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The Home Affordable Modification Program: The Federal Circuit Court Split Leaves Mortgagors’ Rights to Pursue State Law Claims Unclear

I. INTRODUCTION

For most people, the American Dream includes home ownership. Due to the recent financial crisis, many Americans have found it much harder to achieve this goal. With home foreclosures on the rise and many Americans struggling to pay their mortgages, the federal government created the Home Affordable Modification Program (“HAMP”) in 2009 to slow foreclosures and help keep Americans in their homes.\(^1\) Unfortunately, problems with interpretation and implementation of HAMP have led to a significant amount of litigation.\(^2\)

One of the interpretative issues in HAMP is whether mortgagors should be permitted to bring state law claims against lenders and loan servicers for actions relating to HAMP, a federal program. Circuits are currently split on this issue, as some courts have held that HAMP creates no private cause of action and therefore precludes state law claims.\(^3\) Other courts have allowed state law claims arising under facts related to HAMP.\(^4\) This Note argues that mortgagors should be permitted to bring certain state law claims in relation to HAMP because doing so would help ensure that mortgage servicers comply with HAMP directives and that mortgagors are protected against deceptive practices in connection with HAMP modifications.

This Note proceeds in four parts. Part II explains why HAMP

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2. Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 559–60 n.4 (7th Cir. 2012) (noting that the court had analyzed over eighty federal court cases where mortgagors brought HAMP-related claims against their mortgage servicers).
3. *See id.* at 555 (holding that although the allegation arose from action relating to HAMP, mortgagors were not barred from bringing adequately pled state law claims).
4. *See Miller v. Chase Home Fin., LLC*, 677 F.3d 1113 (11th Cir. 2012) (holding that mortgagors were barred from bringing claims because the claims were based on alleged breaches of HAMP, a federal program which afford no private right of action).
was instituted and the process it sets forth for a mortgagor to obtain a permanent modification of a home mortgage. Part III discusses the different approaches federal circuit courts have taken in analyzing whether HAMP precludes state law claims. Part IV discusses why circuit courts allowing state law claims relating to HAMP set a better precedent for mortgagors seeking to enforce their servicer’s HAMP obligations. Part V concludes by discussing the ramifications of precluding state law claims and briefly recounts the claims that have been successfully asserted in federal courts.

II. CREATION OF THE HOME AFFORDABLE MODIFICATION PROGRAM AND THE MODIFICATION PROCESS

A. Purpose and Participation by Loan Servicers in HAMP

In response to the 2008 financial crisis, Congress enacted the Emergency Economic Stabilization Act (“EESA”), which empowered the Secretary of the Treasury (the “Treasury”) to establish certain programs “to restore liquidity and stability” in the U.S. financial system. A major portion of EESA included the Troubled Asset Relief Program (“TARP”), which gave the Treasury authority to inject capital into financial institutions by purchasing preferred stock in them, and to implement a plan to help financially distressed homeowners and minimize foreclosures. As part of this effort, the Treasury instituted HAMP in 2009 to help struggling mortgagors and slow down the pace of foreclosures. HAMP attempts to incentivize mortgage servicers to offer aid to troubled mortgagors by refinancing mortgages with more favorable interest rates and lower monthly payments. The Treasury

5. See infra Part II.
6. See infra Part III.
7. See infra Part IV.
8. See infra Part V.
13. Federally sponsored entities Fannie Mae and Freddie Mac are required to participate in HAMP.
set aside $50 billion to pay mortgage servicers who completed modifications under HAMP. Of these funds, the Treasury has only paid out $2.5 billion through September 2014.

Loan servicers participate in HAMP through written Service Participation Agreements (“SPAs”) with the Treasury. The terms of these SPAs require participating servicers to identify potentially eligible first lien mortgages for possible modification in an effort to make loan payments more affordable through “interest rate reduction, term extension, principal forbearance, and principal forgiveness.” The participating mortgage servicers receive between $800 and $2,000 from the Treasury for every permanent modification entered into, as well as other incentives.

B. Mortgagor Requirements for HAMP Eligibility

A mortgagor is eligible for HAMP if he meets certain basic requirements detailed in the HAMP guidelines. To be eligible for HAMP, the following requirements must be met: (1) the mortgage loan must be a first lien mortgage originated on or before January 1, 2009; (2) the mortgagor must be able to show documented financial hardship and that he does not have sufficient liquid assets to make the current monthly mortgage payments; (3) the current unpaid principal balance must be below the program limit of $729,750 for a single family home; (4) the mortgagor must have submitted an Initial Package requesting a modification on or before December 31, 2015; (5) and the

16. HAMP HANDBOOK, supra note 13, at 23.
17. Id. at 15.
18. Id. at 144. Other monetary incentives are detailed in the HAMP Handbook. Id. at 143–45.
19. Id. at 72.
20. Id.
21. Id.
22. Id.
Modification Effective Date is on or before September 30, 2016.\textsuperscript{23} In addition to these requirements, default on the mortgage must be reasonably foreseeable, the mortgage must be delinquent, or the mortgage must be in foreclosure.\textsuperscript{24} Regardless of the status, the mortgage must be secured by a single family property which is occupied by the mortgagor as his primary place of residence.\textsuperscript{25} Furthermore, the mortgagor’s monthly payment prior to the modification must have been more than 31\% of his verified gross monthly income.\textsuperscript{26} Finally, the loan must not have been previously modified through the HAMP program.\textsuperscript{27}

