

**COURTS BALK AT HOMEOWNERS' ENTITLEMENT
TALK: THE SUBSTANTIVE EFFECTS OF MAKING HOME
AFFORDABLE**

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I. INTRODUCTION

“Toxie’s dead.”¹ After a little more than six months, the residential mortgage-backed security (MBS)² or “toxic asset”³ purchased by the producers of National Public Radio’s Planet Money stopped paying dividends.⁴ The show’s producers bought Toxie so that listeners could follow the life cycle of a residential MBS.⁵ The producers knew from the start that their asset would eventually stop producing dividends, but they believed the cause would be loan defaults on the underlying mortgages, followed by foreclosure.⁶ Instead, kindness in the form of loan modifications killed their residential MBS.⁷

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¹ Chana Joffe-Walt & David Kestenbaum, *Toxie’s Dead*, NPR (Sept. 24, 2010, 12:00 AM), <http://www.npr.org/blogs/money/2010/09/23/130079590/toxie-s-dead>.

² See *Mortgage-Backed Securities*, SEC (July 23, 2010), <http://www.sec.gov/answers/mortgagesecurities.htm>. An MBS is a debt obligation “that represent[s] claims to the cash flows from pools of mortgage loans, most commonly on residential property.” *Id.* The debt obligations may take the form of a participation certificate and may be issued by any one of the government-sponsored enterprises, or “GSEs.” *Id.* Non-GSE residential MBSs are “known as ‘private-label’ mortgage securities.” *Id.* Toxie was a private-label MBS. Joffe-Walt & Kestenbaum, *supra* note 1. This distinction is relevant in the context of the Making Home Affordable Program. See *infra* Section II.A.1.b for a discussion of the GSEs.

³ Joffe-Walt & Kestenbaum, *supra* note 1.

⁴ *Id.*

⁵ See *id.*

⁶ *Id.*

⁷ *Id.*

A. *Loan Modification Basics*

In simple economic terms, loan modifications may work to produce an economic gain to the homeowner while also producing a loss to the lender, or in the case of securitized loans, the investor who is entitled to the revenue stream created by the security instrument.⁸ However, where the homeowner is also the investor, as is the case for homeowners whose retirement or investment savings are invested in MBSs, loan modification may amount to robbing Peter to pay Peter.⁹ Additionally, the securitized nature of the loan itself may disincentivize loan modifications because the agreement between the investors and the party responsible for servicing the loan may contractually limit loan modifications.¹⁰ These considerations came to the forefront in the latter half of the last decade.¹¹

B. *Legislative Responses to the Financial Crisis*

The downturn in economic conditions in late 2007,¹² coupled with an increase in the rate of mortgage defaults, led the 110th Congress to enact several measures related to these conditions.¹³ Of this legislation, the Housing and Economic Recovery Act of 2008 explicitly specified encouraging voluntary loan modifications as its purpose and placed authority for a program to do so under the Federal Housing Administration.¹⁴ The “HOPE for Homeowners Program,”¹⁵ as it was

⁸ *Id.*

⁹ See Peter L. Cockrell, Comment, *Subprime Solutions to the Housing Crisis: Constitutional Problems with the Helping Families Save Their Homes Act of 2009*, 17 GEO. MASON L. REV. 1149, 1154–56 (2010) (describing the potential negative effects of loan modification on owner-investors arising out of large-scale modification regimes).

¹⁰ *Id.* at 1156.

¹¹ See *id.* at 1159–62.

¹² MARC LABONTE, CONG. RESEARCH SERV., RL 34484, EVALUATING THE POTENTIAL FOR A RECESSION IN 2008 I (2008).

¹³ See, e.g., Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified mainly in 12 U.S.C. §§ 5201–5261); Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in various sections of 12 U.S.C.); Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110-142, 121 Stat. 1803 (codified as amended in various sections of 26 U.S.C.); Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613 (codified in various sections of 26 U.S.C.).

¹⁴ See 12 U.S.C. § 1715z-23(b)(1)–(7) (Supp. IV 2006).

¹⁵ 12 U.S.C. § 1715z-23(a) (Supp. IV 2006).

titled, failed to track its projected goal immediately following enactment,¹⁶ leading then President-elect Barack Obama to consider alternatives, including a ninety-day foreclosure moratorium and changes to the bankruptcy code.¹⁷ Ultimately, the chosen solution was to rework the HOPE program under the existing Emergency Economic Stability Act (EESA)¹⁸ by placing the program within the newly created “Homeowner Affordability and Stability Plan,”¹⁹ and renaming HOPE for Homeowners as the “Making Home Affordable Program” (MHA).²⁰

C. MHA

MHA was introduced to the public primarily as a plan to help “4 to 5 million responsible homeowners” refinance their loans to take advantage of lower interest rates.²¹ When announced in early 2009, MHA featured a second, more modest provision aimed at reaching approximately “3 to 4 million at-risk homeowners” who due to the recession, had difficulty paying their mortgage.²² Although these individuals in the past could have taken advantage of rising house prices to refinance²³ or sell, declining

¹⁶ Kathleen Pender, *Obama Wants to Limit Foreclosures-but How?*, S.F. CHRON., Nov. 9, 2008, at C-1 (noting that the FHA revised its estimate of 400,000 modified loans over three years to just 13,300 in the first year, a ten-fold reduction in the estimated annual number of modifications over the projected period).

¹⁷ *Id.* (discussing a ninety-day foreclosure moratorium and reintroduction of changes to the bankruptcy code). See also Cockrell, *supra* note 9, at 1192-94 (arguing in favor of the latter).

¹⁸ See Press Release, U.S. Dep't of the Treasury, Secretary Geithner Introduces Financial Stability Plan (Feb. 10, 2009), available at <http://www.treasury.gov/press-center/press-releases/Pages/tg18.aspx>.

¹⁹ See Press Release, U.S. Dep't of the Treasury, Homeowner Affordability and Stability Plan Executive Summary (Feb. 18, 2009), available at <http://www.treasury.gov/press-center/press-releases/Pages/tg33.aspx>.

²⁰ See Press Release, U.S. Dep't of the Treasury, Relief for Responsible Homeowners One Step Closer Under New Treasury Guidelines (Mar. 4, 2009), available at <http://www.treasury.gov/press-center/press-releases/Pages/tg48.aspx>.

²¹ Press Release, *supra* note 19.

²² See Press Release, U.S. Dep't of the Treasury, Making Home Affordable, Updated Detailed Program Description (Mar. 4 2009), available at http://www.treasury.gov/press-center/press-releases/Documents/housing_fact_sheet.pdf.

²³ See Samantha M. Shapiro, *The Boomtown Mirage*, KEY: THE N.Y. TIMES REAL ESTATE MAGAZINE, Apr. 6, 2008, at 66.

house values left them with negative equity in their home.²⁴ These individuals were “underwater,” in that their home’s value was less than what would be due to the lender upon sale, and selling under such negative equity conditions would leave them with a balance due to the lender.²⁵

The MHA program was intended to fix issues such as low participation rates among the interested parties in previous programs.²⁶ Although MHA is a contractually-based program that provides incentives to private entities to modify loan terms,²⁷ homeowners have claimed that the program creates substantive rights.²⁸ Homeowners have also claimed the ability to bring a cause of action under MHA²⁹ and have asserted certain provisions of MHA as a defense during a foreclosure action.³⁰

This comment examines the legal theories advanced by these individuals, the judicial response to these arguments, and the cost of MHA compared to the benefits of the program. The first section of this comment provides a history of the program, its components, and an explanation of how the modification process works. This section also provides the legal foundation for an understanding of recent court decisions concerning homeowners’ claims under MHA.

The next section examines legal arguments raised by homeowners based on MHA and concludes that courts have correctly decided that, due to the voluntary nature of MHA, no independent cause of action nor any defense arises out of or is related to the program.

Finally, this comment places the brief history of MHA and its goals in perspective by comparing the benefits and costs of the two main components of MHA. Based on the available data, the current costs of certain programs within MHA are justified, while for other programs, the costs outweigh the benefits.

Despite this conclusion, current changes to the program are a positive step toward ameliorating criticism and perceived shortcomings of the program. Because the next generation of programs keeps the essential agreements that compose MHA intact, the judicial foundation upon which

²⁴ See Press Release, *supra* note 22.

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *infra* Section II.A.2.

²⁸ See *infra* Section III.

²⁹ See *infra* Section III.A.

³⁰ See *infra* Section III.D.

challenges to the program have been made and rebuffed should also remain intact also.

II. MAKING HOME AFFORDABLE

The MHA program was one of the components of incoming President Barack Obama's "Comprehensive Financial Stability Plan."³¹ Within one day of U.S. Treasury Secretary Timothy Geithner's testimony before the Senate Finance Committee concerning the Comprehensive Plan, the U.S. Department of Treasury released details concerning MHA and its goals.³² Within two weeks of that testimony, the Department of Treasury launched the MHA website and promoted the program through press releases.³³ The MHA website is a primary source of information for homeowners,³⁴ however, more detailed information on the program's various components may be found in other locations.³⁵ Although two components initially comprised MHA—the refinance plan and the modification program³⁶—there are now at least five different programs under the modification prong of the program alone.³⁷ The following is a brief overview of the two major components of the program and their various sub-parts.

³¹ See Press Release, U.S. Dep't of the Treasury, Treasury Secretary Tim Geithner Outlines Comprehensive Financial Stability Plan (Feb. 10, 2009), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/200921022303013043.aspx> (section titled "Housing Support and Foreclosure Prevention").

³² See Press Release, *supra* note 19.

³³ See Press Release, U.S. Dep't of the Treasury, Administration Launches New Consumer Website for Responsible Homeowners Seeking Relief (Mar. 18, 2009), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/tg63.aspx>.

³⁴ See MAKINGHOMEAFFORDABLE.GOV, <http://www.makinghomeaffordable.gov/pages/default.aspx> (last visited Mar. 22, 2012).

³⁵ See, e.g., Administrative Website for Servicers, HOME AFFORDABLE MODIFICATION PROGRAM, <https://www.hmpadmin.com/portal/index.jsp> (last visited Mar. 22, 2012).

³⁶ See Press Release, *supra* note 19.

³⁷ See Administrative Website for Servicers, *supra* note 35 ("Programs" listed at bottom of page). "At least" is used, because inclusion of the Second Lien Modification Program (2 MP) in this group allows a borrower to participate in more than one program simultaneously. *Id.*

A. MHA Program Components

The stated goal of MHA was to “[help] up to nine million families restructure or refinance their mortgages to a payment that is affordable.”³⁸ The program was also expected to sunset on September 30, 2011, less than three years after the program’s creation.³⁹ Thus, at the time the program was announced in March of 2009, the program had to maintain a sustained rate of approximately one quarter of a million loan refinances or modifications per month to reach its stated numerical goals for relief.⁴⁰

To reach those goals, the Department of Treasury engaged the same organizations that were created to encourage first-time buyers to purchase housing.⁴¹ These included the Government Sponsored Enterprises (GSEs), specifically, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac).⁴² The result of this engagement was that the Department of Treasury, through its ownership and funding interest in Fannie Mae, was in a position to access

³⁸ See Press Release, *supra* note 20 (internal quotations omitted).

³⁹ See 12 U.S.C. § 1715z-23(r) (2011) (detailing the sunset provision, which terminates the authority of the Secretary of the Treasury to insure any previously refinanced mortgage under HOPE, effectively removing these mortgages from the program). *But see* 12 U.S.C. § 1715z-23(b)(6) (2011) (implying that the duration of HOPE might extend beyond any sunset date if “necessary to provide stability to the housing market”).

⁴⁰ See Press Release, *supra* note 20; Press Release, *supra* note 22; 12 U.S.C. § 1715z-23(r) (2011). Dividing the stated goal of assisting seven to nine million homeowners by the projected term of the program from inception on March 4, 2009 to September 30, 2011 returns a range of 233,333 to 300,000 loans modified or refinanced per month.

⁴¹ EDWARD GOLDING, RICHARD K. GREENE & DOUGLAS A. MCMANUS, JOINT CENTER FOR HOUSING STUDIES, HARVARD UNIV., IMPERFECT INFORMATION AND THE HOUSING FINANCE CRISIS 6 (2008) (noting that the “levers” for encouraging home ownership were the GSEs vis-a-vis those organizations’ “Affordable Housing Goals”).

