NOTE

The TPP & Its Broken Promises

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TABLE OF CONTENTS

INTRODUCTION ................................................................................. 1417
I. BACKGROUND .............................................................................. 1420
   A. Determining Eligibility for HAMP ........................................ 1421
   B. Differing Interpretations of the TPP .................................... 1422
   C. Homeowners Flooded Courts with HAMP Litigation ........... 1423
II. WIGOD V. WELLS FARGO BANK, N.A................................. 1424
       A. Breach of Contract Claim ................................................ 1425
       B. Promissory Estoppel Claim .............................................. 1426
       C. Fraudulent Misrepresentation Claim ............................... 1427
       D. Deceptive Business Practices Claim ................................. 1427
III. ANALYSIS ................................................................................ 1429
       A. Common Law Supports Construing the TPP as a Contract. 1429
       B. The TPP Is an Agreement upon Which Homeowners Can Base Various State Law Claims ............................................ 1438
       C. Allowing Rejected Homeowners Redress for HAMP Injuries Furters Public Policy Concerns Regarding Faith in the Judicial and Governmental Systems ............................. 1445
CONCLUSION..................................................................................... 1450

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

Eight months have now passed, yet Helen has heard nothing from the bank regarding the status of her loan. She has paid every reduced monthly payment on time and has sent in all requested documentation. 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. When she called the bank to inquire about this turn of events, an employee told her merely to disregard the notice. Helen Homeowner continues to make the TPP payments.

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. Not only has the bank reported her to a credit agency, but she now also owes a balloon...

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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. She again faces losing her home to foreclosure, but this time she meets even more debt than before. Helen Homeowner sues the bank for redress.

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

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

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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 3423665, 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).


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).


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

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. 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. Second, the bank calculated a modification specific to that homeowner using a “waterfall” method described in HAMP literature. 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. 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. After the first year, the Program no longer authorized the use of oral information for the NPV because of the litigation that had ensued.

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"). 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. During this time, the homeowner needed to timely make each monthly payment and provide all required documentation. 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.

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. Homeowners believed they had been predetermined to qualify for permanent loan modification of their mortgages under the initial NPV test. The banks viewed the TPP as only a “trial” period, and thus believed they had not committed to giving the homeowners permanent loan modifications.

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. In addition to this denial,

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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).


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 1937588, 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

46 See generally Chiles & Mitchell, supra note 15, at 197-200 (detailing the litigation trends from the first year of HAMP).
48 See sources cited supra note 47.
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).
breach of contract, based on their involvement in HAMP, mostly surrounding the banks’ use of the TPP. 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.*

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. The plaintiff, Lori Wigod, was a homeowner with a mortgage serviced by the defendant, Wells Fargo. After Wigod provided documentation of her financial information, Wells Fargo sent her a TPP agreement for a trial period lasting from July until November. Wigod signed two copies of the TPP Agreement and returned them to the bank, along with additional documentation and the first modified payment. Wells Fargo then executed the TPP and returned a copy to Wigod.

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. Wigod made each of the four payments under the TPP on time, and Wells Fargo accepted all payments. At the end of the four months, Wells Fargo denied Wigod the permanent HAMP modification with minimal explanation. 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. Wigod protested Wells Fargo’s decision for months while continuing to make timely reduced mortgage payments.

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33 *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.
34 *Wigod*, 673 F.3d at 558-59.
35 *Id.* at 557-58.
36 *Id.* at 558.
37 *Id.*
38 *Id.*
39 See *id.*
40 *Id.*
41 See *id.*
42 *Id.*
The TPP & Its Broken Promises

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

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. The complaint alleged that Wells Fargo improperly re-evaluated her for HAMP after already determining that she qualified. 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. The district court granted Wells Fargo’s motion to dismiss for failure to state a claim on all counts. On appeal, the Seventh Circuit reversed the dismissal of the breach of contract, promissory estoppel, fraudulent misrepresentation, and deceptive business practices claims.

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. 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. The court rejected each argument.

