
NOTE

The TPP & Its Broken Promises

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INTRODUCTION

In 2009, hundreds of thousands of distressed homeowners sought relief under a new federal program called the Home Affordable Modification Program (“HAMP”).¹ Helen Homeowner faced

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¹ See generally *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556-58 (7th Cir. 2012) (describing similar facts to distressed homeowners across the nation); U.S. DEP’T

foreclosure and entered into a Trial Period Plan (“TPP”) with a bank who had opted into providing relief under HAMP.² During the three or four months of the TPP, Helen made substantially reduced mortgage payments.³ At the end of this trial period, she believed she would be eligible for a permanent loan modification of her mortgage.⁴

Eight months have now passed, yet Helen has heard nothing from the bank regarding the status of her loan.⁵ She has paid every reduced monthly payment on time and has sent in all requested documentation.⁶ Helen has received only a delinquency notice stating the bank would report her to a credit agency if she did not pay the accrued amount.⁷ When she called the bank to inquire about this turn of events, an employee told her merely to disregard the notice.⁸ Helen Homeowner continues to make the TPP payments.⁹

Helen finally receives a response from the bank months later, only to learn the bank has denied her application for permanent modification with minimal explanation.¹⁰ Not only has the bank reported her to a credit agency, but she now also owes a balloon

OF THE TREASURY, SUPPLEMENTAL DIRECTIVE 09-01, HOME AFFORDABLE MODIFICATION GUIDELINES (2009) [hereinafter HAMP SUPP. DIR. 09-01], *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0901.pdf (describing the basics of HAMP and the purpose of the Program).

² See, e.g., *Cave v. Saxon Mortg. Servs., Inc.*, No. CIV.A.11-4586, 2012 WL 1957588, at *2 (E.D. Pa. May 30, 2012) (providing an example of a bank approving a homeowner for a three-month trial period with reduced monthly payments).

³ See, e.g., *Allen v. CitiMortgage, Inc.*, No. CIV.CCB-10-2740, 2011 WL 3425665, at *1-2 (D. Md. Aug. 4, 2011) (recounting facts similar to those in this hypothetical where borrowers’ monthly payments were reduced from \$2776.00 to \$1914.17); see also HAMP SUPP. DIR. 09-01, *supra* note 1, at 8.

⁴ See *Allen*, 2011 WL 3425665, at *1; see also HAMP SUPP. DIR. 09-01, *supra* note 1, at 18.

⁵ See, e.g., *Cave*, 2012 WL 1957588, at *2 (presenting a similar scenario where the borrower was not contacted by the lender for nearly eight months after successfully completing a TPP).

⁶ See, e.g., *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, 538 (N.D. Cal. 2012) (describing a similar scenario where homeowners paid all required reduced monthly payments and submitted all required documentation).

⁷ See, e.g., *id.* (receiving delinquency notice six months after first entered TPP agreement).

⁸ See, e.g., *Allen*, 2011 WL 3425665, at *2 (presenting a similar situation where borrowers paid monthly reduced payments on time under their TPP Agreement, but later received a cancellation notice and were told to disregard it).

⁹ See, e.g., *Cave*, 2012 WL 1957588, at *2 (finding that the plaintiff continued to make TPP payments after being told to disregard an Escrow Shortage Statement).

¹⁰ See, e.g., *Allen*, 2011 WL 3425665, at *2 (stating that plaintiffs received a loan modification rejection letter with minimal explanation months after they submitted their application).

payment and additional late fees.¹¹ She again faces losing her home to foreclosure, but this time she meets even more debt than before.¹² Helen Homeowner sues the bank for redress.¹³

Millions of homeowners across the nation are encountering a similar situation as that described above.¹⁴ These homeowners turned to the courts for redress from HAMP when the government program failed them.¹⁵ However, many homeowners met disappointment there, too, as courts often dismissed their claims early in litigation and foreclosed the opportunity to amend their complaints.¹⁶

The Seventh Circuit was the first federal appellate court to address these HAMP-related issues in *Wigod v. Wells Fargo Bank, N.A.*¹⁷ The court joined the then-minority view in recognizing homeowners' need for redress.¹⁸ The court allowed the vast majority of the plaintiffs'

¹¹ See, e.g., *Cave*, 2012 WL 1957588, at *2 (noting that even if homeowners made all payments in full and on time, they would still have to pay a single balloon payment); *Allen*, 2011 WL 3425665, at *2 (describing a similar scenario where homeowners owed a delinquent balloon payment, and failure to pay resulted in a denial of their permanent loan modification and negative credit reporting).

¹² See *In re JPMorgan Chase Mortg. Modification Litig.*, 880 F. Supp. 2d 220, 227-28 (D. Mass. 2012) (multi-district litigation).

¹³ See, e.g., *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, 539-40 (N.D. Cal. 2012) (providing an example of a homeowner suing her bank and seeking to rescind her TPP and to recover any payments already made).

¹⁴ See, e.g., *Cave*, 2012 WL 1957588 (hearing HAMP-related claims by homeowners in a similar situation as the hypothetical given); *Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059 (N.D. Cal. 2011) (same), *rev'd sub nom. Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013); *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342 (D. Mass. 2011) (same).

¹⁵ See John R. Chiles & Matthew T. Mitchell, *HAMP: An Overview of the Program and Recent Litigation Trends*, 65 CONSUMER FIN. L.Q. REP. 194, 195 (2011) (describing how homeowners who feel they were wrongfully denied a HAMP modification "are increasingly looking to courts for relief"); see also Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP)*, 52 ARIZ. L. REV. 727, 728-29 (2010).

¹⁶ See, e.g., *Helmus v. Chase Home Fin., LLC*, 890 F. Supp. 2d 806, 818 (W.D. Mich. 2012) (granting the bank's motion to dismiss in its entirety); *Lucia*, 798 F. Supp. 2d at 1073 (dismissing plaintiffs' complaints without leave to amend); see also Nicholas T. Maxwell, Note, *The 75 Billion Dollar Question: Why Is HAMP Not an Entitlement Program?*, 97 IOWA L. REV. 1305, 1328 (2012) (describing homeowners' feeling of helplessness as their biggest frustration in the foreclosure crisis).

¹⁷ *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012); see *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 880 (9th Cir. 2013); see, e.g., *Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769, 775, 776 n.4 (4th Cir. 2013) (upholding the dismissal of homeowners' complaint in its entirety where no TPP was ever entered into and quoting district court's holding that the TPP creates privity of contract); see also *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 228 (1st Cir. 2013).

¹⁸ See *Wigod*, 673 F.3d at 559 n.4 (noting that roughly fifty courts granted

claims to proceed against the bank, including breach of contract regarding the TPP, promissory estoppel, deceptive business practices, and fraudulent misrepresentation.¹⁹

This Note argues that the Seventh Circuit correctly allowed homeowners to proceed with their claims and that other courts should follow its rationale to allow homeowners some form of redress. Part I explains the creation of HAMP and the trends of the ensuing litigation.²⁰ Part II discusses *Wigod v. Wells Fargo Bank, N.A.* in depth.²¹ Part III analyzes the Seventh Circuit's rationale and its application to different factual circumstances.²² Ultimately, this Note argues that homeowners deserve redress for the wrongs HAMP caused, and the judiciary is the proper branch of government to provide it.²³

I. BACKGROUND

In response to the rapidly deteriorating financial market and housing crisis that occurred in 2008, Congress enacted the Emergency Economic Stabilization Act.²⁴ The main purpose of this Act was to require the Secretary of the Treasury to implement a program that would encourage servicers of mortgages, like banks, to minimize foreclosures.²⁵ As a result, the Secretary created the Home Affordable Modification Program ("HAMP").²⁶

HAMP provided a system in which the Secretary could enter into Service Participation Agreements ("SPAs") with the banks.²⁷ Under these agreements, the banks would receive funds in exchange for implementing HAMP loan modifications for qualifying homeowners.²⁸ The purpose was to induce lenders to refinance homeowners' mortgages with more favorable interest rates, allowing the homeowners to avoid foreclosure.²⁹ Unfortunately, "the program

motions to dismiss state law claims in full, while only about thirty courts allowed at least some claims to proceed).

¹⁹ *Id.* at 559.

²⁰ *See infra* Part I.

²¹ *See infra* Part II.

²² *See infra* Part III.

²³ *See infra* Part III.

²⁴ *See* 12 U.S.C. § 5201 (2012).

²⁵ *Cf.* HAMP SUPP. DIR. 09-01, *supra* note 1, at 1 (explaining the steps the Treasury Secretary took following the Act's passage).

²⁶ *See id.*

²⁷ *See id.*

²⁸ *Id.* at 23.

²⁹ *See* *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556 (7th Cir. 2012).

seems to have created more litigation than it has happy homeowners.”³⁰

A. Determining Eligibility for HAMP

The banks identified homeowners defaulting on their mortgage payments, or those who were likely to default soon, and determined their eligibility for HAMP using a three-step process.³¹ First, the homeowner needed to have an outstanding mortgage with a monthly payment that was more than thirty-one percent of the person’s income.³² Second, the bank calculated a modification specific to that homeowner using a “waterfall” method described in HAMP literature.³³ Third, the bank would run an initial Net Present Value (“NPV”) analysis to determine the profitability of modifying the homeowner’s mortgage rather than allowing the loan to go to foreclosure.³⁴ Originally, the banks could run these initial tests using oral information provided by homeowners, so that the positive effects of HAMP would be apparent faster.³⁵ After the first year, the Program no longer authorized the use of oral information for the NPV because of the litigation that had ensued.³⁶

After this three-step process, if the NPV indicated it would be more profitable to modify the homeowner’s loan, the bank would implement

³⁰ *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 880 (9th Cir. 2013).

³¹ *See Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 347 (D. Mass. 2011) (describing the goal of HAMP as providing relief to distressed borrowers by reducing mortgage payments to sustainable levels); *see also Wigod*, 673 F.3d at 556-57 (describing the three-step process); HAMP SUPP. DIR. 09-01, *supra* note 1, at 4-5, 8-10.

³² *See* HAMP SUPP. DIR. 09-01, *supra* note 1, at 2.

³³ *Id.* at 8-10. The waterfall method is a series of successive steps the banks must follow until the borrower’s monthly mortgage payments are reduced to a ratio as close as possible to 31% of his or her income. The steps include capitalizing on accrued interest and out-of-pocket escrow, reducing the interest rate charged, extending the terms and amortization of the mortgage, and forbearing part of the principal if necessary. *Id.*

³⁴ *See Wigod*, 673 F.3d at 557; HAMP SUPP. DIR. 09-01, *supra* note 1, at 4-5. The NPV result, which can be calculated using software developed by Fannie Mae, must be calculated with a modification and without one. “If the NPV result for the modification scenario is greater than the NPV result for no modification, the result is deemed ‘positive’ and the servicer MUST offer the modification.” HAMP SUPP. DIR. 09-01, *supra* note 1, at 4. In the opposite scenario, the result is deemed “negative” and the servicer may perform the modification in its discretion. *Id.*

³⁵ *Id.* at 17.

³⁶ *Cf. Wigod*, 673 F.3d at 557 n.2 (noting the change in HAMP-modification application processing).

a Trial Period Plan (“TPP”).³⁷ The TPP would use the newly calculated mortgage amount for the homeowner’s monthly payments and would last roughly three months according to HAMP guidelines.³⁸ During this time, the homeowner needed to timely make each monthly payment and provide all required documentation.³⁹ If the homeowner did so, and all of his or her financial representations remained true and correct, the bank was to offer a permanent modification.⁴⁰

B. Differing Interpretations of the TPP

Problems arose when the banks began to implement these TPPs in the spring of 2009 with a different interpretation than the HAMP guidelines suggested.⁴¹ Homeowners believed they had been predetermined to qualify for permanent loan modification of their mortgages under the initial NPV test.⁴² The banks viewed the TPP as only a “trial” period, and thus believed they had not committed to giving the homeowners permanent loan modifications.⁴³

As a result, many homeowners were strung along for months while they made reduced payments, only to be denied a permanent modification without much explanation.⁴⁴ In addition to this denial,

³⁷ The Program provided the TPP form, which it “strongly encouraged” the banks to use. The vast majority chose to adopt this form, often with few or no changes. See HAMP Supp. Dir. 09-01, *supra* note 1, at 15.

³⁸ See *id.* at 17.

³⁹ See Chiles & Mitchell, *supra* note 15, at 196-97 (describing how a homeowner must timely make all TPP payments to qualify for a permanent modification).

⁴⁰ See *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 348 (D. Mass. 2011); HAMP SUPP. DIR. 09-01, *supra* note 1, at 18.

⁴¹ See, e.g., Maxwell, *supra* note 16, at 1314 (listing the most frequent complaints of homeowners).

⁴² See, e.g., *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 558 (7th Cir. 2012) (recounting the plaintiff’s allegation that the bank improperly re-evaluated her for HAMP after already determining she was qualified under the NPV test); *Cave v. Saxon Mortg. Servs., Inc.*, No. CIV.A.11-4586, 2012 WL 1957588, at *2 (E.D. Pa. May 30, 2012) (describing plaintiffs’ belief that they were pre-qualified for their TPP).