C. The HAMP Modification Process

If a mortgagor meets the program requirements, the loan servicer will calculate a modification payment amount using a “waterfall” approach.\textsuperscript{28} This approach requires the loan servicer to apply changes to the repayment requirements in a specific order until the modified payment is as close as possible to 31\% of the mortgagor’s gross monthly income.\textsuperscript{29} To reach this 31\%, first the loan is capitalized; second, the interest rate is reduced; third, the loan term is extended; and fourth, if necessary, the loan is placed into principal forbearance.\textsuperscript{30}

Once a loan has met the threshold requirements and a modified payment amount has been determined through the waterfall method, the loan servicer will perform a net present value (“NPV”) test.\textsuperscript{31} This test compares the NPV of the mortgage to the NPV of the same mortgage if it were modified under HAMP.\textsuperscript{32} If the NPV with a modification is greater than the NPV without a modification, the result is deemed...

\textsuperscript{23} The Initial Package is the required forms that must be sent to the loan servicers, and includes: a Request for Mortgage Assistance form; IRS form 4506-T or 4506T-EZ or the mortgagor’s most recent tax return; evidence of income; and Dodd-Frank certification. Id. at 83.

\textsuperscript{24} Id. at 74.

\textsuperscript{25} Id. at 73.

\textsuperscript{26} Id.

\textsuperscript{27} Id.

\textsuperscript{28} Id. at 111.

\textsuperscript{29} Id.

\textsuperscript{30} Id. at 111–12. Capitalization is the addition of accrued interest and other advances to the principal of the loan. Id. Principal forbearance is a deferral of a portion of the principal until the end of loan. Id.

\textsuperscript{31} Id. at 122.

\textsuperscript{32} Id.
“positive.” Conversely, if the NPV with a modification is less than the NPV without a modification, the result is deemed “negative.” A loan that has a positive NPV must be offered a Trial Plan Period (‘TPP’). A loan that has a negative NPV is not required to be offered TPP, but the lender may elect to do so.

If a mortgagor is offered a TPP, it must last a minimum of three months. Additionally, the new monthly payment must be set at 31% of the mortgagor’s gross monthly income derived through the waterfall method. Borrowers who make all TPP payments on time and meet all other requirements “will be offered a permanent modification.”

The process described above applies to Tier 1 HAMP modifications. In 2012, HAMP was expanded to include loans that did not qualify under Tier 1, and Tier 2 HAMP modifications were created. The Tier 2 modification process is practically identical to that of Tier 1, but extends modifications to a greater number of mortgages previously ineligible for HAMP. All loans and modifications discussed in this Note relate to Tier 1 HAMP Modifications.

III. THE CIRCUIT SPLIT OVER STATE LAW CLAIMS RELATING TO HAMP

All the federal courts agree that HAMP does not create a private right of action under federal law, and no claim can be made for violations of HAMP. Federal courts split, however, on whether state

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33. Id.
34. Id.
35. Id.
36. Id.
37. Id. at 126.
38. Id. at 127.
39. Id. at 126. The HAMP Handbook uses the language “will be offered a permanent modification,” and this wording is the source of much of the litigation. Id.
40. Id. at 72–126.
41. Id. at 73 n.2.
42. See id. at 73. Tier 2 modifications apply to a broader range of mortgages, including rental properties and loans that have previously been in HAMP, but fell out of good standing. Id.
43. See infra Part III.
44. See Miller v. Chase Home Fin., LLC, 677 F.3d 1113, 1116 (11th Cir. 2012) (stating that HAMP does not create a private right of action); Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 555 (7th Cir. 2012) (stating that HAMP and its enabling statute do not contain a federal right of action).
law claims are thereby precluded.  

A. Federal Courts Finding State Law Claims Relating to HAMP Precluded

The United States Courts of Appeals for the Eleventh and Fifth Circuits have held that because HAMP does not create a private right of action under federal law, mortgagors are barred from bringing claims against lenders for violations relating to HAMP under state law.  

In Miller v. Chase Home Finance, LLC, the Eleventh Circuit rejected the mortgagor’s state law claims. The mortgagor, Miller, requested a loan modification pursuant to HAMP and the lender, Chase, agreed to a temporary modification of the loan. After going through the HAMP process and successfully completing the TPP, Chase informed Miller that it would not extend a permanent modification. After Miller received this notification, he filed suit against Chase for failure to comply with its obligation under HAMP. Miller brought suit “for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) promissory estoppel.” He filed suit in federal court based on diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332.

In rejecting the state law claims pled in Miller, the Eleventh Circuit held that there was no private right of action under HAMP. Although the court acknowledged that there is no express private right of action, it stated that the court had never analyzed whether an implied

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45. See Miller, 677 F.3d at 1117 (rejecting state law claims because they are premised on obligations under HAMP). But see Wigod, 673 F.3d at 555 (establishing that although HAMP does not create a private right of action, it does not preempt viable state law claims).