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. 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. The court

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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.\textsuperscript{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.\textsuperscript{76} The court reasoned that this would give Wells Fargo unfettered discretion, rendering other provisions of the TPP illusory.\textsuperscript{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.\textsuperscript{78} The court found that these requirements constituted new duties under the TPP and did not exist with Wigod’s prior mortgage contract.\textsuperscript{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.\textsuperscript{80}

Finally, the court found that there were definite and certain terms because HAMP guidelines determined the terms and procedures for calculating values.\textsuperscript{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.\textsuperscript{82} Consequently, the Seventh Circuit concluded that Wigod sufficiently pled every element of a breach of contract claim to survive a motion to dismiss.\textsuperscript{83}

\textbf{B. Promissory Estoppel Claim}

Second, the Seventh Circuit held that Wigod asserted a valid promissory estoppel claim.\textsuperscript{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.\textsuperscript{85} The court also found that Wigod relied on that promise to her detriment in foregoing other methods to save her home.\textsuperscript{86} The court concluded that, at the very
least, Wigod presented a facially plausible claim of promissory estoppel to withstand a motion to dismiss.\textsuperscript{87}

\textbf{C. Fraudulent Misrepresentation Claim}

Third, the Seventh Circuit held that Wigod adequately stated a claim of fraudulent misrepresentation.\textsuperscript{88} Even under the heightened pleading standard applicable for fraud,\textsuperscript{89} the court held that Wigod's complaint satisfied this standard.\textsuperscript{90} Wigod alleged that Wells Fargo misrepresented the terms of the contract.\textsuperscript{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.\textsuperscript{92} The court found that this reading of the TPP was not objectively unreasonable.\textsuperscript{93}

\textbf{D. Deceptive Business Practices Claim}

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

\textsuperscript{87} See id. at 558-59, 566.

\textsuperscript{88} Id. at 569.

\textsuperscript{89} See FED. R. CIV. P. 9(b).

\textsuperscript{90} Wigod, 673 F.3d at 569.

\textsuperscript{91} Id.

\textsuperscript{92} Id.

\textsuperscript{93} Id.

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


\textsuperscript{96} Wigod, 673 F.3d at 574.

\textsuperscript{97} Id.
The Seventh Circuit found that Wigod suffered actual injury, a necessary element to the FDCPA claim. 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. The court held that these all sufficed to show actual pecuniary injury.

The Seventh Circuit’s decision has already begun to heavily influence district court and circuit court decisions. Before the Seventh Circuit decided Wigod, district courts tended to dismiss all of homeowners’ claims early in the litigation process. However, Wigod has influenced several district court opinions in a relatively short time. 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. Thus, the Wigod rationale provides a viable analysis of the TPP in one context, but does not cover all situations.

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98 Id. at 574-75.
99 Id. at 575.
100 Id.
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 plaintiffs’ 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

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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.


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. The banks contend that the TPP is not an enforceable offer, there is not sufficient consideration, and the document lacks definite and certain terms. However, the Seventh Circuit correctly rejected each of these contentions based on common law contracts doctrine.

The TPP constitutes an enforceable offer where the homeowner is to fulfill all future conditions. An offer is valid and enforceable when all that remains is for the offeree to accept. 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. Section one requires that the homeowner comply with all terms of the TPP and that all financial information remain true and accurate.

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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).

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

The TPP also constitutes a binding promise.\textsuperscript{123} A binding promise requires the agreement to contemplate sufficient consideration.\textsuperscript{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.\textsuperscript{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.\textsuperscript{126}
Furthermore, the TPP contains definite and certain terms because courts may incorporate by reference the essential terms from HAMP guidelines.\textsuperscript{127} Courts have found that HAMP guidelines contain a set formula that permits calculation of all aspects of the homeowner’s permanent loan.\textsuperscript{128} These courts hold that any missing material terms can be determined through these set calculations.\textsuperscript{129} Because the TPP is fundamentally intertwined with HAMP, HAMP’s guidelines can be easily incorporated by reference.\textsuperscript{130} For all of the above reasons, the Seventh Circuit reasonably construed the TPP as a contract.\textsuperscript{131}