⁴³ See, e.g., *Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059, 1067 (N.D. Cal. 2011) (reviewing with approval another district court’s holding that the TPP was simply part of an application process), *rev’d sub nom. Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013).

⁴⁴ See, e.g., Braucher, *supra* note 15, at 729 (noting that while the goal of HAMP was to reach three to four million struggling homeowners, only roughly 230,000 received permanent modifications by the end of the first year); Maxwell, *supra* note 16, at 1328 (describing homeowners’ feeling of helplessness as their biggest frustration in the foreclosure crisis); see also *Allen v. CitiMortgage, Inc.*, No. CIV.CCB-10-2740, 2011 WL 3425665, at *2 (D. Md. Aug. 4, 2011).

common responses from the bank included: charging homeowners with late fees, subjecting them to balloon payments due to acceleration clauses, and reporting them to credit agencies for being delinquent during the trial period months.⁴⁵

C. Homeowners Flooded Courts with HAMP Litigation

Soon after its implementation, HAMP-related litigation stemming from HAMP's first year flooded courts across the nation.⁴⁶ The first wave of litigants brought claims under HAMP itself.⁴⁷ Courts almost uniformly rejected these claims because HAMP specifically does not provide for a private federal right of action.⁴⁸ The second wave brought claims as third-party beneficiaries to the SPAs between the government and the banks.⁴⁹ Again, the courts dismissed these claims for similar reasons.⁵⁰

The third and current wave has survived dismissal in some courts, unlike its predecessors, but has generated varied results within the district courts.⁵¹ This wave brought parallel state law claims, such as

⁴⁵ See, e.g., *Pool v. Wells Fargo Bank, N.A.*, No. 11-CV-01066-LTB-KLM, 2012 WL 3264294, at *1 (D. Colo. Aug. 10, 2012) (acceleration clause); *Casey v. Fed. Home Loan Mortg. Ass'n*, No. CIV.A.H-11-3830, 2012 WL 1425138, at *1 (S.D. Tex. Apr. 23, 2012) (foreclosure); *Senter v. JPMorgan Chase Bank, N.A.*, 810 F. Supp. 2d 1339, 1343 (S.D. Fla. 2011) (acceleration clause); *Allen*, 2011 WL 3425665, at *2 (negative credit reporting).

⁴⁶ See generally *Chiles & Mitchell*, *supra* note 15, at 197-200 (detailing the litigation trends from the first year of HAMP).

⁴⁷ See *Wigod*, 673 F.3d at 559 n.4 (listing the three stages of HAMP litigation and the outcomes of each); *Simon v. Bank of Am., N.A.*, No. 10-CV-00300-GMN-LRL, 2010 WL 2609436, at *10 (D. Nev. June 23, 2010); *Villa v. Wells Fargo Bank, N.A.*, No. 10-CV-81-DMS (WVG), 2010 WL 935680, at *3 (S.D. Cal. Mar. 15, 2010).

⁴⁸ See sources cited *supra* note 47.

⁴⁹ See *Wigod*, 673 F.3d at 559 n.4 (listing the three stages of HAMP litigation and the outcomes of each); see, e.g., *Boyd v. U.S. Bank, N.A. ex rel. Sasco Aames Mortg. Loan Trust*, Series 2003-1, 787 F. Supp. 2d 747, 757 (N.D. Ill. 2011) (reviewing plaintiff's third-party beneficiary theory under the SPA); *Sampson v. Wells Fargo Home Mortg., Inc.*, No. CV-10-08836-DDP (SSX), 2010 WL 5397236, at *3 (C.D. Cal. Nov. 19, 2010) (same).

⁵⁰ See *Wigod*, 673 F.3d at 559 n.4 (listing the three stages of HAMP litigation and the outcomes of each); *Boyd*, 787 F. Supp. 2d at 757; see also *Astra USA, Inc. v. Santa Clara Cnty.*, 131 S. Ct. 1342, 1345 (2011) (finding no private right of action under a related statute, upon which district courts relied to deny a private right of action under HAMP).

⁵¹ See *Wigod*, 673 F.3d at 559 n.4; *Chiles & Mitchell*, *supra* note 15, at 198; see, e.g., *Vida v. OneWest Bank, F.S.B.*, No. CIV.10-987 AC, 2010 WL 5148473, at *7 (D. Or. Dec. 13, 2010) (granting the defendant's motion to dismiss the breach of contract claim).

breach of contract, based on their involvement in HAMP, mostly surrounding the banks' use of the TPP.⁵² The Seventh Circuit was the first federal appellate court to decide on this last wave of claims in *Wigod v. Wells Fargo Bank, N.A.*⁵³

II. WIGOD V. WELLS FARGO BANK, N.A.

In *Wigod*, the Seventh Circuit considered whether a homeowner was entitled to permanent loan modification upon entering the TPP with Wells Fargo.⁵⁴ The plaintiff, Lori Wigod, was a homeowner with a mortgage serviced by the defendant, Wells Fargo.⁵⁵ After Wigod provided documentation of her financial information, Wells Fargo sent her a TPP agreement for a trial period lasting from July until November.⁵⁶ Wigod signed two copies of the TPP Agreement and returned them to the bank, along with additional documentation and the first modified payment.⁵⁷ Wells Fargo then executed the TPP and returned a copy to Wigod.⁵⁸

The TPP stated that if Wigod complied with its terms and her financial representations continued to be true, then the bank would provide her with a permanent loan modification.⁵⁹ Wigod made each of the four payments under the TPP on time, and Wells Fargo accepted all payments.⁶⁰ At the end of the four months, Wells Fargo denied Wigod the permanent HAMP modification with minimal explanation.⁶¹ Shortly thereafter, Wells Fargo warned Wigod that she owed the outstanding balance and late fees and that she was in default on her mortgage loan.⁶² Wigod protested Wells Fargo's decision for months while continuing to make timely reduced mortgage

⁵² See *Wigod*, 673 F.3d at 559 n.4; *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 350-51 (D. Mass. 2011); *Vida*, 2010 WL 5148473, at *7.

⁵³ *Wigod*, 673 F.3d 547. *But cf.* *Miller v. Chase Home Fin., LLC*, 677 F.3d 1113, 1116-17 (11th Cir. 2012) (holding that HAMP does not provide a private right of action and dismissing all state law claims as well). The full scope of this debate will not be addressed in this Note.

⁵⁴ *Wigod*, 673 F.3d at 558-59.

⁵⁵ *Id.* at 557-58.

⁵⁶ *Id.* at 558.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *id.*

⁶⁰ *Id.*

⁶¹ See *id.*

⁶² *Id.*

payments.⁶³ Wells Fargo responded merely by sending monthly notices threatening to foreclose on her property if she failed to pay the accumulating amount of delinquency.⁶⁴

Wigod filed a complaint in the Northern District of Illinois for, *inter alia*, breach of contract, promissory estoppel, fraudulent misrepresentation, and deceptive business practices claims.⁶⁵ The complaint alleged that Wells Fargo improperly re-evaluated her for HAMP after already determining that she qualified.⁶⁶ She filed the complaint as a class action on behalf of homeowners who also entered TPP Agreements, complied with all terms, and nevertheless were denied permanent modifications.⁶⁷ The district court granted Wells Fargo's motion to dismiss for failure to state a claim on all counts.⁶⁸ On appeal, the Seventh Circuit reversed the dismissal of the breach of contract, promissory estoppel, fraudulent misrepresentation, and deceptive business practices claims.⁶⁹

A. *Breach of Contract Claim*

First, the court held that the TPP was a contract and thus the complaint stated a breach of contract claim.⁷⁰ Wells Fargo contended that the TPP did not constitute a valid offer, that there was no consideration, and that the document lacked clear and definite terms.⁷¹ The court rejected each argument.⁷²

Addressing Wells Fargo's first argument, the court held that a valid offer existed where Wigod fulfilled all conditions precedent and Wells Fargo's interpretation of the TPP would render the rest of its provisions illusory.⁷³ The court found that there were only two conditions precedent to formation of a contract: Wigod's compliance and the continued veracity of her financial information.⁷⁴ The court

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 559; see Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA), 815 ILL. COMP. STAT. 505/2 (2012) (incorporating the Fair Debt Collection Practices Act (FDCPA)).

⁶⁶ *Wigod*, 673 F.3d at 558-59.

⁶⁷ *Id.* at 559.

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ *See id.* at 561, 565-66.

⁷¹ *Id.* at 561.

⁷² *Id.*

⁷³ *Id.* at 562-63.

⁷⁴ *Id.* at 562.

stated that a reasonable person would read the TPP as a definite offer for a permanent modification so long as these conditions were satisfied.⁷⁵ Wells Fargo argued that there was no binding offer because it had further discretion to determine that Wigod qualified, but the court rejected this argument.⁷⁶ The court reasoned that this would give Wells Fargo unfettered discretion, rendering other provisions of the TPP illusory.⁷⁷

Addressing Wells Fargo's next argument, the court found that there was consideration where Wigod agreed to undergo credit counseling if asked and to provide all requested financial documentation.⁷⁸ The court found that these requirements constituted new duties under the TPP and did not exist with Wigod's prior mortgage contract.⁷⁹ Thus, the court rejected Wells Fargo's pre-existing duty argument that Wigod simply agreed to pay reduced payments in satisfaction of a prior debt.⁸⁰

Finally, the court found that there were definite and certain terms because HAMP guidelines determined the terms and procedures for calculating values.⁸¹ Thus, the court rejected Wells Fargo's argument that the TPP was merely an "estimate" that did not specify the exact terms for the permanent loan modification.⁸² Consequently, the Seventh Circuit concluded that Wigod sufficiently pled every element of a breach of contract claim to survive a motion to dismiss.⁸³

B. Promissory Estoppel Claim

Second, the Seventh Circuit held that Wigod asserted a valid promissory estoppel claim.⁸⁴ The court found that Wells Fargo made an unambiguous promise to provide a permanent loan modification under HAMP if she met all of the requirements.⁸⁵ The court also found that Wigod relied on that promise to her detriment in foregoing other methods to save her home.⁸⁶ The court concluded that, at the very

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ *See id.* at 562-63.

⁷⁸ *Id.* at 564.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See id.* at 565.

⁸² *See id.*

⁸³ *See id.* at 558-59, 565-66.

⁸⁴ *Id.* at 566.

⁸⁵ *Id.*

⁸⁶ *Id.*

least, Wigod presented a facially plausible claim of promissory estoppel to withstand a motion to dismiss.⁸⁷

C. *Fraudulent Misrepresentation Claim*

Third, the Seventh Circuit held that Wigod adequately stated a claim of fraudulent misrepresentation.⁸⁸ Even under the heightened pleading standard applicable for fraud,⁸⁹ the court held that Wigod's complaint satisfied this standard.⁹⁰ Wigod alleged that Wells Fargo misrepresented the terms of the contract.⁹¹ She alleged that the bank led her to believe it would offer her a permanent modification once the bank determined she was qualified, sent her an executed copy, and she satisfied the conditions precedent.⁹² The court found that this reading of the TPP was not objectively unreasonable.⁹³

D. *Deceptive Business Practices Claim*

Fourth, the Seventh Circuit held that Wigod's deceptive business practices claim was plausible.⁹⁴ The Fair Debt Collection Practices Act ("FDCPA") and its state law counterparts require a plaintiff to show, *inter alia*, that the defendant's practices were either deceptive or unfair.⁹⁵ The court found that Wigod's deceptive practices claim was plausible, incorporating Wells Fargo's misrepresentations from the earlier fraud claim.⁹⁶ Furthermore, the court found that she sufficiently plead practices that were unfair because Wells Fargo dishonestly and ineffectually implemented HAMP.⁹⁷

⁸⁷ See *id.* at 558-59, 566.

⁸⁸ *Id.* at 569.

⁸⁹ See FED. R. CIV. P. 9(b).

⁹⁰ *Wigod*, 673 F.3d at 569.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 575; see ICFA, 815 ILL. COMP. STAT. 505/2 (2012) (incorporating the FDCPA).

⁹⁵ Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692e-1962f (2012); see, e.g., Rosenthal Fair Debt Collection Practices Act (Rosenthal Act), CAL. CIV. CODE § 1788.17 (2001) (incorporating FDCPA in state law); ICFA, 815 ILL. COMP. STAT. 505/2 (2012) (same); Maryland Consumer Protection Act (MCPA), MD. CODE ANN., COM. LAW § 13-301 (West 2012) (mirroring FDCPA language in state law).

⁹⁶ *Wigod*, 673 F.3d at 574.

⁹⁷ *Id.*

The Seventh Circuit found that Wigod suffered actual injury, a necessary element to the FDCPA claim.⁹⁸ The court found actual injury when Wigod incurred costs and fees, lost other opportunities to save her home, and suffered a negative impact to her credit.⁹⁹ The court held that these all sufficed to show actual pecuniary injury.¹⁰⁰

The Seventh Circuit's decision has already begun to heavily influence district court and circuit court decisions.¹⁰¹ Before the Seventh Circuit decided *Wigod*, district courts tended to dismiss all of homeowners' claims early in the litigation process.¹⁰² However, *Wigod* has influenced several district court opinions in a relatively short time.¹⁰³ The trend among the circuit courts that have since heard similar claims is to find the TPP to be a contract for a permanent modification, as well.¹⁰⁴ Thus, the *Wigod* rationale provides a viable analysis of the TPP in one context, but does not cover all situations

⁹⁸ *Id.* at 574-75.