46. See Miller, 677 F.3d at 1117 (holding that state law claims are based on—and not independent of—HAMP, which affords no private right of action); see also Opinion and Order at 8, Vida v. OneWest Bank, F.S.B., Civ. 10-987-AC, 2010 WL 5148473, at *5 (D. Or. Dec. 13, 2010) (holding state law claims are too closely tied to HAMP to be independent of HAMP which affords no private right of action).

47. 677 F.3d 1113 (11th Cir. 2012).

48. Id. at 1117 (holding that state law claims may not be brought).

49. Id. at 1115.

50. Id.

51. Id.

52. Id.


54. Miller v. Chase Home Fin., LLC, 677 F.3d 1113, 1116 (11th Cir. 2012).
private right of action existed. In concluding that there is no such implied right under HAMP, the court applied the “implied private right of action test.” This test examines four factors: (1) whether the plaintiff is a member of the class for whose especial benefit the law was created; (2) whether there is legislative intent to create or deny a remedy; (3) whether a private right of action is consistent with the purpose for enacting the law; and (4) whether the right of action is traditionally one of state law, and therefore improper to infer a private right of action due to the federal law. The court found that HAMP was enacted not for the benefit of mortgagors, but to allow the Treasury to stabilize the financial markets. The court also noted that it found no legislative intent to create any private right of action. Next, the court stated that allowing mortgagors to bring these claims would conflict with the HAMP’s purpose, which is to incentivize mortgage servicers to modify distressed mortgages. Finally, the court noted that contract and property law are traditionally areas of law left to the states.

Having found that no private right of action exists under HAMP, the court held that Miller lacked standing to bring state law claims arising from his mortgage servicer’s obligations under HAMP. Accordingly, because all of Miller’s claims were based on violations of his servicer’s HAMP obligations, the court dismissed them.

The Fifth Circuit rejected similar HAMP claims on different grounds. In Pennington v. HSBC Bank USA, N.A., the Fifth Circuit rejected the theory that a TPP creates a contract under which state law claims may be brought. The Fifth Circuit acknowledged the approach

55. Id.
56. Id.
57. Id. (citing Hemispherx Biopharma, Inc. v. Johannesburg Consol. Invs., 553 F.3d 1351, 1362 n.14 (11th Cir. 2008)).
58. Id.
59. Id.
60. Id.
61. Id.
62. Id. at 1116–17.
63. See id. at 1117. Interestingly, the court analyzed the sufficiency of Miller’s claims under state law and determined that they would still be dismissed even if HAMP provided Miller with adequate standing. Id.
65. Id. at 551–53.
66. See id. at 553–55 (holding that no contract exists because the mortgage servicer expresses no intent to be bound until a permanent modification is signed).
taken in Miller, but opted to go a different route, stating that the TPP is not a contract because the bank expressed no intent to be bound by it. \(^{67}\) On this rationale, the court dismissed the claims for breach of contract of both the TPP and the Modification Agreement. \(^{68}\) The court also dismissed the remaining claims for insufficient pleadings. \(^{69}\)

B. **Federal Courts Allowing State Law Claims Related to HAMP**

In contrast to the Fifth and Eleventh Circuits, the Seventh, Ninth, First, and Fourth Circuits have allowed certain adequately pled state law claims to proceed, even though they are based on actions arising under HAMP. \(^{70}\)

In *Wigod v. Wells Fargo Bank, N.A.*, \(^{71}\) the Seventh Circuit allowed some of the mortgagor’s state law claims to proceed. \(^{72}\) In 2009, the mortgager, Wigod, was in financial distress and unable to pay her current mortgage payment. \(^{73}\) Wigod requested a modification pursuant to HAMP and submitted all the proper paperwork. \(^{74}\) The lender, Wells Fargo, determined that Wigod was eligible for a HAMP modification and began a TPP for her loan. \(^{75}\) Wigod complied with her obligations under the TPP and made all the requisite payments, \(^{76}\) but upon completion of the TPP, Wells Fargo refused to offer Wigod a permanent modification. \(^{77}\) Wigod filed suit against Wells Fargo, alleging state law claims including breach of contract, promissory estoppel, and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act.

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\(^{67}\) See id. (rejecting the position that the TPP constitutes a contract, the Fifth Circuit declined to follow the Seventh Circuit’s decision in *Wigod*).

\(^{68}\) See id.

\(^{69}\) See id. at 556–57 (dismissing claims for negligent misrepresentation and promissory estoppel for failure to plead a claim for which relief can be granted).

\(^{70}\) See, e.g., *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 235 (1st Cir. 2013) (holding that plaintiff had adequately pled a breach of contract claim from facts arising under HAMP); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 559–60 n.4 (7th Cir. 2012) (holding that federal law does not preclude adequately pled state law claims from being brought even if the claims are based on actions arising under HAMP, which does not provide a private cause of action).

\(^{71}\) 673 F.3d 547.

\(^{72}\) Id. at 559 n.4.

\(^{73}\) Id. at 557–58.

\(^{74}\) Id. at 558.

\(^{75}\) Id.

\(^{76}\) Id.