⁴² See Statement, Fed. Hous. Fin. Agency, Statement of FHFA Director James B. Lockhart 1, 6 (Sept. 7, 2008), *available at* http://www.treasury.gov/press-center/press-releases/Documents/fhfa_statement_090708.pdf. On that day, Federal Housing Finance Agency (FHFA) director James Lockhart announced that Fannie Mae and Freddie Mac had agreed to a conservatorship with FHFA to serve as the conservator. *Id.* at 6. Nineteen days later, FHFA executed an agreement authorizing the U.S. Treasury to become majority shareholder in Fannie Mae. See Press Release, U.S. Dep’t of the Treasury, Amended and Restated Senior Preferred Stock Purchase Agreement Between U.S. Dep’t of the Treasury and FNMA 1 (Sept. 26, 2008), *available at* <http://www.treasury.gov/press-center/press-releases/Documents/seniorpreferredstockpurchaseagreementfnm1.pdf>.

the majority of the mortgage loans made, held, and insured in the United States.⁴³ Fannie Mae and Freddie Mac's industry position and experience were also given as reasons why their participation in MHA was crucial.⁴⁴ The Home Affordable Refinance Program (HARP), rather than the Home Affordable Modification Program (HAMP), was intended to affect the largest number of loans under MHA.⁴⁵

1. HARP

In its simplest form, refinancing a loan secured by a mortgage involves taking out a new loan to pay off a previous loan.⁴⁶ The purpose behind refinancing is to reduce the monthly payment made by the homeowner, either by reducing the interest rate charged,⁴⁷ by re-amortizing the existing loan balance over a longer period of time,⁴⁸ or both. In addition to the simple form of refinancing, homeowners may refinance for more than the existing loan balance, cashing out any equity in the property to get cash back when the refinancing loan closes.⁴⁹ However, refinancing a loan secured by mortgage on real property is dependent upon sufficient value

⁴³ See Statement, *supra* note 42, at 1.

⁴⁴ FED. HOUS. FIN. AGENCY, 2008 REPORT TO CONGRESS 87 (2009).

⁴⁵ Press Release, *supra* note 19.

⁴⁶ See 12 C.F.R. § 203.2(k)(1) (2010) (defining refinancing); FED. TRADE COMM'N, THE REAL ESTATE MARKETPLACE GLOSSARY: HOW TO TALK THE TALK 15 (2009). The Home Mortgage Disclosure Act of 1975 (HMDA) requires annual disclosures by depository institutions to the agency responsible for overseeing the type of depository institution. 12 U.S.C. § 2803(h) (2010). Because the purpose of the HMDA was to provide information about the types of loans lenders were making in a community, the Federal Reserve Board of Governors was authorized to implement regulations defining the various categories of loan types. See 12 C.F.R. § 203.1(a)–(c) (2010).

⁴⁷ See *Ending Mortgage Abuse: Safeguarding Homebuyers: Hearing on S. 1299 Before the Sub-Committee on Hous., Transp., and Cmty. Dev., S. Comm. on Banking, Hous., and Urban Affairs*, 110th Cong. 15 (2007) (statement of David Berenbaum, Executive Vice President, National Community Reinvestment Coalition).

⁴⁸ Damon Darlin, *Keep Eyes Fixed on Variable Mortgages*, N.Y. TIMES, July 15, 2006, at C6.

⁴⁹ CHRISTOPHER J. MAYER, KAREN M. PENCE & SHANE M. SHERLUND, FINANCE AND ECONOMICS DISCUSSION SERIES, FED. RESERVE BD., THE RISE IN MORTGAGE DEFAULTS, NO. 2008–59 9 (2008), available at <http://www.federalreserve.gov/pubs/feds/2008/200859/200859pap.pdf>.

being present in that real property to secure the loan,⁵⁰ which becomes the real issue in attempting to refinance in a market where housing prices have declined.⁵¹

a. Loan to Value Ratio and Mortgage Insurance

The primary consideration by lenders when making a loan secured by real property is whether the value of the real property is sufficient to cover the amount of the loan.⁵² This relationship is referred to as the Loan to Value (LTV) ratio.⁵³ Traditionally, LTV ratios of greater than 80% (four dollars of loan for every five dollars of real estate value) require mortgage insurance.⁵⁴

The purpose of mortgage insurance is to protect the lender against loss in cases of loan default where the value of the property is insufficient to cover the amount of the loan.⁵⁵ Although the lender's self-interest in avoiding loss certainly favors the purchase of mortgage insurance, the driving force behind the decision to obtain mortgage insurance is the security it provides—security demanded by investors in the secondary mortgage market.⁵⁶ Understanding how the secondary mortgage market works explains why participation by Fannie Mae and Freddie Mac is essential to the operation of the MHA.

⁵⁰ See Robert Van Order, *The U.S. Mortgage Market: A Model of Dueling Charters*, 11 J. HOUS. RES. 233, 234 (2000) (“[G]ood loans have [historically] been identified by their (lack of) credit risk . . .”). Credit risk is a combination of underwriting standards, which take into account Loan to Value (LTV) ratio, mortgage guarantees or insurance (also based on LTV), and the ability to foreclose. *Id.* at 240. See also *Frequently Asked Questions, MAKING HOME AFFORDABLE*, <http://www.makinghomeaffordable.gov/about-mha/faqs/Pages/default.aspx> (last visited Mar. 22, 2012).

⁵¹ *Frequently Asked Questions, supra* note 50.

⁵² Cf. Paul Bennett, Richard Peach & Stavros Peristiani, *Structural Change in the Mortgage Market and the Propensity to Refinance*, 33 J. MONEY, CREDIT AND BANKING 955, 963 (2001) (noting that in cases where home values have fallen and LTV exceeds 100%, borrowers will be unable to obtain refinancing).

⁵³ *Id.*

⁵⁴ See MORTG. INS. COS. OF AMERICA, HOW TO BUY A HOME WITH A LOW DOWN PAYMENT 2 (2010), available at http://www.privatemi.com/pdfs/52801_MICA_Eng_HiRes.pdf.

⁵⁵ *Id.*

⁵⁶ *Id.*

b. Freddie and Fannie's Role in the Secondary Mortgage Market

Fannie Mae and Freddie Mac buy loans secured by mortgages.⁵⁷ Then they sell those loans to other entities, which in turn place the mortgage loans into pools from which a securitized interest is created and sold in the form of certificates.⁵⁸ The certificate represents the right to receive income from the mortgage payments, made by homeowners in the case of Residential Mortgage-Backed Securities (RMBS).⁵⁹ Freddie and Fannie also create their own securities backed by the mortgages they purchase, and they sell those securities directly to investors.⁶⁰ The money Freddie and Fannie make from the sale of the loans and securities is used in part to fund the purchase of more loans, thus they “replenish” funds to banks and provide “liquidity . . . to the U.S. housing market.”⁶¹

In addition to the transactions described above, both Freddie and Fannie add one important element to the loans that they purchase, securitize, and sell—a guarantee of payment to investors who purchase the loan or secured loan derivatives.⁶² This guarantee is in part what makes Fannie and Freddie loans attractive to investors⁶³ and is one of the reasons that loans associated with Freddie and Fannie are treated separately under MHA.⁶⁴ In addition, Fannie has been tapped as agent for the U.S. Treasury

⁵⁷ See *Frequently Asked Questions*, FREDDIE MAC, http://www.freddiemac.com/corporate/company_profile/faqs/index.html (last visited Mar. 22, 2012).

⁵⁸ See Cockrell, *supra* note 9, at 1152–55; *Mortgage-Backed Securities*, *supra* note 2 (noting that securities sold by non-GSE entities are “private-label” MBSs).

⁵⁹ See Cockrell, *supra* note 9, at 1152–55.

⁶⁰ *Mortgage-Backed Securities*, *supra* note 2.

⁶¹ See *Frequently Asked Questions*, *supra* note 57.

⁶² See, e.g., *Single-Family Credit Guarantee Business*, FREDDIE MAC (2011), http://www.freddiemac.com/corporate/company_profile/our_business/; FANNIE MAE, GUARANTEED MORTGAGE PASS-THROUGH CERTIFICATES (SINGLE-FAMILY RESIDENTIAL MORTGAGE LOANS) 1 (2009), available at http://www.efanniemae.com/syndicated/documents/mbs/mbspros/SF_June_1_2009.pdf.

⁶³ See Van Order, *supra* note 50, at 236–37. In addition to the explicit guarantee between purchasers of MBSs offered by the GSEs, there is a perception, or “nebulous, implicit guarantee” that in tough times, the government will back any debt instruments, even though Freddie and Fannie are private corporations. *Id.* at 237. This implicit guarantee was proven to exist on September 7, 2008 when then Secretary of the Treasury placed Fannie and Freddie into conservatorship. See Statement, *supra* note 42, at 5.

⁶⁴ See FED. HOUS. FIN. AGENCY, *supra* note 44, at ii. Arguably, another reason they are treated differently has to do with the fact that the conservatorship made the U.S. Treasury
(continued)

in dealing with MHA implementation for non-GSE loans,⁶⁵ while Freddie has been designated compliance officer for the same.⁶⁶ These roles match investor expectations concerning Freddie and Fannie's pedigree and implied guarantee,⁶⁷ and they are likely a quid pro quo arising out of the conservatorship and the related infusion of capital itself.⁶⁸ Investor expectations, specifically the risk involved with lending on an LTV greater than 100%, are the chief concern addressed by HARP.

c. HARP Criteria Are Designed to Accommodate Specific Investor Expectations

Only loans originated or underwritten and guaranteed by Freddie or Fannie are eligible for refinance assistance under HARP.⁶⁹ HARP works by allowing lenders to modify the 80% LTV underwriting criteria to a value greater than 100%, while still making the loan eligible for purchase and guarantee by the GSEs.⁷⁰ The acceptable LTV ratios are set by Fannie and Freddie and in addition to those ratios, a home loan must be secured by a one-to-four unit residential property, must be owned or guaranteed by Fannie Mae or Freddie Mac,⁷¹ and must not be in default for non-payment to be eligible for refinance under HARP.⁷² Owners with existing mortgage insurance must maintain coverage at the current level, although owners

the majority shareholder in the two largest mortgage originators, making controlling the implementation of a loan modification regime easier. *Id.* Another facially apparent reason for treating the two differently is financial—both have experienced huge losses through payouts on those very guarantees, and stemming those losses is one stated goal of FHFA. *Id.*

⁶⁵ *Id.* at 3.

⁶⁶ *Id.*

⁶⁷ See Van Order, *supra* note 50, at 237.

⁶⁸ See *supra* text accompanying note 64.

⁶⁹ See FREDDIE MAC, RELIEF REFINANCE MORTGAGES—OPEN ACCESS 2 (2012), available at http://www.freddiemac.com/sell/factsheets/pdf/relief_refinance_openaccess.pdf; FANNIE MAE, HOME AFFORDABLE REFINANCE-NEW REFINANCE OPTIONS FOR EXISTING FANNIE MAE LOANS 7 (2009), available at <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2009/0904.pdf>.

⁷⁰ See, e.g., FREDDIE MAC, *supra* note 69, at 3 (allowing loan originators who desire to sell to Freddie the opportunity to do so for loans underwritten in accordance with HARP).

⁷¹ See *id.* at 2. The key features of both Freddie and Fannie's loan products under HARP are identical. *Id.* See also FANNIE MAE, *supra* note 69, at 7.

⁷² *Frequently Asked Questions*, *supra* note 50.

who refinance into a LTV that would otherwise require mortgage insurance are not required to obtain new or additional coverage.⁷³ Owners with secondary liens on the property must obtain subordination agreements from all junior lienholders.⁷⁴ Although there is no minimum credit score requirement, refinancing a homeowner's credit score will influence pricing of the new loan.⁷⁵ As with all MHA program components, evaluation for a refinanced loan under HARP requires a detailed submission of the homeowner's financial information.⁷⁶ The purpose of this submission is simple: to provide a new loan that reduces the chance of default, while creating a loan that conforms to the expectations of the investor who holds

⁷³ *Id.* See also Letter from James B. Lockhart III, Dir., Fed. Hous. Fin. Agency, to Suzanne Hutchinson, Exec. Vice President, Mortg. Ins. Cos. of Am. (Feb. 20, 2009), available at <http://www.fhfa.gov/webfiles/1256/HutchinsonGSERefi22009.pdf>.

⁷⁴ *Frequently Asked Questions*, *supra* note 50. See also *ABN AMRO Mortg. Group, Inc. v. Kangah*, 934 N.E.2d 924, 926–28 (Ohio 2010) (discussing cases involving judicial application of equitable subrogation of a junior lien to the senior lienholders' priority); FANNIE MAE, *supra* note 69, at 7.

⁷⁵ FANNIE MAE, MAKING HOME AFFORDABLE REFINANCE: REFI PLUS OPTIONS (2011), available at <https://www.efanniemae.com/sf/mha/mharefi/pdf/refiplusoptionsfacts.pdf>. See also MAKING HOME AFFORDABLE, HOME AFFORDABLE REFINANCE FAQs 9, 21 (2012), available at <https://www.efanniemae.com/sf/mha/mharefi/pdf/refinancefaqs.pdf>. Loans previously owned or guaranteed by Fannie were subject to minimum credit score, along with a host of other requirements. *Id.* Fannie controlled this process by distributing underwriting software that allowed originating lenders, and under MHA, servicers, to ensure that the loans comply with Fannie's risk guidelines. *Id.* at 9.