⁹⁹ *Id.* at 575.

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., *Avevedo v. CitiMortgage, Inc.*, No. 11-C-4877, 2012 WL 3134222, at *4 (N.D. Ill. July 25, 2012) (quoting at length from *Wigod*); *Cave v. Saxon Mortg. Servs., Inc.*, No. CIV.A.11-4586, 2012 WL 1957588, at *5-7 (E.D. Pa. May 30, 2012) (citing *Wigod* extensively and reaching the same conclusion as a result); *Brady v. Chase Home Fin., LLC*, No. 1:11-CV-838, 2012 WL 1900606, at *6 (W.D. Mich. May 24, 2012) (finding the Seventh Circuit's analysis in *Wigod* reasonable and persuasive).

¹⁰² See *Wigod*, 673 F.3d at 559 n.4 (noting that roughly fifty courts granted motions to dismiss state law claims in full, while only about thirty courts allowed at least some claims to proceed); see, e.g., *Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059, 1073 (N.D. Cal. 2011) (granting the bank's motion to dismiss in its entirety), *rev'd sub nom.* *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013); *Grill v. BAC Home Loans Servicing LP*, No. 10-CV-03057-FCD GGH, 2011 WL 127891, at *10 (E.D. Cal. Jan. 14, 2011) (same).

¹⁰³ See, e.g., *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, 551-52 (N.D. Cal. 2012) (finding the rationale in *Wigod* more persuasive than authority within the same district); *Cave*, 2012 WL 1957588, at *5-7 (citing *Wigod* extensively and reaching the same conclusion as a result); *Brady*, 2012 WL 1900606, at *6 (finding the Seventh Circuit's analysis reasonable and persuasive); see also *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 796-97 (2013) (showing some state courts are following *Wigod*'s lead, as well).

¹⁰⁴ See *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 884-85 (9th Cir. 2013) (finding the *Wigod* analysis persuasive and allowing plaintiffs' claims to proceed past the motion to dismiss stage for breach of contract and unfair business practices); *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 233-36 (1st Cir. 2013) (finding plaintiff's breach of contract claim, regarding the TPP as a promise to provide a permanent modification in a timely fashion, to be sufficiently plausible to survive the motion to dismiss stage); see, e.g., *Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769, 775 (4th Cir. 2013) (upholding the dismissal of homeowners' complaint in its entirety where no TPP was ever entered into, and quoting district court's holding that the TPP creates privity of contract).

addressed by lower courts.¹⁰⁵ This Note explores how future courts could extend the Seventh Circuit's rationale to provide relief for homeowners in other situations recently faced by district courts.

III. ANALYSIS

This Note argues that the Seventh Circuit correctly decided *Wigod* for three reasons.¹⁰⁶ First, the Seventh Circuit correctly held that the TPP is a contract so long as the homeowners perform their conditions precedent.¹⁰⁷ This holding would remain true even if the TPP were unsigned.¹⁰⁸ Second, the state law claims presented to the Seventh Circuit were valid and would be so even if the TPP were not a contract.¹⁰⁹ Finally, public policy supports providing distressed homeowners some form of relief.¹¹⁰

A. Common Law Supports Construing the TPP as a Contract

Courts should construe the TPP as a contract so long as the homeowners perform their conditions precedent because common law supports this conclusion.¹¹¹ The homeowners' two conditions precedent include paying all monthly payments on time and providing the banks with all requested documentation.¹¹² Under common law, a

¹⁰⁵ See, e.g., *In re CitiMortgage, Inc. Home Affordable Modification Program ("HAMP") Litig.*, No. ML 11-2274 DSF (PLAx), 2012 WL 1931030, at *2-4 (C.D. Cal. Apr. 17, 2012) (multi-district litigation) (finding that even without the bank's signature, the TPP constitutes a contract); *Lucia*, 798 F. Supp. 2d at 1067-69 (finding no mutual assent where TPP contemplates the bank sending a fully executed modification); *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 349, 352-53 (D. Mass. 2011) (holding that the TPP was, at the very least, a contract governing the three-month trial period).

¹⁰⁶ See generally *infra* Part III.A-C (providing an in-depth analysis of the Seventh Circuit's holdings).

¹⁰⁷ See *infra* Part III.A.

¹⁰⁸ See *infra* Part III.A.

¹⁰⁹ See *infra* Part III.B.

¹¹⁰ See *infra* Part III.C.

¹¹¹ See *In re JPMorgan Chase Mortg. Modification Litig.*, 880 F. Supp. 2d 220, 234-35 (D. Mass. 2012) (multi-district litigation); *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, 549-53 (N.D. Cal. 2012); *Bolone v. Wells Fargo Home Mortg., Inc.*, 858 F. Supp. 2d 825, 832-33 (E.D. Mich. 2012) (finding a genuine issue of material fact relating to whether the homeowner's information remained true and accurate and whether she sent in all documentation as requested).

¹¹² See *In re JPMorgan Chase*, 880 F. Supp. 2d at 225-26; *Sutcliffe*, 283 F.R.D. at 537-38; *Bolone*, 858 F. Supp. 2d at 832-33 (E.D. Mich. 2012) (finding a genuine issue of material fact relating to whether the homeowner's information remained true and accurate and whether she sent in all documentation as requested).

breach of contract claim consists of: an offer and acceptance, consideration, definite and certain terms, plaintiff's performance of conditions precedent, defendant's breach, and damages.¹¹³ The banks contend that the TPP is not an enforceable offer, there is not sufficient consideration, and the document lacks definite and certain terms.¹¹⁴ However, the Seventh Circuit correctly rejected each of these contentions based on common law contracts doctrine.¹¹⁵

The TPP constitutes an enforceable offer where the homeowner is to fulfill all future conditions.¹¹⁶ An offer is valid and enforceable when all that remains is for the offeree to accept.¹¹⁷ The first and last sentence of the TPP both state that the bank will provide the homeowner with a permanent loan modification if the homeowner adheres to section one.¹¹⁸ Section one requires that the homeowner comply with all terms of the TPP and that all financial information remain true and accurate.¹¹⁹ To comply with the TPP, the homeowner

¹¹³ See *Ass'n Benefit Servs., Inc. v. Caremark RX, Inc.*, 493 F.3d 841, 849 (7th Cir. 2007) (explaining elements of a contract under Illinois law); *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003) (explaining elements of a contract under Pennsylvania law); *First Commercial Mortg. Co. v. Reece*, 89 Cal. App. 4th 731, 745 (2001) (defining elements of breach of contract under California law).

¹¹⁴ See *Avevedo v. CitiMortgage, Inc.*, No. 11-C-4877, 2012 WL 3134222, at *4-5 (N.D. Ill. July 25, 2012) (recounting the bank's argument that the TPP was not an enforceable contract); *Nadan v. Homesales, Inc.*, No. CV F 11-1181 LJO SKO, 2011 WL 3584213, at *5 (E.D. Cal. Aug. 12, 2011) (recounting the bank's argument for lack of consideration); *Belyea v. Litton Loan Servicing, LLP*, No. CIV.A.10-10931-DJC, 2011 WL 2884964, at *7-8 (D. Mass. July 15, 2011) (recounting the bank's argument that the TPP does not constitute an enforceable offer); *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 351-52 (D. Mass. 2011) (recounting the bank's argument that the TPP did not contain definite and certain terms).

¹¹⁵ See *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 563-66 (7th Cir. 2012).

¹¹⁶ See *Lee Cnty. v. Pierpont*, 693 So. 2d 994, 996 (Fla. App. Ct. 1997) (defining an offer); *McCarty v. Verson Allsteel Press Co.*, 89 Ill. App. 3d 498, 506-07 (1980) (same); cf. *Cave v. Saxon Mortg. Servs., Inc.*, No. CIV.A.11-4586, 2012 WL 1957588, at *5 (E.D. Pa. May 30, 2012) (rejecting the bank's argument that it reserved unfettered discretion to permanently modify the homeowner's loan under the TPP).

¹¹⁷ See *Pierpont*, 693 So. 2d at 996 (defining an offer); *McCarty*, 89 Ill. App. 3d at 506-07 (same); RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) (same).

¹¹⁸ See *Wigod*, 673 F.3d at 558 (quoting section one as: "If I am in compliance with this Loan Trial Period and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a [permanent] Loan Modification Agreement"); *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, 537 (N.D. Cal. 2012) (quoting section one of the TPP); *Durmic v. JPMorgan Chase Bank, N.A.*, No. 10-CV-10380-RGS, 2010 WL 4825632, at *1 (D. Mass. Nov. 24, 2010) (same).

¹¹⁹ See *Sutcliffe*, 283 F.R.D. at 537-38 (quoting section one of the TPP); *Bolone v. Wells Fargo Home Mortg., Inc.*, 858 F. Supp. 2d 825, 832-33 (E.D. Mich. 2012)

must make all monthly payments on time and send in all requested documentation.¹²⁰ Compliance would constitute acceptance of the bank's offer.¹²¹ According to the well-settled contracts principle, by presenting future conditions for the homeowner to fulfill, the TPP constitutes an enforceable offer.¹²²

The TPP also constitutes a binding promise.¹²³ A binding promise requires the agreement to contemplate sufficient consideration.¹²⁴ The TPP requires homeowners to agree to longer payoff times, to higher principal balances, to undergo credit counseling if the bank requires, and to send in additional documentation.¹²⁵ Although paying a reduced monthly mortgage may be a pre-existing duty, courts have found that these new duties constitute sufficient consideration to support the TPP as a binding promise.¹²⁶

(finding a genuine issue of material fact relating to whether the homeowner's information remained true and accurate and whether she sent in all documentation as requested); *Nadan*, 2011 WL 3584213, at *5 (finding that the homeowners failed to allege that their information had remained true and accurate).

¹²⁰ See *Wigod*, 673 F.3d at 558, 562; *Sutcliffe*, 283 F.R.D. at 537-38 (describing the requirements of the TPP); *In re CitiMortgage, Inc. Home Affordable Modification Program ("HAMP") Litig.*, No. ML 11-2274 DSF (PLAx), 2012 WL 1931030, at *2-3 (C.D. Cal. Apr. 17, 2012) (multi-district litigation) (finding that the TPP indicates only that the homeowner must comply with the TPP's terms, and then he will receive a permanent modification); see also *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 348 (D. Mass. 2011).

¹²¹ See, e.g., *McCarty*, 89 Ill. App. 3d at 506 (defining acceptance as an expression of confirmation sent to the offeror within a reasonable time); see also *Wigod*, 673 F.3d at 561-62 (recounting Wigod's allegations that she met her conditions and accepted the bank's offer and explaining that only Wigod's conditions remained to be fulfilled in response to the bank's offer); *In re JPMorgan Chase Mortg. Modification Litig.*, 880 F. Supp. 2d 220, 233 (D. Mass. 2012) (multi-district litigation) (same).

¹²² See *Pierpont*, 693 So. 2d at 996 (defining an offer as a party showing a willingness to enter a bargain such that the other party need only accept or fulfill his side of the bargain); *McCarty*, 89 Ill. App. 3d at 507 (same); cf. *Belyea v. Litton Loan Servicing, LLP*, No. CIV.A.10-10931-DJC, 2011 WL 2884964, at *7 (D. Mass. July 15, 2011) (rejecting the bank's argument that the TPPs were not enforceable offers and holding the TPP is plainly a contract).

¹²³ See *Cave v. Saxon Mortg. Servs., Inc.*, No. CIV.A.11-4586, 2012 WL 1957588, at *7 (E.D. Pa. May 30, 2012); *Sutcliffe*, 283 F.R.D. at 550-53; cf. *Allen v. CitiMortgage, Inc.*, No. CIV.CCB-10-2740, 2011 WL 3425665, at *6 (D. Md. Aug. 4, 2011) (rejecting the defendant's motion to dismiss the breach of contract claim, indicating a TPP may constitute a binding promise).

¹²⁴ See *Cave*, 2012 WL 1957588, at *6; *Sutcliffe*, 283 F.R.D. at 552; *Allen*, 2011 WL 3425665, at *6.

¹²⁵ See *In re JPMorgan Chase*, 880 F. Supp. 2d at 227; *Cave*, 2012 WL 1957588, at *6; *Bosque*, 762 F. Supp. 2d at 352.