\(^{77}\) Id.
The Seventh Circuit acknowledged that HAMP and its enabling statute did not create a private right of action, but concluded that this did not bar mortgagors from bringing adequately pled state law claims against mortgage servicers for actions relating to HAMP. In reaching this conclusion, the Wigod court reviewed over eighty federal cases where mortgagors attempted to bring claims against their mortgage servicers for actions relating to HAMP. The court identified three legal theories attempted by plaintiffs in these actions. The first theory was to bring claims arising under HAMP and its enabling statutes. However, the Wigod court found that this private right of action theory had been universally rejected by all other federal courts. The second theory attempted to claim that mortgagors were third-party beneficiaries of the SPAs negotiated between the mortgage servicers and the Treasury. The court noted that the vast majority of courts that considered this claim had rejected it, finding that the mortgagors were not intended beneficiaries of the SPAs. The third theory based the claims on the TPP agreements between the mortgagors and the mortgage servicers. This theory has been used by some courts to allow mortgagors to bring contract claims, tort claims, and consumer fraud statute violations against their mortgage servicers by basing these claims directly on the TPP agreements. The TPP agreements place the mortgagors in direct privity with their mortgage servicers, eliminating the third party issue that caused the second theory to fail.

Accepting the TPP claim based theory, the court then analyzed each of Wigod’s state law claims and found that she had adequately...
pled breach of contract, promissory estoppel, fraudulent misrepresentations, and violations of ICFA claims.89 Once it determined that certain state law claims had been adequately pled, the court analyzed whether these claims were preempted by federal law.90 The court determined that no theory of preemption prevented mortgagors from bringing adequately pled state law claims against mortgagor servicers for actions relating to HAMP.91 Express preemption was conceded by the parties, so the court did not analyze the topic.92 In rejecting field preemption, the court disagreed with Wells Fargo’s claim that the Home Owners’ Loan Act93 (“HOLA”) occupied the relevant field.94 The court rejected this theory based on its interpretation of the relevant statutes and precedent.95 The court also rejected Wells Fargo’s claims of conflict preemption based on the argument that allowing state law claims would be an obstacle to Wells Fargo’s participation in HAMP.96 The court rejected this claim based on precedent, the fact that Congress did not intend to foreclose all suits against mortgage servicers, and the fact that the HAMP guidelines require that HAMP be implemented in compliance with state law.97 After clarifying that state law claims are not preempted, the court addressed what it called the “end-run” theory.98 Wells Fargo argued that Wigod’s claims were simply “HAMP claims in disguise,”99 and were an attempt to dodge the fact that HAMP did not provide for a private cause of action.100 The court found no support for this claim, and stated that it is remarkably similar to conflict preemption.101 The court also cited cases in which a federal statute that provides no right of

89. Id. at 560–74 (rejecting claims of negligent hiring or supervision, negligent misrepresentations and concealment, and fraudulent concealment).
90. Id. at 576.
91. Id. at 576–81; see infra notes 136–54 and accompanying text.
92. Wigod, 673 F.3d at 576.
93. Home Owners’ Loan Act (HOLA), ch. 64, 124 Stat. 128 (1933).
94. Id. at 576–77.
95. Id. (citing In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig., 491 F.3d 638 (7th Cir. 2007)).
96. Id. at 577–78.
97. See id. at 577–81 (holding that conflict preemption was inconsistent with the Seventh Circuit’s opinion in In re Ocwen Loan Servicing).
98. Id. at 581.
99. Id.
100. Id.
101. Id. at 581–85.
action does not preclude state law claims.\textsuperscript{102}

In \textit{Corvello v. Wells Fargo Bank, N.A.},\textsuperscript{103} the Ninth Circuit extended the reasoning in \textit{Wigod} when it held that mortgage servicers are contractually required to offer a permanent modification to mortgagors who successfully complete a TPP.\textsuperscript{104} Like \textit{Wigod}, Corvello was a financially distressed mortgagor who sought a modification pursuant to HAMP and entered into a TPP with his servicer, Wells Fargo, but upon successful completion, was not offered a permanent modification.\textsuperscript{105} Based on diversity of citizenship, Corvello filed claims in federal court for breach of contract, “promissory estoppel, breaches of the covenant of good faith and fair dealing, and violations of California’s Unfair Competition Law.”\textsuperscript{106} Similar to the ruling in \textit{Wigod}, the Ninth Circuit held that the TPP creates a contract under which state law claims could be brought.\textsuperscript{107} \textit{Corvello} extended the reasoning in \textit{Wigod} to find a contractual relationship even if the servicer did not receive a signed copy of the TPP, as was the case in \textit{Wigod}.\textsuperscript{108}

The First Circuit allowed state law claims in relation to HAMP in \textit{Young v. Wells Fargo Bank, N.A.}\textsuperscript{109} \textit{Young}’s facts are very similar to other HAMP-related cases.\textsuperscript{110} \textit{Young}, the mortgagor, was financially distressed and applied for a HAMP modification.\textsuperscript{111} After successfully completing the TPP, \textit{Young} was not offered a permanent modification.\textsuperscript{112} \textit{Young} filed suit in Massachusetts state court and Wells Fargo removed the case to the United States District Court for the District of Massachusetts.\textsuperscript{113} In her complaint, \textit{Young} alleged breach of contract, breach of the covenant of good faith and fair dealing, negligent and intentional infliction of emotional distress, and unfair debt