⁷⁶ *Frequently Asked Questions*, *supra* note 50.

an interest in the loan proceeds.⁷⁷ The same twin goals are present under MHA's other component, HAMP.⁷⁸

2. HAMP

HAMP was the second program created under MHA, and was originally intended to affect between "3 to 4 million at-risk homeowners."⁷⁹ As a percentage, HAMP was to reach approximately 30%–50% of the total number of homeowners targeted for relief under MHA overall.⁸⁰

Modification consists of rewriting an existing loan to include changed terms,⁸¹ while retaining the same security interest in the homeowner's property.⁸² Terms that may be altered include the interest rate, maturity

⁷⁷ Cf. FREDDIE MAC, *supra* note 69, at 2 (underwriting requirements include full documentation). The "Securities and Pooling Requirements" also recognize the risk inherent in under-collateralized loans and require complete segregation for those HARP loans with LTV ratios greater than 105. *Id.* at 4. Investors expect both Fannie and Freddie to fully disclose the risk of loss, as evidenced by the prohibition on placing HARP loans in the forward loan sales market without warning, or by bundling HARP loans with those with a lower LTV ratio. *Id.* The TBA market is the "to be announced" method of selling RMBS securities in which an investor "agrees on a sale price, but does not specify which securities will be delivered" on that future date. JAMES VICKERY & JOSHUA WRIGHT, STAFF REPORTS, FED. RESERVE BANK OF N.Y., TBA TRADING AND LIQUIDITY IN THE AGENCY MBS MARKET 2 (2010).

⁷⁸ See OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM (SIGTARP), FACTORS AFFECTING IMPLEMENTATION OF THE HOME AFFORDABLE MODIFICATION PROGRAM 4 (2010), available at http://www.sig tarp.gov/reports/audit/2010/Factors_Affecting_Implementation_of_the_Home_Affordable_Modification_Program.pdf (stating that the collection of data allows the servicer to decide if it "is economically advantageous to modify the loan").

⁷⁹ Press Release, *supra* note 22.

⁸⁰ See Press Release, *supra* note 19.

⁸¹ See FED. TRADE COMM'N, *supra* note 46, at 12.

⁸² *But see* RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 7.3(b) (1997) (noting instead that a first mortgage that is modified by the parties retains priority "except to the extent that the modification is materially prejudicial to the holders of [a junior] interest" and the parties have not reserved the right to modify the first mortgage in that instrument). Modification may be prejudicial in the event of a default and foreclosure on a second lien where a modification to increase the principal decreases or eliminates recovery by the junior lien holder. *Id.* § 7.3(b) cmt b. *But see* First Fid. Bank, N.A. v. Bock, 652 A.2d 262, 264 (continued)

date, payment timing, and frequency.⁸³ Unlike HARP, a subordination agreement is not required under HAMP for modification in those cases where a second lien exists; rather, MHA features a second program for properties with more than one lien, the “Second Lien Modification Program,” or “2MP.”⁸⁴

Under HAMP, loans owned and guaranteed by Fannie and Freddie are eligible for modification because participation in HAMP is mandatory for servicers of GSE owned or guaranteed loans—it is written in to the servicing guidelines themselves.⁸⁵ Participation is voluntary for servicers of non-GSE loans.⁸⁶

B. The Contractual Nature and Process of Loan Modification Under HAMP

The nature of the agreement that requires evaluation for a modification under HAMP is the same for GSE and non-GSE loans. With GSE loans, the servicer is contractually obligated through its agreement with Fannie⁸⁷

(N.J. Super. Ct. Ch. Div. 1994) (holding that loan modifications were entitled to enjoy their priority position as against an intervening judgment creditor, but primarily as a result of New Jersey’s statutory protection for loan modifications, not common law principles).

⁸³ *Frequently Asked Questions, supra* note 50. Note that principal forgiveness is not a part of HAMP and is “optional on the part of the servicer.” *Id.*

⁸⁴ *Id.* Modification of original loan terms without consent from a junior lienholder may create priority issues in the event of a later foreclosure. See, e.g., *Burney v. McLaughlin*, 63 S.W.3d 223, 230 (Mo. Ct. App. 2001) (noting that “[f]ailure to obtain . . . consent” may result “in the modification being ineffective as to the junior [lienholders],” such that the senior lienholder relinquishes priority to the extent that the modified terms “substantially impaired the junior lienors’ security interest or effectively destroyed their equity”) (internal quotations omitted).

⁸⁵ *Frequently Asked Questions, supra* note 50.

⁸⁶ *Id.*

⁸⁷ Section V(A)(3) of the Mortgage Selling and Servicing Contract expressly binds the servicer to perform according to Fannie Mae’s “Servicing Guides,” even prospectively. See FANNIE MAE, MORTGAGE SELLING AND SERVICING CONTRACT § V(A)(3) (2005) available at http://www.allregs.com/tpl/public/fnma_freesiteconv_tll.aspx (access via directory on left-hand side of page) (incorporating servicing guides); FANNIE MAE, 2010 SERVICING GUIDE, PART VII, CHAPTER 6, § 610 (2009), available at http://www.allregs.com/tpl/public/fnma_freesiteconv_tll.aspx (access via directory on left-hand side of page) (“Home Affordable Modification Program”) (requiring servicers to participate in the program for all Fannie Mae loans).

or Freddie.⁸⁸ With non-GSE loans, servicers are contractually obligated through a voluntary agreement with the U.S. Department of Treasury, the Servicer Participation Agreement.⁸⁹ An examination of Fannie's agreement, Freddie's agreement, and the U.S. Department of Treasury's Servicer Participation Agreement reveals that under no circumstances can Fannie,⁹⁰ Freddie,⁹¹ or the Treasury⁹² compel a servicer to modify a loan. All that is required is that the servicers follow the procedure to evaluate homeowners and their loans under certain conditions.⁹³ Further, the decision whether to modify a loan still ultimately rests with the investor.⁹⁴

⁸⁸ See FREDDIE MAC, SINGLE-FAMILY SELLER/SERVICER GUIDE, VOL. 1, CHAPTER 1, § 1.2(a) (2012), available at <http://www.freddiemac.com/sell/guide/> (select link to All Regs). Freddie Mac utilizes the same arrangement, whereby servicers become bound under the master agreement, or "Purchase Contract," and agree to being bound by future changes promulgated in Freddie Mac's "Servicer Guide." *Id.*

⁸⁹ See, e.g., U.S. DEP'T OF THE TREASURY AND CHASE HOME FIN., LLC, SERVICER PARTICIPATION AGREEMENT 2 (2009), available at [http://www.treasury.gov/initiatives/financial-stability/programs/housing-programs/mha/Documents_Contracts_Agreements/093010jpmorganchasebanknaSPA\(incltransmittal\)-r.pdf](http://www.treasury.gov/initiatives/financial-stability/programs/housing-programs/mha/Documents_Contracts_Agreements/093010jpmorganchasebanknaSPA(incltransmittal)-r.pdf) [hereinafter CHASE SERVICER PARTICIPATION AGREEMENT] (noting that the "[s]ervicer wishes to participate in the Programs as a Participating Servicer"). Like Fannie Mae's Mortgage Selling and Servicing Contract and Freddie Mac's Purchase Contract, the Servicer Participation Agreement also prospectively incorporates ongoing guidance. *Id.*

⁹⁰ See FANNIE MAE, 2010 SERVICING GUIDE, *supra* note 87, at § 610.07 (2009) ("Servicer Delegation, Duties, and Responsibilities").

⁹¹ See FREDDIE MAC, SINGLE-FAMILY SELLER/SERVICER GUIDE, VOL. 2, CHAPTER C65, § C65.15 (2011), available at <http://www.freddiemac.com/sell/guide/> (select link to All Regs) ("Compliance").

⁹² See CHASE SERVICER PARTICIPATION AGREEMENT, *supra* note 89, at 6 (noting that the remedies for non-compliance range from monetary penalties and increased oversight to termination of the agreement between servicer, here Chase, and the U.S. Department of Treasury, but in no way include modification of one or more loans).

⁹³ See, e.g., FANNIE MAE, 2010 SERVICING GUIDE, *supra* note 87, at PART VII, CHAPTER 6 (2008) ("Foreclosure Prevention Alternatives") (noting that long-term reasons for default or those that are "too serious for the short-term relief measures" require a servicer to "consider Fannie Mae's permanent foreclosure prevention alternatives").

⁹⁴ See, e.g., MAKING HOME AFFORDABLE PROGRAM, HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES, VERSION 3.0 17 (2010), available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_30.pdf [hereinafter MHA HANDBOOK] (noting that servicers are required to use reasonable efforts to solicit investors for
(continued)

The loan modification procedure begins by identifying which loans are eligible.

a. The HAMP Modification Process—Eligibility

Whether a loan is eligible for modification under HAMP starts with an evaluation of who owns and guarantees the loan.⁹⁵ The specific question is whether Fannie or Freddie own or guarantee the loan because if so, it is automatically eligible for HAMP evaluation.⁹⁶ If not, then homeowners are instructed to contact their loan servicer to determine if the servicer has entered into a voluntary agreement with the U.S. Department of Treasury to participate in the program.⁹⁷ If the homeowner's loan servicer is not participating, then the loan is not eligible for HAMP.⁹⁸ If the homeowner's loan servicer is participating, but the homeowner's loan is held by an investor who declines to participate, then the loan is not eligible for HAMP.⁹⁹ Thus, whether a homeowner's loan will be modified under HAMP rests not in the hands of the homeowner, one of the GSEs, or a government agency, but rather in the hands of a private entity.

If the loan is owned or guaranteed by the GSEs, or serviced by a participating loan servicer, and there is a willing investor, then the next question is whether the loan is about to or has already become delinquent.¹⁰⁰ In the latter case, the servicer is obligated to attempt to make contact with the delinquent homeowner once two or more payments

participation, but that prohibitions in the contract between servicers and the investors, the Pooling and Servicing Agreement (PSA), may prevent modification).

⁹⁵ See *Frequently Asked Questions*, *supra* note 50 (“Is my servicer participating in HAMP?”).

⁹⁶ *Id.*

⁹⁷ *Id.* See also MAKING HOME AFFORDABLE PROGRAM, SERVICER PERFORMANCE REPORT THROUGH DECEMBER 2010 13 (2011), available at <http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/Dec%202010%20MHA%20Report%20Final.pdf> [hereinafter SERVICER PERFORMANCE REPORT] (indicating that 115 servicers are currently participating). Of those participating, fifteen servicers accounted for nearly 85% of the eligible loans as of the December 2010 report. *Id.* at 6.

⁹⁸ See *Frequently Asked Questions*, *supra* note 50 (“If your servicer is not participating in the Program, ask . . . about other options . . .”).

⁹⁹ See MHA HANDBOOK, *supra* note 94, at 17–18.

¹⁰⁰ See *id.* at 41.

are due and unpaid.¹⁰¹ In the former case, a homeowner may contact the servicer and request further evaluation.¹⁰²

The servicer will confirm the remaining prerequisites for eligibility, including that the home is a one-to-four unit, owner-occupied structure;¹⁰³ that the outstanding principal balance is no more than \$729,750 for a one-unit home, and up to \$1,403,400 for a four-unit home;¹⁰⁴ that the mortgage was originated on or before January 1, 2009;¹⁰⁵ that the mortgage is a first lien;¹⁰⁶ that the mortgage payment is greater than 31% of the homeowner's monthly pre-tax income;¹⁰⁷ and finally that the homeowner cannot afford the payment due to a financial hardship "that can be documented."¹⁰⁸ Homeowners are eligible for participation in the program if they meet these criteria, notwithstanding the fact that there is an active foreclosure action pending against them¹⁰⁹ or the fact that they have filed for bankruptcy relief.¹¹⁰

b. Homeowner Input—the Initial Package

Servicers are required to make a "reasonable effort" to solicit a homeowner for participation in HAMP if the loan is otherwise determined to be qualified for the program.¹¹¹ All attempts, whether successful or

¹⁰¹ *Id.* at 46.

¹⁰² See *Frequently Asked Questions*, *supra* note 50.

¹⁰³ *Id.* (noting that as long as the mortgagor lives in one unit, the fact that the other units are rentals is not a bar to participation).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* If the first mortgage is eligible under HAMP, then a second lien with a 2 MP participant is also eligible. *Id.*

¹⁰⁷ *Id.* Under the program guidelines, "payment" includes escrow amounts for real estate taxes, hazard insurance, and community fees such as condominium and owners association dues. *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* ("What if I am facing foreclosure?").

¹¹⁰ See, e.g., MHA HANDBOOK, *supra* note 94, at 43 ("Borrowers in Active Bankruptcy"). *But see id.* (noting that contacting a borrower in bankruptcy is not required under HAMP and doing so is discretionary, although contact by the borrower or the borrower's attorney or bankruptcy trustee triggers the duty to evaluate).

