Avoiding Liability for Mortgage Lenders and Servicers
Under HAMP and State Consumer Protection Laws
During the Mortgage Modification Process

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ABSTRACT

During the most recent financial crisis, the Obama Administration took what appeared to be a promising initiative to slow down the increasing number of foreclosures occurring throughout the country. The Home Affordable Modification Program (HAMP), which was intended to be a win-win for creditors and debtors, would allow creditors to prevent greater losses associated with a foreclosed loan and allow debtors to keep their home. However, after several years of mediocre success, federal courts have begun to place liability on creditors for their perceived failure to save more homes from foreclosure. Although HAMP itself does not contain a private right of action, federal judges have been quick to use other legal doctrines, such as state consumer-protection and contract law, to hold creditors liable for issues arising during the mortgage-modification process. This Essay attempts to outline the various ways in which courts impose this liability, and offers some suggestions for creditors who wish to avoid liability for their perceived shortcomings.

I. INTRODUCTION

Although there has been serious discontent concerning the effectiveness of HAMP, with some attorneys going so far as to say that the modification process is “a dismal failure for struggling homeowners,” judicial activity is beginning to change debtors’ views of the loan-modification process. Increased pushback from debtors’ attorneys following modification denials are prompting courts to take a closer look at the process used by mortgage lenders in evaluating under-

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performing loans. Because there is no private right of action under HAMP, courts have created other equitable avenues of liability, including holding lenders and loan servicers liable under state unfair or deceptive trade practices acts and breach of contract claims for violations of HAMP protocols in the modification process. Both federal and state laws concerning mortgage modification, especially in the face of HAMP’s extension, are becoming increasingly relevant to creditors hoping to avoid the ever-increasing reach of liability.\(^2\) This Essay will explore the numerous ways by which federal courts have attempted—or are attempting—to expand creditor liability for malfeasance or inaction during the mortgage-modification process, and will propose ways that creditors can avoid liability.

II. BACKGROUND INFORMATION ABOUT HAMP

HAMP was an initiative undertaken by the Obama Administration in the midst of the worst financial and foreclosure crises the country had experienced since the Great Depression. Although HAMP was created under the assumption that the mortgage-modification process was a win-win for creditors and debtors by allowing owners to avoid foreclosure and creditors to mitigate the losses that a default would bring, it quickly alienated both parties.\(^3\) Neither borrowers nor lenders saw the immediate results that they had hoped for, and the program subsequently received negative reviews from creditors, borrowers, policymakers, and academics.

In the wake of the most recent financial collapse and housing bubble burst, HAMP, which was overseen by the Treasury Department and funded by the Temporary Asset Relief Program, attempted to lower mortgage payments for distressed borrowers.\(^4\) This was not, however, a legislative mandate for mortgage modification, but rather an agreement between the Obama Administration and lenders and loan servicers to allow them, pursuant to Treasury guidelines, to modify home loans.\(^5\) The federal government provides banks with financial incentives to modify mortgages for eligible borrowers

\(^2\) See Loren Berlin, HAMP Loan Program Expands, Too Little Too Late, HUFFINGTON POST (Jan. 27, 2012, 10:00 PM), http://www.huffingtonpost.com/2012/01/27/hamp-loan-modification-expands_n_1237169.html (explaining HAMP extended to end of 2013 with possible future expansions to follow).

\(^3\) See Jean Braucher, Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP), 52 ARIZ. L. REV. 727, 735-36 (2010) (noting HAMP originally intended help both debtors stave off foreclosure and creditors recover investments somewhere between original mortgage and what default would have yielded).

\(^4\) See Teke Wiggin, Has HAMP Gotten Any Better at Helping Distressed Homeowners?, AOL REAL EST. (Oct. 1, 2012, 11:36 PM), http://realestate.aol.com/blog/2012/08/15/has-hamp-gotten-any-better-at-helping-distressed-homeowners (outlining HAMP’s attempt to reduce monthly mortgage payments for eligible households by lowering interest rates, delaying payments, cutting loan balances, or simultaneously implementing any combination).

