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## Corvello V. Wells Fargo Bank: Lending Support For A New Generation Of HAMP Litigation And Mortgage Relief

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# **CORVELLO v. WELLS FARGO BANK: LENDING SUPPORT FOR A NEW GENERATION OF HAMP LITIGATION AND MORTGAGE RELIEF**

*Byron Tuyay\**

## I. INTRODUCTION

In October 2008, Congress passed the Emergency Economic Stabilization Act (EESA) in response to the worst economic recession the United States had suffered since the Great Depression.<sup>1</sup> A major contributor to the recession was the foreclosure crisis that swept the nation.<sup>2</sup> Consequently, the centerpiece of EESA featured the Troubled Asset Relief Program (TARP), which directed the Secretary of the Treasury (“Treasury”) to “implement a plan that seeks to maximize assistance to homeowners” and to incentivize loan servicers of underlying mortgages to take advantage of available programs to minimize foreclosures.<sup>3</sup>

In 2009, the Obama Administration unveiled the Home Affordable Modification Program (HAMP) with the aim of curbing avoidable foreclosures.<sup>4</sup> HAMP encourages loan servicers to modify

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1. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008); Arsen Sarapinian, *Fighting Foreclosure: Using Contract Law to Enforce the Home Affordable Modification Program (HAMP)*, 64 HASTINGS L.J. 905, 906 (2013).

2. Sarapinian, *supra* note 1, at 906; *see also* Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565, 570 (2009) (“Foreclosures also depress housing and commercial real-estate prices throughout entire neighborhoods[,] . . . [and] property-value declines caused by foreclosure hurt local businesses and erode state and local government tax bases.”) (citations omitted).

3. 12 U.S.C. § 5219a(a) (2012).

4. *Home Affordable Modification Program Supplemental Directive 09-01*, at 1 (2009) [hereinafter *Supplemental Directive 09-01*], available at [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/sd0901.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0901.pdf); *see also* 12 U.S.C. § 5201 (2008) (authorizing the United States Department of Treasury to create and implement a plan to decrease the rate of

home loans to reduce monthly mortgage payments for distressed borrowers facing imminent foreclosure.<sup>5</sup> Through HAMP, qualified borrowers may lower their monthly loan payments to 31 percent of their monthly income and thereby decrease their risk of foreclosure.<sup>6</sup>

Before receiving an offer for permanent loan modification, however, a borrower must complete a trial payment period (TPP), during which the borrower preliminarily makes lower monthly payments on his or her mortgage while the loan servicer determines the borrower's eligibility for a permanent modification through HAMP, based on the borrower's personal financial information.<sup>7</sup>

Phillip Corvello ("Corvello") and Jeffery and Karen Lucia ("the Lucias") sought permanent loan modifications through HAMP<sup>8</sup> and received TPP plans from their mortgage servicer, Wells Fargo Bank ("Wells Fargo").<sup>9</sup> After the expiration of their trial periods, however, Corvello and the Lucias were denied offers for permanent loan modification.<sup>10</sup>

Corvello and the Lucias filed separate actions against Wells Fargo in federal court, invoking diversity jurisdiction and alleging that California law governed their claims.<sup>11</sup> Both complaints alleged that—because the plaintiffs had complied with the express terms of the TPP agreement—the loan servicer was bound by an enforceable contract to offer them permanent modifications.<sup>12</sup> In dismissing the breach of contract claims, "the district court concluded that[,] accepting the plaintiff's allegations as true, the language of the TPP could not support a contract for a permanent loan modification."<sup>13</sup>

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foreclosures).

5. Under EESA, the term "servicer" is defined as "the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan)." 12 U.S.C. § 5220(a)(4) (2006); 12 U.S.C. § 2605(i)(2) (2006); *Supplemental Directive 09-01*, *supra* note 4, at 1; *see also* Sarapinian, *supra* note 1, at 913 ("A servicer is neither a lender nor investor but is often a third-party financial institution that is hired by investors to manage and account for the loan.").