¹¹¹ *Id.* at 46. Reasonable efforts include a minimum of four phone calls "at different times of the day," one certified or overnight piece of mail using the form letter provided by MHA, "and one letter via regular mail." *Id.* Note however that a servicer is not required to

(continued)

unsuccessful, must be documented.¹¹² Successful contact with the homeowner triggers a duty to provide additional information, specifically, details on the “Initial Package.”¹¹³ The initial package is composed of the “Request for Modification and Affidavit Form,” an IRS Form 4506-T or 4506T-EZ authorizing release of the homeowner’s income tax returns to the servicer, and evidence of income.¹¹⁴

When HAMP was first announced, significant hostility to the program existed, specifically voiced in the form of fears of helping irresponsible individuals,¹¹⁵ or persons engaged in investment schemes (speculators and “house flippers”) rather than struggling homeowners.¹¹⁶ Early press releases sought to demonstrate not only the speed with which the administration could modify loans,¹¹⁷ but also that the program benefited only responsible homeowners.¹¹⁸ The three pieces of information in the initial package appear to be an attempt to balance the speed with which information can be gathered against the need to maintain some level of accuracy to ensure that the “responsible” homeowner’s needs are being met.¹¹⁹

Prior to June 1, 2010, servicers had a choice between whether to condition evaluation upon receipt of the initial package from the homeowner, or to instead rely on verbal information taken over the telephone and later confirmed when the initial package arrived.¹²⁰ One

pursue a futile course of action, and that once reasonable efforts have been made and documented as unsuccessful, “resolicitation of the borrower is not required.” *Id.* at 47.

¹¹² *Id.*

¹¹³ *Id.* Successful efforts are termed/identified as “Right Party Contact” and trigger a duty to “send a written communication to the borrower via regular or electronic mail that clearly describes the [i]nitial [p]ackage.” *Id.*

¹¹⁴ *Id.*

¹¹⁵ See Press Release, *supra* note 19.

¹¹⁶ See *id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See, e.g., MAKING HOME AFFORDABLE, SUPPLEMENTAL DIRECTIVE 09-01 2, 5–6 (2009), available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0901.pdf. Under the first supplemental directive, even the writing requirement was discretionary, as servicers could begin evaluation with nothing more than verbal assertions by the borrower concerning income and hardship, as long as the documents were received within three months of contact. *Id.*

¹²⁰ See *id.*

criticism of HAMP was the pace with which the program changed.¹²¹ Program changes were announced through a series of servicer participation agreement amendments, the supplemental directives.¹²² The supplemental directives, in turn, were incorporated by reference into the Servicer Participation Agreement.¹²³ Despite the fact that all servicers were bound by the same language in the Servicer Participation Agreement,¹²⁴ and the fact that they were all bound by the same supplemental directives, the dichotomy of choice in SD 09-01 as to what was necessary to begin evaluation meant that similarly situated homeowners might receive different responses to the question of what they had to submit to be considered for a HAMP modification. Perhaps because of this criticism, receipt of the written initial package is now a prerequisite to further evaluation.¹²⁵ Once the initial package is received, homeowner evaluation begins with the modification waterfall.¹²⁶

a. A Standardized Approach to Varying the Terms of Loan Agreements—the Modification Waterfall

The purpose behind HAMP's modification scheme is to lower homeowners' monthly payments to no more than 31% of their monthly

¹²¹ See, e.g., SIGTARP, *supra* note 78, at 24. In what can be termed a critical look at the implementation of HAMP and HARP, servicers complained that constantly changing conditions to the agreement (the supplemental directives issued by Fannie Mae under Department of Treasury guidance) led to confusion. *Id.*

¹²² See CHASE SERVICER PARTICIPATION AGREEMENT, *supra* note 89, at 2.

¹²³ See *id.* at 1–2 (“Program Directives”).

¹²⁴ Compare, e.g., *id.* at 1–2, with U.S. DEP'T OF THE TREASURY AND BANK OF AM., SERVICER PARTICIPATION AGREEMENT 1–2 (2010), available at [http://www.treasury.gov/initiatives/financial-stability/programs/housing-programs/mha/Documents_Contracts_Agreements/093010bankofamericanaSPA\(incltransmittal\)-r.pdf](http://www.treasury.gov/initiatives/financial-stability/programs/housing-programs/mha/Documents_Contracts_Agreements/093010bankofamericanaSPA(incltransmittal)-r.pdf) [hereinafter BANK OF AMERICA SERVICER PARTICIPATION AGREEMENT].

¹²⁵ See SIGTARP, *supra* note 78, at 5, 23. SIGTARP reported that “[o]ne servicer in particular noted that it changed from offering only fully documented trial modification to verbal modification after Treasury threatened to make examples of servicers with low trial modification numbers.” *Id.* at 23. The Department of Treasury clarified its position on the form of the initial package in Supplemental Directive 10-01, and required that effective June 1, 2010, receipt of completed documentation was a prerequisite to offering a trial period plan. See MAKING HOME AFFORDABLE, SUPPLEMENTAL DIRECTIVE 10-01 1 (2010), available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1001.pdf.

¹²⁶ See *infra* text accompanying notes 128–129.

income.¹²⁷ The determination of a proper payment amount was based on reasonable commercial underwriting standards.¹²⁸ Creating loan terms that meet the 31% goal is done by changing certain terms of the loan, in the exact order designated in the MHA Handbook.¹²⁹ The sequence in which terms are changed is referred to as the “standard modification waterfall.”¹³⁰

Broadly, the steps include capitalization of outstanding amounts, interest rate reduction, term extension, and principal forbearance.¹³¹ These steps are applied one at a time in that order to reach the 31% goal.¹³² The MHA Handbook makes it clear that “principal forbearance will result in a balloon payment” at the end of the loan term.¹³³ Unlike principal forgiveness, principal forbearance is a required step in the modification waterfall, unlike principal forgiveness.¹³⁴ The servicer may also elect to reach the target goal of a payment that is 31% or less than the homeowner’s income by forgiving principal, although HAMP guidelines explicitly state that this is not required.¹³⁵

Each of the broad categories above is governed by more detailed instructions on inputs to the standard waterfall, and if the loan cannot be modified within those limits, the loan is not eligible for HAMP.¹³⁶ If the loan is able to reach the goal within the prescribed guidelines, the next step is a trial period during which the final evaluation occurs—the net present value test.

¹²⁷ See MHA HANDBOOK, *supra* note 94, at 65.

¹²⁸ See MARY SCHWARTZ & ELLEN WILSON, U.S. CENSUS BUREAU, WHO CAN AFFORD TO LIVE IN A HOME: A LOOK AT DATA FROM THE 2006 AMERICAN COMMUNITY SURVEY 1–2 (2007), available at <http://www.census.gov/hhes/www/housing/special-topics/files/who-can-afford.pdf> (attributing the 30% housing debt-to-income ratio to guidance contained in the definition of “burdened” under the United States National Housing Act of 1937, which was then adopted by the GSEs for loan underwriting purposes).

¹²⁹ MHA HANDBOOK, *supra* note 94, at 65.

¹³⁰ *Id.*

¹³¹ *Id.* at 65–67.

¹³² *Id.*

¹³³ *Id.* at 67.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See, e.g., *id.* at 71 (describing HAMP ineligibility where the servicer has reached the limit on the amount of principal forbearance, but the payment is still greater than 31% of the borrower’s income).

b. If It Is Possible to Reach the 31% Goal, Does it Make Financial Sense to Do So?—the Net Present Value Test

The net present value test (NPV) simply indicates whether it is in the best (financial) interest of an investor to modify a mortgage loan.¹³⁷ If the result of the NPV model run is positive, then the predicted cash value of the loan as modified is greater than the value of the loan if not modified (the “positive” in “NPV positive”).¹³⁸ NPV model inputs include not only the terms of the modification as created under the standard waterfall but also expense and valuation data including the cost of conducting a foreclosure action, the “value of the home,” and “trends in home prices.”¹³⁹ If a positive value on an NPV model run indicates that the value of the loan as modified is greater than the value if left alone, then “the servicer must offer the modification.”¹⁴⁰ As phrased, the offer is mandatory.¹⁴¹ However, the modification is contingent upon completion of a trial period payment plan.¹⁴²

c. Test Run for Modification—the Trial Period Payment Plan

Following submission of the initial package, and after the NPV evaluation, the homeowner must accept the offer to participate in a trial period plan.¹⁴³ After the servicer sends notice to the homeowner offering a trial period, the homeowner is required to make payments to the servicer for a minimum of three months in an amount that is the target payment amount determined under the modification waterfall.¹⁴⁴ Homeowners who remain current at the end of the period, and whose NPV results are

¹³⁷ See HOME AFFORDABLE MODIFICATION PROGRAM, BASE NET PRESENT VALUE (NPV) MODEL SPECIFICATIONS 1–2 (2009), available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/npvoverview.pdf. Borrowers, investors, and servicers are faced with a choice of “whether to modify the mortgage or leave it as-is,” and the results of NPV modeling provide an “objective test” or benchmark by which this question can be answered. *Id.*

¹³⁸ *Id.* at 2.

¹³⁹ *Id.* at 3.

¹⁴⁰ See MHA HANDBOOK, *supra* note 94, at 73.

¹⁴¹ *Id.*

¹⁴² *Id.* at 77. See also *id.* at 80 (“A borrower . . . may receive a permanent modification as long as the servicer has received all required trial period payments . . .”).

¹⁴³ *Id.* at 77.

¹⁴⁴ *Id.*

positive, “will be offered a permanent modification.”¹⁴⁵ Homeowners who fail to remain current are deemed ineligible.¹⁴⁶

d. Permanent Modification and Compensation

Following the successful completion of the steps above, a permanent loan modification is sent to the homeowner.¹⁴⁷ The modification conditions under HAMP require the servicer to waive all past due late fees and charges, and all costs incurred in gathering the information that goes into the NPV, including property valuation fees.¹⁴⁸ The servicer must also pay all fees and costs associated with the execution and recordation of the modification itself, set up and administer an escrow account, and obtain any mortgage insurer approval for the modification.¹⁴⁹ Finally, a condition of modification is that “the servicer will follow investor guidance to ensure that the modified mortgage loan retains its first lien position and is fully enforceable.”¹⁵⁰ In cases where a tax lien statute provides for priority, this means paying any accumulated taxes.¹⁵¹

In exchange for performing the foregoing tasks and perhaps paying or waiving the above costs, the servicer receives \$1,000 per completed modification.¹⁵² The homeowner, in addition to receiving the benefits of reduced monthly payment, may also receive \$1,000 a year for up to five years.¹⁵³

2. Rights and Obligations of Program Participants—the Foundation for MHA

The Economic Emergency Stabilization Act (EESA) is the legislative grant of authority to the Treasury to create and administer the MHA

¹⁴⁵ *Id.* at 77–78. Note that trial period plans prior to June 1, 2010 defined “current” as having received “all trial period payments [before] the last day of the . . . period,” while after that date, “current” was determined on a monthly basis with a borrower deemed not current if payment due in any month was received after the last day of that month. *Id.*

¹⁴⁶ *Id.* at 78.

¹⁴⁷ *Id.* at 80.

¹⁴⁸ *Id.* at 81.

¹⁴⁹ *Id.* at 81–84.

¹⁵⁰ *Id.* at 81.

¹⁵¹ *See, e.g.,* OHIO REV. CODE ANN. § 5721.10 (2010) (noting that Ohio acquires the first lien for delinquent property taxes).

¹⁵² MHA HANDBOOK, *supra* note 94, at 92.

¹⁵³ *Id.* at 93.

program.¹⁵⁴ The MHA program relies on the Servicer Participation Agreements between servicers and the Department of Treasury with non-GSE loans, or between servicers and Fannie and Freddie with GSE loans, to bind the servicers to program participation.¹⁵⁵ Servicers in turn rely on Pooling and Servicing Agreements (PSAs) between themselves and investors in the case of MBSs for their authority to act on behalf of the legal and equitable owners of the loan.¹⁵⁶ Finally, the loan documents themselves primarily govern the borrower's relationship with the lender or the lender's assigns.¹⁵⁷ Those documents reveal the rights and obligations of all parties involved.

No matter what the terms of an individual loan secured by a mortgage are, the agreement is fundamentally the same: A borrower is contractually obligated to pay someone for the money loaned,¹⁵⁸ and a lien against real property secures that obligation.¹⁵⁹ That "someone" begins as the lender, who may in turn sell the loan to a trust,¹⁶⁰ the new "owner" of the loan.¹⁶¹

The PSA sets the duties and rights as between servicers, investors, and the trust with a securitized loan.¹⁶² That agreement can run in excess of one hundred pages,¹⁶³ and details what the servicer is required to do in the

¹⁵⁴ 12 U.S.C. §§ 5219a–5219b (Supp. IV 2011).

¹⁵⁵ See, e.g., CHASE SERVICER PARTICIPATION AGREEMENT, *supra* note 89, at 1–2.

¹⁵⁶ See Cockrell, *supra* note 9, at 1156–57 (describing the PSA that governs these parties' rights and obligations).

¹⁵⁷ See RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 1.1 (2010). The parties may, for example, limit personal liability of the mortgagor by including language that the loan is non-recourse, which in a foreclosure action will bar personal judgment against the mortgagor. *Id.* at § 1.1 cmt.