\(^5\) See Why Obama’s Home Affordability Program Was Set Up To Fail for US Homeowners, YAHOO! (Nov. 11, 2009), http://voices.yahoo.com/why-obamas-home-affordability-program-was-set-to-fail-4863144.html.
through “Servicer Participation Agreements” (SPAs). The goal of the program was to “assist at-risk homeowners by promoting loan modifications and reducing monthly mortgage payments” to stave off an increasing number of foreclosures. Nevertheless, since its inception and original implementation, HAMP has produced a great deal of criticism for its perceived failure to effectively help homeowners. Among claims of lender dishonesty and excessive—possibly intentional—convolution of the mortgage-modification process, courts have readily shown their eagerness and ability to subject lenders to liability, both legally and in equity, for many perceived shortcomings in the modification process.

III. POTENTIAL LIABILITY FOR CREDITORS

Although both case law and federal statutes explicitly state that HAMP does not provide a private right of action for debtors who feel mistreated before or during the mortgage-modification process, federal courts have interpreted HAMP to impose liability on creditors through other legal doctrines. Courts have expanded their influence in the processing of loan-modification applications by creating a system of mandatory mediation for mortgages in default (complete with judicial sanctions for creditors who do not participate); imposing liability for fraudulent application processing; recognizing private rights of action under state or federal unfair or deceptive trade practices laws; and permitting contractual remedies based upon correspondence between the lender and borrower.

While it is easy to view this as an alarming trend of judicial activism, given the stakes for borrowers and the opportunities litigation provides them, the increased judicial scrutiny is unlikely to recede. Therefore, it is important for mortgage lenders and loan servicers to be fully aware of the various approaches


that courts take in different jurisdictions to ensure they can enact comprehensive reforms of their mortgage-modification processes to avoid liability.

A. The Possibility of Mandatory Mediation/Modification

Because HAMP is a contract between the federal government and lenders, it leaves homeowners without privity; therefore, judges cannot force lenders to modify debtors’ mortgages. However, fourteen states have adopted some form of mortgage mediation, with the Florida Supreme Court even adopting a statewide program and individual bankruptcy courts within the state adopting mandatory mediation programs for borrowers who qualify. The programs require lenders, under penalty of judicial sanction, to substantially increase the level and effectiveness of their communication with homeowners. Therefore, mortgage lenders are not only “incentivized to attend mediation sessions,” and to “bring required documents to the mediation,” but also to “participate in good faith.” In states that have enacted these mandatory mediation programs, failure to participate in good faith, even if a modification cannot be reached, may impair the mortgagee or lender’s right to foreclose.

B. Liability for Fraudulent Modification Processes

1. Judicial Examination of the Actual Processes Used by Lenders

One of the main criticisms that debtors and their attorneys have made against the mortgage-modification process is that the “programs simply provide homeowners with an opportunity to talk with mortgagees to possibly avoid foreclosure . . . . However, servicers or mortgagees have ignored requests for modification or inconsistently applied modification standards.” A number of lawsuits have been filed against lenders claiming that they use flawed or even fraudulent methods during their processing and review of loan-modification

11. See Jenkins v. JP Morgan Chase Bank, N.A. (In re Jenkins), 488 B.R. 601, 613 (Bankr. E.D. Tenn. 2013) (recognizing many courts have found plaintiff-homeowner has no HAMP-based right to force lender to modify mortgage).
12. See Diana Olick, Is Mortgage Mediation the Answer?, CNBC (May 28, 2010, 12:02 PM), http://www.cnbc.com/id/37399815 (noting fourteen states have adopted some kind of mortgage-mediation program and number likely to increase as programs’ popularity continues growing).
13. See id.
16. See id. at 494.
17. Id. at 487.
requests. While courts have been hesitant to employ judicial scrutiny of lender’s internal policies and processes, this may change in the future. If recent class-action lawsuits proceed to discovery and lender/loan servicers’ processes are exposed to courts, judges may be willing to permit claims for improper denials once they see the staggering number of such denials, and the lack of oversight of the modification process.