¹²⁶ *Bosque*, 762 F. Supp. 2d at 351-52; see *Durmic v. JPMorgan Chase Bank, N.A.*, No. 10-CV-10380-RGS, 2010 WL 4825632, at *3 (D. Mass. Nov. 24, 2010); cf. *In re*

Furthermore, the TPP contains definite and certain terms because courts may incorporate by reference the essential terms from HAMP guidelines.¹²⁷ Courts have found that HAMP guidelines contain a set formula that permits calculation of all aspects of the homeowner's permanent loan.¹²⁸ These courts hold that any missing material terms can be determined through these set calculations.¹²⁹ Because the TPP is fundamentally intertwined with HAMP, HAMP's guidelines can be easily incorporated by reference.¹³⁰ For all of the above reasons, the Seventh Circuit reasonably construed the TPP as a contract.¹³¹

However, some district courts hold that the TPP does *not* constitute a contract because it lacks mutual assent.¹³² These courts offer three reasons for why the TPP lacks mutual assent.¹³³ First, some of these courts hold that the TPP is merely an application for a permanent loan modification with remaining conditions precedent for both parties.¹³⁴

Lloyd, Carr & Co., 617 F.2d 882, 890 (1st Cir. 1980) (defining pre-existing duty and the rationale behind the doctrine).

¹²⁷ See *In re JPMorgan Chase*, 880 F. Supp. 2d at 233-34; *Sutcliffe*, 283 F.R.D. at 552; *Durmic*, 2010 WL 4825632, at *4; see also *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 564-65 (7th Cir. 2012).

¹²⁸ See HAMP SUPP. DIR. 09-01, *supra* note 1, at 8-10; see also *In re JPMorgan Chase*, 880 F. Supp. 2d at 234; *Durmic*, 2010 WL 4825632, at *4. *But see Senter v. JPMorgan Chase Bank, N.A.*, 810 F. Supp. 2d 1339, 1350-51 (S.D. Fla. 2011) (rejecting this approach).

¹²⁹ *In re JPMorgan Chase*, 880 F. Supp. 2d at 234; *Durmic*, 2010 WL 4825632, at *4; see *Wigod*, 673 F.3d at 565 (stating that HAMP guidelines provided the standard for Wigod's permanent modification terms).

¹³⁰ See *In re JPMorgan Chase*, 880 F. Supp. 2d at 227; *Durmic*, 2010 WL 4825632, at *4; see also *Wigod*, 673 F.3d at 565 (stating that HAMP guidelines provided the standard for Wigod's permanent modification terms). *But see Senter*, 810 F. Supp. 2d at 1351 (rejecting this argument because the TPP did not explicitly incorporate the guidelines by reference).

¹³¹ See *Wigod*, 673 F.3d at 566.

¹³² See, e.g., *Avevedo v. CitiMortgage, Inc.*, No. 11-C-4877, 2012 WL 3134222, at *8 (N.D. Ill. July 25, 2012) (holding there is no mutual assent where the bank does not sign and return the TPP to the homeowner); *Senter*, 810 F. Supp. 2d at 1351 (holding that the TPP constitutes merely an agreement to agree); *Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059, 1067 (N.D. Cal. 2011) (holding that the TPP is merely part of the application process), *rev'd sub nom. Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013).

¹³³ See, e.g., *Avevedo*, 2012 WL 3134222, at *8 (holding there is no mutual assent where the bank does not sign and return the TPP to the homeowner); *Senter*, 810 F. Supp. 2d at 1351 (holding that the TPP constitutes merely an agreement to agree); *Lucia*, 798 F. Supp. 2d at 1067 (holding that the TPP is merely part of the application process).

¹³⁴ See *Lucia*, 798 F. Supp. 2d at 1067; *Grill v. BAC Home Loans Servicing LP*, No. 10-CV-03057-FCD GGH, 2011 WL 127891, at *4 (E.D. Cal. Jan. 14, 2011); see also *Senter*, 810 F. Supp. 2d at 1349.

These courts look to the second section of the TPP, which states: “[T]he Lender will send me a signed copy of this [TPP] if I qualify for the [permanent modification] Offer.”¹³⁵ In looking to this section, these courts hold that the banks must determine qualification as a condition precedent.¹³⁶ If both parties have remaining conditions precedent, then there is no enforceable offer and, thus, no mutual assent.¹³⁷

Second, other courts under this view hold that the TPP is merely an agreement to agree on a future loan modification and, thus, lacks mutual assent.¹³⁸ These courts point to the title of the document, which states that it is “Step One of Two-Step Documentation Process.”¹³⁹ They find that the title itself states there is a second step before the contract or loan modification becomes binding on the parties.¹⁴⁰ They found that the second step had not occurred.¹⁴¹ These courts also look to the second section of the TPP, but to different language. They focus on the statement: “[T]he [TPP] is not a modification of the Loan Documents . . . unless and until . . . (ii) [the borrower] receive[s] a fully executed copy of a Modification Agreement”¹⁴² These courts found no mutual assent where the

¹³⁵ *Wigod*, 673 F.3d at 558 (emphasis added).

¹³⁶ See *Soin v. Fed. Nat'l Mortg. Ass'n*, No. CIV.2:12-634 WBS EFB, 2012 WL 1232324, at *3 (E.D. Cal. Apr. 12, 2012); *Senter*, 810 F. Supp. 2d at 1353-56. *But see Lucia*, 798 F. Supp. 2d at 1068.

¹³⁷ See *McCarty v. Verson Allsteel Press Co.*, 89 Ill. App. 3d 498, 507 (1980); RESTATEMENT (SECOND) OF CONTRACTS § 26 (1981); see also *Lee Cnty. v. Pierpont*, 693 So. 2d 994, 996 (Fla. App. Ct. 1997) (defining an offer).

¹³⁸ See *Nadan v. Homesales, Inc.*, No. CV F 1:11-1181 LJO SKO, 2011 WL 3584213, at *6-7 (E.D. Cal. Aug. 12, 2011); *Senter*, 810 F. Supp. 2d at 1351. *But cf. Belyea v. Litton Loan Servicing, LLP*, No. CIV.A.10-10931-DJC, 2011 WL 2884964, at *8 (D. Mass. July 15, 2011) (rejecting the bank's argument that the TPP constitutes merely an agreement to agree).

¹³⁹ *Pool v. Wells Fargo Bank, N.A.*, No. 11-CV-01066-LTB-KLM, 2012 WL 3264294, at *1 (D. Colo. Aug. 10, 2012) (quoting title of TPP); *Thomas v. JPMorgan Chase & Co.*, 811 F. Supp. 2d 781, 787 (S.D.N.Y. 2011) (same); see *Helmus v. Chase Home Fin., LLC*, 890 F. Supp. 2d 806, 810 (W.D. Mich. 2012) (describing the two steps of the TPP).

¹⁴⁰ *Pool*, 2012 WL 3264294, at *1 (quoting title of TPP); *Thomas*, 811 F. Supp. 2d at 787 (same); see *Helmus*, 890 F. Supp. 2d at 810 (describing the two steps of the TPP).

¹⁴¹ See *Helmus*, 890 F. Supp. 2d at 813.

¹⁴² *Lucia*, 798 F. Supp. 2d at 1067 (“I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (I) [sic] I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed. I further understand and agree that the

bank had not sent the plaintiff a fully executed modification agreement.¹⁴³ Consequently, they held that this modification agreement was a condition precedent to the formation of a contract and there was no mutual assent.¹⁴⁴ Thus, the TPP is not a contract.¹⁴⁵

Third, courts have also not found mutual assent where the banks did not sign and return the TPP form.¹⁴⁶ Generally, both parties must sign a document for it to constitute a contract.¹⁴⁷ These courts also point to the language in the second section, but focus on the signature requirement.¹⁴⁸ In referencing this section, courts have found that the lack of the bank's signature on the TPP is significant.¹⁴⁹ They held that there could be no contract when both parties do not sign and signify their mutual assent.¹⁵⁰

However, this counterargument fails because the more reasonable interpretation of the TPP illustrates that mutual assent is present where only conditions precedent for the homeowners remain.¹⁵¹ Thus,

Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan.”)

¹⁴³ See *Soin v. Fed. Nat'l Mortg. Ass'n*, No. CIV.2:12-634 WBS, 2012 WL 1232324, at *3 (E.D. Cal. Apr. 12, 2012); *Lucia*, 798 F. Supp. 2d at 1068; see also *Rummell v. Vantium Capital, Inc.*, No. 12-10952, 2012 WL 2564846, at *7 (E.D. Mich. July 2, 2012).

¹⁴⁴ See sources cited *supra* note 143.

¹⁴⁵ See sources cited *supra* note 143.

¹⁴⁶ See *Pool v. Wells Fargo Bank, N.A.*, No. 11-CV-01066-LTB-KLM, 2012 WL 3264294, at *5 (D. Colo. Aug. 10, 2012); *Avevedo v. CitiMortgage, Inc.*, No. 11-C-4877, 2012 WL 3134222, at *8 (N.D. Ill. July 25, 2012); *Rummell*, 2012 WL 2564846, at *6.

¹⁴⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 95 & cmt. c (1981); see, e.g., *Helmus*, 890 F. Supp. 2d at 813 (requiring a signature); *Pool*, 2012 WL 3264294, at *5 (same).

¹⁴⁸ See *Avevedo*, 2012 WL 3134222, at *1 (“[T]his [TPP] will not take effect unless and until both I and the Lender sign it and Lender provides me with a copy of this Plan with the Lender's signature.” (internal quotation omitted)); cf. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 558 (7th Cir. 2012) (quoting section two as: “[T]he Lender will send me a signed copy of this [TPP] if I qualify for the [permanent modification] Offer.” (emphasis added)).

¹⁴⁹ See *Helmus*, 890 F. Supp. 2d at 813; *Avevedo*, 2012 WL 3134222, at *8; *Rummell*, 2012 WL 2564846, at *6.

¹⁵⁰ See *Pool*, 2012 WL 3264294, at *5; *Avevedo*, 2012 WL 3134222, at *8; *Rummell*, 2012 WL 2564846, at *6.

¹⁵¹ See *Cave v. Saxon Mortg. Servs., Inc.*, No. CIV.A.11-4586, 2012 WL 1957588, at *5 (E.D. Pa. May 30, 2012) (rejecting the bank's argument that it reserved unfettered discretion to permanently modify the homeowner's loan under the TPP); *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, 551 (N.D. Cal. 2012); see also *Wigod*, 673 F.3d at 563.

the TPP constitutes a contract.¹⁵² Although the homeowner must be qualified, HAMP literature envisions the bank to have determined qualification before offering homeowners the TPP, using the NPV test.¹⁵³ Several district courts have found that the banks would not have proceeded with the TPP process if they had not found the homeowners to be qualified.¹⁵⁴ Thus, the more reasonable interpretation is that the only conditions left to be fulfilled are those required of the homeowner.¹⁵⁵ Once the homeowners have fulfilled those conditions, they have accepted the banks' offer and there is mutual assent.¹⁵⁶

Rather than requiring homeowners to have received fully executed modification agreements, the Seventh Circuit's interpretation of section two of the TPP¹⁵⁷ is more reasonable because it gives weight to all sections.¹⁵⁸ Courts must read documents as a whole and in a manner that does not render other provisions illusory.¹⁵⁹ The Seventh

¹⁵² See *supra* text accompanying notes 116-131.

¹⁵³ See *supra* Part I.A (describing the three-step process the bank must put a homeowner through before determining eligibility for the TPP); see also HAMP SUPP. DIR. 09-01, *supra* note 1, at 2-5, 8-10; cf. *Casey v. Fed. Home Loan Mortg. Ass'n*, No. CIV.A.H-11-3830, 2012 WL 1425138, at *1 (S.D. Tex. Apr. 23, 2012) (recounting plaintiffs' assertion that they had been verbally assured by the bank that they pre-qualified for permanent modification).

¹⁵⁴ See, e.g., *Cave*, 2012 WL 1957588, at *7 (holding that plaintiffs' allegations would not make sense unless one presumed they were qualified); *Gaudin v. Saxon Mortg. Servs., Inc.*, No. C11-1663 RS, 2011 WL 5825144, at *1 (N.D. Cal. Nov. 17, 2011) (finding that the bank's signature implied that it found plaintiff to be qualified); *Durmic v. JPMorgan Chase Bank, N.A.*, No. 10-CV-10380-RGS, 2010 WL 4825632, at *1 (D. Mass. Nov. 24, 2010) (stating how the NPV test determines pre-eligibility for the TPP).

¹⁵⁵ See *Lee Cnty. v. Pierpont*, 693 So. 2d 994, 996 (Fla. App. Ct. 1997) (defining an offer); *McCarty v. Verson Allsteel Press Co.*, 89 Ill. App. 3d 498, 506-07 (1980) (same); cf. *Cave*, 2012 WL 1957588, at *5 (rejecting the bank's argument that it reserved unfettered discretion to permanently modify the homeowner's loan under the TPP).

¹⁵⁶ See *In re JPMorgan Chase Mortg. Modification Litig.*, 880 F. Supp. 2d 220, 225 (D. Mass. 2012) (multi-district litigation); *Sutcliffe*, 283 F.R.D. at 537; *Bolone v. Wells Fargo Home Mortg., Inc.*, 858 F. Supp. 2d 825, 832-33 (E.D. Mich. 2012) (finding a genuine issue of material fact relating to whether the homeowner's information remained true and accurate and whether she sent in all documentation as requested).

