Planning, Performance, and Accountability*, U.S. GOV'T ACCOUNTABILITY OFFICE, http://www.gao.gov/about/strategic.html (last visited Jan. 13, 2014).

345. The COP was established by Congress in 2008. *See* 12 U.S.C. § 5233 (2012). Particularly, § 5233(b) outlines the duties of COP: to issue regular reports, particularly regarding the extent to which the information made available on transactions under TARP has contributed to market transparency; to release special reports on regulatory reform; and to release a special report on farm loan restructuring. *Id.* COP ceased operation in early 2011, but its entire website, including research and reports, has been archived electronically, and is available at http://cybercemetery.unt.edu/archive/cop/20110401223205/http:/www.cop.senate.gov/.

346. The OFS is a division of the Department of the Treasury, established in 2008. *See* 12 U.S.C. § 5214 (2012). The OFS oversees the administration of TARP and other emergency authorities granted to the Secretary of the Treasury under the EESA. *About OFS*, U.S. DEP'T OF THE TREASURY, www.treasury.gov/initiatives/financial-stability/Pages/about-ofs.aspx (last visited Jan. 16, 2014). Its chief purpose in exercising this oversight is "to help restore liquidity and stability to the U.S. financial system." *Id.*

347. The office of the SIGTARP was established in 2008 as a division within the Department of the Treasury. *See* 12 U.S.C. § 5231 (2012). SIGTARP's duties include conducting and supervising TARP audits and investigations of the purchase, management, and sale of assets on behalf of the Secretary of the Treasury. *Id.* § 5231(c); *see also* Office of the Special Inspector Gen. for the Troubled Asset Relief Program, *About Us*, SIGTARP, www.sigtarp.gov/pages/aboutus.aspx (last visited Jan. 13, 2014). Section 5231 also incorporates the general duties of inspectors general of the United States. Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified at 5 U.S.C. app 3, §§ 4 & 6 (2012)).

348. ALYS COHEN, ARIELLE COHEN & DIANE E. THOMPSON, NATIONAL CONSUMER LAW CENTER, AT A CROSSROADS: LESSONS FROM THE HOME AFFORDABLE MODIFICATION PROGRAM (HAMP) 30 (2013).

349. *Id.*

of the 20 largest servicers were not running the NPV test in compliance with HAMP's guidelines."[350] Those deficiencies "likely resulted in differences in how borrowers were evaluated, and could have resulted in the inequitable treatment of similarly situated borrowers."[351] Additionally, SIGTARP found in June 2010 that 19% of the inputs for the NPV test were either incorrect or unsupported by the servicer's records.[352] This led SIGTARP to conclude that "[t]he extent to which servicers used incorrect data [had] increased the risk of an improper decision to an unacceptable level."[353] Finally, and perhaps most convincingly, the Treasury Department reported in June 2011 that "all 10 of the largest HAMP servicers [had] used erroneous gross income amounts when evaluating borrowers for HAMP, with gross income calculation errors that ranged from 6% to 33%."[354] This led the Department to conclude that four of the ten largest servicers needed "substantial improvement," while the remaining six needed "moderate improvement."[355] Nearly one year later, the Treasury Department continued to report that seven of the ten largest servicers needed "moderate improvement" in their compliance.[356] These situations have not significantly improved.[357]

In addition to problems associated with discerning eligibility, servicers have performed poorly with regard to document processing and maintenance. In fact, while the largest single reason for denying HAMP modifications is that the borrower failed to submit the required documentation within the requisite period of time, both the National Consumer Law Center and the Consumer Financial Protection Bureau have indicated that the absence of requisite documentation is "often" the fault of the servicer. Servicers have an uncomfortable history of routinely seeking the same information from borrowers repeatedly and then denying the borrower's HAMP application on the basis that the information was never sent.[358]

Furthermore, servicers have rated poorly in their communications with mortgagors. For instance, using a representative sample of denial letters sent to mortgagors, the SIGTARP found that only

350. SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, *supra* note 16, at 5.

351. *Id.*

352. *Id.* at 10.

353. *Id.* at 11.

354. *Id.* at 14.

355. *Id.*

356. SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, *supra* note 16, at 15.

357. COHEN ET AL., *supra* note 348, at 30.

358. *Id.* at 31.

7% of the letters complied with HAMP's mandates.[359] These deficiencies "can have serious consequences because a delay may prevent homeowners from finding other foreclosure alternatives sooner."[360] In that regard, SIGTARP found that the servicers failed to provide the mortgagor with information on foreclosure alternatives in 69% of the cases it reviewed.[361] Finally, a number of other bodies have noted that Participating Institutions regularly violate HAMP's mandates by dual-tracking—namely, proceeding with foreclosure and modification simultaneously.[362]

Given this evidence of noncompliance, one would expect a plethora of penalties assessed against culpable servicers. Governmental records, though, demonstrate that for more than a year after HAMP's rollout, the Treasury Department lacked sufficient mechanisms to even evaluate servicer compliance.[363] For example, the GAO noted that as of July 2009, the Treasury Department had failed to articulate mechanisms to evaluate servicers' compliance with HAMP.[364] The GAO concluded that the absence of these provisions "limited [Treasury's] ability to identify, assess, and address potential risks that could prevent servicers from fulfilling program requirements."[365] Thereafter, in July 2010, the GAO again noted that the Treasury Department had still not articulated penalties for noncompliance.[366] Indeed, to date, there is no evidence that the Treasury Department—or any of its agents—has ever penalized a servicer for noncompliance.[367] Rather, as of June 2012, the SIGTARP found that "Treasury has never permanently withheld any TARP payments or clawed back any TARP funds paid to servicers for servicers' noncompliance with HAMP guidelines."[368] Thus the notion that the Treasury Department will actually enforce HAMP's mandates through contractual penalties is "utterly belied by experi-

359. *Id.* at 15.

360. *Id.*

361. *Id.*

362. *Id.* at 35.

363. U.S. Gov't Accountability Office, GAO-09-837, Troubled Asset Relief Program, Treasury Actions Needed to Make the Home Affordable Modification Program More Transparent and Accountable 43 (2009).

364. *Id.*

365. *Id.*

366. U.S. Gov't Accountability Office, GAO-10-933T, Troubled Asset Relief Program: Continued Attention Needed to Ensure the Transparency and Accountability of Ongoing Programs 12 (2010).

367. Special Inspector Gen. for the Troubled Asset Relief Program, *supra* note 16, at 15.

368. *Id.*

ence."[369] Furthermore, the failure to enforce compliance has been directly tied to HAMP's programmatic failures.[370] More specifically, the failure to enforce HAMP's mandates had led to HAMP's failure to achieve its primary goal—to prevent foreclosures.[371]

Admittedly, the above discussion suggests that the Treasury's power to enforce compliance is simply underutilized. More bluntly, a simple answer to the problem seems to be to simply motivate the Treasury Department to enforce compliance. In that regard, Treasury does in fact have a number of enforcement mechanisms at its disposal to remedy noncompliance. For instance, the SPAs provide Fannie Mae the rights "to reduce the amounts payable to the servicer, require repayment of previous payments made under HAMP . . . , require the servicer to submit to additional oversight, or terminate the servicer's participation agreement" in the event of material noncompliance.[372] Even assuming the Treasury could be further motivated to enforce servicer compliance with HAMP, the enforcement mechanisms fall short of achieving the ultimate goal—preserving home ownership. Specifically, the Treasury's enforcement mechanisms are only available retrospectively.[373] Thus even if optimally utilized, they fall short of prospectively or concurrently requiring an appropriate eligibility determination, requiring the proper dissemination of information, and stopping the foreclosure process.

V.
A PROPOSAL, ITS JUSTIFICATIONS, AND ITS ELEMENTAL REQUIREMENTS

The underlying goals of the proposed legislation, while manifold, may be reduced to one concise statement: The goal of any proposed alteration to HAMP's enforcement structure is to prevent unwarranted foreclosures by ensuring proper compliance with HAMP's mandates. Although that goal is easily stated, the mecha-

369. *Legislative Proposals to End Taxpayer Funding for Ineffective Foreclosure Mitigation Programs: Hearing before the H. Subcomm. on Ins., Hous., and Cmty. Opportunity of the Comm. on Fin. Servs.*, 112th Cong. 112–13 at 4 (2011) (statement of Neil Barofsky, SIGTARP), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg65670/pdf/CHRG-112hhrg65670.pdf.