¹⁵⁸ See, e.g., FANNIE MAE/FREDDIE MAC, MULTISTATE FIXED RATE NOTE 1 (2001), available at <http://www.freddiemac.com/uniform/doc/3200-MultistateFRNote.doc> [hereinafter MULTISTATE NOTE].

¹⁵⁹ See BLACK'S LAW DICTIONARY 1031 (8th ed. 2004) (defining "mortgage").

¹⁶⁰ See MULTISTATE NOTE, *supra* note 158 ("The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'").

¹⁶¹ See Cockrell, *supra* note 9, at 1152–53.

¹⁶² *Id.* at 1156.

¹⁶³ See, e.g., WELLS FARGO BANK, SERVICING AGREEMENT (2008), available at <http://www.sec.gov/Archives/edgar/data/1421064/000091412108000101/0000914121-08-000101-index.htm>.

case of default by a borrower on the underlying debt.¹⁶⁴ That agreement also defines who is responsible for paying the difference in cost when a loan term is modified in a manner not explicitly authorized by the PSA.¹⁶⁵ With costs associated with modifying a loan, agreements may require the servicer, or the borrower if allowed by the mortgage, to bear those costs.¹⁶⁶ The existence of these PSA terms explains the incentive structure of HAMP, which compensates the servicer and the borrower for this cost in a successful modification,¹⁶⁷ as well as the NPV model, which takes into account the effects of the decision to modify on the underlying investment.¹⁶⁸ The contractual nature of the PSA also explains why a safe-harbor provision¹⁶⁹ was necessary under the Helping Families Save Their Homes Act of 2009¹⁷⁰ to shield servicers from suits by investors claiming breach of fiduciary duty arising out of servicer participation in HAMP.¹⁷¹

Finally, the contractual nature of the agreement between the U.S. Department of Treasury and loan servicers also provides a key to understanding efforts by frustrated homeowners to assert a claim or defense under MHA.¹⁷² That frustration arises out of MHA's failure to meet its stated goals.

¹⁶⁴ *Id.* at Articles 12–13.

¹⁶⁵ *Id.* at Section 4.4.2 (noting that servicer is not liable for acts done in accordance with servicing agreement), Section 12.3.6 (setting forth acceptable modification procedures), Section 12.3.7 (noting that no modifications are permitted “other than as provided in Section 12.3.6”).

¹⁶⁶ *Id.* at Section 12.1.4 (“The cost of any of the servicing procedures detailed in this Agreement shall be borne solely by the Servicer. . . . [However, t]he foregoing shall not preclude the Servicer from recovering such expenses from the Borrower to the extent permitted by . . . [the] Mortgage Loan Documents.”).

¹⁶⁷ MHA HANDBOOK, *supra* note 94, at 92–94.

¹⁶⁸ *Id.* at 73–75. Servicers who have exposure of forty billion dollars or greater may limit that exposure by creating a customized NPV model using their own cure and redefault data. *Id.* at 74.

¹⁶⁹ 15 U.S.C. § 1639a (2009).

¹⁷⁰ Pub. L. No. 111-22, 123 Stat. 1632 (2009).

¹⁷¹ *See* Cockrell, *supra* note 9, at 1168 (arguing that section 201 of the Homes Act of 2009 may be a regulatory taking by precluding investors from suing a servicer who has modified a loan in conformity with MHA but outside the terms of the PSA).

¹⁷² *See infra* Section III.

3. *HAMP and HARP Performance Data*

Under the MHA umbrella, HAMP was to provide relief to three to four million homeowners, while HARP was to affect four to five million; however, HAMP was intended to reach a greater number of homeowners, more quickly in the early part of the program, with HARP to catch up later.¹⁷³ Instead, the number of loans refinanced under HARP exceeded the number of loans modified under HAMP six months from the announcement of both programs.¹⁷⁴ Currently, HARP appears on-track to meet its projected goal of four to five million loans refinanced.¹⁷⁵ The same is not the case for HAMP.

Judged by its own performance data, HAMP has failed to live up to its promises.¹⁷⁶ As of the most recent progress report, there were more than 2.9 million eligible delinquent loans.¹⁷⁷ Since the program's inception, however, there have been fewer than 580,000 permanent modifications.¹⁷⁸ Further, the "permanence" of those modifications is questionable where approximately 20% of modifications from 2009 were delinquent ninety days or more within one year of the modification.¹⁷⁹ Were that rate to remain constant until the program is scheduled to expire, 60% or more of the permanent modifications would be seriously delinquent.¹⁸⁰

These data strongly suggest that as a means of preventing the condition precedent to foreclosure (loan default due to loss of income) merely

¹⁷³ See Press Release, *supra* note 19; Press Release, *supra* note 20 ("It is imperative that we continue to move with speed . . .").

¹⁷⁴ Compare FED. HOUS. FIN. AGENCY, REFINANCE REPORT 2 (2009), available at <http://www.fhfa.gov/webfiles/14764/FHFARefiRpt81309F%5B1%5D.pdf> (showing 1.9 million HARP refinances since program inception out of 2.9 million refinances for the entire year), with FED. HOUS. FIN. AGENCY, FORECLOSURE PREVENTION & REFINANCE REPORT 2 (2009), available at <http://www.fhfa.gov/webfiles/15570/FPR32410F.pdf>. The tabular data labeled "Loan Modifications Completed" shows a month-by-month, non-cumulative count of Freddie and Fannie held or guaranteed loans which have been permanently modified. *Id.* These data indicate that as of August 2009, roughly 100,000 Fannie and Freddie loans had been permanently modified. *Id.*

¹⁷⁵ See REFINANCE REPORT, *supra* note 174, at 1 (noting that through July 2009 HARP had already completed approximately 1.9 million refinances).

¹⁷⁶ See SERVICER PERFORMANCE REPORT, *supra* note 97, at 2.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 4.

¹⁸⁰ See *id.*

changing the terms and providing borrowers with \$1,000 cash is insufficient.¹⁸¹ At least tacitly acknowledging that the current program does not adequately address the core causes of loan delinquency (i.e., unemployment), the U.S. Treasury has proposed supplemental programs at the state level to do so.¹⁸²

4. *Recent Developments*

The most recent trend has been a shift toward state-administered programs that work within the existing MHA structure to incentivize loan modifications.¹⁸³ For example, Ohio applied for and received a grant from the U.S. Treasury from the “Hardest Hit Fund.”¹⁸⁴ The program works with MHA by giving servicers cash to be applied to a borrower’s principal balance.¹⁸⁵ Reducing principal changes one of the key inputs into the NPV model, which may result in a positive NPV value, which in turn could produce a loan modification offer.¹⁸⁶ In addition to the principal reduction components, Hardest Hit Fund recipients may offer some of the same types of relief offered under MHA.¹⁸⁷ However, the Hardest Hit Fund differs from MHA by providing assistance directly to borrowers through targeted local relief, implemented by state housing finance agencies rather than by financial institutions and servicers.¹⁸⁸ Although this program seems to address the core issue of borrowers’ lack of funds more directly, and with a

¹⁸¹ *See id.* at 3–4. The number one listed hardship reason under the initial package reports is loss of income, whether it be complete job loss or reduction in hours or wages. *Id.* at 4. Because HAMP is designed to reach a payment of 31% of a borrower’s income, a further loss of income following evaluation and the trial period but before NPV means that the result will likely be negative. Further, a total loss of income during evaluation will always fail NPV, because 31% of zero is zero, which is no payment at all.

¹⁸² Press Release, U.S. Dep’t of the Treasury, Administration Announces Second Round of Assistance for Hardest-Hit Housing Markets (Mar. 29, 2010), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/tg618.aspx>.

¹⁸³ *See id.*; MHA HANDBOOK, *supra* note 94, at 151.

¹⁸⁴ Press Release, *supra* note 182 (\$172 million dollars were allocated to Ohio).

¹⁸⁵ MHA HANDBOOK, *supra* note 94, at 151.

¹⁸⁶ *Id.* at 151–53.

¹⁸⁷ *See* Press Release, *supra* note 182.

¹⁸⁸ *Id.* *See also* *Frequently Asked Questions for Restoring Stability: A Save the Dream Ohio Initiative (Ohio’s Hardest-Hit Fund)*, OHIO HOUS. FIN. AGENCY, <http://www.ohiohome.org/restoringstability/RestoringStability-FAQs.pdf> (last visited Mar. 22, 2012).

regional component wholly absent under MHA,¹⁸⁹ the written agreement between Treasury and state housing finance agencies is identical to that between Treasury and loan servicers.¹⁹⁰ Most likely, the Treasury's use of the same participation agreement will give rise to the same claims of entitlement to a loan modification as under the existing MHA structure.

Claims of entitlement to a loan modification seem to arise out a belief that MHA requires servicers to modify loans.¹⁹¹ The source of this belief is not readily apparent. However a plausible cause is the program's relatively fast development, coupled with the public's ample access to primary documentation via the program's website and press releases focusing on MHA's stated goal of helping homeowners. This supposition is not borne out by the case law developed around MHA, which has taken a more measured approach to interpreting those same sources.

III. ANALYSIS

MHA gives homeowners no substantive rights. It does not provide homeowners with a private right of action, either express or implied.¹⁹² Homeowners do not have a protected property interest in a loan modification,¹⁹³ and they are not intended third-party beneficiaries of the Servicer Participation Agreement between their loan servicers and the U.S. Treasury.¹⁹⁴ Nor do substantive rights arise from MHA when homeowners find themselves in a defensive posture during a foreclosure action.

Once foreclosure proceedings have begun, MHA does not provide homeowners with an affirmative defense.¹⁹⁵ At best, it may provide one

¹⁸⁹ See MHA HANDBOOK, *supra* note 94, at 2–9 (showing organization around lien type and servicer function without regard to geography).

¹⁹⁰ Compare CHASE SERVICER PARTICIPATION AGREEMENT, *supra* note 89, with U.S. DEP'T OF THE TREASURY, HFA PARTICIPATION AGREEMENT 1 (2010), available at http://www.treasury.gov/initiatives/financial-stability/programs/housing-programs/hhf/DocumentsContracts_Agreements/OH_Redacted_HPA.PDF.

¹⁹¹ See *infra* Section III.

¹⁹² See *infra* Section III.A; Marks v. Bank of America, N.A., No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988, at *5–7 (D. Ariz. June 22, 2010).

¹⁹³ Williams v. Geithner, Civil No. 09-1959-ADM/JJG, 2009 WL 3757380, at *6 (D. Minn. Nov. 9, 2009).

¹⁹⁴ See Marks, 2010 WL 2572988, at *4, *6; McKensi v. Bank of America, N.A., No. 09-11940-JGD, 2010 WL 3781841, at *6 (D. Mass. Sept. 22, 2010).

¹⁹⁵ See *infra* Section III.D.1.

element of a legal defense.¹⁹⁶ If the homeowner presents a legal defense, MHA's role is merely ancillary because any valid defense requires additional facts.¹⁹⁷

The program was designed to provide loan servicers with an incentive to modify loans, not as a tool to be wielded by homeowners to compel the same.¹⁹⁸ The initial hurdle faced by homeowners claiming that MHA entitles them to affirmative relief is simply stating a claim.

A. MHA Provides No Private Right of Action

Homeowners claiming that MHA or the statutes authorizing the program provide homeowners with a cause of action have been consistently defeated at the pleading stage in multiple jurisdictions.¹⁹⁹ An example of the analysis leading to dismissal in those cases is found in the June 22, 2010 Order by the United States District Court in *Marks v. Bank of America, N.A.*²⁰⁰

The facts in *Marks* are straightforward. Plaintiff Andrea Marks applied for a loan modification by submitting the requisite borrower verification forms along with her initial payment under a trial period plan.²⁰¹ Defendant Bank of America received the information and payment, but "was unable to process the payment," never sent the trial period documentation to Marks, foreclosed Marks's mortgage, and filed a forcible entry and detainer action to evict her.²⁰² Marks sued Bank of America in federal court, seeking relief under MHA itself, and for breach of contract as a third-party beneficiary of the Servicer Participation Agreement between the U.S. Treasury and Bank of America.²⁰³

¹⁹⁶ See *infra* Section III.D.2.

¹⁹⁷ See *infra* Section III.D.2.

¹⁹⁸ See *Robinson v. Wells Fargo Bank, N.A.*, No. CV-09-2066-PHX-JAT, 2010 WL 2534192, at *5–7 (D. Ariz. June 18, 2010).

¹⁹⁹ See, e.g., *Vida v. OneWest Bank, F.S.B.*, No. 10-987-AC, 2010 WL 5148473, at *7 (D. Or. Dec. 13, 2010); *Zoher v. Chase Home Fin.*, No. 10-14135-CIV, 2010 WL 4064798, at *5 (S.D. Fla. Oct 15, 2010); *McKensi*, 2010 WL 3781841, at *6; *Wright v. Bank of America, N.A.*, No. CV-10-01723-JF-(HRL), 2010 WL 2889117, at *1 (N.D. Cal. July 22, 2010).