¹⁵⁷ See *supra* note 142 and accompanying text (quoting section two of the TPP).

¹⁵⁸ *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 563 (7th Cir. 2012) (arguing that "[t]he more natural interpretation" of the provision regarding a fully modified agreement is to read it as though the loan documents were not yet modified, but that the bank had an obligation to permanently modify the homeowner's loan); see *Sutcliffe*, 283 F.R.D. at 551; see also *Cave*, 2012 WL 1957588, at *5.

¹⁵⁹ See *Cave*, 2012 WL 1957588, at *5; *Gaudin*, 2011 WL 5825144, at *4; *McHenry*

Circuit's interpretation satisfies this contracts maxim because it treats section two as qualifying language, rather than as setting out new requirements.¹⁶⁰ Requiring plaintiffs to have received a fully executed modification agreement would give the banks unfettered discretion and render other provisions of the TPP illusory.¹⁶¹ Courts have acknowledged that section two lays out more of the procedure, rather than what the homeowner needs to accomplish.¹⁶² The homeowner must meet all conditions and then he or she will receive a new loan agreement after the TPP period has elapsed.¹⁶³ Thus, a fully executed modification agreement is not a condition precedent for the bank to fulfill.¹⁶⁴ Once the homeowner fulfills her part of the bargain, there is mutual assent and, therefore, the TPP constitutes a contract.¹⁶⁵

Courts disagree on how to apply *Wigod* when the bank does not sign and return the TPP, but the more reasonable interpretation is to find mutual assent.¹⁶⁶ Even though both parties' signatures are normally

Sav. Bank v. Autoworks of Wauconda, Inc., 399 Ill. App. 3d 104, 111 (2010) (defining common contracts interpretation doctrine, stating that courts must give effect to all provisions of a contract whenever possible).

¹⁶⁰ See *Wigod*, 673 F.3d at 562-63; *Sutcliffe*, 283 F.R.D. at 551; *Darcy v. CitiFinancial, Inc.*, No. 1:10-CV-848, 2011 WL 3758805, at *6 (W.D. Mich. Aug. 25, 2011) (finding that the only requirements to be fulfilled in section two are placed on the homeowner).

¹⁶¹ See *Cave*, 2012 WL 1957588, at *5; *Gaudin*, 2011 WL 5825144, at *4. But see *Brady v. Chase Home Fin., LLC*, No. 1:11-CV-838, 2012 WL 1900606, at *7 (W.D. Mich. May 24, 2012) (dismissing plaintiff's breach of contract claim where the bank never sent her a fully executed modification agreement).

¹⁶² See, e.g., *Cave*, 2012 WL 1957588, at *5 (rejecting the bank's interpretation of section two that would give banks unfettered discretion); *Sutcliffe*, 283 F.R.D. at 551-52 (agreeing with the Seventh Circuit that the more natural interpretation is to read the language as qualifying). See generally *Jackson v. Fed. Nat'l Mortg. Ass'n*, No. 6:10-CV-06342-SI, 2012 WL 1030016, at *2-3 (D. Or. Mar. 26, 2012) (quoting most of the second section of the TPP).

¹⁶³ See *Wigod*, 673 F.3d at 563; *Sutcliffe*, 283 F.R.D. at 551-52; see also *Cave*, 2012 WL 1957588, at *5.

¹⁶⁴ See *Cave*, 2012 WL 1957588, at *5; *Sutcliffe*, 283 F.R.D. at 551-52; see also *Wigod*, 673 F.3d at 563.

¹⁶⁵ See *Wigod*, 673 F.3d at 563; *Sutcliffe*, 283 F.R.D. at 551-52; see also *Cave*, 2012 WL 1957588, at *5.

¹⁶⁶ See, e.g., *Avevedo v. CitiMortgage, Inc.*, No. 11-C-4877, 2012 WL 3134222, at *8 (N.D. Ill. July 25, 2012) (finding the lack of the bank's signature on the TPP to be fatal to plaintiffs' breach of contract claim); *In re CitiMortgage, Inc. Home Affordable Modification Program ("HAMP") Litig.*, No. ML 11-2274 DSF (PLAx), 2012 WL 1931030, at *2 (C.D. Cal. Apr. 17, 2012) (multi-district litigation) (finding the lack of the bank's signature to be overcome by its acceptance of plaintiffs' performance); *Darcy v. CitiFinancial, Inc.*, No. 1:10-CV-848, 2011 WL 3758805, at *5 (W.D. Mich. Aug. 25, 2011) (recognizing that the lack of the bank's signature was not sufficient to

required to create a contract, the defendant's acceptance of plaintiff's performance can be an excuse for this failed condition precedent.¹⁶⁷ One district court excused the lack of the bank's signature when the bank accepted the monthly payments and documentation sent in by homeowners.¹⁶⁸ Other courts have held that acceptance of this performance created a promise to perform even without the bank's signature on the TPP.¹⁶⁹ Thus, the more reasonable interpretation of the TPP requires courts to look to common excuses for conditions precedent.¹⁷⁰ Under this interpretation, once again, the only conditions precedent remaining are those for the homeowner to fulfill in order to signal acceptance of the bank's offer.¹⁷¹ The TPP constitutes a contract, hinging only on whether the homeowner complies with the payment and documentation requirements, and whether the financial information remains accurate.¹⁷² If the homeowners have alleged that

foreclose plaintiff's breach of contract claim).

¹⁶⁷ See *In re CitiMortgage*, 2012 WL 1931030, at *2; see also *Berkshire Med. Ctr., Inc. v. U.W. Marx, Inc.*, 644 F.3d 71, 77 (1st Cir. 2011) (finding that even if notice in writing was not given, the condition was excused when the defendant accepted whatever notice was given and acted upon it); RESTATEMENT (SECOND) OF CONTRACTS § 246(1) (1981). *But see* *Rummell v. Vantium Capital, Inc.*, No. 12-10952, 2012 WL 2564846, at *7 (E.D. Mich. July 2, 2012) (rejecting the argument that the bank cannot excuse itself by pointing to its own lack of signature).

¹⁶⁸ *In re CitiMortgage*, 2012 WL 1931030, at *2; see *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 351 (D. Mass. 2011) (holding the TPPs were plainly offers, and that plaintiffs' signatures and monthly payments constituted acceptance of those offers). *But see* *Rummell*, 2012 WL 2564846, at *7 (rejecting the argument that the bank cannot excuse itself by pointing to its own lack of signature).

¹⁶⁹ See *In re CitiMortgage*, 2012 WL 1931030, at *2 (disapproving of the bank's position that it was allowed a "pocket veto" of the homeowner's TPP by simply not signing and returning the document); see also *Sutcliffe*, 283 F.R.D. at 550-51; *Bosque*, 762 F. Supp. 2d at 351.

¹⁷⁰ See *Chi. Coll. of Osteopathic Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1343 (7th Cir. 1983) (stating that a party may excuse a condition precedent by continuing to accept performance of the contract and to receive the benefit therefrom); *In re CitiMortgage*, 2012 WL 1931030, at *2; RESTATEMENT (SECOND) OF CONTRACTS § 246(1) (1981).

¹⁷¹ See *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 561-62 (7th Cir. 2012); see also *McCarty v. Verson Allsteel Press Co.*, 89 Ill. App. 3d 498, 506 (1980) (defining acceptance); RESTATEMENT (SECOND) OF CONTRACTS § 26 (1981).

¹⁷² See *In re CitiMortgage*, 2012 WL 1931030, at *2 (finding that the TPP indicates only that the homeowner must comply with the TPP's terms, and then he will receive a permanent modification); *Bolone v. Wells Fargo Home Mortg., Inc.*, 858 F. Supp. 2d 825, 832-33 (E.D. Mich. 2012) (allowing claims to proceed past summary judgment where the court found a genuine issue of material fact relating to whether the homeowner complied with the TPP); *cf.* *Pool v. Wells Fargo Bank, N.A.*, No. 11-CV-01066-LTB-KLM, 2012 WL 3264294, at *1 (D. Colo. Aug. 10, 2012) (recounting plaintiff's assertion that a bank representative assured that she only needed to make

they fulfilled these requirements signifying acceptance, courts should allow homeowners to proceed at least past the motion to dismiss stage.¹⁷³

B. *The TPP Is an Agreement upon Which Homeowners Can Base Various State Law Claims*

The TPP constitutes a promise upon which other claims can rest.¹⁷⁴ Homeowners generally assert state law claims tangentially related to HAMP in addition to their breach of contract claims.¹⁷⁵ These often include claims of promissory estoppel, fraud or misrepresentation, and deceptive or unfair business practices.¹⁷⁶ Even in the absence of a binding contract, homeowners have sufficient facts to proceed with these claims beyond the motion to dismiss stage.¹⁷⁷ The Seventh Circuit correctly allowed these claims to proceed.¹⁷⁸

the three payments and send in all documentation to receive the loan modification); *Nungaray v. Litton Loan Servicing, LP*, 200 Cal. App. 4th 1499 (2011) (rejecting similar HAMP claims, based at least partially on the fact that the homeowners had not complied with all requirements of the TPP because they did not send in all requested documents).

¹⁷³ See *Sutcliffe*, 283 F.R.D. at 550; *Gaudin v. Saxon Mortg. Servs., Inc.*, No. C11-1663 RS, 2011 WL 5825144, at *3 (N.D. Cal. Nov. 17, 2011); *Belyea v. Litton Loan Servicing, LLP*, No. CIV.A.10-10931-DJC, 2011 WL 2884964, at *8 (D. Mass. July 15, 2011); *Durmic v. JPMorgan Chase Bank, N.A.*, No. 10-CV-10380-RGS, 2010 WL 4825632, at *4 (D. Mass. Nov. 24, 2010).

¹⁷⁴ See *In re CitiMortgage*, 2012 WL 1931030, at *4; *Allen v. CitiMortgage, Inc.*, No. CIV.CCB-10-2740, 2011 WL 3425665, at *8 (D. Md. Aug. 4, 2011) (agreeing with the plaintiffs' characterization of the TPP as a clear and definite promise); see also *Cave v. Saxon Mortg. Servs., Inc.*, No. CIV.A.11-4586, 2012 WL 1957588, at *9 (E.D. Pa. May 30, 2012) (reaffirming its earlier holding that the TPP constitutes a binding promise).

¹⁷⁵ See, e.g., *Wigod*, 673 F.3d at 559 (listing plaintiff's claims of promissory estoppel, negligent hiring and supervision, fraudulent misrepresentation, and deceptive and unfair business practices in addition to her breach of contract claims); *Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059, 1064 (N.D. Cal. 2011) (listing plaintiffs' claims of breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, and deceptive and unfair business practices), *rev'd sub nom.* *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013); *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 346 (D. Mass. 2011) (same).

¹⁷⁶ See, e.g., *Wigod*, 673 F.3d at 559 (listing plaintiff's claims of promissory estoppel, negligent hiring and supervision, fraudulent misrepresentation, and deceptive and unfair business practices in addition to her breach of contract claims); *Lucia*, 798 F. Supp. 2d at 1064 (listing plaintiffs' claims of breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, and deceptive and unfair business practices); *Bosque*, 762 F. Supp. 2d at 346 (same).

¹⁷⁷ See *Sutcliffe*, 283 F.R.D. at 548; *Gaudin*, 2011 WL 5825144, at *5; *In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.*, No. CIV.A.10-

The TPP represents a clear and unambiguous promise that supports homeowners' claims of promissory estoppel.¹⁷⁹ Common law promissory estoppel requires an unambiguous promise upon which a plaintiff reasonably and foreseeably relied to his or her detriment.¹⁸⁰ Various courts have held that the TPP constitutes a promise for homeowners to receive permanent modifications of their home loans if they make timely payments and send in all documentation.¹⁸¹ These homeowners reasonably and detrimentally relied on this promise where they forewent other opportunities and remedies to save their homes.¹⁸² A multi-district consolidated case against one bank, *In re JPMorgan Chase Mortgage Modification Litigation*, specifically found that homeowners ended up in a worse position than before they had entered the TPP.¹⁸³ The Seventh Circuit reviewed similar facts and properly held that the TPP constitutes a promise on which homeowners can base promissory estoppel claims.¹⁸⁴

MD-02193, 2011 WL 2637222, at *4-6 (D. Mass. July 6, 2011) (multi-district litigation).

¹⁷⁸ *Wigod*, 673 F.3d at 566, 569, 574-75; *accord Cave*, 2012 WL 1957588, at *9-11 (ruling similarly to the Seventh Circuit on almost all claims); *In re Bank of Am.*, 2011 WL 2637222, at *4-6 (allowing similar claims as brought in *Wigod* to proceed past the motion to dismiss stage).

¹⁷⁹ See *In re CitiMortgage*, 2012 WL 1931030, at *4; *Allen*, 2011 WL 3425665, at *8 (agreeing with the plaintiffs' characterization of the TPP as a clear and definite promise); see also *Cave*, 2012 WL 1957588, at *9 (reaffirming its earlier holding that the TPP constitutes a binding promise).