370. COHEN ET AL., *supra* note 348, at 30 ("Despite all of its progress, HAMP did not achieve its goals because homeowners have been unable and Treasury unwilling to hold servicers accountable for performance or compliance with the program's rules.").

371. *Id.*

372. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 366, at 21.

373. *Id.*

nism of achieving that goal is at least less concise. And while insiders and scholars can legitimately disagree about the nuances of any proposed legislation in this regard, assuming a private right of action is warranted, at least two fundamental facets for the legislation must exist. First, to have any effect, positive or otherwise, the statutory language must clearly indicate that private citizens can sue servicers for failure to comply with the mandates of HAMP and clearly articulate the elemental requirements for stating a claim for HAMP's violation. Second, the statutory language must explicitly provide for equitable relief and, more specifically, for injunctive relief.

A. Clear Language Indicating a Right of Action Exists and Explicitly Defining the Prohibited Conduct

As indicated in Part II.A, federal courts have been unwilling to imply a right of action for violations of HAMP.[374] This unwillingness proceeds from the fact that federal courts are, in general, wary of creating implied rights of action, and thus usually require a manifestation of clear, unambiguous congressional intent.[375] For this reason, any statutory mechanism of enforcement would need to clearly state that a private right of action exists.

The Supreme Court has not articulated a formula for generating an explicit right of action, so no "magical language" must exist to generate one. Nevertheless, it is sensible to simply follow existing statutory structures that have explicit private enforcement mechanisms. In that regard, the following language, or some variation of it, is commonly used: "Any person who fails to comply with the provisions of this subchapter shall be liable to any aggrieved person."[376] Alternatively, Congress has also used language that focuses on the aggrieved party. For example: "Any person aggrieved by any violation of this chapter may sue and seek a remedy in law or equity."[377] Both of these types of "formulations" have withstood scrutiny by the

374. *See supra* Part III.A.

375. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S 273, 290 (2002) ("If Congress wishes to create new rights [under the FERPA] enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action.").

376. *See, e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692k (2012) ("Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of . . . .").

377. *See, e.g.*, 15 U.S.C. § 3611 (2012) ("[A]ny person aggrieved by a violation of this chapter may sue at law or in equity.").

federal courts.[378] And while neither is necessarily better or more effective than the other,[379] both would be suitable for the purposes of this Article. What remains, then, is delineating both the prohibited conduct and the elemental requirements of the statutory tort.

Admittedly, there are a thousand configurations for generating this statutory tort. But following the idea that TARP was intended to stabilize the economy by preventing foreclosures, the optimal configuration would limit HAMP claims to those that will prevent unnecessary foreclosures. In that vein, the allegations of existing and past plaintiffs, in combination with the quantifiable failures in compliance noted by TARP's oversight bodies, inform what types of conduct require private regulation.

Generally, plaintiffs have alleged four types of conduct that could be directly tied to unnecessary foreclosures. First, and perhaps most disturbingly, plaintiffs have alleged significant and widespread misrepresentation on the part of servicers.[380] Second, they have alleged improper or ineffective eligibility assessments.[381] Third, plaintiffs have alleged that servicers are failing to timely and

378. *See, e.g.*, Dunham v. Portfolio Recovery Assocs., 663 F.3d 997, 1001 (8th Cir. 2011) (stating the elements for a claim pursuant to the Fair Debt Collection Practices Act).

379. Although not specifically relevant to this Article, it is worth noting that the latter of these two common options is more frequently used when referring to private actions for the review of decisions by governmental bodies. *See, e.g.*, 5 U.S.C. § 7123 (2012) ("Any person aggrieved by any final order of the [Federal Labor Relations] Authority . . . may . . . institute an action for judicial review . . . .").

380. *See supra* Part III.B.2.

381. Reitz v. Nationstar Mortg., LLC, 954 F. Supp. 2d 870, 891 (E.D. Mo. 2013) ("Plaintiff alleges that the defendant was obligated by contract or common law to act in good faith and to deal fairly with the plaintiff and that defendant breached the implied covenant of good faith and fair dealing in several ways, including but not limited to, failing to perform loan servicing functions consistent with its responsibilities; failing to properly supervise i[t]s agents and employees as to loss mitigation, debt collection, and foreclosure; failing to make accurate calculations and determinations as to plaintiff's eligibility for HAMP[;] failing to follow through on its contractual obligations by not providing the plaintiff with a permanent loan modification; and routinely demanding information it had already received."); Morris v. BAC Home Loans Servicing, L.P., 775 F.Supp.2d 255, 260 (D. Mass. 2011) ("Under the above requirements, plaintiffs allege that BAC had an obligation to provide them with confirmation of receipt of their application within 10 days, and to complete their eligibility evaluation within 30 days. At the end of those 30 days, BAC was required to either send the plaintiffs a Trial Period Plan notice, or inform them in writing of their ineligibility and consider them for 'another foreclosure prevention alternative.' Plaintiffs allege that BAC fulfilled none of the above obligations. When all reasonable inferences are drawn in plaintiff's favor, BAC did not timely or properly evaluate the plaintiffs for HAMP. If such

clearly communicate with them and to timely complete the modification process.[382] Finally, claimants have alleged that servicers have failed to transmit a permanent loan modification following the mortgagor's successful completion of a TPP agreement.[383] Each of these is discussed below.

1. Misrepresentation-Based Conduct

It is somewhat obvious that misrepresentations—particularly intentional misrepresentations—are undesirable[384] and could be directly tied to the increased frequency of foreclosures.[385] Assuming these postulates, this portion of the Article will contend that some form of a misrepresentation-based tort is justified.[386] The remainder of this discussion will therefore focus on delimiting the contours of this particular facet of the statutory tort. In that regard, the misrepresentation-based portion of the tort should at least carry the following two features. First, heightened pleading requirements should be eliminated. Second, the traditional elements of misrepresentation-based torts should be modified.

a. Relaxed Pleading Requirements

Heightened pleading requirements constitute one of the greatest problems that plaintiffs face when attempting to obtain relief for misrepresentation-based torts.[387] While the prudence of these re-

failure is fairly and sufficiently pled as deceptive or unfair, it can provide the basis for relief under Chapter 93A.").

382. *See* COHEN ET AL., *supra* note 348, at 33.

383. *See supra* Part II.D.

384. Indeed, the common law actions for both intentional and negligent misrepresentation reflect this basic perspective—when a misrepresentation causes damage to another, that damage is compensable. *See* RESTATEMENT (SECOND) OF TORTS §§ 525–77 (1977).

385. For example, in *Wigod v. Wells Fargo Bank*, the plaintiff alleged claims for breach of contract, promissory estoppel, negligent hiring and supervision, fraudulent misrepresentation, negligent misrepresentation, promissory fraud, fraudulent concealment, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (IFCA). 673 F.3d 547 (7th Cir. 2012). Assuming those allegations are true, the conduct would lead to increased foreclosures.

386. This Article discusses the normative justifications for the statutory tort in Part V.A.1.

387. All federal jurisdictions are subject to Rule 9(b) of the Federal Rules of Civil Procedure. Rule 9(b) provides: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9. Similar provisions exist in nearly every state jurisdiction, either in rules of civil procedure or the courts' requirement that plaintiffs specifically plead facts to show fraud. *See, e.g.*, FLA. R. CIV. P. 1.120(b); MICH. CT. R. 2.112;

quirements is generally defensible,[388] the requirements generate a near impossible hurdle within the context of privately regulating communications by financial institutions.[389] Furthermore, when comparing the benefits derived from the heightened pleading requirements with the disservice they operate within this specific context, the requirements are not justifiable.