\begin{itemize}
  \item \textsuperscript{102} \textit{Id.} at 581 (citing Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005)).
  \item \textsuperscript{103} 728 F.3d 878 (9th Cir. 2013).
  \item \textsuperscript{104} \textit{Id.} at 880.
  \item \textsuperscript{105} \textit{Id.} at 884.
  \item \textsuperscript{106} \textit{Id.} at 882.
  \item \textsuperscript{107} \textit{Id.} at 884.
  \item \textsuperscript{108} \textit{Id.}
  \item \textsuperscript{109} 717 F.3d 224 (1st Cir. 2013).
  \item \textsuperscript{110} See, e.g., Miller v. Chase Home Fin. LLC, 677 F.3d 1113, 1115–117 (11th Cir. 2012); \textit{Wigod v. Wells Fargo Bank, N.A.}, 673 F.3d 547, 557–59 (7th Cir. 2012).
  \item \textsuperscript{111} \textit{Young}, 717 F.3d at 230.
  \item \textsuperscript{112} \textit{Id.}
\end{itemize}
collection practices in violation of Massachusetts state law.114 The First Circuit allowed the claims for breach of contract and unfair debt collection practices to proceed.115

The court in Young did not specifically address whether HAMP’s lack of a private right of action bars state law claims.116 The court addressed each of Young’s claims and determined she adequately pled a claim for breach of contract and unfair debt collection practices in violation of Massachusetts law.117 Although the court never addressed the issue of whether HAMP precluded state law claims, it allowed a breach of contract claim based on the TPP, an integral part of the HAMP modification process.118

The Fourth Circuit may be open to following Wigod’s path.119 In Spaulding v. Wells Fargo Bank, N.A.,120 the Fourth Circuit noted that state law claims related to HAMP are not necessarily precluded simply because HAMP creates no private right of action.121 The Spaulding court dismissed all the claims, but based its dismissal on the fact that the mortgagors had never entered into a TPP agreement with their mortgage servicer.122

When courts have allowed state law claims for actions relating to HAMP, they generally fall under contract claims, alternative contract theories such as promissory estoppel, and consumer fraud protection laws.123 These courts base the breach of contract claims on the theory that the TPP agreement between the mortgagor and the mortgage

114. Young, 717 F.3d at 228.
115. Id. at 242.
116. See id. at 236 n.10 (stating that the district court dismissed Count II because HAMP provides no private right of action, and since Young does not challenge that ruling, the First Circuit will not pass on the merits).
117. See id. at 236, 242 (holding that Young adequately pled a violation of MASS. GEN. LAWS ch. 93A (2014), which provides a cause of action for those injured by unfair or deceptive acts or practices).
118. Id. at 235–36.
119. See Spaulding v. Wells Fargo Bank N.A., 714 F.3d 769, 776–77 n.4 (4th Cir. 2013) (citing Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 581 (7th Cir. 2012) (“The absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law.”)).
120. 714 F.3d 769.
121. Id. at 776–77 n.4 (citing Wigod, 673 F.3d at 581).
122. Id. at 775.
123. See Wigod, 673 F.3d at 559–60 n.4 (allowing claims for breach of contract, promissory estoppel, and the Illinois Consumer Fraud and Deceptive Business Practices Act); see also Young, 717 F.3d at 235 (holding that plaintiff had adequately pled a breach of contract claim and MASS. GEN. LAW ch. 93A).
The consumer protection law claim in Wigod was based solely on actions relating to the TPP. Young allowed a similar claim on actions based on the TPP, but the claim also involved certain actions of Wells Fargo that extended beyond the TPP to actions related to notices that she was in arrears and a forbearance agreement that occurred over a year before she began the HAMP process.

C. Federal Courts That Have Side-stepped the HAMP Issue

In Cox v. Mortgage Electronic Registration Systems, Inc., the Eighth Circuit declined to address whether HAMP’s failure to provide a private cause of action precluded adequately pled state law claims. This case arose when the mortgagor, Cox, found himself in financial distress and attempted to modify his mortgage payment through HAMP. After successfully completing the TPP, Cox was not offered a permanent modification. Cox filed suit in Minnesota state court, and Mortgage Electronic Registration Services removed it to the United States District Court for the District of Minnesota based on diversity of citizenship pursuant to 28 U.S.C. § 1332. Cox alleged certain state law claims, and the district court dismissed all the claims due to the fact that “HAMP creates no private right of action” and the claims were premised on HAMP obligations. In the alternative, the district court would have dismissed the claims for failure to state a claim.

In its review of the district court decision, the Eighth Circuit noted that it would not address the issue of whether HAMP precluded adequately pled state law claims because Cox had not adequately pled...
his state law claims. The Eighth Circuit upheld the dismissal of all Cox’s state law claims for reasons independent of their connection to HAMP, purposefully declining to decide the issue.

IV. MORTGAGORS’ STATE LAW CLAIMS RELATING TO HAMP SHOULD BE PERMITTED

A. HAMP Should Not Preempt Adequately Pledged State Law Claims

State law claims relating to HAMP have raised preemption concerns. The Constitution provides that federal law has supremacy over state law. In order for federal law to preempt state law, preemption must be the “clear and manifest purpose of Congress.” Preemption occurs in one of three ways: (1) express preemption, (2) field preemption, or (3) conflict preemption.