6. *Making Home Affordable Program: Handbook for Servicers of Non-GSE Mortgages* 105–08 (2013) [hereinafter *MHA Handbook*], available at [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/mhahandbook\\_43.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_43.pdf).

7. *Id.* at 122.

8. *Corvello v. Wells Fargo Bank, NA*, 728 F.3d 878, 881 (9th Cir. 2013).

9. *Id.*

10. *Id.*

11. *Id.* at 882.

12. *Id.*

13. *Id.*

On appeal, Corvello's and the Lucias' cases were consolidated and the Ninth Circuit addressed whether the terms of the TPP agreement constituted an enforceable contract under which Wells Fargo was obligated to offer permanent modifications to Corvello and the Lucias after they satisfied their obligations under the TPP; the panel held that it did.<sup>14</sup>

In *Corvello*, the Ninth Circuit followed the Seventh Circuit's recent decision in *Wigod v. Wells Fargo Bank, N.A.*<sup>15</sup> by interpreting HAMP-related claims in favor of consumer protection.<sup>16</sup> The Ninth Circuit's holding in *Corvello* also signals a departure from competing rationales adopted in the Fifth and Eleventh Circuits, which prohibit individuals from enforcing TPP agreements against loan servicers.<sup>17</sup> Thus, by validating contract-based TPP claims, *Corvello* strengthens plaintiff-borrowers' claims in future Ninth Circuit HAMP litigation.<sup>18</sup>

Part II of this Comment presents the historical background and legislative history of HAMP. In Part III, this Comment summarizes the relevant facts and the arguments advanced by the parties on appeal in *Corvello*. Part IV sets forth the Ninth Circuit's reasoning in its decision. Part V analyzes the significance of the holding in *Corvello*, specifically, the consequences of adopting the Seventh Circuit's interpretation of the TPP and contract-based HAMP claims for distressed mortgagors in the Ninth Circuit. Finally, Part VI concludes that the Ninth Circuit properly upheld the plain-language interpretation of the TPP terms in *Corvello*, thereby avoiding injustice and serving HAMP's legislative goals.

## II. HISTORICAL FRAMEWORK

After Congress passed EESA in 2008, the Treasury, acting under direction of Congress, launched HAMP in 2009.<sup>19</sup> HAMP helps distressed homeowners that have fallen behind on monthly mortgage payments by establishing a process and procedure through which borrowers can reduce monthly mortgage payments to

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14. *Id.* at 880–81, 883.

15. 673 F.3d 547 (7th Cir. 2012).

16. *Corvello*, 728 F.3d at 883; *see infra* Part V.A.

17. *See infra* Part V.A.

18. *See infra* Part V.A.

19. *Corvello*, 728 F.3d at 880.

approximately 31 percent of the borrower's income.<sup>20</sup> HAMP was designed to incentivize banks to refinance mortgages, thereby reducing foreclosures and allowing distressed borrowers to stay in their homes.<sup>21</sup>

Through HAMP, the Treasury entered into Servicer Participation Agreements (SPAs) with the nation's largest home-loan servicers.<sup>22</sup> Under these SPAs, loan servicers are eligible to receive TARP funds as long as they facilitate loan modifications to prevent avoidable foreclosures.<sup>23</sup> Participating loan servicers, such as Wells Fargo, can receive up to \$1,600 in federal incentive compensation for each permanent loan modification offered through HAMP.<sup>24</sup>

In April 2009, the Treasury issued the first of a series of directives and policies in an attempt to provide servicers with uniform guidance in implementing HAMP modifications.<sup>25</sup> Under HAMP, qualified borrowers initiate the process of modifying their home loans by submitting personal financial information to their loan servicers.<sup>26</sup> Before receiving a permanent loan modification, borrowers must pay reduced monthly mortgage payments for a trial period.<sup>27</sup> At the end of the trial period, borrowers who submitted payments for each month during the period and whose personal financial representations remained accurate during that same period receive Modification Agreements that permanently modify the terms of their loans.<sup>28</sup>

The loan servicers must report to the borrowers—regardless of their eligibility or ineligibility—the results of the eligibility

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20. *Id.*; see *MHA Handbook*, *supra* note 6, at 105–08.