¹⁸⁰ See *U.S. Ecology, Inc. v. California*, 129 Cal. App. 4th 887, 901 (2005) (defining elements of promissory estoppel under California law); *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 51 (2009) (defining elements of promissory estoppel under Illinois law); *Turnpike Motors, Inc. v. Newbury Grp., Inc.*, 413 Mass. 119, 123 (1992) (defining elements of promissory estoppel under Massachusetts law); RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) (defining promissory estoppel).

¹⁸¹ See *Sutcliffe*, 283 F.R.D. at 537 (describing the requirements of the TPP); *In re CitiMortgage*, 2012 WL 1931030, at *2 (finding that the TPP indicates only that the homeowner must comply with the TPP's terms, and then he will receive a permanent modification); *Bosque*, 762 F. Supp. 2d at 348; see also *Wigod*, 673 F.3d at 566.

¹⁸² See *In re CitiMortgage*, 2012 WL 1931030, at *4; *Allen*, 2011 WL 3425665, at *8-9; see also *In re JPMorgan Chase Mortg. Modification Litig.*, 880 F. Supp. 2d 220, 238 (D. Mass. 2012) (multi-district litigation) (describing plaintiffs' statements that they were better off before they entered the TPP).

¹⁸³ *In re JPMorgan Chase*, 880 F. Supp. 2d at 238; see *In re CitiMortgage*, 2012 WL 1931030, at *4; *Allen*, 2011 WL 3425665, at *8-9.

¹⁸⁴ See *Wigod*, 673 F.3d at 566; *In re CitiMortgage*, 2012 WL 1931030, at *4; *Allen*, 2011 WL 3425665, at *8 (agreeing with the plaintiffs' characterization of the TPP as a clear and definite promise); see also *Cave*, 2012 WL 1957588, at *9 (reaffirming its earlier holding that the TPP constitutes a binding promise).

The banks' use of the TPP also sufficiently supports a claim of fraudulent misrepresentation.¹⁸⁵ Common law fraudulent misrepresentation requires: a known false statement of material fact, intended to induce the plaintiff to act in reliance upon it, from which the plaintiff suffers damage.¹⁸⁶ Homeowners have alleged that the banks never intended to give permanent modifications to homeowners enrolled in the TPP.¹⁸⁷ Several courts have found these allegations plausible based on the bank's actions in dragging out the TPPs.¹⁸⁸ Furthermore, courts have found that the banks were deceptive in telling homeowners that they pre-qualified when receiving the TPP, but claiming they were not qualified several months later.¹⁸⁹ During the interim months, the banks told homeowners to continue making modified payments under the TPP.¹⁹⁰ Banks often did so even when

¹⁸⁵ See *Wigod*, 673 F.3d at 569-70; see also *Cave*, 2012 WL 1957588, at *10; *In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.*, No. CIV.A.10-MD-02193, 2011 WL 2637222, at *5 (D. Mass. July 6, 2011) (multi-district litigation); *Allen*, 2011 WL 3425665, at *9.

¹⁸⁶ See *Dloogatch v. Brincat*, 396 Ill. App. 3d 842, 847 (2009) (defining the elements of fraud under Illinois law); see also *Casey v. Fed. Home Loan Mortg. Ass'n*, No. CIV.A.H-11-3830, 2012 WL 1425138, at *3 (S.D. Tex. Apr. 23, 2012) (same for Texas law); *Thomas v. JPMorgan Chase & Co.*, 811 F. Supp. 2d 781, 793 (S.D.N.Y. 2011) (same for New Jersey and New York law).

¹⁸⁷ Cf. *Pool v. Wells Fargo Bank, N.A.*, No. 11-CV-01066-LTB-KLM, 2012 WL 3264294, at *1 (D. Colo. Aug. 10, 2012) (describing how the bank told plaintiff that as long as she made the three monthly payments and submitted all the required documentation, her loan would be modified, but denying that interpretation of the TPP during litigation); *Senter v. JPMorgan Chase Bank, N.A.*, 810 F. Supp. 2d 1339, 1343 (S.D. Fla. 2011) (recounting facts where the bank told plaintiff that her file was complete with all necessary documentation, but then denied her a permanent modification two months later because of missing documentation); *Belyea v. Litton Loan Servicing, LLP*, No. CIV.A.10-10931-DJC, 2011 WL 2884964, at *3 (D. Mass. July 15, 2011) (recounting the bank's justification for not giving a permanent modification as not receiving the requested additional information, even though plaintiffs provided all requested documentation).

¹⁸⁸ See *In re JPMorgan Chase*, 880 F. Supp. 2d at 238 (D. Mass. 2012) (multi-district litigation) (re-stating plaintiffs' allegation that the bank strung homeowners along through a drawn-out modification process that the bank had "no real intention of honoring"); *Cave*, 2012 WL 1957588, at *10 (recounting plaintiffs' allegations that the banks never intended to provide permanent loan modifications to the majority of applicants); see also *Wigod*, 673 F.3d at 570.

¹⁸⁹ See *Cave*, 2012 WL 1957588, at *2 (describing plaintiffs' belief that they were pre-qualified for their TPP); *Casey*, 2012 WL 1425138, at *1 (recounting plaintiffs' assertion that the bank had verbally assured that they pre-qualified for permanent modification); see, e.g., *Allen*, 2011 WL 3425665, at *2 (describing how the bank told plaintiffs to disregard a notice cancelling their TPP, only to find out months later that they had been reported to a credit agency and now owe a balloon payment).

¹⁹⁰ *Cave*, 2012 WL 1957588, at *10; see *In re JPMorgan Chase*, 880 F. Supp. 2d at

they had already decided against offering the homeowners a permanent modification.¹⁹¹ As a result, courts have credited homeowner allegations that the banks made false promises they never intended to fulfill.¹⁹² Therefore, with similar facts, the Seventh Circuit was correct in allowing homeowners to seek relief on claims of promissory fraud or fraudulent misrepresentation.¹⁹³

Finally, homeowners brought viable deceptive or unfair business practices claims under state versions of federal consumer protection laws and other state law protective statutes.¹⁹⁴ The federal Fair Debt Collection Practices Act (“FDCPA”) and its state law counterparts require a plaintiff to show, *inter alia*, that the defendant’s practices were either deceptive or unfair.¹⁹⁵ Courts have found that the banks deceived and misled homeowners by enrolling them in the TPPs and leading them to believe the banks would offer them permanent loan modifications.¹⁹⁶ The TPP is only meant to last three months, but the banks would prolong the period extensively and then simply deny

225, 228 (quoting plaintiffs’ complaint describing how the bank deceived them); *see, e.g., Pool*, 2012 WL 3264294, at *1 (recounting how the bank told plaintiff to continue making payments, only for plaintiff to receive a notice of default and accelerated balance five months later); *Thomas*, 811 F. Supp. 2d at 788 (recounting how the banks told plaintiffs to continue making payments, but did not credit those payments to their account).

¹⁹¹ *See* sources cited *supra* note 190.

¹⁹² *See Wigod*, 673 F.3d at 570; *In re JPMorgan Chase*, 880 F. Supp. 2d at 238 (crediting plaintiffs’ allegation that the bank strung homeowners along through a drawn-out modification process that the bank had “no real intention of honoring”); *Cave*, 2012 WL 1957588, at *1, *10 (recounting plaintiffs’ allegations that the banks never intended to provide permanent loan modifications to the majority of applicants and finding plausible their claims that the bank deceptively had them continue to make payments); Braucher, *supra* note 15, at 753 (“Servicer [i.e., bank] foot-dragging became apparent by the summer of 2009.”).

¹⁹³ *Wigod*, 673 F.3d at 570; *see In re JPMorgan Chase*, 880 F. Supp. 2d at 237-38 (listing examples of the bank’s fraudulent conduct); *Cave*, 2012 WL 1957588, at *10.

¹⁹⁴ *See In re JPMorgan Chase*, 880 F. Supp. 2d at 241-42; *Gaudin v. Saxon Mortg. Servs., Inc.*, No. C11-1663 RS, 2011 WL 5825144, at *4 (N.D. Cal. Nov. 17, 2011) (finding that the TPP is, at a minimum, misleading); *see also Casey*, 2012 WL 1425138, at *7 (not allowing fraud or promissory estoppel claims to proceed, but permitting unreasonable debt collection claims to proceed).

¹⁹⁵ FDCPA, 15 U.S.C. §§ 1692-1692p (2012); *see, e.g., ICFA*, 815 Ill. Comp. Stat. 505/2 (2012) (incorporating FDCPA in state law); MCPA, MD. CODE ANN., COM. LAW § 13-301 (West 2012) (mirroring FDCPA language in state law).

¹⁹⁶ *See Gaudin*, 2011 WL 5825144, at *4 (finding that the TPP is, at a minimum, misleading); *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 353-54 (D. Mass. 2011); *see also Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, 548-49 (N.D. Cal. 2012) (holding plaintiffs sufficiently alleged unfair and fraudulent conduct).

homeowners the modification.¹⁹⁷ Thus, the Seventh Circuit, in facing similar facts, correctly allowed Wigod's deceptive and unfair business practices claims to proceed.¹⁹⁸

Some district courts reason that all of the homeowners' other claims besides breach of contract must be dismissed as well.¹⁹⁹ They find that no reasonable person could interpret the TPP as a promise and, thus, it cannot even be considered misleading.²⁰⁰ A district court in the Northern District of California found that homeowners could not reasonably rely on the TPP as a promise when it contains several conditions precedent.²⁰¹ These courts found a person's reliance particularly unreasonable considering HAMP authorized banks to rely on verbal representations of homeowners' finances in the first year of the program.²⁰² These courts rejected the idea that a bank would bind itself based on these oral representations alone merely by giving the homeowners the TPP.²⁰³

In addition, several of these district courts reaffirm their belief that the TPP is merely an application for permanent modification.²⁰⁴ One

¹⁹⁷ See *Soin v. Fed. Nat'l Mortg. Ass'n*, No. CIV.2:12-634 WBS, 2012 WL 1232324, at *2 (E.D. Cal. Apr. 12, 2012); see also *Pool v. Wells Fargo Bank, N.A.*, No. 11-CV-01066-LTB-KLM, 2012 WL 3264294, at *1 (D. Colo. Aug. 10, 2012); *Allen v. CitiMortgage, Inc.*, No. CIV.CCB-10-2740, 2011 WL 3425665, at *2 (D. Md. Aug. 4, 2011).

¹⁹⁸ *Wigod*, 673 F.3d at 574-75; see *In re JPMorgan Chase*, 880 F. Supp. 2d at 241-42; *Gaudin*, 2011 WL 5825144, at *4.

¹⁹⁹ See, e.g., *Rummell v. Vantium Capital, Inc.*, No. 12-10952, 2012 WL 2564846, at *8 (E.D. Mich. July 2, 2012) (dismissing plaintiffs' promissory estoppel claim because the TPP does not constitute a clear and definite promise upon which to rely); *Thomas v. JPMorgan Chase & Co.*, 811 F. Supp. 2d 781, 802 (S.D.N.Y. 2011) (dismissing plaintiffs' claims of promissory estoppel, fraud, and unfair and deceptive business practices); *Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059, 1070, 1072-73 (N.D. Cal. 2011) (dismissing both promissory estoppel and unfair/deceptive business practices claims because there was no promise upon which plaintiffs could reasonably rely), *rev'd sub nom. Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013).

²⁰⁰ See sources cited *supra* note 199.

²⁰¹ *Lucia*, 798 F. Supp. 2d at 1072; see *Helmus v. Chase Home Fin., LLC*, 890 F. Supp. 2d 806, 814 (W.D. Mich. 2012); *Thomas*, 811 F. Supp. 2d at 798.

²⁰² See HAMP SUPP. DIR. 09-01, *supra* note 1, at 17; see also *Rummell*, 2012 WL 2564846, at *8 (finding that the TPP is not a promise upon which a plaintiff can reasonably rely); *Thomas*, 811 F. Supp. 2d at 798 (same).

²⁰³ See *Lucia*, 798 F. Supp. 2d at 1069-70; see also *Rummell*, 2012 WL 2564846, at *8 (finding that the TPP is not a promise upon which a plaintiff can reasonably rely); *Thomas*, 811 F. Supp. 2d at 798 (same).

²⁰⁴ See *Grill v. BAC Home Loans Servicing LP*, No. 10-CV-03057-FCD GGH, 2011 WL 127891, at *8-10 (E.D. Cal. Jan. 14, 2011) (dismissing plaintiffs' promissory estoppel, deceptive business practices, and unfair competition law ("UCL") claims

district court maintained that the TPP is exactly what it says: a *trial period*.²⁰⁵ These courts found that no reasonable person could believe he or she would automatically receive a permanent loan modification merely because the bank gave him or her a TPP.²⁰⁶ Thus, these district courts held that all other state law claims should fail as well.²⁰⁷ In their view, these claims all encapsulate the same issue of whether the TPP is a contract or a clear promise — and it is neither.²⁰⁸

However, the argument that no reasonable person could interpret the TPP as a promise fails on its face.²⁰⁹ Federal judges across the nation have held conflicting interpretations of the same three-page document.²¹⁰ It follows that a reasonable person might be equally misled.²¹¹ Moreover, the HAMP guidelines could lead a reasonable

because the TPP does not reasonably constitute a promise); *see also Rummell*, 2012 WL 2564846, at *8 (finding that the TPP is not a promise upon which a plaintiff can reasonably rely). *But see Cave v. Saxon Mortg. Servs., Inc.*, No. CIV.A.11-4586, 2012 WL 1957588, at *9 (E.D. Pa. May 30, 2012) (rejecting this same argument against plaintiffs' promissory estoppel claim).