As a general matter, heightened pleading requirements are intended to achieve two objectives—to protect the defendant's reputation and to provide the defendant sufficient notice of the allegations such that the defendant can effectively respond to them.[390] Whatever their purposes, though, the effect of heightened pleading requirements is to force a plaintiff to particularize a number of specific facts within the Complaint or face dismissal for failure to comply.[391] Specifically, the heightened pleading requirements have the effect of forcing a plaintiff to identify the speaker, the substance of the alleged misrepresentation, and the temporal context of the alleged misrepresentation.[392]

While those requirements initially appear simple to meet, within the context of suits against financial institutions, those requirements can prove a challenging burden. To demonstrate the point, imagine two different hypotheticals. In the first hypothetical, an individual seller makes an oral misrepresentation to the buyer regarding the previous ownership of a car. In the second hypothetical, a variety of employees at a financial institution make a variety of different statements about a loan modification to the mortgagor. The standard heightened pleading requirements for fraud would

N.Y. C.P.L.R. 3016 (McKinney 2014); *see also* Murphy v. BDO Seidman, LLP, 113 Cal. App. 4th 687, 692 (2007) (citations omitted) ("[T]he policy of liberal construction of the pleadings . . . will not ordinarily be invoked . . . . This particularity requirement necessitates pleading *facts* which show how, when, where, to whom, and by what means the representations were tendered.").

388. *But see generally* Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 U.C. DAVIS. L. REV. 281 (2004) (arguing that the motion practice surrounding dismissal in fraud claims is ineffective in protecting the defendant's reputation and adds further cost, delays, and attention).

389. A number of federal courts have recognized this problem and "relaxed" the heightened pleading requirements on a case-by-case basis. *See* Emery v. Am. Gen. Fin., Inc., 134 F.3d 1321, 1323 (7th Cir. 1998) (collecting cases which permitted this relaxation).

390. FED. R. CIV. P. 9(b); Valerie Lee Litwin, *Pleading Constructive Fraud in Securities Litigation—Avoiding Dismissal for Failure to Plead Fraud with Particularity*, 33 EMORY L.J. 517, 531 (1984).

391. *See* sources cited *supra* note 390.s

392. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1004 (2003).

be easy to allege in the first hypothetical, as the buyer would only need to allege the name of the seller, the substance of the statement, and the approximate timing of the statement. Even without discovery, the buyer would presumably be able to rather easily accomplish the task because it involved one conversation with one individual. But within the context of the second hypothetical, the mortgagor would need to state the names of each speaker, the substance of each statement, and the approximate timing of each statement—all without the benefit of discovery.

The reason this proves a difficult burden within the context of financial institutions is that most conversations between the employees of financial institutions and their clients happen over the phone.[393] And most of those conversations occur in an environment where the employee at the financial institution is only providing her given name, as opposed to both her given name and her surname.[394] Furthermore, unlike the first hypothetical, a mortgagor may speak with thirty different employees before the modification ultimately fails.[395] And due to the stressful nature of these conversations, the likelihood that the mortgagor is taking specific, particularized notes is diminished. Thus the pleadings will, at best, resemble the following: "Sometime during the week of August 1, 2013, 'Cindy' told the mortgagor that her loan was ineligible for a HAMP modification. Thereafter, within the next week, 'Frank' informed the mortgagor that the modification was denied because the bank failed to receive the requisite paperwork." Now the mortgagor's lawyer need only add similar information for roughly twenty-eight more telephone encounters, assuming, of course, that the additional information is even this articulable.

Although this burden is formidable for mortgagors, financial institutions gain little from maintaining the heightened pleading requirements for these claims for two reasons. First, the vast majority of financial institutions involved with HAMP are regularly named as defendants in lawsuits[396] and regularly named as defend-

393. *Cf., e.g.,* Arthur Delaney, *One Man's HAMP Hell: 'Just Wait This Thing Out'*, HUFFINGTON POST (Oct. 14, 2010, 11:53 AM EDT), http://www.huffingtonpost.com/2010/10/14/post_547_n_757979.html; *Call Centre Workers—Not Giving You Their Name*, MONEYSAVINGEXPERT.COM, http://forums.moneysavingexpert.com/showthread.php?t=1640525 (last visited May 12, 2014).

394. *See Call Centre Workers—Not Giving You Their Name*, *supra* note 393.

395. *See* Delaney, *supra* note 393.

396. For example, Wells Fargo Bank has been named a defendant 2,289 times within the past three years. This data is based on a search conducted on February 4, 2014 using the search term: "ALLCASES: "Wells Fargo" /2 defendant respondent & da(aft 02/04/2011)."

ants in misrepresentation-based lawsuits.[397] Accordingly, to the extent financial institutions could argue their reputations would be diminished by simply being named in a lawsuit that contained allegations of misrepresentation-based conduct, those arguments would lack merit. At a minimum, relaxing the heightened pleading requirements would not increase a financial institution's exposure to reputational damage as a result of frivolous lawsuits; irrespective of whether the pleading requirements are relaxed, large financial institutions will get sued, and irrespective of whether the pleadings requirements are relaxed, mortgagors must still prove their claims if they are to be successful. Furthermore, relaxing the heightened pleading requirements would not diminish a financial institution's ability to respond to the allegations. When an allegation is *too* generally stated, any defendant need only deny the allegation and demand strict proof thereof.

What remains, then, is to define the limits of the relaxed standard. Although there are admittedly a number of mechanisms that could be used to ameliorate the harsh effects of heightened pleading requirements while maintaining some of the "bite" of the general rule, it seems more analytically sound to eliminate the rule altogether within the context of HAMP-based claims. That is, as indicated above, heightened pleading requirements serve little, if any, purpose within the context of HAMP-based claims against financial institutions. Nevertheless, the requirements do serve as a hindrance to otherwise legitimate claims. As a result, heightened pleading requirements for HAMP-based claims are not justifiable and should be abolished in this context.

b. Modified Elemental Requirements

For purposes of some consistency, and quite frankly for ease, the analysis for generating the elemental requirements for the misrepresentation-based tort should begin with the misrepresentation-based framework that already exists at common law. At common law, a plaintiff alleging fraud is ordinarily required to prove the existence of a misrepresentation, scienter, an intent to induce reliance, objective reliance, subjective reliance, and damages.[398] In the same vein, a plaintiff alleging negligent misrepresentation is ordi-

397. For example, of the 2,289 cases defended by Wells Fargo within the past three years, 110 contained an allegation of fraud. *See* supra note 396.

398. *E.g.*, Kramer v. Petisi, 940 A.2d 800, 805 (Conn. 2008). It should be noted that not all jurisdictions require a plaintiff to prove each of these elements. For instance, some jurisdictions do not require that a plaintiff demonstrate the existence of scienter. *Cf.* 37 AM. JUR. 2D *Fraud and Deceit* § 123 (2014). Neverthe-

narily required to prove the same elements, with the exception of scienter.[399] Assuming those elements are justifiable for misrepresentation-based torts,[400] the only remaining inquiry is the extent to which any of the traditional elements should be maintained in the context of HAMP-based claims.

In that regard, the traditional elements of misrepresentation and subjective reliance should be maintained; the elements of scienter, intent to induce reliance, and objective reliance should be eschewed; and the requirement of damages should be maintained, albeit in a modified state. Because this Article does not advocate for any alterations to the requirements of misrepresentation[401] and subjective reliance,[402] no further discussion in that regard is warranted. Furthermore, because Part VI.B will discuss damages, both generally and in the context of the misrepresentation-based portion of the statutory tort no further discussion is warranted here. Ac-

less, the formula used herein is the most commonly used formula. RESTATEMENT (SECOND) OF TORTS § 526 (1977).

399. *E.g.*, Heard v. City of New York, 623 N.E.2d 541, 545 (N.Y. 1993); s*ee also* 37 AM. JUR. 2D *Fraud and Deceit* § 29 (2014) (explaining that to prove negligent misinterpretation, a plaintiff must show that the defendant made a misrepresentation with the intent to induce plaintiff, the plaintiff was so induced, and the plaintiff's grounds for belief were justifiable); RESTATEMENT (SECOND) OF TORTS § 552 (1977).

400. A number of scholars have argued that the elemental requirements for misrepresentation-based torts are not justifiable in a number of areas. *E.g.*, Jeremy N. Trousdale, *Reasonable or Justifiable Reliance: Who Can We Believe?*, 21 AM. J. TRIAL ADVOC. 385, 388 (1997); Comment, *The Perimeters of Liability for Negligent Misrepresentation in Maryland*, 48 MD. L. REV. 384, 400-01 (1989).

401. Because this Article does not advocate any modification to the traditional element of misrepresentation, a full discussion of that element has not been provided herein. Nevertheless, it seems unequivocal that the misrepresentation requirement found within the traditional, common law formula of misrepresentation-based torts should be retained within the context of the statutory tort, as there is no normative basis for creating equitable relief for plaintiffs who have been exposed to true statements. Stated more bluntly, plaintiffs are not, or should not be, harmed by statements that are in fact true—at least not within the context of misrepresentation-based claims.