21. See 12 U.S.C. § 5219a (2012).

22. See Sarapinian, *supra* note 1, at 914–15 & n.71.

23. *Supplemental Directive 09-01*, *supra* note 4, at 23.

24. *Id.*; Brief for Defendant-Appellee Wells Fargo Bank, N.A. at 7, *Corvello v. Wells Fargo Bank, NA*, 728 F.3d 878 (9th Cir. 2013) (Nos. 11-16234, 11-16242), 2012 WL 1650301, at \*6–7; *MHA Handbook*, *supra* note 6, at 140. The amount of TARP funds that a loan servicer receives for any given loan modification depends on the degree of the borrower's delinquency in connection with the underlying mortgage. For a detailed account of the financial incentives offered to servicers, see Sarapinian *supra* note 1, at 915 n.75; 12 U.S.C. § 5219 (2012).

25. *Supplemental Directive 09-01*, *supra* note 4, at 1.

26. To qualify for HAMP, borrowers must satisfy certain threshold requirements relating to the date their loans were originated and other indicators of personal financial hardship. See *Corvello*, 728 F.3d at 880.

27. *Id.* at 880–81.

28. *Supplemental Directive 09-01*, *supra* note 4, at 14–15.

determinations made during the trial period.<sup>29</sup> In the event that the borrowers are ineligible for permanent modifications under HAMP, loan servicers should also consider foreclosure prevention alternatives for such a borrower.<sup>30</sup>

### III. STATEMENT OF THE CASE

“In May 2009, Corvello sought a loan modification from Wells Fargo because he was struggling to make his mortgage payments.”<sup>31</sup> Corvello received information about the permanent loan modification program and responded by sending an application to Wells Fargo, which included copies of pay stubs and other personal financial information.<sup>32</sup>

Wells Fargo sent Corvello a written TPP agreement on July 17, 2009.<sup>33</sup> The TPP included a cover letter stating that Wells Fargo would modify Corvello’s loan so long as his financial information was accurate and he complied with the terms of the TPP.<sup>34</sup> It read:

If I am in compliance with this Loan Trial Period and my [personal financial] representations in Section 1 continue to be true in all material respects, then the Lender *will provide* me with a Loan Modification Agreement, as set forth in Section 3, that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage. . . . I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan if I qualify for the Offer or will send me written notice that I do not qualify for the Offer.<sup>35</sup>

Paragraph 2F of the TPP notified the borrower of the party’s obligations:

If prior to the Modification Effective Date, (i) the Lender does not provide me a fully executed copy of this Plan and the Modification Agreement; (ii) I have not made the Trial

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29. *Id.*

30. *Id.* at 15.

31. Appellants’ Opening Brief at 6, *Corvello*, 728 F.3d 878 (Nos. 11-16234, 11-16242), 2012 WL 1132108 at \*6.

32. *Id.* at 6–7.

33. *Id.* at 7.

34. *Id.* at 7; *Corvello*, 728 F.3d at 881.

35. *Corvello*, 728 F.3d at 881; Appellants’ Opening Brief, *supra* note 31, at 7.

Period payments required under Section 2 of this Plan; or (iii) the Lender determines that my representations in Section 1 are no longer true and correct, the Loan Documents will not be modified and this Plan will terminate.<sup>36</sup>

The TPP expressly stated that no modification would take effect “unless and until” Corvello received a signed copy of the modification agreement, but assured him that the bank would notify him one way or another about his eligibility for a loan modification.<sup>37</sup> Accordingly, Paragraph 2G read:

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) 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.<sup>38</sup>

Corvello sent a signed copy of the TPP agreement to Wells Fargo.<sup>39</sup> He contended that, despite the performance of his obligations under the TPP in the subsequent three months, Wells Fargo never offered him a permanent modification, nor did it notify him that he did not qualify for the modification program.<sup>40</sup>

Karen and Jeffrey Lucia were in a similar financial situation as Corvello in late 2009.<sup>41</sup> The Lucias asserted that, during a phone conversation in February 2010, Wells Fargo offered them a TPP with the promise of a permanent modification if payments were timely completed, and if their financial information remained accurate throughout the trial period.<sup>42</sup> After five months, however, the Lucias still had not received an offer for permanent modification, nor had they received notification that they were ineligible for HAMP.<sup>43</sup>

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36. *Corvello*, 728 F.3d at 881–82.