Additionally, some courts will impose obligations of good faith during the mortgage-modification negotiation stage, even if those negotiations do not occur through court-ordered or statutory mediation. This good-faith standard is not mere judicial abstraction, as courts have taken hardline stances against lenders and loan servicers who fail to adequately participate in talks with the mortgagor. In *IndyMac Bank F.S.B. v. Yano-Horoski*, a New York trial court held that if a lender’s conduct is willful or unconscionable and “of such a nature that honest and fair minded folk would roundly denounce” it, then a court may dismiss the lender’s foreclosure action and leave the lender without a cause of action in a court of equity. The court’s failure to find that the lender acted in good faith resulted in not only the mortgage debt being canceled, but also the discharge of the recorded mortgage and an award of monetary sanctions to the plaintiff-homeowner.

The obligation to negotiate in good faith only attaches once the mortgagor or loan servicer begins negotiations, as courts will not read in an implied duty of good faith to negotiate a modification or offer a modification to distressed homeowners. Courts are, however, willing to consider abstentions from modification negotiations as a breach of good faith under certain circumstances. For example, courts may find such a breach if mortgage lenders willfully fail to modify mortgages, or borrowers plead that lender or loan servicers instructed employees to falsify documents so that a modification would not have to be processed.


19. See id. (stating claim of promissory estoppel separate from HAMP claim insufficient to constitute private cause of action when challenging lender’s procedures and policies). Additionally, the grant of a trial period for the modification with no allegation of a promise for permanent modification is a sufficient basis from which to challenge the subsequent denial. See id.


21. Id. at 319; see Williams, supra note 15, at 495 (citing *IndyMac Bank F.S.B.*, 890 N.Y.S.2d at 319).

22. See *IndyMac Bank F.S.B.*, 890 N.Y.S.2d at 319-20 (identifying penalties to be enforced against defendant-lender).


Additionally, state prosecutors are enforcing procedural-fairness requirements imposed by the recent settlements reached by lenders and the attorneys general of forty-nine states over foreclosure abuses.\textsuperscript{25} Claiming that the banks did not follow the agreed upon guidelines implemented by the settlement agreement pertaining to “how the banks field and process requests from homeowners trying to modify their mortgages,” New York Attorney General Eric Schneiderman is preparing a lawsuit against Wells Fargo. Bank of America may avoid the same lawsuit, however, by announcing “a series of additional protections that it has adopted after discussions with Mr. Schneiderman’s office.”\textsuperscript{26} If the claims made by the New York Attorney General are true, then lenders that are parties to the settlement agreement need to be sure that they are in strict compliance with the 302 guidelines adopted by the agreement, otherwise state authorities can impose yet another layer of liability for failure to properly handle mortgage-modification requests.

Servicers and lenders have enjoyed greater success on issues regarding whether borrowers can attack loan-modification processing using the class-action process. The United States District Court for the District of Massachusetts recently declined to certify a class consisting of:

All individuals with home mortgage loans on properties in [state] whose loans have been serviced by Bank of America and who, since April 13, 2009, have entered into a Trial Period Plan Agreement with Bank of America and made all trial payments required by their Trial Period Plan Agreement, other than borrowers to whom Bank of America tendered either:

(a) A Home Affordable Mortgage Agreement sent to the borrower prior to the Modification Effective Date specified in the Trial Period Plan Agreement; or

(b) A written denial of eligibility sent to the borrower prior to the Modification Effective Date specified in the Trial Period Plan Agreement.\textsuperscript{27}

The proposed class action would have consisted of twenty-six classes from twenty-six different states. The court found that the classes would meet the requirements of Rule 23(a) of the Federal Rules of Civil Procedure, consisting


of numerosity, commonality, typicality, and adequacy. However, the court found that the classes failed to show under Rule 23(b)(3) that the question of law or fact common to class members predominate over any questions affecting only individual members.

In declining to certify the class, the court reviewed the issues of predominance as related to all the claims alleged by the plaintiffs—breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, and unfair or deceptive trade practices. The court’s analysis of the breach of contract claims was the most extensive. With respect to breach of contract, the court favorably cited Young v. Wells Fargo Bank, N.A. ex rel. Option One Mortgage Loan Trust for the proposition that a trial period plan (TPP) could plausibly be read to require the servicer to offer a permanent modification if the borrower met the obligations under the agreement. However, the court’s critical finding was that the “common question [was] outweighed by the numerous individual questions affecting liability.” Particularly individualized questions would arise concerning the borrower-plaintiffs’ compliance with the following requirements cited by the court:

Each borrower had to certify, represent . . . and agree that he was unable to afford his mortgage payments; that he live[d] in the Property and it was his principal residence; that there had been no change in the ownership of the property; that he would provide [] documentation for all income; that all the documents and information he had provided were true and correct; and that he would obtain credit counseling if required to do so. In addition, each borrower had to make the required trial payments on a timely basis.