However, some district courts hold that the TPP does not constitute a contract because it lacks mutual assent.\textsuperscript{132} These courts offer three reasons for why the TPP lacks mutual assent.\textsuperscript{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.\textsuperscript{134}
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.”\(^\text{135}\) In looking to this section, these courts hold that the banks must determine qualification as a condition precedent.\(^\text{136}\) If both parties have remaining conditions precedent, then there is no enforceable offer and, thus, no mutual assent.\(^\text{137}\)

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.\(^\text{138}\) These courts point to the title of the document, which states that it is “Step One of Two-Step Documentation Process.”\(^\text{139}\) They find that the title itself states there is a second step before the contract or loan modification becomes binding on the parties.\(^\text{140}\) They found that the second step had not occurred.\(^\text{141}\) 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 . . . .”\(^\text{142}\) These courts found no mutual assent where the
The bank had not sent the plaintiff a fully executed modification agreement. Consequently, they held that this modification agreement was a condition precedent to the formation of a contract and there was no mutual assent. Thus, the TPP is not a contract.

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

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. Thus,
the TPP constitutes a contract. Although the homeowner must be qualified, HAMP literature envisions the bank to have determined qualification before offering homeowners the TPP, using the NPV test. 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. Thus, the more reasonable interpretation is that the only conditions left to be fulfilled are those required of the homeowner. Once the homeowners have fulfilled those conditions, they have accepted the banks’ offer and there is mutual assent.

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

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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).
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. Requiring plaintiffs to have received a fully executed modification agreement would give the banks unfettered discretion and render other provisions of the TPP illusory. Courts have acknowledged that section two lays out more of the procedure, rather than what the homeowner needs to accomplish. The homeowner must meet all conditions and then he or she will receive a new loan agreement after the TPP period has elapsed. Thus, a fully executed modification agreement is not a condition precedent for the bank to fulfill. Once the homeowner fulfills her part of the bargain, there is mutual assent and, therefore, the TPP constitutes a contract.

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. Even though both parties’ signatures are normally

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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).


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.

required to create a contract, the defendant's acceptance of plaintiff's performance can be an excuse for this failed condition precedent.\textsuperscript{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.\textsuperscript{168} Other courts have held that acceptance of this performance created a promise to perform even without the bank's signature on the TPP.\textsuperscript{169} Thus, the more reasonable interpretation of the TPP requires courts to look to common excuses for conditions precedent.\textsuperscript{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.\textsuperscript{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.\textsuperscript{172} If the homeowners have alleged that

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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).


\textsuperscript{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).


176 See, e.g., Wigod, 673 F.3d at 559 (listing plaintiffs’ 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. Common law promissory estoppel requires an unambiguous promise upon which a plaintiff reasonably and foreseeably relied to his or her detriment. 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. These homeowners reasonably and detrimentally relied on this promise where they forewent other opportunities and remedies to save their homes. 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. The Seventh Circuit reviewed similar facts and properly held that the TPP constitutes a promise on which homeowners can base promissory estoppel claims.

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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).


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. See also *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. 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


\(^{187}\) 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. As a result, courts have credited homeowner allegations that the banks made false promises they never intended to fulfill. Therefore, with similar facts, the Seventh Circuit was correct in allowing homeowners to seek relief on claims of promissory fraud or fraudulent misrepresentation.

Finally, homeowners brought viable deceptive or unfair business practices claims under state versions of federal consumer protection laws and other state law protective statutes. 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. 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. 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 1937588, 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 1937588, 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).


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
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
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


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).


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.”).

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

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\(^{220}\) 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).


\(^{223}\) 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. After the first year of HAMP, homeowners were largely disappointed with the results. People need to believe the government has not turned its back on them, particularly in a downturned economy. Faith in the government already has been diminishing rapidly in recent years. Distressed homeowners who participated in HAMP put their faith in the government. It let them down.


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").


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. Reasonable people have interpreted the TPP as a contract promising homeowners a permanent modification. Homeowners’ reliance on HAMP literature and the promise of a permanent modification to save their homes clearly led to their detriment. 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.

State law claims based on a plaintiff’s reasonable reliance or a defendant’s deceptive actions apply perfectly in these types of situations. The banks used the TPP to receive payments for months while the homeowners still ultimately had their homes foreclosed upon. 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).


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.

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.\(^{243}\)


\(^{240}\) 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).


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).


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.\textsuperscript{259}