37. *Id.* at 882.

38. *Id.*

39. *Id.*

40. *Id.*

41. Appellants’ Opening Brief, *supra* note 31, at 8; *see also* Lucia v. Wells Fargo Bank N.A., 798 F. Supp. 2d 1059, 1063 (N.D. Cal. 2011) (“Due to the economic recession, the Lucias lost their jobs and, struggling to make their mortgage payments, sought out a loan modification.”), *rev’d sub nom.* Corvello v. Wells Fargo Bank, NA, 728 F.3d 878 (9th Cir. 2013).

42. *Corvello*, 728 F.3d at 882.

43. Appellants’ Opening Brief, *supra* note 31, at 8–9.

Instead, Wells Fargo terminated the TPP and foreclosed on, and subsequently sold, the Lucias' home.<sup>44</sup>

Corvello and the Lucias separately filed complaints against Wells Fargo in the United States District Court for the Northern District of California.<sup>45</sup> Corvello's and the Lucias' complaints sought permanent modification of their respective home loans under California law.<sup>46</sup> Their complaints alleged that Wells Fargo's failure to fulfill its obligations under the TPP to either offer permanent loan modifications or send notification of ineligibility under HAMP constituted a breach of the enforceable contract that formed when the borrowers met their obligations under the TPP.<sup>47</sup> Additionally, both complaints alleged promissory estoppel, breaches of the covenant of good faith and fair dealing, violations of California's Unfair Competition Law, and violations of the Rosenthal Fair Debt Collection Practices Act.<sup>48</sup>

The district court issued orders granting Wells Fargo's motions to dismiss both actions.<sup>49</sup> The court concluded in both cases that, accepting the plaintiffs' allegations as true, the language of the TPP "could not support a contract for permanent loan modification."<sup>50</sup> In both cases, the district court held that, under the provisions in Paragraph 2G, Wells Fargo's promise to offer a permanent loan modification was conditioned on the bank sending the plaintiffs a signed Modification Agreement.<sup>51</sup> As such, the district court concluded that Wells Fargo was not required to offer Corvello or the Lucias a *permanent* loan modification, since Wells Fargo never sent them signed Modification Agreements.<sup>52</sup>

On appeal, Wells Fargo maintained that the district court properly found that the terms of the TPP did not constitute an offer for permanent modification.<sup>53</sup> Relying on the language of Paragraph 2G of the TPP, Wells Fargo argued that any subsequent offer for

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44. *Corvello*, 728 F.3d at 882.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 882–83.

50. *Id.* at 882.

51. *Id.*

52. *Id.*

53. *Id.* at 883.



permanent modification did not exist “unless and until” a borrower received a fully executed copy of a Modification Agreement.<sup>54</sup>

#### IV. REASONING OF THE COURT

The Ninth Circuit adopted the reasoning of the recent Seventh Circuit decision in *Wigod v. Wells Fargo Bank, N.A.*<sup>55</sup> In *Wigod*, under similar facts, Wells Fargo raised the same defense that it raised in *Corvello*.<sup>56</sup> The Seventh Circuit rejected Wells Fargo’s argument that Paragraph 2G of the TPP agreement precluded the existence of any offer for permanent modification “unless and until” the servicer sent the borrower a signed Modification Agreement.<sup>57</sup>

Notably, the Seventh Circuit found that the TPP agreement contained sufficient consideration because it required the borrower to “open new escrow accounts, undergo credit counseling . . . [and] provide and vouch for the truth of her financial information.”<sup>58</sup> Furthermore, the Seventh Circuit held that any conditions precedent to Wells Fargo’s obligation to offer permanent modification were to be satisfied by the *borrower*—not by Wells Fargo.<sup>59</sup> The Seventh Circuit thus concluded that, when *Wigod* satisfied those conditions (i.e., complied with the requirements of the trial plan and maintained accurate financial information throughout the trial period), Wells Fargo had a contractual obligation to offer her a permanent loan modification or to otherwise send notice of her ineligibility.<sup>60</sup>