Despite somewhat holding off the trend of advancing servicer liability, the Massachusetts federal district court made a point that individual questions, rather than class-wide questions, predominate servicing issues related to loan-modification review. This pronouncement is the converse of other courts ruling on cases of individual liability, such as Young and Wigod, which have allowed claims for lender liability under TPPs past the 12(b)(6) stage. The common thread is that situation-specific facts are critical. Moreover, the same situationally specific facts, which are necessary components of a well-pleaded complaint seeking lender liability, also cut against the possibility of creating a

28. See id. at *2 (citing Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003)).
29. See id. at *13 (citing Fteo R. Civ. P. 23(b)(3)).
30. 717 F.3d 224 (1st Cir. 2013).
32. Id.
33. Id. at *10 (alterations in original) (citations omitted) (internal quotation marks omitted).
class of similarly situated plaintiffs harmed by the loan-modification process.

2. Federal Oversight of the Mortgage-Modification Process Heats Up

Although this Essay is concerned about addressing potential creditor liability that courts have continually increased, it is worth noting that there is a simultaneous, although related, uptick in federal oversight. Recently, federal regulators have begun to increase their oversight of the processes that lenders and loan servicers use during the modification process. The processes subject to oversight include how the companies contacted debtors, the method of evaluation that lender’s used in determining homeowner eligibility for the program, and how the creditor assisted the debtor with questions or procuring missing documents.34 This trend is important not only as an additional source of concern for creditors, but also because debtors’ attorneys are increasingly turning their attention to the processes that creditors employ in determining homeowner eligibility and in customer service departments.35 Failure to meet basic fairness and procedural requirements, such as timely processing of applications, inadequate communication with the debtor, and unexplained denials for modification, can give rise to lender liability and sanctions imposed not only by federal regulators, but by courts as well.

C. Potential Liability Under State Unfair or Deceptive Trade Practices Laws

Creditors, including loan originators and loan servicers, are also liable for actions taken in the mortgage-modification process under state consumer-protection laws. For example, the Nevada Attorney General brought suit against Bank of America under the Nevada Deceptive Trade Practices Act for misleading consumers about “the terms and operations of its mortgage modification and foreclosure processes.”36 Additionally, federal courts will find rights of action for individual debtors by finding a violation of state consumer-protection laws where HAMP regulations have been violated during the mortgage-modification process. This liability under consumer-protection statutes does not only encompass the processes that lenders use to come to a decision, but also extends to post denial actions that they take.37


35. See Hinson v. Countrywide Home Loans, Inc. (In re Hinson), 481 B.R. 364, 376 (Bankr. E.D.N.C. 2012) (holding violation of statute designed to protect public consumers or violations of public policy may constitute de facto unfair or deceptive practices).


North Carolina courts are not opposed to debtor’s litigation over mortgage modification, although they have followed the majority rule that HAMP does not create a private right of action. However, federal courts in North Carolina have imposed HAMP liability on creditors for their behavior during the mortgage-modification process, reasoning that “violations of a statute designed to protect the public . . . may constitute unfair or deceptive practices under state law, even where the statute violated does not provide for a private right of action.” This rationale conforms to the approach used by an increasing number of jurisdictions, in which HAMP violations are explicitly stated to give rise to claims under a state’s unfair or deceptive trade practices act. Therefore, lenders and mortgage servicers who fail to follow the HAMP guidelines established by the Treasury Department, such as sending the borrower timely notification of approval for modifications, extending the borrower a TPP Notice, or conducting a foreclosure sale on a property before evaluating and determining the borrower’s eligibility under HAMP, could face potential liability for their actions.