Express preemption occurs when a federal law expressly states that the particular federal statute trumps state and local laws. Nowhere in the HAMP enabling statute is there a clear statement of preemption over state laws, and therefore no express preemption exists. The lack of express preemption is so prominent that the Wigod court barely touched on the topic in its detailed preemption analysis.

134. Id. at 675 n.4.
135. See id. (dismissing all the claims for failure to sufficiently plead “sufficient factual matter accepted as true, to state a plausible claim on its face.”) The court dismissed Count I requesting an accounting of the lender’s activities in relation to the loan stating that if any other claim was viable, discovery would be adequate to make the sought after information available. Id. The court dismissed Count II pertaining to the fairness of a lender purchasing a home it foreclosed on because the complaint did not make allegations in relation to the sale. Id. They further dismissed the count for breach of the duty of good faith and fair dealing because the mortgagor did not plead sufficient facts for such a claim. Id. The court also dismissed claims of misrepresentation because the mortgagor did not plead reliance, a necessary element. Id.
137. U.S. CONST. art. VI, cl. 2.
138. Wigod, 673 F.3d at 576 (quoting Wyeth v. Levine, 555 U.S. 555, 565 (2009)).
140. Id. (citing FMC Corp. v. Holliday, 498 U.S. 52, 56–57 (1990)).
142. Wigod, 673 F.3d at 576–77.
Field preemption occurs when “federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’ ” Field preemption should not apply to state law claims implicating actions related to HAMP because HAMP does not apply to all home modifications, but only those that meet HAMP’s strict requirements. Loan modifications occurred before HAMP was enacted, and the HAMP guidelines do not cover every mortgagor that seeks modification. This should eliminate the possibility of field preemption precluding state law claims relating to HAMP. The court in Wigod reached the same conclusion, and rejected Wells Fargo’s argument that HOLA and the Office of Thrift Supervision (“OTS”) regulations occupy the relevant field. In doing so, the court pointed to a provision of the OTS regulations that explains certain state law claims, including contract claims, are not preempted if they only have incidental effects on lending operations. The court also noted that the position taken by Wells Fargo is in direct conflict with the precedent set by the Seventh Circuit. In In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig., the Seventh Circuit held that HOLA did not create a private right of action, but this did not preempt state common law claims by those harmed by wrongful acts of their savings and loan associations.

Conflict preemption occurs when “(1) ‘it is impossible for a private party to comply with both state and federal requirements,’ or (2) ‘where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’ ”

143. Id. at 576 (quoting Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992)).
144. HAMP HANDBOOK, supra note 13, at 68 (describing the requirements that must be met to qualify for a HAMP modification).
145. Wigod, 673 F.3d at 576–77. Wells Fargo attempted to rely on HOLA, a statute enacted to provide relief from the massive amount of home loan defaults during the Great Depression. Id. (citing Home Owners’ Loan Act (HOLA), ch. 64, §§ 4(a), 5(a), 124 Stat. 128, 129, 132 (1933) (codified as amended at 12 U.S.C.A. §§ 1463(a), 1464(a) (West 2013))). HOLA gave the OTS authority to create and regulate savings associations. HOLA §§4(a), 5(a), 12 U.S.C.A. §§ 1463(a), 1464(a). Wells Fargo attempted to rely on OTS regulation that stated it “occupies the entire field of federal regulation for federal savings associations.” Wigod, 673 F.3d at 576–77. (citing 12 C.F.R. § 560.2(a) (2014)).
146. Wigod, 673 F.3d at 577.
147. Id. (citing In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig., 491 F.3d 638, 643 (7th Cir. 2007)).
148. 491 F.3d 638 (7th Cir. 2007).
149. Id. at 643.
150. Wigod, 673 F.3d at 578 (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287
HAMP guidelines state that implementation of the program by mortgage servicers must be in compliance with all laws, including state laws.\textsuperscript{151} This provision contradicts the idea that HAMP preempts state law claims because of a conflict.\textsuperscript{152} Compliance with state law would include statutes and common law and leads to the conclusion that if these laws are violated, the courts may provide a remedy.\textsuperscript{153} In Wigod, Wells Fargo unsuccessfully argued that state law claims presented an obstacle to their accomplishment and execution of HAMP.\textsuperscript{154}

Allowing state law claims would not conflict with the implementation of HAMP, but rather ensure loan servicers compliance with the program. The HAMP guidelines lay out detailed steps loan servicers must follow in the modification process.\textsuperscript{155} State law claims would only be brought if a mortgagor believes his loan servicer has violated the servicer’s HAMP obligations, further ensuring compliance, not creating an obstacle to HAMP implementation. Wigod reached the same conclusion, and rejected this argument because it contradicted the precedent set in \textit{In re Ocwen} that state common law claims are complementary to HOLA.\textsuperscript{156}