Additionally, the Seventh Circuit found Wells Fargo’s interpretation of the TPP to be suspect because such interpretation allowed Wells Fargo to avoid any obligations under the TPP simply by refraining from sending borrowers a signed Modification Agreement.<sup>61</sup> Moreover, the Seventh Circuit concluded that Wells Fargo’s proposed interpretation essentially nullified the express promise to send borrowers a signed Modification Agreement if the borrower complied with his or her obligations under the TPP.<sup>62</sup> The

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54. *Id.*

55. *Id.* (citing *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012)).

56. *Corvello*, 728 F.3d at 883; *Wigod*, 673 F.3d at 562–63.

57. *Corvello*, 728 F.3d at 883; *Wigod*, 673 F.3d at 563.

58. *Wigod*, 673 F.3d at 564.

59. *Id.* at 562.

60. *Id.*

61. *Id.* at 563.

62. *Id.*

court also reasoned that adopting Wells Fargo’s reading of the TPP would allow loan servicers to refuse permanent modification for “any reason whatsoever . . . turning an otherwise straightforward offer into an illusion.”<sup>63</sup>

Similarly, in *Corvello*, the Ninth Circuit reasoned that the “more natural and fair” interpretation of the TPP is that loan servicers must send borrowers signed Modification Agreements only after borrowers meet their obligations, assuming they did not notify borrowers of ineligibility.<sup>64</sup> Like the court in *Wigod*, the Ninth Circuit held that if Paragraph 2G dictated the parties’ obligations under the TPP, it would leave the ultimate decision to offer loan modifications to the “unfettered discretion” of Wells Fargo.<sup>65</sup> Instead, the courts in *Wigod* and *Corvello* interpreted the borrowers’ receipt of the signed Modification Agreements as a condition precedent to permanent modifications taking effect.<sup>66</sup> In other words, the modifications were not complete until the above conditions were met.<sup>67</sup> Under Paragraph 1 Section 3 of the TPP, however, “Wells Fargo still had an obligation to *offer* [Corvello and the Lucias] a permanent modification” if they satisfied their end of the bargains.<sup>68</sup>

Wells Fargo countered that *Wigod* was distinguishable from *Corvello* because—unlike the plaintiff in *Wigod*—neither Corvello nor the Lucias received a signed Modification Agreement. Therefore, Wells Fargo argued, under Paragraph 2F, the TPP should have terminated if the borrowers did not receive a signed plan *and* Modification Agreement.<sup>69</sup>

The Ninth Circuit rejected this argument because the holding in *Wigod* did not turn on the borrowers receiving the signed Modification Agreement.<sup>70</sup> Rather, the Ninth Circuit noted that under the terms of the TPP, when Wells Fargo initiated the borrower’s TPP, Wells Fargo had the opportunity to determine the borrower’s eligibility for a permanent modification.<sup>71</sup> If the borrower did not

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63. *Id.*

64. *Corvello*, 728 F.3d at 883.

65. *Id.*

66. *See id.*

67. *Id.* at 883–84.

68. *Id.* (citing *Wigod*, 673 F.3d at 563) (emphasis added).

69. *Id.* at 884.

70. *Id.*

71. *Id.*

qualify, “[Wells Fargo] could have and should have denied [the borrower] a modification on that basis.”<sup>72</sup>

Wells Fargo also “contend[ed] that the Lucias’ breach of contract claim [could not] survive the statute of frauds because it [was] an oral agreement to modify the terms of the mortgage.”<sup>73</sup> The court rejected this argument and held that, because the Lucias alleged full performance of their obligations under the contract, they could enforce the remaining promises under the TPP.<sup>74</sup>