Although Illinois gave their consumer-protection statutes another name—the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA)—federal courts have still found state unfair or deceptive trade practices law to apply in situations involving mortgage modifications. In Boyd v. U.S. Bank, a seminal case in the jurisdiction on this issue, an Illinois federal district court held that violations of HAMP procedures created a sustainable private right of action for debtor-homeowners under the ICFA. In Boyd, the defendant-lender failed to consider a homeowner in default for mortgage modification, which violated Treasury Department directives promulgated as guidelines for implementing HAMP. Because of this, the plaintiff-borrower suffered damages, including repossession and damage to his credit score.

41. See SUPPLEMENTAL DIRECTIVE 10-01: HOME AFFORDABLE MODIFICATION PROGRAM—PROGRAM UPDATE AND RESOLUTION OF ACTIVE TRIAL MODIFICATIONS, at 3 (Jan. 28, 2010), https://www.hmpadmin.com//portal/programs/docs/hamp_servicer/sd1001.pdf (requiring servicers refrain from foreclosing on borrower’s home until borrower has been evaluated for program, which includes contacting and informing debtor of HAMP program).
44. See Boyd, 787 F. Supp. 2d at 754.
45. See SUPPLEMENTAL DIRECTIVE 09-01: INTRODUCTION OF THE HOME AFFORDABLE MODIFICATION PROGRAM, at 13-14 (Apr. 6, 2009), https://www.hmpadmin.com//portal/programs/docs/hamp_servicer/sd0901 .pdf (requiring servicers refrain from foreclosing on borrower’s home until borrower has been evaluated for program, which includes contacting and informing debtor of HAMP program).
46. See Boyd v. U.S. Bank, N.A. ex rel. Sasco Aames Mortg. Loan Trust, 787 F. Supp. 2d 747, 754 (N.D.
This decision is notable not just because it is another instance of creditor liability for failing to follow HAMP procedures, but also because the court held that the scope of relief could possibly be expanded to situations in which the defendant-creditor’s actions are not necessarily deceptive, just unfair.\(^{47}\)

North Carolina, Illinois, and Massachusetts\(^{48}\) state court decisions all represent an ever-growing trend of courts seeking to expand creditor liability for violations of HAMP protocols through state consumer-protection laws. As popular sentiment towards lenders and loan servicers continues to sour, and stories about dual tracking\(^{49}\) and improper denials for modifications continue to hit the press, courts will increasingly look to state consumer-protection laws to ensure that mortgage-modification processes accord with federal guidelines. Otherwise, courts will impose liability on lenders and loan servicers in the form of judicial sanctions or impairments on the foreclosure process.

**D. Liability for Mortgage Servicers Under State Contract Law**

The HAMP mortgage-modification framework provides for government subsidization of lenders’ mortgage modifications if the loan servicers agree to participate in a standardized modification process.\(^{50}\) In order to participate in this program, the loan servicers must execute a SPA.\(^{51}\) These SPAs place rather rigorous demands on loan servicers, who must, among other things: screen borrowers for HAMP eligibility for all properties that are two or more payments behind; proactively solicit these borrowers’ participation in the HAMP program; acknowledge receipt of the original application within ten days; and respond within thirty days with their final decision (or with a request for more information).\(^{52}\)

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\(^{47}\) See id. at 751-53 (explaining to sustain ICFA claim under Illinois law conduct must be unfair and plaintiff must suffer damages). Although the court relied on a violation of federal directives to sustain a cause of action for unfair practices, it is possible that actions by the mortgage servicer or lender, which violate less explicit tenets, could also provide the basis for a cause of action. See id. at 753.


These SPAs do more than just lay out a list of ideal practices for the creditor. They were enacted to directly benefit homeowners who were going through, or who were about to enter, the foreclosure process. Under federal common law, a third party can recover under a contract if it can show that the contract was made for its direct benefit, and that it is an intended beneficiary of the contract. Even though an SPA signed by the loan servicer/lender and the government does not expressly say that it was entered into for the benefit of third-party homeowners, courts have been willing to look past recitals that they deem ritualistic. In fact, some judges believe there is no ambiguity as to the intended beneficiaries of the SPAs, noting that “there is nothing in the standard-form SPA to suggest that borrowers—who were obviously and primarily intended to benefit from the contractual commitments made by servicers . . . —should not be allowed to enforce the [SPA] commitments.” Therefore, courts will sometimes permit a HAMP-eligible homeowner’s breach of contract claim predicated on a third-party-beneficiary theory to proceed to trial when the homeowner contacts his servicer and the servicer fails to properly evaluate their mortgage.