²⁰⁵ *See Pool v. Wells Fargo Bank, N.A.*, No. 11-CV-01066-LTB-KLM, 2012 WL 3264294, at *1 (D. Colo. Aug. 10, 2012) (quoting the title of the document as step one of a two-step process); *see, e.g., Lucia*, 798 F. Supp. 2d at 1072 (stating that the TPP is the first step of a two-step process and thus could not deceive or mislead even the least-sophisticated debtor); *see also Helmus*, 890 F. Supp. 2d at 814 (describing the TPP as only step one of a two-step process).

²⁰⁶ *See Lucia*, 798 F. Supp. 2d at 1070; *see also Rummell*, 2012 WL 2564846, at *8; *Thomas*, 811 F. Supp. 2d at 798.

²⁰⁷ *See Thomas*, 811 F. Supp. 2d at 802; *Grill*, 2011 WL 127891, at *10; *Lucia*, 798 F. Supp. 2d at 1072-73.

²⁰⁸ *See Rummell*, 2012 WL 2564846, at *7-8; *Thomas*, 811 F. Supp. 2d at 798; *Grill*, 2011 WL 127891, at *10.

²⁰⁹ *See, e.g., In re CitiMortgage, Inc. Home Affordable Modification Program ("HAMP") Litig.*, No. ML 11-2274 DSF (PLAx), 2012 WL 1931030, at *4 (C.D. Cal. Apr. 17, 2012) (multi-district litigation) (finding the TPP to include a clear and unambiguous promise for permanent modification if homeowners comply with the TPP's terms); *Allen v. CitiMortgage, Inc.*, No. CIV.CCB-10-2740, 2011 WL 3425665, at *8 (D. Md. Aug. 4, 2011) (agreeing with the plaintiffs' characterization of the TPP as a clear and definite promise); *see also Cave*, 2012 WL 1957588, at *9 (reaffirming its earlier holding that the TPP constitutes a binding promise).

²¹⁰ *Compare Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 559 (7th Cir. 2012) (finding the TPP is a contract and allowing several of plaintiff's state law claims to proceed), *with Lucia*, 798 F. Supp. 2d at 1068, 1073 (finding the TPP is not a contract and dismissing all of plaintiffs' claims with prejudice), *and Senter v. JPMorgan Chase Bank, N.A.*, 810 F. Supp. 2d 1339, 1366 (S.D. Fla. 2011) (finding the TPP is not a contract and dismissing most of plaintiffs' claims with prejudice).

²¹¹ *See Casey v. Fed. Home Loan Mortg. Ass'n*, No. CIV.A.H-11-3830, 2012 WL 1425138, at *7 (S.D. Tex. Apr. 23, 2012) (preventing fraud and promissory estoppel claims from proceeding, but allowing the unreasonable debt collection claims to proceed); *Gaudin v. Saxon Mortg. Servs., Inc.*, No. C11-1663 RS, 2011 WL 5825144,

person to understand that the TPP was an offer for potential permanent loan modification.²¹² According to HAMP guidelines, the purpose of HAMP was to provide homeowners with relief.²¹³ HAMP initially allowed banks to use verbal representations to give more homeowners relief within a relatively short timeframe.²¹⁴ A reasonable person could read this to mean that the TPP was an offer for potential permanent loan modification, if homeowners complied with all the requirements.²¹⁵ The TPP itself says so in a clear directive in both the first and third sections.²¹⁶ Therefore, homeowners were reasonable in relying on the TPP as a promise, and the banks were deceptive in using it as such without intending to fulfill its obligations.²¹⁷ Even in the absence of a binding contract, homeowners have sufficient facts to proceed with these claims beyond the motion to dismiss stage.²¹⁸

at *4 (N.D. Cal. Nov. 17, 2011) (finding that the TPP is, at a minimum, misleading); see also *In re JPMorgan Chase Mortg. Modification Litig.*, 880 F. Supp. 2d 220, 227-28 (D. Mass. 2012) (multi-district litigation).

²¹² See HAMP SUPP. DIR. 09-01, *supra* note 1, at 1-2 (describing the background of HAMP); see *In re JPMorgan Chase*, 880 F. Supp. 2d at 225 n.3; *Allen*, 2011 WL 3425665, at *1.

²¹³ See HAMP SUPP. DIR. 09-01, *supra* note 1, at 1-2 (describing the background of HAMP); see *In re JPMorgan Chase*, 880 F. Supp. 2d at 226; *Allen*, 2011 WL 3425665, at *1.

²¹⁴ See *Wigod*, 673 F.3d at 557; *Allen*, 2011 WL 3425665, at *1 n.1; HAMP SUPP. DIR. 09-01, *supra* note 1, at 17.

²¹⁵ See *Wigod*, 673 F.3d at 562; *In re CitiMortgage, Inc. Home Affordable Modification Program ("HAMP") Litig.*, No. ML 11-2274 DSF (PLAx), 2012 WL 1931030, at *2 (C.D. Cal. Apr. 17, 2012) (multi-district litigation) (finding that the TPP indicates only that the homeowner must comply with the TPP's terms, and then he will receive a permanent modification); *Bolone v. Wells Fargo Home Mortg., Inc.*, 858 F. Supp. 2d 825, 832 (E.D. Mich. 2012) (finding a genuine issue of material fact relating to whether the homeowner's information remained true and accurate and whether she sent in all documentation as requested).

²¹⁶ See *Wigod*, 673 F.3d at 558; *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, 537 (N.D. Cal. 2012) (quoting section one of the TPP); *Durmic v. JPMorgan Chase Bank, N.A.*, No. 10-CV-10380-RGS, 2010 WL 4825632, at *1 (D. Mass. Nov. 24, 2010).

²¹⁷ See *Wigod*, 673 F.3d at 570; see, e.g., *In re JPMorgan Chase*, 880 F. Supp. 2d at 227 (quoting plaintiffs' complaint describing how the bank deceived them); *Allen*, 2011 WL 3425665, at *2 (describing how the bank told plaintiffs to disregard a notice cancelling their TPP, only to find out months later that they had been reported to a credit agency and now owe a balloon payment); Braucher, *supra* note 15, at 753 ("Servicer [i.e., bank] foot-dragging became apparent by the summer of 2009.").

²¹⁸ See *Sutcliffe*, 283 F.R.D. at 548; *Gaudin v. Saxon Mortg. Servs., Inc.*, No. C11-1663 RS, 2011 WL 5825144, at *5 (N.D. Cal. Nov. 17, 2011); *In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.*, No. CIV.A.10-MD-02193-RWZ, 2011 WL 2637222, at *4 (D. Mass. July 6, 2011) (multi-district litigation).

C. *Allowing Rejected Homeowners Redress for HAMP Injuries Furthers Public Policy Concerns Regarding Faith in the Judicial and Governmental Systems*

Courts should not leave homeowners without redress when they are facing foreclosure or have already had their home foreclosed upon due to their reliance on HAMP.²¹⁹ One's home is often regarded as one's most valued possession.²²⁰ As such, the United States Supreme Court and state supreme courts have often given special significance to the home under the law.²²¹ The argument logically follows that laws and programs helping homeowners keep their homes should not be rendered toothless.²²² Furthermore, recent legal developments in 2013 show that the government intended for the TPP to be a contract for permanent modification — indicating that the courts following *Wigod* are correct in doing so.²²³

Congress gave hope to distressed homeowners by creating HAMP to help them keep their homes and avoid foreclosure.²²⁴ In the first year

²¹⁹ See *Sutcliffe*, 283 F.R.D. at 553-54; *Allen*, 2011 WL 3425665, at *2; *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 349 (D. Mass. 2011).

²²⁰ See Shelby D. Green, *Imagining a Right to Housing, Lying in the Interstices*, 19 GEO. J. ON POVERTY L. & POL'Y 393, 415 (2012) (describing the home as the seat of family life with incredible importance); Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 646 (2012) (discussing another author's view of the sanctity of the home and the right to privacy as contributing to personhood); see also *Boyd v. United States*, 116 U.S. 616, 630 (1886) (describing the home as embodying the very essence of the constitutional rights of personal security, liberty, and private property).

²²¹ See, e.g., *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 301 (1967) (stating that the purpose of the Fourth Amendment was to protect against invasions into the sanctity of a person's home); *Coleman v. State*, 286 Ga. 291, 297 (2009) (describing how the sanctity of a person in his home justifies a defense that allows him to use deadly force even if the homeowner does not fear death or great bodily injury); Sharfstein, *supra* note 220, at 646 (discussing another author's view of the sanctity of the home and the right to privacy as contributing to personhood).

²²² See *Cave v. Saxon Mortg. Servs., Inc.*, No. CIV.A.11-4586, 2012 WL 1957588, at *5 (E.D. Pa. May 30, 2012); *Sutcliffe*, 283 F.R.D. at 551-52; *Gaudin*, 2011 WL 5825144, at *4; see also *Wigod*, 673 F.3d at 563.

²²³ See, e.g., *Sutcliffe*, 283 F.R.D. at 551-52 (finding the rationale in *Wigod* more persuasive than authority within the same district); *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 796-97 (2013) (showing some state courts are following *Wigod's* lead, as well); see also *Bushell v. JPMorgan Chase Bank, N.A.*, 220 Cal. App. 4th 915, 918, n.1 (2013) (exercising the court's discretion to rule on the merits of the case, despite the fact that the parties settled, because the appeal "pose[d] an issue of broad public interest that is likely to recur," and held that the breach of contract, promissory estoppel, and fraud claims should be allowed to proceed).

²²⁴ See HAMP SUPP. DIR. 09-01, *supra* note 1, at 1; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-367R, TROUBLED ASSET RELIEF PROGRAM: RESULTS OF HOUSING

of HAMP, Congress expected three to four million homeowners to receive HAMP permanent modifications, but banks gave only 230,801 by March 2010.²²⁵ After the first year of HAMP, homeowners were largely disappointed with the results.²²⁶ People need to believe the government has not turned its back on them, particularly in a downturned economy.²²⁷ Faith in the government already has been diminishing rapidly in recent years.²²⁸ Distressed homeowners who participated in HAMP put their faith in the government.²²⁹ It let them down.²³⁰

COUNSELORS SURVEY ON BORROWERS' EXPERIENCE WITH THE HOME AFFORDABLE MODIFICATION PROGRAM (2011), available at <http://www.gao.gov/products/GAO-11-367R> (describing the intent of HAMP as to preserve homeownership and protect home values); see also Allen, 2011 WL 3425665, at *2.

²²⁵ Braucher, *supra* note 15, at 729; see Allen, 2011 WL 3425665, at *1; HAMP SUPP. DIR. 09-01, *supra* note 1, at 1.

²²⁶ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 224 (describing the results of the survey rating borrowers' overall experience as negative or very negative for roughly seventy-six percent of respondents); Braucher, *supra* note 15, at 779 (listing the disappointingly low statistics of conversions from trial periods to permanent modifications); Maxwell, *supra* note 16, at 1328 (stating that "[w]ithout a doubt, HAMP is a failed program").

²²⁷ See, e.g., Graham Mayeda, *Legal Aspects of the Security-Development Nexus: International Administrative Law as a Check on the Use of Development Assistance in the "War on Terror,"* 13 CHI. J. INT'L L. 71, 90 (2012) (arguing that those who live in fragile and insecure states "often lose faith in the government's ability to provide for security"); Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 747 (2000) (arguing for a more pragmatic approach to politics that places more faith in the government and bureaucracy); see also Rebecca W. Watson, *Perspectives of the Bush Administration on Public Land Law and Policies*, 3 ROCKY MTN. MIN. L. SPECIAL INST. 1 (2003) (stating that every public servant must remember that the boss is the American public).

²²⁸ Catherine Rampell, *Losing Faith in the Government*, N.Y. TIMES (Sept. 26, 2011), <http://economix.blogs.nytimes.com/2011/09/26/losing-faith-in-government/>; see Chrystia Freeland, *What Happens When Citizens Lose Faith in Government?*, REUTERS (Aug. 5, 2011), <http://blogs.reuters.com/chrystia-freeland/2011/08/05/what-happens-when-citizens-lose-faith-in-government/>; Liz Sidoti, *Trust in Government?: Poll Finds Nearly 80% of Americans Don't*, HUFF. POST (Apr. 19, 2010), http://www.huffingtonpost.com/2010/04/19/trust-in-government-poll_n_542423.html.