402. Because this Article does not advocate any modification to the traditional element of subjective reliance, a full discussion of that element has not been provided herein. Nevertheless, it seems unequivocal that the requirement of subjective reliance should be retained, as there is no basis for remediating misrepresentations, at least not in private, civil litigation, unless the plaintiff actually relied upon the misrepresentations. *See* John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1026 (2006). That is, the existence of an untruth, without some resulting reliance on the part of the audience, could not possibly give rise to an individualized injury, and as a result, should not give rise to individualized equitable relief.

cordingly, the remainder of this discussion will address scienter, intent to induce reliance, and objective reliance.

2. Eschewing Intent: Scienter and the Intent to Induce Reliance[403]

The decision to eschew the requirements of scienter[404] and intent to induce reliance[405] is premised upon two guiding principles. First, the harm that the statutory tort is intended to remedy exists irrespective of whether the defendant's conduct is intentional, reckless, or negligent. Thus those distinctions are irrelevant within the context of fulfilling HAMP's promise—preventing unnecessary foreclosures. Second, while those distinctions serve legitimate goals within the context of common law torts, as they serve as dividing lines for certain types of recovery,[406] HAMP's statutory tort should only permit injunctive relief.[407] As a result, the purposes ordinarily served by the elemental requirement of intentional conduct are irrelevant within the context of the statutory tort.

The first reason to discard the intent requirement is that a misrepresentation inflicts the same harm irrespective of whether the conduct was intentional or negligent. In both cases, the mortgagee that made the misrepresentation still forecloses upon the mortgagor's home. Two hypotheticals will illustrate this point. In the first hypothetical, assume a mortgagee tells a mortgagor the following: "You are ineligible for any type of federal relief through the HAMP Program or otherwise." Now assume the mortgagee *actually knew* that was untrue at the time the statement was made and made it with the malicious intent to induce the mortgagor's reliance. Fi-

403. For purposes of this Part, the phrase "intentional conduct" is used to refer to both actually intentional conduct as well as reckless conduct, in the collective sense.

404. Within the context of common law, misrepresentation-based torts, scienter typically requires a plaintiff to prove that the defendant's misrepresentation was made either with actual knowledge of its falsity or under circumstances wherein the defendant recklessly disregarded the truth. *See* RESTATEMENT (SECOND) OF TORTS § 526 (1977).

405. Within the context of common law, misrepresentation-based torts, "intent to induce reliance" typically requires a plaintiff to prove that the defendant made the misrepresentation "for the purpose of inducing another to act or to refrain from acting in reliance upon it . . . ." RESTATEMENT (SECOND) OF TORTS § 525 (1977).

406. *See generally* 22 AM JUR. 2D *Damages* § 556 (2014) (explaining that under the common law, punitive damages are added to compensatory damages as punishment for the wanton, reckless, or malicious character of an act); 86 C.J.S. *Torts* § 22 (West 2014) (explaining that a defendant's state of mind is relevant when the plaintiff is seeking punitive damages).

407. *See infra* Part V.B.

nally, assume the mortgagor actually relied on the statements. The ultimate harm from that statement is that the mortgagor's home is likely to be foreclosed, as, assuming true reliance exists, the mortgagor is unlikely to apply for federal relief for which the mortgagor would have otherwise been eligible.

Now assume that the misrepresentation was made negligently instead of intentionally. Has the likely *result* changed? The answer, of course, is no. From the mortgagor's perspective, the conduct is identical because the harm is identical—in either event, the mortgagor loses her house. More importantly, from the perspective of achieving HAMP's goals, the conduct is identical because the harm is identical—in either event, an unnecessary foreclosure occurs. Thus at least in terms of a result-based inquiry, there is no justification for treating intentional conduct and negligent conduct disparately—at least not with respect to the *existence* of some culpability sufficient to impose liability.

Admittedly, once the inquiry shifts from the *existence of culpability* to the *recovery of relief*, intentional conduct and negligent conduct differ significantly in both their recovery goals[408] and their practical recovery effects.[409] Thus from a recovery-based perspective, significant distinctions typically exist between the two levels of culpability. Nevertheless, those distinctions are irrelevant within the context of the HAMP-based statutory tort for two reasons. First, the inquiry into culpability is relevant primarily for the sake of determining the availability of punitive damages.[410] However, the statutory tort that this Article proposes permits only injunctive relief.[411] Thus irrespective of the *degree* of culpability, the *resulting effect* of culpability will remain the same within the context of the envisioned statutory tort. As a result, the traditional damages inquiry that would ordinarily serve as the basis for distinction between varying degrees of culpability when applied to actions at law is inapposite in this context.

Second, this proposal's form as a statutory tort, instead of a cause of action at common law, eliminates the traditional basis on which courts must delimit the two levels of culpability. At common

408. *Id.*

409. *Compare* Gold v. Dubish, 549 N.E.2d 660, 667 (Ill. App. 1989) (permitting recovery of compensatory and expectation damages upon proof of fraudulent misrepresentation), *with* Banker's Trust Co. of W.N.Y. v. Steenburn, 409 N.Y.S.2d 51, 67–69 (N.Y. Sup. Ct. 1978) (restricting plaintiff's damages for claim of negligent misrepresentation to restitution of investment, but not loss of expected profit).

410. *See supra* notes 406 & 409.

411. *See infra* Part V.B.

law, the existence of intentional conduct was intended to play at least some role in the exercise of judicial discretion.[412] Furthermore, equity jurisdiction and its corresponding remedies were traditionally intended to remedy perceived deficiencies within law jurisdiction, particularly to the extent that no cognizable action or appropriate remedy existed at law.[413] Alternatively, statutory torts mandate specific relief available to plaintiffs and the elements required to meet the tort. The decision to intervene and determine what is fair—the touchstone of equity jurisdiction—will already have been made by Congress rather than the court. Thus because the court's role in determining "fairness" is eliminated within the context of the statutory tort, the corresponding traditional role played by an intent-based inquiry is unnecessary.

3. Eschewing Objective Reliance

At common law, the traditional assumption underlying extension of misrepresentation-based liability was that a plaintiff's reliance on a misrepresentation was uncognizable, unless the plaintiff's reliance was in fact reasonable.[414] While that basic assumption and its underlying justifications may go unchallenged,[415] it is necessary

412. That is, when a defendant's actions were found to be intentional, a judge sitting in equity was more likely to exercise her discretion in the plaintiff's favor when determining both whether equitable relief was available and the extent to which the court would exercise it. For example, equitable estoppel is available in instances where the actions of another have the effect of committing an injustice or fraud upon another. 31 C.J.S. *Estoppel and Waiver* § 75 (West, 2014); s*ee also* 28 AM. JUR. 2D *Estoppel and Waiver* §§ 26–31 (2014).

413. 30A C.J.S. *Equity* § 3 (West 2014). Admittedly, it is highly unusual for a statutory scheme to both generate equitable remedies and remove judicial discretion in applying them. And, undoubtedly, there are a variety of normative bases for both supporting and attacking this unusual facet of the statutory tort. Nonetheless, the ultimate, touchstone reason for the rule is simply this: equity jurisdiction, and its corresponding remedies, was traditionally intended to remediate perceived deficiencies within law jurisdiction. *Id.* Thus, to the extent no cognizable action existed at law, or to the extent no appropriate remedy existed at law, a court was empowered to exercise some discretion in determining whether to intervene, "what is fair," and, to the extent "unfairness" exists, what is necessary to cure the lack of fairness. *See id.* §§ 3, 5. In that frame, it makes sense for a judge to engage an intent-based inquiry, as "fairness" might not dictate judicial intervention in the absence of intent. Stated more simply, in the absence of intentional conduct, it might be perfectly fair for the court to abstain and leave the parties where they find themselves.