However, the most recent strategy being used to force mortgage lenders to reconsider or reissue a mortgage-modification decision is that the lender, if it puts a borrower on a HAMP trial plan and denies them a permanent modification, violates a direct contract with the homeowners. These breach of contract claims are derived from a letter lenders send to borrowers, which often stipulates that if the borrower complies with the trial plan and payment schedule, the servicer will provide them with a permanent HAMP modification. Because the expectation of many consumers entering into the trial period was to obtain a permanent modification, many debtors have felt personally slighted and frustrated by lenders who did not grant them a


54. See Marques v. Wells Fargo Home Mortg., Inc., No. 09-cv-1985-L(RBB), 2010 WL 3212131, at *4 (S.D. Cal. Aug. 12, 2010). In Marques, the district court suggested that formalistic language naming the third party as a beneficiary is not necessary to support a claim of breach of a HAMP SPA, as courts look to other factors to determine whether plaintiff-homeowners constitute third-party beneficiaries. See id.


58. See id.
permanent modification after successful completion of the TPP.59 The denial of a permanent modification for a HAMP-qualifying borrower who has successfully completed a TPP is potentially problematic for lenders, as attorneys have brought, and will continue to bring, class-action lawsuits against lenders alleging breach of contract.60 Recently, these claims of breach of a direct contract between the lender and borrower have recently been successful in sustaining a cause of action against lenders for their denial of mortgage-modification requests.61 In a recent decision, the Seventh Circuit Court of Appeals focused on the denial of a permanent modification as a breach of contract, calling it the “heart of [the plaintiff’s] complaint.”62 A significant portion of the court’s decision is dedicated to a thorough analysis of the “contract” formed between Wigod (the plaintiff) and Wells Fargo (the lender), which was alleged to have been formed when Wells Fargo sent Wigod a TPP Agreement.63 The TPP Agreement, which promised permanent modification if Wigod made her payments on time and her representations remained true and accurate, was the main source of the appellate court’s inquiry. After running the TPP Agreement through a standard contractual analysis, including determinations of whether there was a valid offer and consideration,64 the court determined that there were sufficient allegations to support a cause of action under contract law.65 By extending liability to banks who do not give permanent modifications to borrowers who have successfully completed the TPP,66 this decision has tremendous potential to impose liability on banks for denying mortgage-modification proposals, which could exceed the $25 billion paid out in the settlement reached last year with the attorneys general of forty-nine states.

Although Wells Fargo argued that the TPP Agreement was not a contractual

62. See Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 560 (7th Cir. 2012).
63. See id. at 560-63 (stating TPP Agreement promised permanent modification if two conditions fulfilled by Wigod during trial period).
64. See id. at 561 (questioning whether TPP Agreement constituted valid offer, included adequate consideration, and used clear and definite terms).
65. See id. at 565.
offer, as it required further review by Wells Fargo before a permanent modification could be given, the court found that argument was unpersuasive. Because the permanent modification was only conditioned on Wigod’s successful completion of two requirements to secure a permanent modification, the court held that the TPP constituted a valid offer because the granting of a permanent modification was conditioned on future action by the promissee. Continuing with their contractual analysis, the court found valid consideration to exist, as Wigod “incurred cognizable legal detriments,” including the promise to open new escrow accounts, to undergo credit counseling, and provide accurate financial information. Finally, definite terms were found to exist, even though the court recognized that Wells Fargo had some discretion to modify the permanent loan amount. Although the court hints that this would not require the same payments made during the TPP, it appears that at least a good-faith attempt to make a permanent modification, consistent with HAMP-modification guidelines is a prerequisite.

This approach has not been limited to just the Seventh Circuit, as district courts in a number of other circuits have followed the contractual-based approach laid out in Wigod. More recently, both the First and Ninth Circuits followed the reasoning of the Wigod court in holding that the language of a TPP sent to borrowers created a contractual relationship between a servicer and a borrower. Both the Corvello and Young courts noted that they analyzed the TPP documents at issue under relevant state contract law (as opposed to Illinois law, which was the case in Wigod).