²⁰⁰ 2010 WL 2572988, at *1–7.

²⁰¹ *Id.* at *1.

²⁰² *Id.*

²⁰³ *Id.*

Bank of America moved to dismiss because Marks failed to state a claim upon which relief could be granted because she lacked standing to sue under the Servicer Participation Agreement,²⁰⁴ and because nothing in MHA, HAMP, or EESA authorizes a private right of action.²⁰⁵ The court agreed with Bank of America. After explaining what is necessary to find an express or implied right of action arising out of a federal enactment, it dismissed the case.²⁰⁶

1. *Congress Did Not Expressly Provide for a Private Right of Action Under HAMP*

The court first explained that HAMP was the administrative program authorized by Section 109 of the EESA.²⁰⁷ The court then noted that Freddie Mac was tapped to be the compliance officer for HAMP on behalf of the U.S. Treasury, and that Freddie Mac alone was “charged with conducting independent compliance assessments” and evaluating documents to “confirm adherence . . . to HAMP requirements such as the evaluation of borrower eligibility.”²⁰⁸ This explicit assignment of compliance authority to a single, identified entity, together with the absence of any express language in EESA or the HAMP guidelines meant “Congress intended that a private cause of action was not permitted.”²⁰⁹ Applying a more nuanced analysis, the court also concluded that no implied private cause of action existed either.²¹⁰

2. *Congress Did Not Impliedly Provide for a Private Right of Action Under HAMP*

The court next analyzed whether, despite the absence of express language authorizing a private right of action, Congress nonetheless intended HAMP and EESA to provide for one.²¹¹ Moving through a four-factor test developed by the Supreme Court of the United States in *Cort v.*

²⁰⁴ *Id.* at *1–3.

²⁰⁵ *Id.* at *5–6.

²⁰⁶ *Id.* at *5–7.

²⁰⁷ *Id.* at *5.

²⁰⁸ *Id.* at *6 (internal quotations omitted).

²⁰⁹ *Id.*

²¹⁰ *Id.* at *6–7.

²¹¹ *Id.*

Ash,²¹² the court determined that nothing in either EESA or HAMP was intended to create a private right of action.²¹³

The *Cort* test requires a court to consider first whether the plaintiff is in the class “for whose especial benefit the statute was enacted.”²¹⁴ Although homeowners were certainly expected to benefit from EESA and HAMP, the court found that financial institutions, distressed homeowners, and homeowners “at large” were together the intended class for whom the statute was written.²¹⁵ Because the “economic stimulus effort attempts to promote the welfare” of a diverse group, Congress did not intend an especial benefit solely to homeowners like Marks.²¹⁶ This lack of intended benefit to one subset of a larger group was borne out even more clearly by application of the second *Cort* factor, evidence of congressional intent to create a remedy.

Under *Cort*, the reviewing tribunal was asked to find “whether there was any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one.”²¹⁷ The court found that the stated intent of HAMP was “to effectuate the goals of EESA” by easing “restrictions on lenders and servicers and encourag[ing] loan modifications,” not creating a cause of action.²¹⁸ In addition, “[a]llowing the Plaintiff to assert a private cause of action would contravene clear legislative intent” because that right “lies with the Secretary [of the Treasury] via the Administrative Procedure Act.”²¹⁹ The third and fourth *Cort* factors were equally absent in the scheme of MHA and EESA.²²⁰

²¹² 422 U.S. 66 (1975).

²¹³ *Marks*, 2010 WL 2572988, at *6–7.

²¹⁴ *Id.* at *6 (emphasis omitted) (internal quotations omitted).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* (internal quotations omitted). See also *Thompson v. Thompson*, 484 U.S. 174, 189 (1988) (Scalia, J., concurring). In *Thompson*, Justice Scalia argued that *Cort* had been effectively overruled by subsequent decisions making the second factor, congressional intent, “into the *determinative factor*, with the other three merely indicative of its presence or absence.” *Id.* Although not expressly stated, the *Marks* court takes this approach by analyzing the factors in this fashion. See *Marks*, 2010 WL 2572988, at *6–7 (couching analysis of each factor in terms of congressional intent).

²¹⁸ *Marks*, 2010 WL 2572988, at *7.

²¹⁹ *Id.*

²²⁰ *Id.*

Under the third and fourth *Cort* factors, the court looked to “whether the cause of action is consistent with the underlying purposes of the legislative scheme,” and “whether the cause of action [is] one traditionally relegated to state law.”²²¹ The answer was no to both, where relegating compliance solely to Freddie Mac was evidence that Congress intended enforcement “from the top down,” and where “loan modification requirements[,] . . . [r]eal property interests[,] and contract rights are paradigms of state law concern.”²²²

It is tempting to explain the result in *Marks* as a case where the only blunder was the attorney’s choice of the wrong cause of action. In doing so, the particularly egregious facts take on far less importance, in effect reducing *Marks* to merely a casebook illustration of deficient pleading and the operation of Federal Rule of Civil Procedure 12(b)(6).²²³ Doing this, however, misses the more fundamental undercurrent of that entire decision, which is that MHA does exactly what it says it does, and no more—it provides money to voluntary participants in a U.S. Treasury program.²²⁴ Overlooked by subsequent homeowners is that MHA and specifically HAMP will not support a cause of action, no matter how artfully pleaded, either factually or legally.²²⁵

Various federal courts have cited the order by the *Marks* court for its analysis of the issues above, as well as its analysis of the claim that a homeowner is a third-party beneficiary of the Servicer Participation

²²¹ *Id.* at *6 (internal quotations omitted).

²²² *Id.* at *7.

²²³ *See, e.g.,* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). *Iqbal*’s complaint alleged abuse by prison guards while incarcerated immediately following the September 11, 2001 World Trade Center attacks. *Id.* at 1954–55 (Souter, J., dissenting). Despite the compelling factual basis for his complaint, it was insufficiently pleaded to survive a motion to dismiss based on the claim stated. *Id.* The subject matter in *Marks* is far less fundamental than that in *Iqbal*, and the facts far less harsh. Nonetheless, those facts disclose that she took all appropriate action to effectuate a successful review for HAMP, was successful, was told she qualified, and then was made a party to a foreclosure action and summarily evicted. *Marks*, 2010 WL 2572988, at *1.

²²⁴ *Id.* at *5.

²²⁵ *Id.* at *5–6 (calling a breach of contract claim merely a “disguised” attempt to assert a cause of action on the agreement between Bank of America and the U.S. Treasury). *See also id.* at *7 (dismissing quiet title and declaratory and injunctive relief on the same basis).

Agreement, the second legal theory put forward by the plaintiff in *Marks*.²²⁶

B. Homeowners Are Not Intended Third-Party Beneficiaries of the Servicer Participation Agreement

If a party has no express right of action and no implied cause of action, another method of asserting a claim lies in contract, specifically that a homeowner has standing to sue on the Servicer Participation Agreement as an intended third-party beneficiary.²²⁷ The plaintiff in *Marks* made this claim, which was in turn dismissed.²²⁸ In dispatching Marks's claim, the court rested its decision to dismiss squarely on fundamentals of contract law.²²⁹

After identifying the agreement as one between the U.S. Department of Treasury and Bank of America, the court stated the basic rule that parties not in privity to an agreement may sue on a contract as third-party beneficiaries only if they “show that the contract was made for their direct benefit—that they are intended beneficiaries of the contract.”²³⁰ The court used the framework given in § 302 of the Restatement (Second) of Contracts to illustrate the two requisites to finding that a party is an intended beneficiary of a contract, here the Servicer Participation Agreement.²³¹

The first is where recognition of the right to enforce a promise is appropriate to effectuate the intentions of the parties.²³² On this point, the court relied upon two earlier federal district court decisions which examined the agreements for evidence of intent and held that neither the express “language of the [Servicer Participation Agreement],”²³³ nor the “intent” of Servicer Participation Agreement can be interpreted to “grant

²²⁶ See, e.g., *Zoher v. Chase Home Fin.*, No. 10-14135-CIV, 2010 WL 4064798, at *5 (S.D. Fla. Oct 15, 2010); *McKensi v. Bank of America, N.A.*, No. 09-11940-JGD, 2010 WL 3781841, at *6 (D. Mass. Sept. 22, 2010); *Wright v. Bank of America, N.A.*, No. CV-10-01723-JF-(HRL), 2010 WL 2889117, at *1 (N.D. Cal. July 22, 2010).

²²⁷ *Marks*, 2010 WL 2572988, at *2.

²²⁸ *Id.*

²²⁹ *Id.* at *3.

²³⁰ *Id.*

²³¹ *Id.* (referring to the Servicer Participation Agreement as the “HAMP Agreement”).

²³² *Id.*

²³³ *Id.* at *4.

borrowers a right to enforce the HAMP contract between the government and loan servicer” because neither intended that outcome.²³⁴

Despite having found the first requirement lacking, the court continued to examine the second requisite—circumstantial evidence that the parties to the agreement intended to give the right to enforce the agreement to the putative third-party beneficiary.²³⁵ The court clarified that there is a strong presumption that parties benefited by government contracts were incidental beneficiaries.²³⁶ The Servicer Participation Agreement was a government contract, and nothing in that agreement evidenced intent to grant a homeowner the right to enforce.²³⁷ Instead, Freddie Mac was specifically designated as the compliance officer, not a homeowner like the Marks.²³⁸ In all, no facts evidenced any intent by Bank of America or the U.S. Treasury to make Marks, or any other homeowner, a third-party beneficiary of the Servicer Participation Agreement.²³⁹

The last portion of the analysis underscored the real difficulty with any homeowner’s claim that the homeowner can obtain a loan modification by enforcing the Servicer Participation Agreement as a third-party beneficiary—the Servicer Participation Agreement does not require any party to perform a loan modification.²⁴⁰ Therefore, no homeowner would “be reasonable in relying on an agreement between a participating servicer and the U.S. Department of Treasury as manifesting an intention to confer a right on the borrower”²⁴¹ The end result is that no homeowner has a cause of action on a Servicer Participation Agreement, despite the fact that the “HAMP Program undoubtedly has a goal of assisting homeowners”²⁴² Although this may seem a harsh result, it is entirely consistent with the overall permissive and voluntary nature of the process leading up to a permanent loan modification.

²³⁴ *Id.* (emphasis omitted) (internal quotations omitted).

²³⁵ *Id.* at *3–4.

²³⁶ *Id.*

²³⁷ *Id.* at *7.

²³⁸ *Id.*

²³⁹ *Id.* at *5–7.

²⁴⁰ *Id.* at *3 (noting that neither the U.S. Treasury nor Fannie Mae, who has limited rights under Servicer Participation Agreements, can “require that the participating servicer modify eligible loans”).

²⁴¹ *Id.*

²⁴² *Id.* at *3–4 (internal quotations omitted).

Bank of America was under no legal obligation to enter into an agreement with the U.S. Treasury.²⁴³ Once it entered into that agreement, it was under no obligation to do anything but consider Marks for participation and solicit the same.²⁴⁴ Once solicited, Bank of America did not have to offer a modification if it could not get her payments to 31% or less using the modification waterfall.²⁴⁵ Further, even if Bank of America had done so, and even if it determined that a modification would produce a positive NPV, the investor could still decline to make the offer.²⁴⁶ The question *Marks* answered was if a homeowner gets past all of the foregoing hurdles and is still denied a loan modification, despite what the language of the MHA Handbook arguably states as an imperative (“must offer the loan modification”),²⁴⁷ does the homeowner have a cause of action?²⁴⁸ The answer was unequivocally no.²⁴⁹

If borrowers have no private right of action under MHA and are barred by the application of third-party beneficiary jurisprudence from asserting a contract claim on the PSA, does the goal of assisting homeowners implicate the United States Constitution’s Fifth Amendment due process guarantee when a loan modification is not forthcoming? Although this is the next logical legal step following the facts and reasoning in *Marks*, the federal district court in *Williams v. Geithner*²⁵⁰ balked at the notion of a protected property interest in loan modifications under MHA.²⁵¹

²⁴³ See 12 U.S.C. § 1715z-23(b)(1) (Supp. IV 2006) (“[P]articipation . . . is voluntary.”); CHASE SERVICER PARTICIPATION AGREEMENT, *supra* note 89, at 1 (“Servicer wishes to participate.”).

²⁴⁴ MHA HANDBOOK, *supra* note 94, at 46.

²⁴⁵ *Id.* at 65.

²⁴⁶ *Id.* at 17 (allowing investor participation in HAMP subject to limitations and restrictions).

²⁴⁷ *Id.* at 73.

²⁴⁸ *Marks*, 2010 WL 2572988, at *5–7.

²⁴⁹ *Id.*

²⁵⁰ Civil No. 09-1959-ADM/JJG, 2009 WL 3757380 (D. Minn. Nov. 9, 2009).

²⁵¹ *Id.* at *6.