In sum, the Ninth Circuit concluded that (1) Corvello and the Lucias could assert their breach of contract claims against Wells Fargo because, under the TPP, loan servicers are obligated to offer borrowers permanent mortgage modifications when the borrowers have performed their obligations under the TPP; and (2) Wells Fargo was engaged in debt collection under California’s Rosenthal Fair Debt Collection Practices Act.<sup>75</sup> The court of appeals reversed the district court’s judgment and remanded the case for further proceedings.<sup>76</sup>

## V. ANALYSIS

The Ninth Circuit’s holding in *Corvello* demonstrates a shift toward interpreting TPPs in favor of consumers. *Corvello* advances consumer interests in two ways. First, it permits distressed homeowners to enforce the terms of the TPP under applicable state law, thereby allowing homeowners to hold loan servicers accountable to the HAMP Treasury guidelines. Second, it avoids the injustice that would result were Wells Fargo allowed to keep borrowers’ trial payments without offering anything in exchange, and it advances HAMP’s legislative purpose.

### A. *Holding the Door Open for HAMP-Related Litigation*

State and federal courts across the United States have uniformly held that HAMP does not imply a private right of action.<sup>77</sup> Unlike

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72. *Id.* (quoting *Wigod*, 673 F.3d at 562) (internal quotation marks omitted).

73. *Id.* at 885.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Wigod*, 673 F.3d at 560 n.4 (“We have identified more than 80 other federal cases in

federal consumer protection laws, an administrative program such as HAMP does not provide an explicit means for holding participating loan servicers accountable for their obligations under the Supplemental Treasury Guidelines.<sup>78</sup> As a result, individual and class action lawsuits arising from alleged violations of the Supplemental Treasury Guidelines have been widely dismissed. Borrowers have little hope, if any, of finding relief in courts.<sup>79</sup> Nonetheless, distressed borrowers have creatively argued various theories of liability in “HAMP-related” actions against loan servicers.<sup>80</sup> Generally, however, such attempts have proven unsuccessful.<sup>81</sup>

*Corvello* strengthens plaintiff-borrowers’ claims in what has been coined the “second generation” of HAMP-TPP litigation.<sup>82</sup> The court’s holding with respect to the Lucias’ claims in *Corvello* lends circuit-level support to the proposition that borrowers may defeat servicers’ statute of frauds defense if the borrowers have performed their obligations under the TPP.<sup>83</sup> Additionally, *Corvello* further expands plausible theories of loan servicer liability by affirming that HAMP servicers engage in debt collection, and therefore, *Corvello* provides borrowers additional protection from loan servicers through state fair debt collection statutes.<sup>84</sup> Accordingly, *Corvello* will likely serve as a launching pad for future HAMP-related claims against servicers based on state common law and consumer protection laws.

*Corvello* also signals a departure from the Fifth and Eleventh Circuits’ treatment of contract-based TPP claims. For example, in *Pennington v. HSBC Bank*,<sup>85</sup> the Fifth Circuit refused to enforce the

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which mortgagors brought HAMP-related claims. . . . Courts have uniformly rejected these claims because HAMP does not create a private federal right of action for borrowers against servicers.”); see also John R. Chiles & Matthew T. Mitchell, *HAMP: An Overview of the Program and Recent Litigation Trends*, 65 CONSUMER FIN. L.Q. REP. 194, 197 n.10 (2011) (providing a survey of cases holding that there is no private right of action under HAMP).

78. See Chiles & Mitchell, *supra* note 77, at 197 n.10 (providing a survey of cases holding that there is no right of enforcement or action).

79. *Id.* at 197–98; Harry N. Arger, *Support for Dismissal of State Law Based HAMP TPP Cases*, BUS. L. TODAY, Jan. 2013, at 2.

80. Chiles & Mitchell, *supra* note 77, at 197–200 (explaining that in addition to claims based on breach of contract and state consumer protection statutes, plaintiffs elsewhere have asserted claims based on constitutional challenges, tort law, and the Equal Credit Opportunity Act).

81. *Id.*; Arger, *supra* note 79, at 1–2.

82. Arger, *supra* note 79, at 1.

83. *Corvello v. Wells Fargo Bank, NA*, 728 F.3d 878, 885 (9th Cir. 2013).