414. Learning Works, Inc. v. Learning Annex, Inc., 830 F.2d 541, 546 (4th Cir. 1987).

415. W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 108, at 749–50 (5th ed. 1984) (stating that the purpose of the objective reliance requirement is to corroborate the subjective reliance requirement).

to modify the manner in which objective reliance is applied to any given factual situation within the context of HAMP, if the statutory tort is expected to have any practical effect. More specifically, the requirement of objective reliance must be modified such that a mortgagor's reliance upon statements made by the mortgagee will be adjudicated per se reasonable. While that position is admittedly fundamentally inconsistent with traditional notions of objective reliance,[416] it is nonetheless normatively justifiable for one simple reason: the doctrine of objective reliance within the context of misrepresentation-based HAMP claims presents a problem of asymmetrical information, where the mortgagee holds exclusive access to foundational information regarding the transaction, the mortgagor lacks any bargaining power to equalize access, and the mortgagor lacks any reasonable mechanism of verification.[417] Thus while abrogating objective reliance may not be normatively justifiable for all misrepresentation-based claims, it is justifiable within the context of HAMP-based claims.

As a general matter, transactional information can be either ancillary or foundational. In terms of the former, asymmetries in ancillary information are common in the vast majority of transactions. Thus, for instance, the manufacturer of a product has more information about the product's production than a distributor or remote purchaser. And while a distributor or remote purchaser could theoretically tour the factory, inspect the product, and even interview employees, the fact remains that the manufacturer will retain a substantial amount of exclusive information regarding the product's production. As a result, the manufacturer will retain superior knowledge in at least some matters ancillary to the transaction.

Although this ancillary transactional asymmetry undoubtedly both exists and remains throughout any given transaction, it is ordinarily not an issue because, as the phraseology indicates, the asymmetry only affects matters tangential to the transaction, and as a result, only affects matters that typically do not have significant impact on the value of the transaction. Thus, for instance, in reference to the first example above, while the manufacturer may have superior information regarding the diligence and work habits of its employees on a day-to-day basis, that information provides, at most,

416. RESTATEMENT (SECOND) OF TORTS § 537 (1977).

417. Scholars have discussed the concepts of informational asymmetries and unequal access in contexts other than TARP or HAMP. *See, e.g.*, Eric H. Franklin, *Mandating Precontractual Disclosure*, 67 U. MIAMI L. REV. 553, 558 (2013) (discussing informational asymmetry in the context of freedom of contract).

signaling information regarding the quality of the goods. That information, whether positive or negative, does not inherently necessitate a resulting quality assessment for any particular good, or for that matter, any particular unit of goods. Accordingly, parties are unlikely to seek ancillary information, and even in the event that they do, there usually are not any reasonable mechanisms of externally verifying the resulting information for accuracy.

In contrast with information that is ancillary to a transaction, foundational information is both ordinarily subject to reasonable access by both parties and subject to reasonable, external mechanisms of verification. Thus, for instance, while the seller of a business has dominant information regarding the finances of the business at least initially, the buyer could, through the process of due diligence, require production of that information prior to consummating the purchase. And as a mechanism of verifying that information, the buyer could require access to other documents ostensibly generated before the sale was conceived. For instance, a buyer could require the production of tax records. Similarly, while a would-be insured ordinarily has dominant information regarding her physical health, a life insurance company has the option of requesting health information from her. And more importantly, the insurer has the option of exercising reasonable mechanisms to verify that information. Thus, for instance, life insurance companies can require extensive medical testing prior to issuing a life insurance policy. Accordingly, at least in the general sense, parties ordinarily have equivalent access to foundational information—information that significantly impacts the value of a transaction. And to the extent the party with lesser information seeks the information and is denied access to it, the party has the option of eschewing the transaction. The end result, then, is that a servient party can prospectively seek information regarding foundational matters, and more importantly, has an opportunity to verify that information before actual reliance occurs. Or stated within the misrepresentation-based language of the common law, parties suffering from foundational asymmetries can seek representations regarding those asymmetries from the dominant party, and where appropriate and reasonable, verify that information through external information before committing themselves to action.[418]

418. Courts regularly require some minimal investigation in a variety of circumstances. *See, e.g.*, Bourgeois v. Hughes, 55 So. 3d 1195, 1202 (Ala. Civ. App. 2010) ("[T]he right of reliance comes with a concomitant duty on the part of the plaintiffs to exercise some measure of precaution . . . . The return to the reasonable-reliance standard imposes again on a plaintiff a general duty . . . to read the

Those ordinary assumptions regarding informational asymmetries, though, are inapplicable within the context of HAMP-based representations. Rather, in some sense, HAMP-based informational asymmetries are hybrid in nature. That is, mortgagees possess a tremendous amount of information that is not subject to reasonable, external verification by the mortgagor, thus comprising elements of ancillary information. And yet, the information within the mortgagees' exclusive possession has the capacity to significantly impact the value of the transaction, thus comprising elements of foundational information. Furthermore, because the parties have already consummated the underlying transaction—both parties already executed the underlying note and mortgage—the mortgagor does not have the option of simply walking away without action. Thus the question is not whether the mortgagor will continue at least some business relationship with the mortgagee; the question is whether that relationship will result in a foreclosure.

While examples of these problems abound in the HAMP environment, the most common example is actually the most instructive. The backbone of many misrepresentation-based HAMP claims is that the mortgagee misrepresented its intention to modify the loan.[419] Obviously, the present mental intention of the mortgagee is within the mortgage's exclusive possession. And to the extent the mortgagor would seek that information, the mortgagor has no means of verifying it. As a result, mortgagors are left with two practical options: mortgagors can disbelieve the mortgagee, devote their resources elsewhere, and potentially eschew a loan modification that could have ultimately occurred. Or mortgagors can believe mortgagees, devote their resources towards completing the modification, and hope that the mortgagee is telling the truth.

That practical reality is then further complicated by the fact that mortgagees regularly provide inconsistent information regarding their intentions to the mortgagor. Thus, for instance, mortgagees will make representations that indicate the mortgagee intends to proceed to foreclosure. At other times, the mortgagee will indi-

documents received in connection with a particular transaction, with a duty to inquire and investigate."); *In re* Estate of McKenney, 953 A.2d 336, 343 (D.C. Cir. 2008) (citations and internal quotation marks omitted) ("It may be unreasonable to rely on a misrepresentation when the statement is preposterous or obviously false or if there was an adequate opportunity to conduct an independent investigation and the party making the representation did not have exclusive access to such information.").

419. *See supra* Part III.B.2.

cate that the modification agreement has been approved.[420] Although similar scenarios could be said to exist in ordinary transactions, HAMP situations are different for two reasons. First, unlike ordinary transactions, mortgagors cannot simply "walk away" without also walking away from their houses. Second, because mortgagors ordinarily lack any bargaining power once their loans are in default, mortgagors are not able to force the mortgagee to provide information that would reasonably eliminate informational asymmetries.

To demonstrate these points, imagine two different hypotheticals. In the first hypothetical, Party B, a potential seller of real property, owns two large tracts of adjacent land. Party A, a prospective buyer, is negotiating for the purchase of one of the tracts of land. During the negotiations, it is obvious to Party A that the asking price for the tract is inflated compared to the market. But Party B, the seller, has indicated the inflated price is intended to account for an expected, significant increase in the tract's value as a result of a shopping mall that will be constructed on the seller's adjacent tract of land within the next two years. Notwithstanding that statement, though, Party B also makes representations to Party A that the adjacent tract is likely to be preserved in its current state for the tax benefits of a conservation easement.

Initially, it is clear that the seller in the first hypothetical has the benefit of significant foundational informational asymmetry. That is, only the seller *really* knows the seller's intention, and given the facts, it is clear the seller's intention would significantly impact the value of the transaction. Nevertheless, the buyer in the first hypothetical has significant, prospective protective devices that, if exercised, could eliminate the asymmetry and/or cure the inconsistency. In that vein, the buyer could, for instance, attempt to independently verify the claim by checking the county records system to determine whether zoning applications had been filed. Or the buyer could seek a copy of the construction contract. Or the buyer could require that the seller make a definite promise in writing that both clearly and unequivocally states the favorable representation and unequivocally shuns the negative representation. And of course, if the seller were unwilling to provide reasonable verifications that would eliminate the informational asymmetries, the buyer could threaten to walk away from the transaction in an exercise of equal bargaining power.

420. For an actual case with similar facts, see, for example, *Freitas v. Wells Fargo Home Mortgage, Inc.*, 703 F.3d 436, 440–41 (8th Cir. 2013).