C. Homeowners Do Not Have a Protected Property Interest in a Loan Modification

The precise issue considered in *Williams* was whether the failure by defendants²⁵² to notify plaintiffs²⁵³ of a loan modification denial, and the resulting missed opportunity for an administrative appeal, was a deprivation of a protected property interest without due process of law.²⁵⁴ The short answer was no.²⁵⁵

The court began its analysis by delineating the plaintiff's burden, which was to "show a deprivation of a protected . . . property interest," or entitlement, such that procedural due process was implicated.²⁵⁶ To do so, the court relied upon the definition of "entitlement" from *Board of Regents of State Colleges v. Roth*.²⁵⁷

Under *Roth*, a protected property interest does not arise based on the subjective "unilateral expectation" by one claiming that interest, but from "existing rules and or understandings that stem from an independent source" sufficient to support a "legitimate claim of entitlement."²⁵⁸ Due process in the form of hearing and notice was implicated, according to the Supreme Court in *Roth*, because that entitlement was relied upon and so

²⁵² Defendants included Timothy Geithner, in his official capacity as Secretary of the U.S. Treasury, the FHFA, Fannie Mae, Freddie Mac, and three loan servicers of Williams' and three other plaintiffs' loans. *Id.* at caption, *1.

²⁵³ See *id.* *Williams* was a class action brought by four putative class representatives who sought to enjoin the prosecution of all foreclosures in Minnesota. *Id.* at *1, *4. The memorandum opinion was issued along with an order denying plaintiffs' request for an injunction. *Id.* at *7.

²⁵⁴ *Id.* at *4.

²⁵⁵ *Id.* at *7.

²⁵⁶ *Id.* at *5.

²⁵⁷ 408 U.S. 564 (1972). *Roth* involved a due process claim based on the Fourteenth Amendment involving a state university professor and the university. *Id.* at 566–69. The Court held that prior to the deprivation of a protected property interest, the person with that interest must be afforded notice and the opportunity for "some kind of prior hearing." *Id.* at 569–70. *Williams* involved a claim against the federal government, not the state of Minnesota, implicating the Fifth rather than the Fourteenth Amendment as in *Roth*. See *Williams*, 2009 WL 3757380, at *4–5.

²⁵⁸ *Roth*, 408 U.S. at 577.

necessary to the individual claiming the entitlement that the “reliance . . . must not be arbitrarily undermined.”²⁵⁹

To the extent that the source of an entitlement is external,²⁶⁰ an examination of the source of the claimed entitlement is similar to the examination of a contract in third-party beneficiary claims, like *Marks*, to determine if the parties to that contract intended to provide for suit by the beneficiary.²⁶¹ However, unlike the inquiry in contract claim cases, which involves the expectations of all of the parties including the third-party beneficiary,²⁶² the Supreme Court in *Roth* pointed out that whether the interest arises is determined purely by examining the sources themselves, and does not involve an inquiry into the expectations of the claimant.²⁶³ Further, those sources give rise to a protected property interest only where they use mandatory language requiring the official to act in a certain way regarding the claimed entitlement.²⁶⁴

The plaintiffs in *Williams* claimed that EESA, the Treasury Guidelines, and the Servicer Participation Agreements all created an entitlement to a loan modification.²⁶⁵ Thus, denial of that loan modification without notice and opportunity to be heard was a due process violation.²⁶⁶ As was the case in *Marks*, the ultimate demise of the claim in *Williams* was due to the fact that, despite some mandatory language in the sources put forth by plaintiffs, both Timothy Geithner in his official capacity as Secretary of the Treasury and the loan servicers had discretion not to approve a loan modification.²⁶⁷ By granting this discretion, Congress did not intend to

²⁵⁹ *Id.* The *Roth* Court provided several examples of daily necessity and reliance when this type of arbitrary action would be prohibited, including denial of welfare benefits, dismissal of a tenured professor at a state university, and the board of tax appeals' denial of an application by an attorney to practice before the court. *Id.* at 576–78.

²⁶⁰ *Id.* Each example given relies upon some external source for the benefit claimed. *Id.*

²⁶¹ Compare *Marks*, 2010 WL 2572988, at *3, with *Roth*, 408 U.S. at 576–78.

²⁶² *Marks*, 2010 WL 2572988, at *3.

²⁶³ *Roth*, 408 U.S. at 576–78. A legitimate claim is not created by a “unilateral expectation.” *Id.*

²⁶⁴ *Williams v. Geithner*, Civil No. 09-1959-ADM/JJG, 2009 WL 3757380, at *5 (D. Minn. Nov. 9, 2009).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at *4–5.

²⁶⁷ *Id.* at *6–7. Further, 12 U.S.C. § 5219(c) provides that “the Secretary shall consent, where appropriate, and considering net present value to the taxpayer, to reasonable requests

(continued)

create a protected property interest, and absent such an interest, notice, and opportunity for a hearing on denial were not required.²⁶⁸

Between the reasoned applications of law in *Williams* and in *Marks*, the unequivocal outcomes should have removed any doubt concerning the position that MHA creates or modifies a party's substantive rights. However, nested in the context of a foreclosure action, the same legal theories that supposedly gave rise to a claim have also been repurposed as a defense.

D. MHA Is Not a Defense in a Foreclosure Action

The outcome of *Marks* and *Williams*, as well as other cases using the same legal analysis, strongly suggests that any claim founded on a right of action, entitlement, or intended third-party beneficiary status from MHA's sources of authority²⁶⁹ is destined for an early demise.²⁷⁰ Notwithstanding the fact that the sources to which a court will look are identical in all claims involving entitlement,²⁷¹ homeowners and the defense bar continue to press the claim that HAMP creates some substantive rights in

for loss mitigation." 12 U.S.C. § 5219(c) (Supp. IV 2006). Although shall is mandatory, the statutory language is qualified and offers substantial discretion. *Williams*, 2009 WL 3757380, at *6–7. Likewise, servicers have the ability to adjust some variables on the NPV model. *Id.* In addition, participation in the first instance is voluntary, and while Congress could have made it mandatory, it did not do so. *Id.* at *7. Nothing presented in *Williams* presents evidence of an intent to create an entitlement. *Id.* at *4–7. *See also* MHA HANDBOOK, *supra* note 94, at 17 (showing that servicer does not have to modify when an investor declines to modify an otherwise eligible loan).

²⁶⁸ *Id.* at *6–7.

²⁶⁹ *See Marks*, 2010 WL 2572988, at *5–6. Those sources are EESA, the MHA Handbook, the Servicer Participation Agreement, and Freddie and Fannie's Servicing Guides. *Id.*

²⁷⁰ *See Marks*, 2010 WL 2572988, at *4, *6; *McKensi v. Bank of America, N.A.*, No. 09-11940-JGD, 2010 WL 3781841, at *6 (D. Mass. Sept. 22, 2010).

²⁷¹ The Servicer Participation Agreement is identical for all servicers. *See CHASE SERVICER PARTICIPATION AGREEMENT*, *supra* note 89; *BANK OF AMERICA SERVICER PARTICIPATION AGREEMENT*, *supra* note 124; 12 U.S.C. § 5219(c). These three and the MHA Handbook are equally uniform. *See* 12 U.S.C. § 5219(c) (Supp. IV 2006); MHA HANDBOOK, *supra* note 94.

homeowners.²⁷² However, an analysis of those claims as defenses shows that they are equally doomed to fail.

1. *HAMP Is Not an Affirmative Defense*

The most basic definition of an affirmative defense is one that must be set forth in a pleading because not doing so fails to give the plaintiff notice of the defense and the grounds upon which it rests.²⁷³ The specific language used by Federal Rule of Civil Procedure 8 states that “[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense.”²⁷⁴ Wright and Miller clarify:

Generally speaking, the rule’s reference to “an avoidance or affirmative defense” encompasses two types of defensive allegations: those that admit the allegations of the complaint but suggest some other reason why there is no right of recovery, and those that concern allegations outside of the plaintiff’s prima facie case that the defendant therefore cannot raise by a simple denial in the answer.²⁷⁵

Basic examples of the “confession and avoidance”²⁷⁶ concept of defenses convey the core logic of those defenses better than a definition. Some examples include defenses such as “breach of warranty as a justification for non-payment” (contract-breach claim) and a defense alleging that “the defendant’s conduct was justified” in light of avoiding a greater hazard (torts-negligence claim).²⁷⁷ However, this type of confession and avoidance does not lead to the conclusion that MHA or any component thereof provides a defense that must be set forth affirmatively.

²⁷² See, e.g., Peggy P. Lee, Patrick W. Skilliter & Melissa C. Benson, *Problems with Expectations, Not HAMP Itself*, OHIO LAWYER, Nov./Dec. 2010, at 26 (acknowledging that *Williams* “was unfavorable to homeowners,” but stating that entitlement claims may yet prevail as “Ohio appellate courts have yet to weigh in on the issue, and several HAMP cases are pending in Ohio courts”).

²⁷³ See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1271 (3d ed. 2004).

²⁷⁴ Fed. R. Civ. P. 8(c)(1).

²⁷⁵ WRIGHT & MILLER, *supra* note 273.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

A foreclosing plaintiff's claim includes allegations that there is a valid debt instrument, a valid security instrument, and a default for non-payment of the obligation secured by the mortgage or deed of trust.²⁷⁸ Because of this default, the plaintiff has the right to cut-off (foreclose) the defendant/homeowner's right to redeem the property at some point after judgment by paying the judgment in full.²⁷⁹ With MHA claims repurposed as defenses, the homeowners "confession and avoidance" would require admission of all of the elements above, followed by a claim that the loan must be modified. The claim that a loan must be modified has been explicitly rejected by courts adjudicating claims of entitlement implicating due process,²⁸⁰ and claims asserting intended third-party beneficiary status were adjudged invalid.²⁸¹

With non-payment for breach of warranty or the greater hazard examples given above, there is a causal or explanatory aspect to those defenses²⁸² that is wholly lacking in an MHA defense. A defense stating that default occurred because a loan must be modified or refinanced is a nonsequitur absent some duty to modify the loan prior to default. The idea that MHA somehow acts as a legal or equitable defense to the elements of a foreclosing plaintiff's claim is hindered by an even more fundamental flaw—refinancing or modification necessarily admits two of the three elements of a foreclosing plaintiff's claim.

²⁷⁸ See, e.g., 18 AM. JUR. PLEADING AND PRACTICE FORMS, MORTGAGES § 95 (2005).

²⁷⁹ 55 AM. JUR. 2D. *Mortgages* §§ 394, 573 (2009).

²⁸⁰ *Williams v. Geithner*, Civil No. 09-1959-ADM/JJG, 2009 WL 3757380, at *7 (D. Minn. Nov. 9, 2009).

²⁸¹ *Marks v. Bank of America, N.A.*, No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988, at *2 (D. Ariz. June 22, 2010).

²⁸² See, e.g., *True Drilling Co. v. Donovan*, 703 F.2d 1087, 1090 (9th Cir. 1983) (setting forth the elements of a greater hazard defense to non-compliance with OSHA regulations); *Carter v. Goodman Grp. Music Publishers*, 848 F. Supp. 438, 444–45 (S.D.N.Y. 1994) (raising breach of warranty that plaintiff owned the rights to musical compositions as a defense to non-payment of royalties when defendant learned that plaintiff did not own those rights).

2. *HAMP Is Not a Defense to Any Element of a Foreclosure Claim*

A modification under HAMP acts to amend one or more of the terms of the debt instrument and the security instrument.²⁸³ In a refinance under HARP, the refinancing lender pays off the prior lender at the request of the homeowner.²⁸⁴ In both cases, the validity of the underlying debt is affirmed—by modification and continuance as amended in the former, and by acknowledgment through payment and extinguishment in the latter. Neither modification nor refinancing, though, has any bearing on the non-payment and default condition of the debt instrument.²⁸⁵ A defense that simply admits the validity of the claim, without more, is not a defense.²⁸⁶

All of this raises a fair question: If MHA was intended to help three to four million homeowners, but provides no judicial right to help, as either a sword or a shield, who was it really intended to help? Notwithstanding the press releases, news articles, and claims made by homeowners in cases involving MHA, the short answer is primarily loan servicers, investors, and

²⁸³ See, e.g., FANNIE MAE/FREDDIE MAC, MULTISTATE HOME AFFORDABLE MODIFICATION AGREEMENT 2 (2010), available at <https://www.efanniemae.com/sf/formsdocs/documents/specialpurpose/pdf/3157.pdf>.

²⁸⁴ See MAKINGHOMEAFFORDABLE.GOV, HOME AFFORDABLE REFINANCE PROGRAM 1 (2010), available at <http://www.makinghomeaffordable.gov/spanish/Documents/HARP%20Fact%20Sheet%20English%20Spanish.pdf> (noting that homeowners must contact servicer to apply).