²²⁹ See Watson, *supra* note 227, at 1 (stating that the Bush Administration meant to set an ethical example in government to restore the faith of the people); see also Desmond Manderson, *The Law of the Image and the Image of the Law: Colonial Representations of the Rule of Law*, 57 N.Y.L. SCH. L. REV. 153, 155 (2012) (describing how the rule of law is meant to enhance society's faith in the government); Mayeda, *supra* note 227, at 90 (arguing that those who live in fragile and insecure states "often lose faith in the government's ability to provide for security").

²³⁰ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 224 (describing the results of the survey rating borrowers' overall experience as negative or very negative for roughly seventy-six percent of respondents); Braucher, *supra* note 15, at 779

Homeowners who relied on and enrolled in the TPPs often suffered a grave injustice.²³¹ Reasonable people have interpreted the TPP as a contract promising homeowners a permanent modification.²³² Homeowners' reliance on HAMP literature and the promise of a permanent modification to save their homes clearly led to their detriment.²³³ Scholars have interpreted the promissory estoppel doctrine to state that justice requires compensation for people who rely on the ordinary meaning of the defendant's words and actions.²³⁴

State law claims based on a plaintiff's reasonable reliance or a defendant's deceptive actions apply perfectly in these types of situations.²³⁵ The banks used the TPP to receive payments for months while the homeowners still ultimately had their homes foreclosed upon.²³⁶ Some homeowners timely made payments for eighteen months before the bank denied them a permanent modification with

(listing the disappointingly low statistics of conversions from trial periods to permanent modifications); Maxwell, *supra* note 16, at 1328 (describing homeowners' feeling of helplessness as their biggest frustration in the foreclosure crisis).

²³¹ See *Allen v. CitiMortgage, Inc.*, No. CIV.CCB-10-2740, 2011 WL 3425665, at *2 (D. Md. Aug. 4, 2011); see also *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, 538-39 (N.D. Cal. 2012); *Soin v. Fed. Nat'l Mortg. Ass'n*, No. CIV.2:12-634 WBS EFB, 2012 WL 1232324, at *2 (E.D. Cal. Apr. 12, 2012).

²³² See *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 566 (7th Cir. 2012); *In re CitiMortgage, Inc. Home Affordable Modification Program ("HAMP") Litig.*, No. ML 11-2274 DSF (PLAx), 2012 WL 1931030, at *4 (C.D. Cal. Apr. 17, 2012) (multi-district litigation); *Allen*, 2011 WL 3425665, at *8 (agreeing with the plaintiffs' characterization of the TPP as a clear and definite promise); see also *Gaudin v. Saxon Mortg. Servs., Inc.*, No. C11-1663 RS, 2011 WL 5825144, at *4 (N.D. Cal. Nov. 17, 2011) (finding that the TPP is, at a minimum, misleading).

²³³ See *In re JPMorgan Chase Mortg. Modification Litig.*, 880 F. Supp. 2d 220, 238 (D. Mass. 2012) (multi-district litigation) (describing plaintiffs' statements that they were better off before they entered the TPP); *In re CitiMortgage*, 2012 WL 1931030, at *4; *Allen*, 2011 WL 3425665, at *8.

²³⁴ See Avery Katz, *When Should an Offer Stick?: The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249, 1254 (1996) (defining the purpose of the promissory estoppel doctrine as to punish or deter those who mislead other people to their detriment and to compensate those who were so misled); Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 111 (1991) (defining the purpose of promissory estoppel as compensating plaintiffs for the detriment caused by their reliance on defendant's promise); see also Christopher T. Wonnell, *Expectation, Reliance, and the Two Contractual Wrongs*, 38 SAN DIEGO L. REV. 53, 54 (2001) (describing the remedy for promissory estoppel as restoring plaintiff to his or her original position had defendant not made the relied upon promise).

²³⁵ See *Wigod*, 673 F.3d at 566 (7th Cir. 2012); *Allen*, 2011 WL 3425665, at *8; Katz, *supra* note 234, at 1254.

²³⁶ See *Sutcliffe*, 283 F.R.D. at 238-39; *Allen*, 2011 WL 3425665, at *2; *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 349 (D. Mass. 2011).

little explanation.²³⁷ Furthermore, these same homeowners would learn alongside the denial that the bank had also reported them to a credit agency for delinquent payments.²³⁸ The bank often did so while the homeowners still believed they were in the “trial period.”²³⁹ This situation provides the quintessential scenario where promissory estoppel, among other claims, demands compensation and redress for these distressed homeowners.²⁴⁰

When the federal government has failed these injured people, the need for courts to provide them with some form of a remedy is even more essential.²⁴¹ The district courts that have denied homeowners relief have often done so at the motion to dismiss stage — early on in the litigation process.²⁴² Courts must at least allow these homeowners’ plausible claims to proceed beyond the motion to dismiss stage.²⁴³ The

²³⁷ See *Soin v. Fed. Nat’l Mort. Ass’n*, No. CIV.2:12-634 WBS EFB, 2012 WL 1232324, at *2 (E.D. Cal. Apr. 12, 2012); see also *Pool v. Wells Fargo Bank, N.A.*, No. 11-CV-01066-LTB-KLM, 2012 WL 3264294, at *1 (D. Colo. Aug. 10, 2012); *Allen*, 2011 WL 3425665, at *2.

²³⁸ See *In re JPMorgan Chase*, 880 F. Supp. 2d at 228; *Gaudin v. Saxon Mortg. Servs., Inc.*, No. C11-1663 RS, 2011 WL 5825144, at *1 (N.D. Cal. Nov. 17, 2011); *Allen*, 2011 WL 3425665, at *2.

²³⁹ See *Allen*, 2011 WL 3425665, at *2; see also *Cave v. Saxon Mortg. Servs., Inc.*, No. CIV.A.11-4586, 2012 WL 1957588, at *3 (E.D. Pa. May 30, 2012); *Brady v. Chase Home Fin., LLC*, No. 1:11-CV-838, 2012 WL 1900606, at *2 (W.D. Mich. May 24, 2012).

²⁴⁰ See *Wigod*, 673 F.3d at 566 (7th Cir. 2012); *Allen*, 2011 WL 3425665, at *8; *Katz*, *supra* note 234, at 1254.

²⁴¹ See Galia Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases*, 29 N.Y.U. REV. L. & SOC. CHANGE 425, 442-43 (2004) (arguing that concern for fairness extends even to appearances of impropriety); see also *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995) (describing the inherent power of the court to protect its institutional integrity); *In re Mandeville*, 144 Vt. 608, 609 (1984) (describing how Vermont has a judicial canon that requires public confidence in the integrity of the judiciary).

²⁴² See, e.g., *Helmus v. Chase Home Fin., LLC*, 890 F. Supp. 2d 806, 818 (W.D. Mich. 2012) (granting the bank’s motion to dismiss in its entirety); *Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059, 1073 (N.D. Cal. 2011) (granting bank’s motion to dismiss without leave to amend), *rev’d sub nom.* *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013); *Vida v. OneWest Bank, F.S.B.*, No. CIV. 10-987-AC, 2010 WL 5148473, at *9 (D. Or. Dec. 13, 2010) (granting the bank’s motion to dismiss on all claims for lack of standing).

²⁴³ See *Wigod*, 673 F.3d at 565 (holding that at the early pleading stage, plaintiffs have asserted enough to proceed); *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, 548, 552-53 (N.D. Cal. 2012); *Gaudin*, 2011 WL 5825144, at *5; *In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.*, No. CIV.A.10-MD-02193, 2011 WL 2637222, at *4-6 (D. Mass. July 6, 2011) (multi-district litigation).

Seventh Circuit correctly allowed these distressed homeowners a form of relief.²⁴⁴

In 2012–2013, the federal government and some state legislatures finally began to respond to the crisis created by the rampant foreclosures by the banks.²⁴⁵ The spark for this movement came in February 2012, when forty-nine state attorneys general and the federal government “announced a historic joint state-federal settlement with the country’s five largest mortgage servicers” (Wells Fargo, JPMorgan Chase Bank, CitiMortgage, Bank of America, and Ally/GMAC).²⁴⁶ The so-called “National Mortgage Settlement” will provide twenty-five billion dollars, in part as relief to distressed homeowners who either need loan modifications or have already lost their homes to foreclosure.²⁴⁷ This settlement marks the first time a nationwide attempt has been made at creating servicing standards for banks.²⁴⁸ Furthermore, the settlement expressly leaves banks accountable for claims outside of mortgage servicing, and allows states to create their own laws in accordance with this settlement.²⁴⁹

At least one state, California, has taken advantage of the opportunity left available by the National Mortgage Settlement to enact the so-called “Homeowner Bill of Rights” law, effective as of January 1, 2013.²⁵⁰ The law’s purpose is to “ensure fair lending and borrowing practices” and to “guarantee basic fairness and transparency for

²⁴⁴ *Wigod*, 673 F.3d at 559 (allowing plaintiff’s breach of contract, promissory estoppel, fraudulent misrepresentation, and unfair and deceptive business practices claims to proceed); *see, e.g., In re CitiMortgage, Inc. Home Affordable Modification Program (“HAMP”) Litig.*, No. ML 11-2274 DSF (PLAx), 2012 WL 1931030 (C.D. Cal. Apr. 17, 2012) (multi-district litigation) (allowing plaintiffs’ claims to proceed despite the lack of the banks’ signatures on the TPPs); *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 352 (D. Mass. 2011) (allowing plaintiffs to proceed on the theory that the TPP is a contract governing the three-month trial period).

²⁴⁵ *See About the Settlement*, NAT’L MORTGAGE SETTLEMENT, <http://www.nationalmortgagesettlement.com/about> (last visited Nov. 1, 2013); *California Homeowner Bill of Rights*, ST. CAL. DEP’T JUST., OFF. ATT’Y GEN. (2013), <http://oag.ca.gov/hbor> [hereinafter CAL. DOJ].

²⁴⁶ *About the Settlement*, *supra* note 245; *see United States v. Bank of Am. Corp.*, No. 1:12-cv00361 RMC (D.D.C. 2011).

²⁴⁷ *About the Settlement*, *supra* note 245.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ CAL. DOJ, *supra* note 245; *see* CAL. CIV. CODE § 2923.4 (West 2013) (purpose of act); *id.* § 2923.6 (legislative findings and declarations); *id.* § 2924.12 (injunctive relief); *see also What Is the California Homeowner Bill of Rights (HBOR)?*, CAL. HOMEOWNER BILL RTS. COLLABORATIVE (2013), <http://calhbor.org/the-california-homeowner-bill-of-rights/> [hereinafter HBOR COLLABORATIVE].

homeowners in the foreclosure process.”²⁵¹ One novel aspect of this law is that it *expressly* creates a private right of action for homeowners to enforce its provisions.²⁵² However, this Homeowner Bill of Rights exempts the five banks who participated in the National Mortgage Settlement.²⁵³ Despite this exemption, as the National Mortgage Settlement allows, the law does permit homeowners to file suit against those five banks if they are not complying with the terms of the settlement.²⁵⁴ Thus, the state law allows homeowners the right to bring an action in court to ensure they receive their promised modification.

These recent federal and state responses show that the government’s intent was to help homeowners avoid foreclosure of their homes, just as the HAMP materials stated.²⁵⁵ These responses further bolster the argument that *Wigod*, and subsequent cases following the Seventh Circuit’s lead, have correctly been interpreting the TPP as a contract to provide homeowners with a permanent modification if they comply with all of their conditions. Thus, public policy also dictates that courts should interpret the TPP as a contract, or, at the very least, as a promise.

CONCLUSION

Courts must allow homeowners some form of recourse for the serious harms that have befallen them because of entering HAMP. The TPP constitutes a contract, with valid mutual assent, consideration, and certain and definite terms.²⁵⁶ Even if the TPP were not a contract, the TPP is a misleading promise upon which homeowners may base other state law claims.²⁵⁷ At the very least, disparaged homeowners have claims sufficient to surpass the motion to dismiss stage of litigation.²⁵⁸ When Congress has created a program to provide relief to these distressed homeowners, public policy demands that courts do

²⁵¹ CAL. DOJ, *supra* note 245; *see also* CIV. § 2923.4; HBOR COLLABORATIVE, *supra* note 250.

²⁵² CIV. § 2924.12; *see* CAL. DOJ, *supra* note 245; HBOR COLLABORATIVE, *supra* note 250.

²⁵³ CIV. § 2924.12(g).

²⁵⁴ *See id.* (stating that a lender “that is in compliance with [the Settlement] . . . shall have no liability for a violation of [this bill]” (emphasis added)); *see, e.g.,* Winterbower v. Wells Fargo Bank, N.A., No. SA CV 13-0360-DOC-MLGx, 2013 WL 1232997, at *3 (C.D. Cal. Mar. 27, 2013) (refusing injunctive relief to a plaintiff who did not allege noncompliance by Wells Fargo with the settlement).

²⁵⁵ *See* HAMP SUPP. DIR. 09-01, *supra* note 1, at 1.

²⁵⁶ *See supra* Part III.A.

²⁵⁷ *See supra* Part III.B.

²⁵⁸ *See* sources cited *supra* notes 173, 218, 243 and accompanying text.

not render such legislation toothless and leave the homeowners without redress.²⁵⁹

²⁵⁹ See *supra* Part III.C.