It is also important to note that the procedural posture of Corvello, as well as Wigod, was the 12(b)(6) motion-to-dismiss stage, and both courts were required to unquestioningly accept the plaintiffs’ allegations that they had fulfilled all of their obligations under the TPP. For example, the United States District Court for the Northern District of California found that a TPP was backed by sufficient consideration as the debtor expended time and energy and made financial disclosures to fulfill the terms of the TPP.

67. See Wigod, 673 F.3d at 561.
68. See Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 561 (7th Cir. 2012) (explaining valid offer exists where offer subject to events not within promisor’s control).
69. Id. at 564.
70. See id. at 565 (suggesting although Wells Fargo may have discretion to set terms of permanent modification, it must make good-faith offer at least consistent with HAMP guidelines).
71. See generally Corvello v. Wells Fargo Bank, NA, 728 F.3d 878 (9th Cir. 2013) (per curiam); Young v. Wells Fargo Bank, N.A. ex rel. Option One Mortg. Loan Trust, 717 F.3d 224 (1st Cir. 2013).
72. See Corvello, 728 F.3d at 884; Young, 717 F.3d at 232.
73. See Corvello, 728 F.3d at 881; Wigod v. Wells Fargo Bank, N.A., 673 F. 3d 547, 555-56 (7th Cir. 2012).
IV. CONCLUSIONS AND RECOMMENDATIONS FOR CREDITORS AND LOAN SERVICERS

Although a large segment of consumers are angry over the perceived ineffectiveness of the HAMP framework for mortgage modification, it is not a toothless initiative that lenders and loan servicers can ignore. Especially because courts have now had ample opportunity to add their own interpretations of SPAs and rule on modification best practices, creditors—including lenders and loan servicers—face substantial regulatory hurdles and potential liability to consumers for noncompliance with HAMP procedures. From breach of contract claims to unfair or deceptive trade practices lawsuits, lenders and loan servicers must act with caution when entering into the realm of mortgage modification.

First, private creditors and loan servicers for non-Fannie- and non-Freddie-backed loans could streamline the process for debtor-homeowners. The primary way that this could be accomplished is through the adoption of streamlined programs similar to the ones federal regulators introduced for Fannie- and Freddie-backed loans. This streamlined process drastically reduces the documentation requirement for debtors, as it requires only two initial instances of communication.  

Borrowers frequently complain about their inability to get lenders to compile or accept packages, and cite reasons such as changed fax numbers, high staff turnover on staffers working their file, and their inability to secure a confirmation of receipt. The streamlined process drastically reduces the flurry of documents that is initially exchanged between the two parties, which often results in creditors failing to acknowledge timely receipt of the necessary documents, and homeowners not responding to mortgage-modification proposals when asked for an imposing list of documents. 

Hopefully, this type of reform would address some of the most frequently cited problems in the modification process, namely lost documents, inexplicable denials for modifications, and dual tracking.

While the Consumer Financial Protection Bureau (CFPB) has enacted a new


77. See Reckard, supra note 76.
list of rules and restrictions on lenders and servicers who seek to foreclose on properties,²⁸ strict adherence by creditors is not enough. One potential reason for the judicial creation of consumer-protection rules, as they relate to the modification process, could be the lack of perceived transparency or fairness with which creditors treat homeowners. While legalistic adherence to these new best practices is a great way for creditors to shield themselves from liability, merely hiding behind a formulaic checklist will never be enough to stem the tide of judicial activism. Instead, lenders and loan servicers must voluntarily modify and adopt new best practices in “the spirit of consumer protection.”²⁹ This may include hiring additional staff members to overstaff mortgage-modification centers, instituting extra training, or adding additional supervisors for added oversight. Additionally, the retention of outside counsel who can regularly audit mortgage-modification files to check on lender or loan servicer inaccuracies that would have resulted in rejected modifications, could help quell popular ill will. Implementing these safeguards, although somewhat of a costly endeavor, would be a crucial step for lenders to change the public’s opinion that they made empty promises to better assist homeowners in order to secure government bailout funds.