Now imagine a second hypothetical in which a mortgagor executes a note and mortgage. Thereafter, the mortgagor experiences a serious medical condition that results in her permanent inability to work. As a result of not working, the mortgagor has an arrearage on her note. Subsequently, she seeks and acquires Social Security payments for the medical condition. But the payments are not enough to make her ends meet, unless the note is modified. Two months after the initial arrearage, the mortgagor and mortgagee commence discussions regarding the potential of a loan modification that would both cure the arrearage and provide the mortgagor with a more reasonable monthly payment. During those negotiations, the mortgagee represents to the mortgagor that she "will get" a loan modification. Several days later, the mortgagee, through its attorney, sends the mortgagor information indicating the foreclosure has commenced. Thereafter, depending on which employee at the bank that the mortgagor talks to, the mortgagor continues to get mixed signals regarding whether the loan modification is likely. In the meantime, though, she does not pursue other potential options that could save her house. So for instance, the mortgagor does not petition for bankruptcy. Ultimately, the mortgagee forecloses on the house, and to add insult to injury, it is subsequently revealed that the mortgagee never intended to modify the loan but was rather intentionally misleading the mortgagor.

Although the first hypothetical and the second hypothetical appear initially analogous, there are significant practical disparities between the buyer in the first hypothetical and the mortgagor in the second hypothetical. Specifically, while the mortgagor in the second hypothetical suffers from the same informational disparities as the buyer in the first hypothetical, the mortgagor in the second hypothetical lacks the ability to weaponize bargaining power and thus lacks the same prospective options to protect herself. And while the mortgagor in the second hypothetical could conceivably walk away from the modification, the mortgagor would do so at the expense of petitioning for bankruptcy—a significantly more detrimental result than simply deciding not to purchase a piece of real property. Furthermore, although the mortgagor in the second hypothetical could conceivably seek information from the mortgagee that would eliminate the informational disparities—the mortgagor could ask for the immediate production of the modification agreement for example—the mortgagor lacks any real bargaining power to incentivize the mortgagee to provide it, with the exception of course of the petition for bankruptcy.

Once framed in light of both informational disparity and bargaining power, it would be perfectly logical to require the buyer in the first hypothetical to exercise some reasonable, prospective measure to verify inconsistent information before making a commitment that relies on that information. And to the extent the buyer fails to exercise one or more of those measures, it would be perfectly logical to deny judicial relief on the basis that the buyer failed to act reasonably. After all, given the slim costs of any of those protective actions, who wouldn't exercise them? That having been said, and for the inverse reasons, it would be completely illogical to require the mortgagor in the second hypothetical to demonstrate the exercise of some protective action, when the practical reality is that no real prospective device existed. Stated differently, it would be illogical to hold the mortgagor in the second hypothetical to the standard of objective reliance, when that standard cannot be met.

4. The Remaining Liability Facets: Eligibility Assessment Problems, Communication Problems, and Failures to Transmit

Ordinarily, the first step in creating or justifying a statutory right of action would be to identify some "wrong" to be avoided.[421] While this Article has certainly identified undesirable conduct on the part of Participating Institutions—conduct that is either deceptive or is prohibited by the Guidelines—this Article has not yet attempted to discern whether that conduct is "wrongful" in the philosophical sense.[422] More specifically, this Article has not engaged in the more complex analysis of what, if any, normative basis exists for either requiring or prohibiting specific conduct in the first instance. Rather, at least to this point, this Article has taken for granted that the undesirable conduct is wrong in the general sense and thus has focused its efforts only on identifying and justifying the mechanisms best tailored to accomplish the goal of preventing them. Although the preliminary step of identifying a "wrong" is justifiable in the circumstance where a proposal is seeking to, in the first instance, discern some conduct to be avoided, the proposal in this Article is not operating in a legal vacuum. Rather, the proposal is operating against the background of governmental action that is

421. Maw Enters. v. City of Marksville, 128 So. 3d 575, 578 (La. Ct. App. 2013).

422. For a discussion of the concept of "wrongs" within the law, see generally Jeanne L. Schroeder & David Gray Carlson, *The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law*, 24 CARDOZO L. REV. 2481 (2003) (offering a philosophical account of right and wrong and arguing that wrong is the negative of right).

ostensibly intended to both encourage some conduct and prevent other conduct by servicers. As a result, this proposal takes for granted that violation of the requirements or prohibitions outlined in HAMP's Guidelines is sufficiently wrongful to justify some remedy, assuming the remedy is in fact structured to achieve goals consistent with both HAMP's Guidelines and Congress' objectives in enacting TARP. Assuming that postulate is sound, the remaining analysis is two-fold. First, one must determine which portions of the specific conduct required or prohibited by HAMP's Guidelines, if any, are conducive to achieving Congress' underlying goals, and second, once those portions of HAMP's Guidelines are identified, one must determine the elemental requirements of the resulting rights of action. Each of those is discussed below.

a. Congress' Goals and Identification of the Remaining Liability Facets

As discussed above,[423] one of Congress' chief aims in enacting TARP was to "preserv[e] homeownership."[424] That unequivocal fact is clear from the statutory language itself as well as from the legislative history surrounding TARP. With regard to the language of the statute, the chief operative portion of TARP is grounded in Section 5211, which empowers the Secretary of the Treasury to purchase troubled assets.[425] That section, though, is delimited by Section 5213, which specifies the factors the Secretary must consider when determining whether and to what extent specific troubled assets should be purchased.[426] Among those considerations, Congress requires that the Secretary consider "the need to help families keep their homes and to stabilize communities."[427] To achieve this end, both the Secretary[428] and federal property managers[429] are required to implement plans to minimize foreclosures.

423. *See supra* Part I.

424. 12 U.S.C. § 5201(2)(B) (2012).

425. *Id.* § 5211(a)(1).

426. *Id.* § 5213(1)–(9).

427. *Id.* § 5213(3).

428. *Id.* § 5219(a)(1) ("To the extent that the Secretary acquires mortgages, mortgage backed securities, and other assets secured by residential real estate, . . . the Secretary *shall* implement a plan that seeks to maximize assistance for homeowners and use the authority of the Secretary to encourage the servicers of the underlying mortgages . . . to minimize foreclosures.") (emphasis added).

429. *Id.* § 5220(b)(1) ("To the extent that the Federal property manager holds, owns, or controls mortgages, mortgage backed securities, and other assets secured by residential real estate, . . . the Federal property manager *shall* implement a plan that seeks to maximize assistance for homeowners and use its authority to encourage the servicers of the underlying mortgages . . . to minimize foreclosures.") (emphasis added).

With regard to the legislative history surrounding TARP, minimizing foreclosures was a primary concern for many of the legislators who voted for TARP's passage.[430] Indeed, some legislators only voted for the measure in hopes of stemming foreclosures.[431] Moreover some legislators lamented that TARP did not go far enough in terms of minimizing foreclosures.[432] Thus given both TARP's statutory language and legislative history, it is reasonable to posit that minimizing foreclosures was one of the statute's primary objectives. Accordingly, the only remaining inquiry for this Section is to identify the portions of the Guidelines that are reasonably conducive to achieving Congress's goal. More specifically, the remaining inquiry is to determine which Guidelines, if violated, are likely to lead to unnecessary foreclosures.

The exercise of attempting to discern which Guidelines, if violated, could lead to unnecessary foreclosures is an ambitious one.[433] The Guidelines themselves encompass thousands of pages of rules that both require certain behaviors and prohibit others. And osten-

430. *See, e.g.*, 154 CONG. REC. S10293 (Oct. 1, 2008) (statement of Sen. Reid) ("[W]e ensured that homeowners facing foreclosure would receive much needed help."); 154 CONG. REC. H10772 (Oct. 3, 2008) (statement of Rep. Barton) ("This is the strongest part of the legislation, protecting homeowners and doing the kind of loan modifications that will keep people in their homes who have these adjustable rate mortgages even before they rest."); 154 CONG. REC. H10775 (Oct. 3, 2008) (statement of Rep. Hoyer) ("[W]e will help homeowners renegotiate their mortgages to prevent a further flood of 2 million projected foreclosures. That's what this bill is about. That is the action we are asked to take today.").

431. *See, e.g.*, 154 CONG. REC. HS10771 (Oct. 3, 2008) (statement of Rep. Edwards) ("[W]hile I voted 'no' in opposition on Monday for the earlier package, hearing your clarification and the authority of the Secretary of Treasury to deal directly with addressing foreclosures that many people in my community are facing and across this country, I stand in support of the bill.").