²⁸⁵ But see *Garcia v. Ocwen Servicing, Inc.*, No. C-10-09290-PVT, 2010 WL 1881098, at *1–4 (N.D. Cal. May 10, 2010). *Garcia* brought affirmative claims for negligent misrepresentation and negligence arising out of her allegations that her loan servicer solicited her for HAMP, then repeatedly lost her documentation. *Id.* at *1–2. These complaints are common. See *Lee, Skilliter & Benson*, *supra* note 272, at 26. Although the court dismissed *Garcia*'s negligent misrepresentation claim, it allowed her negligence claim to go forward. *Garcia*, 2010 WL 1881098, at *4. Another common complaint is that servicers induce homeowners to default as a prerequisite to a HAMP modification to generate fees. See, e.g., Complaint at 12, *Forster v. Wells Fargo*, No. 2010-CV-05321 (N.D. Cal. filed Nov. 23, 2010) (unjust enrichment claim). The viability of *Garcia*'s claim together with other theories arising out of some facet of MHA thus suggests that any action by a servicer related to HAMP may also provide the factual basis for a defense to default. However, there is nothing inherent in MHA that compels this result; the same representation could be made about a private modification, or even promises to compromise or settle a claim.

²⁸⁶ See *WRIGHT & MILLER*, *supra* note 273.

only incidentally homeowners.²⁸⁷ If that is the case, then an equally fair question is whether the cost of MHA to loan servicers, homeowners, and investors is justified by the results. The answer is yes for HARP, and no for HAMP.

E. Helping Servicers, Homeowners, and Investors

Under MHA's current incarnation, only HARP appears to be successful, despite total refinance numbers well below those initially projected.²⁸⁸ As formulated, it costs no money to loan servicers where the costs of HARP are born by the homeowner in the form of a slightly increased Private Mortgage Insurance (PMI) premium to cover the spread between permissible LTV ratios and the excess created by the negative equity condition of the home.²⁸⁹ HARP benefits homeowners in that PMI costs are spread over the life of the new loan,²⁹⁰ interest rates are historically low,²⁹¹ and there is the possibility of eventually recapturing lost equity if housing prices rebound.

HARP has the potential to penalize investors when the loan is refinanced. Investors in the first loan count on decades of returns from interest payments, which early satisfaction of the debt cuts off.²⁹² However, this penalty has to be weighed against the likelihood that without a refinance and payoff, default and foreclosure will result. In that scenario, foreclosure is followed by a judicial sale, and interest payments are still cut off well before the full life of the loan. Both foreclosure and HARP may

²⁸⁷ See *Williams v. Geithner*, Civil No. 09-1959-ADM/JJG, 2009 WL 3757380, at *6 n.5 (D. Minn. Nov. 9, 2009) (quoting portions of the congressional record where Ohio Representative Dennis Kucinich and Texas Representative Sheila Jackson Lee expressed dismay at the non-mandatory language in EESA and question whether it was "tru[ly] inten[ded] . . . to bail out 'Main Street'").

²⁸⁸ See FED. HOUS. FIN. AGENCY, FORECLOSURE PREVENTION & REFINANCE REPORT 5 (2010), available at http://www.fhfa.gov/webfiles/19665/Nov-10_fpr_draftv2.pdf. As of November 2010, there have been 25,251 HARP refinances where the LTV was greater than 105%. *Id.* This is 0.5% of the projected 5 million loans that were to be modified when the program was announced. Compare *id.*, with Press Release, *supra* note 19.

²⁸⁹ *Contra* MORTG. INS. COS. OF AM., *supra* note 54, at 1–2 (noting the costs of PMI paid by homeowner).

²⁹⁰ See *id.*

²⁹¹ FORECLOSURE PREVENTION & REFINANCE REPORT, *supra* note 288, at 4.

²⁹² See MAYER, PENCE & SHERLUND, *supra* note 49, at 13; VICKERY & WRIGHT, *supra* note 77, at 3.

produce a loss of future income to the initial investor. For the subsequent investor who takes the right to interest payments on a successfully refinanced loan however, HARP is a gain over a foreclosure scenario.

As between two loan investors for the same property, one foreclosed and one refinanced, the overall return of a refinance is likely higher than the return in a foreclosure. Even with a loan guarantee, the foreclosed property will only return what was received prior to the foreclosure, plus enough to guard against a loss, not the full gain that would have been received.²⁹³ With a performing refinanced loan, the investor is better off because in addition to recouping the payoff amount (principal), the investor is entitled to receive the full amount of interest as well.²⁹⁴ When considered as a broad class, then, investors fare better under HARP than they would if the loan were not refinanced. Based on the foregoing, HARP provides an attractive, if underutilized, solution with positive benefits for servicers, homeowners, and investors. HAMP is a different story.

As formulated, it costs significant money to loan servicers merely to comply with the ever-changing and increasingly voluminous guidance put forth by the U.S. Treasury.²⁹⁵ HAMP imposes significant transactional costs on loan servicers to evaluate loans,²⁹⁶ solicit borrowers, and then comb through applications, all with a less than one in three chance of success.²⁹⁷ Of the small fraction of loans that are modified, at least one-third will fail.²⁹⁸ The result of that failure is foreclosure, and loan servicers, not investors, are generally contractually bound to advance funds for some if not all of the costs of prosecuting the foreclosure action.²⁹⁹ The foregoing not only makes the time and expense of procuring a HAMP

²⁹³ See FANNIE MAE, *supra* note 62, at 7–8 (guarantee to pay only principal due to investors and limited amount of interest).

²⁹⁴ See, e.g., MULTISTATE NOTE, *supra* note 158, at 1 (noting that the borrower promises to pay principal and interest).

²⁹⁵ Compare MHA HANDBOOK, *supra* note 94 (containing 170 pages of guidance), with SUPPLEMENTAL DIRECTIVE 09-01, *supra* note 119 (containing thirty-eight pages).

²⁹⁶ See, e.g., SIGTARP, *supra* note 78, at 25–26 (detailing increase in staffing necessary for program implementation).

²⁹⁷ SERVICER PERFORMANCE REPORT, *supra* note 97, at 6.

²⁹⁸ *Id.*

²⁹⁹ See, e.g., SERVICING AGREEMENT, *supra* note 163, at Article 13.4.1 (noting that costs are to be advanced by servicer), Article 13.1.2 (noting that costs are recoverable to the extent they are covered by insurance, but fees in excess of those amounts are not reimbursable).

modification wasted for approximately one million homeowners and their loan servicers³⁰⁰ but also results in a what is essentially a high-cost and futile delay mechanism.³⁰¹

Homeowners may benefit from a modification over the short term, as it allows them to avoid foreclosure as well as retain their primary residence.³⁰² In addition, lower interest rates mean the possibility of more money each month going toward principal, which translates into a lower cost for equity. However, HAMP does nothing to solve the underlying cause for modification requests, high debt to income ratios caused by underemployment or unemployment.³⁰³ Further, if a homeowner has already incurred a substantial arrearage that is to be added on to the principle balance, the homeowner may face a longer loan term or a balloon payment to satisfy the amplified debt, because principal forgiveness is neither required³⁰⁴ nor favored³⁰⁵ under HAMP. Both are impediments to recapturing lost home equity if housing prices rebound or if the homeowner's situation changes so that a sale is desirable or necessary. HAMP just makes the loan bigger, longer, or both, which in turn exacerbates the core issue—high debt to income ratio.

As to investors, HAMP has the potential to reduce or eliminate the amount received in interest payments for some investors.³⁰⁶ A modification avoids the issue inherent in HARP whereby refinancing extinguishes the income stream for an entire class of investors; if interest rates are reduced in the modification, only some investors will be

³⁰⁰ *Id.* See also MHA HANDBOOK, *supra* note 94, at 84 (noting that previous default under HAMP renders a loan ineligible for further HAMP modification, making a failed modification the first and last time a homeowner can participate in the program).

³⁰¹ See SIGTARP, *supra* note 78, at 29–31 (noting that borrowers who make trial plan payments but never convert to permanent modification merely delay foreclosure, even at their own expense by making trial plan payments that could be used to secure more affordable housing).

³⁰² *But see id.*

³⁰³ *Id.* at 15–16.

³⁰⁴ MHA HANDBOOK, *supra* note 94, at 67.

³⁰⁵ SIGTARP, *supra* note 78, at 17 (noting that testimony of Timothy Geithner indicated that principal reduction was not favored, because principal reduction was expensive for taxpayers, harder to justify, perceived as unfair by those who paid their mortgages, and presented a moral hazard).

³⁰⁶ See Joffe-Walt & Kestenbaum, *supra* note 1.

negatively affected.³⁰⁷ As long as some interest is being generated, those investors entitled to receive payments first will continue to benefit from the modified loan. Considered as a broad class, investors may fare better under HAMP than in the event of default followed by foreclosure where all payments will certainly be extinguished. Although the high re-default numbers indicate that HAMP is merely delaying what is inevitable for some loans,³⁰⁸ the time-value of money principle³⁰⁹ and common sense make that delay justifiable for investors where any funds received are better than no funds at all. For those loans that do continue to perform, HAMP is undeniably a more attractive option than extinguishing any possibility of future payments through foreclosure and sale.

Finally, in terms of litigation, the cost of HAMP cannot be discounted. Whether defending a claim,³¹⁰ or attempting to prosecute an action in which HAMP has been raised as a defense, the additional cost created by the program negatively affects all parties, especially when increased costs incurred during a delay are later taxed to the homeowner in the form of a deficiency judgment.³¹¹

³⁰⁷ See MAYER, PENCE & SHERLUND, *supra* note 49, at 9.

³⁰⁸ SIGTARP, *supra* note 78, at 30–31.

³⁰⁹ See 44B AM. JUR. 2D *Interest and Usury* § 1 (2010). The time value of money represents the cost of giving another the use of the money loaned, or simply interest. *Id.* With RMBS, the time value of money is the cost to purchase the certificate giving the right to payment divided into the amount received on that certificate, expressed as a percentage (interest). *Id.* For any given certificate, whether the investor realizes a gain or loss will depend upon how much the investor paid and how long the investor received payments, but in any case, a delay during which time some payments were received would reduce a loss or increase a gain. *Id.*

³¹⁰ See *Williams v. Geithner*, Civil No. 09-1959-ADM/JJG, 2009 WL 3757380, at caption, *1 (D. Minn. Nov. 9, 2009). Twenty-five attorneys were counsel of record in *Williams*. *Id.* Although that case was somewhat exceptional in terms of the number, stature, and scope of claims, the number of cases citing *Williams* indicates that lenders continue to incur needless costs to defend against meritless claims.

³¹¹ See, e.g., FREDDIE MAC, OHIO SINGLE FAMILY UNIFORM INSTRUMENT 3 (2007), available at <http://www.freddiemac.com/uniform/unifsecurity.html> (select “Master Mortgage Form,” under “Ohio,” under “Master/Short Forms”) (noting that borrower agrees to pay escrowed items). These include property taxes, costs of home inspection, and preservation after default and hazard insurance—all costs which continue to accrue while litigation on HAMP takes place. *Id.* at 5–8.

The better solution, if the Department of Treasury is to spend money on assisting homeowners, is to forego the expense of evaluation by the loan servicer, and simply pay homeowners' loans and associated costs for a limited time while the homeowner attempts to find work if unemployed.³¹² Other proposed solutions include putting that same money toward the principal and encouraging non-judicial foreclosure alternatives for those who cannot afford to stay in the property.³¹³ Those are some of the proposed solutions in Ohio and other states receiving Hardest Hit funds under EESA and Troubled Asset Relief Program, solutions that seem to avoid the core problem of high transactional costs associated with HAMP.³¹⁴

Whether implementation of the Hardest Hit Fund gives rise to the same claims of entitlement remains to be seen. However, if it does, the result reached by courts interpreting claims of entitlement should be the same as previous cases under MHA due to the shared identity of the primary documents between both programs.³¹⁵

IV. CONCLUSION

In the final analysis, MHA confers upon homeowners no substantive rights. The program was created to incentivize, but not mandate, loan refinance and modification. The fact that MHA's stated goal was to help homeowners likely fostered the idea that homeowners had a protected property interest in a loan modification, that they were intended third-party beneficiaries of various agreements, or that EESA created a right of action against a non-compliant loan servicer. None of these claims are viable, nor do these legal arguments lend themselves to defenses in the context of a foreclosure action. At best, MHA provides the factual backdrop that may allow another claim or defense to survive a motion to dismiss as plausible, but such a claim is not inherent in or unique to HAMP.

Of the two main programs under MHA, HARP appears to have fallen short on its numeric goals. It has, however, provided an effective method to take advantage of lower interest rates while avoiding litigation and placing transactional costs on the party that should bear them—the homeowner, rather than the investors or servicers.

³¹² See OHIO HOUS. FIN. AGENCY, *supra* note 188.

³¹³ See *id.*

³¹⁴ See *id.*

³¹⁵ *Supra* text accompanying notes 189 and 190.

On the other hand, HAMP suffers from a dearth of successes. Unless and until the root cause of loan delinquencies—high debt to income ratios caused by underemployment or unemployment—is addressed, the transactional costs associated with HAMP make it unnecessarily expensive for both loan servicers and homeowners. The best available solution is to dedicate those resources, in a simple and transparent fashion, to reducing the overall debt ratio of homeowners while incentivizing non-judicial foreclosure solutions.