Furthermore, allowing state law claims would not contradict the Congress’ purpose in enacting HAMP.\textsuperscript{157} Allowing such claims would not impose additional duties on mortgage servicers, it would not open mortgage servicers to multiple standards of conduct, nor would it conflict with the intent of Congress.\textsuperscript{158} Wigod acknowledged that allowing state claims may decrease servicer participation in HAMP.\textsuperscript{159} Servicer participation in HAMP was almost certainly a goal of Congress, but another goal was to prevent banks from taking advantage of mortgagors in financial difficulty.\textsuperscript{160} Nothing in HAMP leads to the conclusion that servicer participation should be more important than

\begin{itemize}
\item \textsuperscript{151} Id. at 581.
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id. at 580.
\item \textsuperscript{154} Id. at 578.
\item \textsuperscript{155} HAMP HANDBOOK, supra note 13, at 104–18.
\item \textsuperscript{156} \textit{In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig.}, 491 F.3d 638, 643 (7th Cir. 2007).
\item \textsuperscript{157} \textit{Wigod}, 673 F.3d at 579–81.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id. at 580.
\item \textsuperscript{160} Id. at 581.
\end{itemize}
servicer compliance with their obligations under HAMP. Nevertheless, federal courts are still reluctant to allow state law claims in relation to HAMP due to preemption issues. However, the preemption doctrine is not implicated in these cases because these state common law claims are not interfering with, nor are they contrary to, the federal program; they are simply a means by which mortgagors who have been wronged may seek justice.

B. Lack of a Private Right of Action in a Federal Statute Should Not Equate to Dismissal of State Law Claims

Federal courts have previously allowed state law claims implicating federal laws and statutes when the federal statute creates no private right of action. For example, the Seventh Circuit discussed how the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) does not create a federal cause of action for farmers who are injured from these products due to manufacturer violations of the act, but the courts have allowed these injured farmers to bring state law claims. In relation to FIFRA, the Supreme Court held that state common law claims are not preempted because they are consistent with and do not conflict with FIFRA. So long as the state law claims do not create or add requirements to the federal statute, they should be allowed to move forward.

Similarly, HOLA is a federal statute that has been enforced through state law claims. HOLA has no private right of action, but this has not prevented the courts from allowing injured parties to bring state law claims to enforce its provisions. In In re Ocwen, the Seventh Circuit held that state law claims for breach of contract and

161. Id.
162. Sarapinian, supra note 139, at 921.
163. See Wigod, 673 F.3d at 576–81 (analyzing and dismissing preemption issues in relation to state law claims brought from actions arising under HAMP).
164. Id. at 581 (citing Bates v. Dow Agrosciences LLC, 544 U.S. 431, 448 (2005)); Sarapinian, supra note 139, at 926 (citing In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig., 491 F.3d 638, 643 (7th Cir. 2007)).
165. Wigod, 673 F.3d at 581 (citing Bates, 544 U.S. at 448).
166. Sarapinian, supra note 139, at 928 (citing Bates, 544 U.S. at 447).
167. Id.
168. Id. (citing In re Ocwen Loan Servicing, 491 F.3d at 643).
169. Id.
fraudulent misrepresentation are enforceable in relation to HOLA and will complement the federal statute.\textsuperscript{170} In relation to state law claims relating to HOLA, the Seventh Circuit noted that it would be surprising if a federal statute or regulatory scheme prevented state law claims for violation of state laws.\textsuperscript{171}

The \textit{Wigod} court noted that when federal jurisdiction is invoked due to diversity of citizenship, the lack of a private cause of action should actually be considered as a factor against dismissing the state law claims.\textsuperscript{172} Under the reasoning used in cases implicating FIRFA and HOLA, where neither federal statute created a private cause of action, adequately pled state law claims should be permitted even though they relate to HAMP.\textsuperscript{173}

\textbf{C. Precluding State Law Claims Negatively Impacts Mortgagors and Favors Deceptive Practices by Mortgage Servicers}

HAMP was instituted to slow down foreclosures and assist financially distressed homeowners by granting mortgagors a permanent modification of the mortgage.\textsuperscript{174} Regardless of this goal, many eligible homeowners who have qualified for HAMP or successfully completed a TPP have not received these modifications.\textsuperscript{175} Some loan servicers have used deceptive tactics to avoid granting eligible mortgagors permanent modifications.\textsuperscript{176} In a class action lawsuit, Bank of America employees testified that they lied to mortgagors seeking modification, denied modification for fictitious reasons, and received rewards for denying distressed mortgagors modifications.\textsuperscript{177} Bank of America employees

\begin{itemize}
\item \textsuperscript{170} \textit{In re Ocwen Loan Servicing}, 491 F.3d at 643–44.
\item \textsuperscript{171} \textit{Sarapinian, supra note 139}, at 926 (quoting \textit{In re Ocwen Loan Servicing}, 491 F.3d at 643).
\item \textsuperscript{172} \textit{Wigod v. Wells Fargo Bank, N.A.}, 673 F.3d 547, 582 (7th Cir. 2012) (citing \textit{Wyeth v. Levine}, 555 U.S. 555, 574 (2009)).
\item \textsuperscript{173} \textit{Sarapinian, supra note 139}, at 926.
\item \textsuperscript{174} \textit{Hawes, supra note 1}, at 309.
\item \textsuperscript{175} \textit{Id.}
\item \textsuperscript{177} \textit{Id.}, citing Paul Kiel, \textit{Bank of America Lied to Homeowners and Rewarded Foreclosures, Former Employees Say}, ProPublica (June 2014), http://www.propublica.org/article/bank-of-america-lied-to-homeowners-and-rewarded-foreclosures).  
\end{itemize}
have admitted to engaging in deceptive practices and rejecting qualified mortgagors from receiving permanent modification under HAMP, and similar allegations have been made in many other cases attempting to seek redress for actions related to HAMP.