84. *Id.*

85. 493 F. App’x 548, 554 (5th Cir. 2012).

terms of the TPP agreement against a servicer in the absence of evidence that the servicer signed and returned the Modification Agreement to the borrower.<sup>86</sup> *Corvello* therefore revives the rationale in *Wigod*, which the Fifth and Eleventh Circuits refused to follow. Similarly, in *Miller v. Chase Home Finance, LLC*,<sup>87</sup> the Eleventh Circuit narrowly interpreted a TPP agreement in holding that, under the TPP, servicers promise only to “temporarily modify” the loan.<sup>88</sup>

The *Pennington* and *Miller* courts, however, seemed to reach their conclusions without any reference to the plain language in Paragraph 1 Section 3 of the TPP, which conditions the offer for permanent modification on the borrower’s performance.<sup>89</sup> To the contrary, the court in *Pennington* relied primarily on Paragraph 2G to support the finding that no contract for permanent modification existed “unless and until” the servicer sent the borrower a Modification Agreement.<sup>90</sup> This was the very argument Wells Fargo raised—and that the Ninth Circuit squarely rejected—in *Corvello*.<sup>91</sup>

The interpretations advanced by the courts in *Pennington* and *Miller* run counter to consumer interests. As noted by the court in *Corvello*, such interpretations inevitably leave loan modifications to the unfettered discretion of loan servicers.<sup>92</sup> Furthermore, servicers, who decide whether to offer such loan modifications, are motivated by incentives that favor foreclosure over loan modification.<sup>93</sup> Additionally, loan servicers, unlike lenders or investors, are compensated regardless of the performance of the loan.<sup>94</sup> These conflicting interests suggest that a minimum level of accountability

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86. *Id.* at 554.

87. 677 F.3d 1113 (11th Cir. 2012).

88. *Id.* at 1117.

89. *See id.* at 1116–17 (“Miller . . . lacks standing to pursue his breach of contract, breach of implied duty of good faith and fair dealing, and promissory estoppel claims insofar as they are alleged on an alleged breach of Chase’s HAMP obligations.”); *See Pennington*, 493 F. App’x at 554 (holding that there was no enforceable contract between the borrower and servicer because the servicer’s failure to send a signed copy of the agreement to the borrower was evidence that the lender did not intend to be bound by the TPP).

90. *Pennington*, 493 F. App’x at 555.

91. *Corvello v. Wells Fargo Bank, NA*, 728 F.3d 878, 883 (9th Cir. 2013).

92. *Id.*

93. *See* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 761, 770–71 (2011) (arguing that weak incentives for servicers to perform modifications cause foreclosures to outpace modifications and prevent modifications that would make economic sense for investors).

94. *See id.* at 761, 767–68.

on the part of loan servicers is necessary to ensure the just administration of HAMP in favor of consumer interests. The holding in *Corvello* creates a threshold level of accountability by imposing on loan servicers the obligation to terminate the TPP by notifying borrowers of their HAMP eligibility rather than prolonging the TPP term indefinitely. Such an obligation preserves servicers' incentive-based compensation structure while affording some avenues of mortgage relief for borrowers.

Indeed, the holdings in *Wigod* and *Corvello* should not implicate servicers that comply with the procedures outlined in the latest MHA Servicer Handbook.<sup>95</sup> Servicers maintain fiscal safeguards built in to HAMP's federal compensation incentive structure because they are not required to offer permanent modifications under HAMP, unless the Net Present Value of the loan indicates that it would be more profitable to modify the loan than to initiate a foreclosure.<sup>96</sup> This, in addition to the profits garnered from TARP funds for each offer for permanent modification,<sup>97</sup> creates a win-win situation for loan servicers and the lenders of the underlying mortgages. Accordingly, *Corvello's* TPP interpretation advances consumer interests, but leaves intact the compensation incentives for servicers to offer HAMP loan modifications.