432. *See, e.g.*, 154 CONG. REC. S10280 (Oct. 1, 2008) (statement of Sen. Enzi) ("This plan inadequately addresses the root cause of our market crisis, home foreclosure."); 154 CONG. REC. S10295 (Oct. 1, 2008) (statement of Sen. Kohl) ("I am also disappointed that this bill does not address the root cause of the crisis and do more to directly help homeowners facing foreclosure."); 154 CONG. REC. S10774 (Oct. 3, 2008) (statement of Sen. Baca) ("Over the past few days, I have fought vigorously to include a stronger foreclosure mitigation provision in a revised bill. . . . While I believe today's bill still does not do enough to protect struggling homeowners, I am pleased that it does include critical improvements in the areas of oversight and accountability."); 154 CONG. REC. H10778-79 (Oct. 3, 2008) (statement of Rep. Jackson-Lee) ("If the American people are facing mortgage foreclosure, it is my desire that monies be provided to them so that they can continue to stay in their home and pay their mortgages and their bills.").

433. Of course, Congress could simply state that a right of action exists for any violation of HAMP's Guidelines. Whatever would be gained in that regard through ease of drafting would be lost in terms of careful tailoring.

sibly, violation of any one of those rules could lead, albeit perhaps indirectly, to an unnecessary foreclosure. Nevertheless, the vast array of claims that have arisen since HAMP's rollout gives rise to clear patterns which, if targeted, may provide a manageable solution to staving off unnecessary foreclosures.

As stated earlier,[434] plaintiffs' HAMP-based claims have arisen from two trigger points in the modification process—the eligibility phase and the permanent modification phase.[435] More specifically, plaintiffs have alleged that servicers failed to properly assess eligibility for a HAMP modification[436] and failed to transmit a permanent modification following the plaintiffs' successful completion of a TPP agreement,[437] respectively. Furthermore, and more pervasive to the entire modification process, plaintiffs have alleged that servicers failed to properly and timely communicate with the mortgagors, leading to failed modifications, and ultimately, foreclosures.[438] Taking these three categorical allegations together, one can account for nearly every HAMP-based claim brought in the federal courts.[439]

It is unnecessary to identify each category of claim or conduct to understand how they, theoretically, *could* lead to unnecessary foreclosures.[440] TARP's oversight bodies have already substantiated how the statute's shortcomings have produced this result.[441] It is

434. *See supra* Part I.

435. *Id.*

436. *See supra* note 22.

437. *See supra* Part II.D.

438. *E.g.*, Velasco v. Aurora Loan Servs., No. 2:11-cv-04784-JHN-RZx, 2012 WL 569582, at *2 (C.D. Cal. Feb. 21, 2012); *see also* COHEN ET AL., *supra* note 348, at 33 (explaining how dual track servicing impedes homeowners' qualification for modification).

439. There are two significant outliers to this statement. First, this statement intentionally excludes misrepresentation-based claims which were discussed in Part III.B.2 and V.A.1. Second, the categories do not explicitly include claims for dual-tracking, as dual-tracking, at least standing alone, does not lead to *increased* foreclosures. Rather, at most, it leads to *faster* foreclosures.

440. For example it is unequivocally true that errors in eligibility assessments *could*, at least theoretically, lead to increased and unnecessary, foreclosures; by their very nature, eligibility assessments determine which mortgagors *can* benefit from HAMP and which are categorically barred. Similarly, it is unequivocally true that failing to transmit a permanent modification following the successful completion of a TPP agreement *could* lead to an unnecessary foreclosure, as, in the definitional sense, TPP agreements are intended to determine whether the mortgagor is capable, in the long-term, of making timely payments to the modified loan.

441. *E.g.*, SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, SIGTARP 10-005, FACTORS AFFECTING IMPLEMENTATION OF THE HOME AFFORDABLE MODIFICATION PROGRAM 13 (2010) (attributing slow pace of conversion to perma-

thus fair to say that, at least in some circumstances, providing some remedy for violations of these categorical areas of the Guidelines, referred to hereinafter as the *remaining liability facets*, would serve Congress's stated objectives for TARP.

b. The Elemental Requirements of the Remaining Liability Facets

Unlike the misrepresentation-based tort claims, claims premised upon the remaining liability facets of the statutory tort lack a common law corollary. Thus, the process of determining the elemental requirements for those facts requires "starting from scratch." In that regard, it makes sense to employ a mechanism of generating the elements that, at least in the general sense, is both simple and tailored to achieve Congress' underlying goal of minimizing foreclosures. That is, mortgagees should be exposed to the statutory tort, and its corresponding equitable remedy, in any circumstance where a mortgagee engaged in conduct inconsistent with the guidelines applicable to the identified categorical areas, and where that conduct is causally linked to a foreclosure action.

The previous Subpart identified several categorical areas within HAMP's Guidelines that, if violated, *could*, at least theoretically, lead to unnecessary foreclosures. Of course, in each of these situations, the operative word is "could," as the existence of a violation, without more, would not *necessarily* lead to an unnecessary foreclosure in any individual circumstance. And thus extending liability, however formulated, on the basis of a violation does not serve Congress' goal of minimizing or preventing unnecessary foreclosures—unless, of course, compliance with HAMP's Guidelines, as applied in the individual circumstance, would have altered the result for the mortgagor. Stated more succinctly, the remaining liability facets do not serve Congress' goal of minimizing foreclosures, unless the liability they generate is contingent upon some causal link. Drawing those two streams of thought together, generating a mechanism of mortgagor relief in light of Congress' goals then entails three components. First, mortgagees should be exposed to the statutory tort, and its corresponding equitable remedy, in any circumstance where the mortgagee incorrectly or improperly assessed mortgagor eligibility for HAMP, the incorrect or improper assessment yielded a negative eligibility result, and a correct assessment would have yielded a positive eligibility result. Second, mortgagees should be exposed to the statutory tort, and its equitable remedy,

nent modifications to uncertainty of oral modifications and payment due date during the trial period).

where the mortgagee failed to communicate with the mortgagor in a manner consistent with the Guidelines and where that failure is causally linked to the foreclosure action. Finally, mortgagees should be exposed to the statutory tort in any circumstance where a mortgagor successfully completed a TPP agreement and the mortgagee nonetheless failed to tender a permanent modification agreement.

B. A Prevention-Based System of Equitable Relief

Descriptively, all legal remedial systems can be characterized as either compensation-based or prevention-based.[442] That is, all remedial systems are intended to either compensate those who have been harmed—compensation-based systems—or to prevent the harm from occurring in the first instance—prevention-based systems.[443] Although both systems have their individual normative merits, the proposed legislation adopts a prevention-based approach to servicer noncompliance for two reasons.[444] First, at the facial level, a prevention-based system is more consistent with Congress' goal of minimizing unnecessary foreclosures, as a prevention-based system, if properly designed, will prevent unwarranted foreclosures from occurring in the first instance. Second, a compensatory system, if adopted, could significantly heighten the risk of programmatic flight, thus potentially encumbering Congress' recovery efforts.

Initially, it is relatively easy to discern why a prevention-based system is preferable to a compensation-based system in terms of achieving Congress' goal of minimizing foreclosures. That is, a prevention-based system, if properly calibrated and applied, is designed to prevent harm before it occurs. Within the context of

442. Although scholars have formulated this structure with some variation, even their structures may be reduced to this dichotomy. *See generally* Marco Jimenez, *Remedial Consilience*, 62 EMORY L.J. 1309 (2013) (arguing that remedial interests, in the descriptive sense, are of four varieties—restorative interests, retributive interests, coercive interests, and protective interests); C.C. Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 111 (1887) (arguing remedies can protect an interest in one of three ways—by preventing it, by compelling a specific reparation, and by requiring money damages).

443. Samuel L. Bray, *Preventative Adjudication*, 77 U. CHI. L. REV. 1275, 1279 (2010).

444. With only slight limitations that are inapplicable here, the ability of Congress to both fashion remedies for violations of its statutory schemes and to fashion the limitations of those remedies is inviolable. *See* Edward L. Barrett, Jr., *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS. L. REV. 673, 675–76 (2011) (recognizing there are some constitutional limitations). Thus, initially, the determination of which remedies *are* available for violations of HAMP is only delimited by what Congress *should do*, as opposed to what Congress *can do*. *See id.* at 697–98.