To fight their servicers’ deceptive actions and failure to comply with servicer obligations under HAMP, some homeowners have turned to the courts. In Wigod, the Seventh Circuit found that Wigod successfully pled all the requirements for a claim for violations of the Illinois Consumer Fraud and Protection Act (“ICFA”) and allowed the claim to survive a motion to dismiss. The specifics of the complaint are not detailed in the opinion but Wigod alleged “that Wells Fargo dishonestly and ineffectually implemented HAMP.”

The Wigod decision represents a victory for mortgagors seeking to end deceptive and fraudulent practices by their mortgage servicers when it comes to HAMP modifications. Unfortunately, some courts have found ways to distinguish Wigod. These courts have held that the contract between the mortgagor and servicer is not complete until the permanent modification is signed by the mortgage servicer. Other courts have distinguished Wigod through differences in the language of the TPP agreements. In Cave v. Saxon Mortgage Services, Inc., the court distinguished the TPP from that in Wigod based on language that stated the servicer will determine qualification for a permanent modification after completion of the TPP. The HAMP Guidelines do not require servicers to use specific language in the TPP, but simply states “[t]he TPP notice describes the terms and conditions of the trial period and sets forth the required payment due dates.”

178. Id.
179. See, e.g., Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 574 (7th Cir. 2012) (alleging deceptive and unfair practice by Wells Fargo against Wigod in the handling of her HAMP modification); Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 240–42 (1st Cir. 2013) (claiming Wells Fargo engaged in unfair and deceptive practices).
180. Hawes, supra note 1, at 309.
181. Wigod, 673 F.3d at 574–76.
182. Id. at 574.
183. Hawes, supra note 1, at 310.
184. Id. at 312.
185. Id.
186. Id.
188. Id. at *4–5.
189. HAMP HANDBOOK, supra note 13, at 126.
that have distinguished Wigod are leaving financially distressed mortgagors open to potentially deceptive practices by their mortgage servicer when seeking a HAMP modification.  

V. CONCLUSION

Many mortgagors are attempting to bring state law claims against their lenders in relation to HAMP modification, more specifically through the TPP and other representations made during the modification process. Although these claims undoubtedly arise from actions relating to HAMP, which does not create a private right of action, state law claims provide mortgagors a remedy if lenders treat mortgagors unfairly in relation to their HAMP duties.

Without access to the court system, mortgagors are left with no remedy for the actions of their lenders that violate HAMP. It is clear from the amount of litigation that mortgagors believe they are being treated unfairly, and that their lenders and mortgage servicers do not always fully comply with the HAMP mandates. Because courts have unanimously held that HAMP creates no private right of action, without the ability to assert state law claims, mortgagors are left at the mercy of their lenders. Denying access to the courts keeps the door open to the possibility of deceptive practices.

Furthermore, precluding state law claims will allow lenders and mortgage servicers to go unpunished for violating their HAMP obligations and engaging in deceptive practices in denying homeowners permanent modifications. If mortgagors cannot seek redress under HAMP or through state law claims, there is no incentive for the mortgage servicers to comply with the HAMP guidelines or dissuade them from engaging in further deceptive practices with respect to

190. Talbut, supra note 176, at 315.
192. See Bosque, 762 F. Supp. 2d at 351 (holding that if the TPP or representations made during the HAMP modification process can be seen as a contract, plaintiffs must have standing to bring state breach of contract claims).
193. See, e.g., Miller v. Chase Home Fin., LLC, 677 F.3d 1113, 1117 (11th Cir. 2012) (stating HAMP does not create a private right of action); Wigod, 673 F.3d at 555 (stating HAMP and its enabling statute do not contain a federal right of action).
HAMP modifications.

Breach of contract and quasi-contract claims, such as promissory estoppel, have had the most success at surviving in federal courts.194 State law claims alleging fraud and violation of state consumer protection laws have also seen some success.195 Many of these state law claims are appearing in federal courts based on diversity of citizenship and amount in controversy.196 Others are getting into federal court through class action and multi-district litigation.197

The HAMP Guidelines state that mortgagors who successfully comply with all the TPP requirements “will be offered a permanent modification.”198 It is this mandatory language that mortgagors are relying on. Federal courts should follow Wigod and Young, and allow adequately pled state law claims to proceed to ensure that mortgage servicers are not deceiving mortgagors and are following through with their HAMP obligations.199

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194. See Wigod, 673 F.3d at 566 (allowing alternative claim of promissory estoppel in relation to HAMP).
195. See id. at 559 n.4 (allowing claim for violation the Illinois Consumer Fraud and Deceptive Business Practices Act); Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 235 (1st Cir. 2013) (holding that plaintiff had adequately pled violation of MASS. GEN. LAW ch. 93A (2014)).
198. HAMP HANDBOOK, supra note 13, at 126.
199. See Talbut, supra note 176, at 315 (stating that courts that distinguish Wigod leaves mortgagors in “HAMP hell”).