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95. The Supplemental Treasury Guidelines and latest MHA handbook have since abandoned the two-step eligibility processes disputed in *Pennington* and *Miller* in favor of a one-time eligibility determination at the beginning of the TPP process. Section 2.3 of the current MHA handbook states that "servicer[s] must send a Borrower Notice to every borrower that has been evaluated for HAMP, but is not offered a TPP, is not offered a permanent modification or is at risk of losing eligibility for HAMP." *MHA Handbook, supra* note 6, at 82; *see also* Arger, *supra* note 79, at 2.

96. The Net Present Value (NPV) test is a calculation used by investors and loan servicers to determine the value of a mortgage. All loans that meet HAMP eligibility criteria are evaluated using a standardized NPV test that compares the NPV of a loan with and without the HAMP modification. Servicers *must* offer a loan modification in circumstances where the modification would increase the NPV of a mortgage, but are not required to offer a modification if it would decrease the NPV of a mortgage. *MHA Handbook, supra* note 6, at 118–19; *see also* *CheckMyNPV.com Frequently Asked Questions*, CHECKMYNPV.COM, <https://www.checkmynpv.com/sites/all/themes/npvtool/pdf/CheckMyNPV-FAQ.pdf> (last visited July 27, 2014).

97. *See supra* note 24 and accompanying text.

### B. Avoiding Injustice

The Ninth Circuit's approach promotes HAMP's legislative purpose—to prevent avoidable foreclosures.<sup>98</sup> *Corvello*'s TPP interpretation complements the Treasury's policy objectives by allowing borrowers to enforce their potential rights to mortgage relief through the courts. As noted above, *Corvello* held—at minimum—that borrowers could successfully plead a contract-based cause of action against loan servicers when the borrower has met his or her obligations under the TPP by maintaining accurate financial information and making timely payments throughout the term of the TPP. This is a significant development because it promotes efficiency across the mortgage modification industry. As an illustration, loan servicers that neglect to notify borrowers of their ineligibility for a permanent loan modification at the end of their trial periods, as Wells Fargo did in *Corvello*, now risk exposure to liability under common law.<sup>99</sup> Such risk necessarily places some limits on the discretion that loan servicers have in deciding whether to offer permanent loan modifications. Accordingly, *Corvello* fortifies the underlying policy objectives of HAMP.

The “natural and fair” interpretation of the TPP endorsed by the courts in *Corvello* and *Wigod* has since been adopted in the Treasury's most recent MHA Servicer Handbook.<sup>100</sup> This handbook, which provides uniform programmatic guidance for loan modification procedures across the industry, directs loan servicers to send signed Modification Agreements “no later than 30 calendar days after receipt of the agreement executed by the borrower, and the borrower's compliance with all conditions set forth in the trial period plan notice.”<sup>101</sup> Imposing such a time constraint avoids the problems created when borrowers, like *Corvello* and the *Lucias*, are left waiting in limbo long after the end of their trial periods.

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98. 12 U.S.C. § 5219(a)(1) (2009).

99. See *Corvello v. Wells Fargo Bank, NA*, 728 F.3d 878, 883–85 (9th Cir. 2013); see also *Lueras v. BAC Home Loans Servicing, LP*, 163 Cal. Rptr. 3d 804 (2013) (holding that a plaintiff-borrower could state a claim for breach of oral contract where the borrower continued to make temporary monthly mortgage payments for 10 months and the lender failed to assess the feasibility or implement a permanent solution).

100. *MHA Handbook*, *supra* note 6, at 127.

101. *Id.* at 127.

## VI. CONCLUSION

In sum, the Ninth Circuit correctly upheld the validity of contract-and common law–based HAMP claims. As HAMP does not imply a private right of action, *Corvello* arms borrowers with a much-needed sword by preserving their opportunity to enforce contractual rights under the TPP and to seek foreclosure relief in courts. By adopting a fair and natural construction of TPP agreements, such that borrowers can trigger the loan servicer’s obligation to offer permanent modification by satisfying the conditions of the TPP, the court has bolstered HAMP’s policy objectives and avoided the unjust result of granting loan servicers the unfettered discretion to deny requests for permanent loan modifications.