HAMP-based claims, the "harm" associated with noncompliance is the foreclosure itself. Thus the effect of a prevention-based-remedial system would be to prevent the foreclosure before it occurs and thus preserve homeownership. In contrast, a compensation-based system would not prevent the harm—the foreclosure—from occurring. Rather, a compensation-based system would award damages to compensate for the harm after the harm has occurred. Thus a prevention-based system is more consistent with Congress' goal of preserving homeownership.

While that simplistic view is sufficient to justify some preventative aspects to the remedial system, it falls short of describing why exactly the system should be limited to preventative responses, and more specifically, why the remedial scheme should not combine preventative mechanisms with compensatory mechanisms. The simple answer to those questions is this: assuming the legislation proposed in this Article adopted some compensatory mechanism as a compliment to the prevention-based mechanisms, the compensatory mechanisms could deter servicer participation, leading to programmatic flight and potentially encumbering Congress' recovery efforts. That is, mortgagees could decline to participate in HAMP on the basis that civil exposure exists for failing to comply with HAMP's requirements. While the realization of that concern is at least possible in a prevention-based system, it is nonetheless unlikely to actualize given the remedy proposed herein, as the "detriment" a servicer could realize under the proposal should not significantly impair an institution's cost-benefit analysis at a macro level for two reasons. First, the availability of injunctive relief is not a new risk for servicers, and thus the potential costs associated with the process of defending actions for injunctive relief do not constitute new, unallocated costs that are likely to significantly alter an institution's cost-benefit analysis. Second, assuming injunctive relief is granted, servicers will not be exposed to any hazard that was not prospectively foreseeable at the time they executed the SPA. In contrast, while a compensation-based system would be unlikely to enhance servicer costs associated with defending HAMP actions, compensation-based awards are at least more likely to offset a servicer's cost-benefit analysis and thus are at least more likely to increase the risk of programmatic flight.

Referring to the costs of defending HAMP actions, twenty-two states currently have judicial foreclosure legislation.[445] Thus in

445. Joe Light, *Foreclosure Backlog Slows Housing Recovery in Some* States, WALL ST. J. BLOG (Nov. 14, 2014, 1:18 PM ET), http://www.wsj.com/articles/foreclosure-backlog-slows-recovery-in-some-states-1415989098.

twenty-two states, servicers are already exposed to mortgagors delaying or preventing foreclosures on the basis that some error exists in the foreclosure process. In the remaining jurisdictions, the foreclosure process is nonjudicial.[446] Nevertheless, even in nonjudicial foreclosure states, mortgagors, in response to a foreclosure action by the mortgagee, are permitted to seek an injunction as a sword to prevent the foreclosure.[447] Accordingly, the risk of *defending* an action for injunctive relief already exists in every jurisdiction, and thus the costs a servicer might encounter as a result of defending against those claims have already been presumably projected and allocated in the servicer's cost-benefit analysis. Accordingly, permitting HAMP-based actions for injunctive relief should have a neutral effect on servicer costs associated with defending HAMP actions.[448]

With that in mind, the same could be said of compensation-based systems. That is, compensation-based mechanisms are available in every jurisdiction, and thus servicers presumably project and allocate costs associated with *defending* against claims, even though those claims are currently noncognizable. At least in terms of costs *associated with defending* HAMP actions, the two remedial systems are relatively equal, and neither system heightens the risk of servicer flight. The distinction between the two systems, at least in terms of the potential for programmatic flight, lies in the ultimate potential relief available.

To explain the distinction between the two systems—and their potential to offset a servicer's cost-benefit analysis—imagine the following hypothetical. Dave executed a note and mortgage in favor of Big Bank. Several years later, Dave's note fell into arrears. Subsequently, Dave applied for a HAMP modification, was found eligible, and successfully completed the resulting TPP agreement. Nevertheless, Big Bank refused to execute a permanent modification of Dave's loan and, as a consequence, Big Bank proceeded with a foreclosure action.[449] Under the proposal, Dave could, depending on the jurisdiction, either file an independent claim for injunctive relief (nonjudicial foreclosure jurisdiction) or file a counterclaim to

446. *Id.*

447. Stephen Elias, *How to Fight a Foreclosure in Court: Nonjudicial Foreclosure*, NOLO, http://www.nolo.com/legal-encyclopedia/how-fight-foreclosure-court-nonjudicial-foreclosure.html (last visited May 12, 2014).

448. As more fully described in Part V.B, it is unlikely that creating a private right of action for injunctive relief will significantly increase case filings in the federal courts.

449. This example is substantially similar to a variety of claims made by mortgagors. *See, e.g.*, Wigod v. Wells Fargo Bank, 673 F.3d 547, 558–59 (7th Cir. 2012); Sutcliffe v. Wells Fargo Bank, 283 F.R.D. 533, 538–39 (N.D. Cal. 2012).

Big Bank's foreclosure action (judicial foreclosure jurisdiction). The effect of that claim would be simply this: the court would temporarily enjoin the foreclosure action until the HAMP claim could be heard. Furthermore, assuming a HAMP violation is proven, the court would require Big Bank to issue a permanent loan modification to Dave. While a servicer would admittedly sustain costs in this instance, those costs were presumably known at the time the servicer signed the SPA. That is, one must presume that servicers executed the SPA with an eye towards both actual compliance with the mandates and the costs associated with actual compliance with those mandates. Thus injunctive relief, even when granted, should not offset that cost-benefit analysis, as injunctive relief simply requires the servicer to do what it agreed to do in the first instance.

In contrast, compensation-based awards, and particularly those that include attorneys' fees, are factually driven inquiries that will likely be different in each individual loan and are thus harder to calculate ex ante. Furthermore, compensation-based awards are not risks that servicers envisioned when they enrolled in HAMP by signing the SPAs. Thus the costs associated with paying compensation-based awards were not incorporated in a servicer's cost-benefit analysis. Finally, the availability of compensation-based awards, particularly those with attorneys' fees, has the potential to undermine the incentives for a servicer to participate in HAMP. Attorneys' fees are expensive, and once multiplied over the potential of hundreds of thousands of loans, could quickly outmatch HAMP's incentives program. Thus a prevention-based system strikes a careful balance between minimizing foreclosures and maintaining servicer participation.

CONCLUSION

The financial recession of 2008 has generated a flurry of legislation aimed at both ameliorating the effects of the recession for those who have already been harmed[450] and preventing others from fostering an economic environment where another recession is likely.[451] Although TARP was ostensibly aimed at the first of those

450. *See, e.g.*, Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C. and 15 U.S.C.) (addressing the subprime mortgage crisis by placing Fannie Mae and Freddie Mac under government conservatorship and requiring other actions).

451. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., and 31 U.S.C.) (for example, by banning proprietary trading by commercial banks) .

goals, it—as well as its resulting programs—has failed to fulfill that promise.[452] That failure is due, at least in part, to a combination of servicer noncompliance with HAMP's mandates and the Secretary of the Treasury's failure to exercise available financial penalties to demand compliance.[453] As a response to those reasons for TARP's failure, this Article proposes a legislative solution whereby affected mortgagors have a private right of action to demand servicer compliance with HAMP's mandates in situations where noncompliance would lead to foreclosure. Although this Article's proposal will admittedly fall short of preventing all foreclosures, it nevertheless has the potential to at least fulfill HAMP's promise of preventing those foreclosures that are unnecessary—a worthy step in this country's recovery efforts.

452. Although foreclosures have been nationally declining since October 2010—a promising trend—that purported decline masks the reality of the foreclosure crisis, as the rate of defaults continue to rise, "the amount of distressed houses remains dangerously high," and the foreclosure statistics do not account for shadow inventory. Josh Salman, *Shadow Foreclosures Loom over Housing Market*, SARASOTA HERALD-TRIB., July 10, 2013, at D1. In any event, though, and even assuming the foreclosure statistics painted an accurate picture of the housing market, the reality remains that servicer noncompliance continues to compromise TARP's, and HAMP's, expected fruits. *See* COHEN ET AL., *supra* note 358, at 30.

453. *E.g.*, SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, SIGTARP 12-003, THE NET PRESENT VALUE TEST'S IMPACT ON THE HOME AFFORDABLE MODIFICATION PROGRAM 18-19 (2012).