



**L E G A L
S E R V I C E S**

I N C O R P O R A T E D

TESTIMONY

ON

**FORECLOSURE PREVENTION PART II: ARE LOAN
SERVICERS HONORING THEIR COMMITMENT TO HELP
PRESERVE HOMEOWNERSHIP?**

PRESENTED BEFORE:

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.
THURSDAY, JUNE 24, 2010**

PRESENTED BY:

MFY LEGAL SERVICES, INC.

My name is Elise Brown and I am the supervising attorney of the Foreclosure Prevention Project at MFY Legal Services, Inc. (MFY), a not-for-profit legal service in New York City. On behalf of MFY, I would like to thank Chairman Towns for the opportunity to submit our written testimony highlighting the failures of the Home Affordable Modification Program (“HAMP”). MFY has represented hundreds of homeowners facing foreclosure who seek HAMP modifications and possesses first-hand knowledge of the HAMP process from the homeowners’ perspective.

The number of denials of modification requests under the HAMP is astounding and speaks volumes about the ultimate efficacy of the Program. Behind each number, behind each denial, is a homeowner, a person who is desperately trying to keep his family in their home and who sincerely believes that HAMP will help him with this effort. But through the shoddy implementation of HAMP by Treasury and its agents, the loan servicing companies’ pervasive disregard of HAMP’s guidelines, and the absence of any type of recourse to remedy deviations, far too many homeowners quickly learn that HAMP will not, in fact, help them.

HAMP’s Numbers Show a Failed Program in Which Most Homes Are Lost

Today’s hearing asks “are loan servicers honoring their commitment to help preserve homeownership?” The answer is a resounding “no.” The Obama Administration’s leading solution to America’s current foreclosure crisis – enactment of the HAMP – is an overwhelming failure, falling far short of its stated metric of success: helping up to 7 to 9 million families refinance or restructure their mortgages and avoid foreclosure.¹ Today, 15 months into the HAMP, a mere 340,000 homeowners have been granted permanent modifications, or just 4 % of the intended number of beneficiaries.² At that rate, it would take more than 25 years to assist those 7 to 9 million families.

But the notion that 7 to 9 million families would ever be helped presupposes that the banks and servicers who administer HAMP actually intend to assist that number of homeowners to avoid foreclosure. So far the numbers show that this simply is not true. Since HAMP’s inception, more than 429,000 homeowners who began a “trial modification” were denied permanent modifications.³ That is one-third more than the number of homeowners granted permanent modifications. While newspaper accounts euphemistically claim that these homeowners have “dropped out” of the Program, make no mistake, the banks and the servicers denied these homeowners the chance to obtain the permanent modifications they desperately sought. Notably

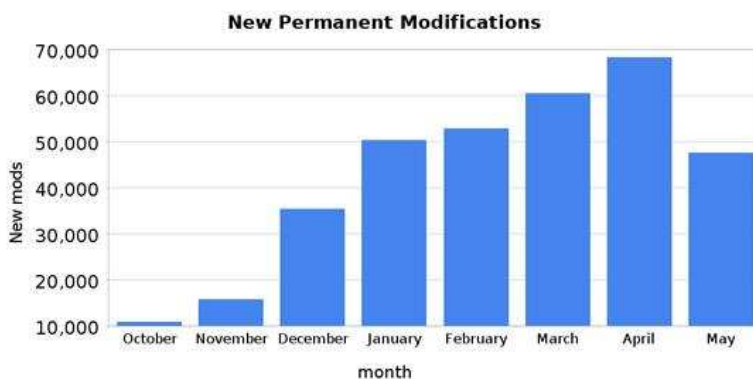
¹ Home Affordable Modification Program Supplemental Directive (herein “HAMP SD”) 09-01, p. 1.

² Making Home Affordable Program -- Servicer Performance Report through May 2010 at p. 2.

³ *Id.*

absent from these statistics are the number of homeowners whose requests for temporary modifications were denied and who are utterly ignored in the HAMP reports. We estimate that, for every one person granted a temporary modification, one person is denied even preliminary access to the Program. In addition to the 1.2 million people granted temporary modifications since the program's inception,⁴ many more were denied HAMP's benefits at the temporary modification stage.

Do not expect these numbers to improve. In fact, we anticipate the number of denials of permanent modifications to increase while the number of those approved decreases. As shown in the chart below, May 2010 saw the first decrease in the number of permanent modifications granted.



Courtesy of Shahien Nasiripour, The Huffington Post, June 21, 2010

In our experience – representing hundreds of homeowners in the foreclosure process – it takes on average 6 to 9 months for a servicer to convert a temporary modification to a permanent modification, two to three times longer than the HAMP-mandated three-month trial period.⁵

In addition, consolidation in the loan servicing industry is a distinct exacerbating circumstance creating significant delays in conversion. For example, MFY client Ms. F., a homeowner in Staten Island, NY, had a mortgage serviced by Wilshire Credit Corporation (Wilshire). Ms. F. was placed on a temporary HAMP modification in or about November 2009. Ms. F. made all her temporary modification payments to Wilshire and provided Wilshire with all the information and documentation to verify her income and convert her temporary modification to a permanent modification under the HAMP. As a result of a corporate acquisition, servicing of Ms. F.'s loan was transferred from Wilshire to BAC Home Loan Servicing (BAC) in March 2010, before the temporary modification was converted a permanent modification. BAC has obdurately refused to acknowledge Ms. F.'s compliance with the temporary modification and continues to send Ms.

⁴ *Id.* 1.2 million includes the number of permanent modifications (340,000), the number of active temporary modifications currently under review for a permanent modification (467,000) and the number of temporary modifications denied a permanent modifications (429,000).

⁵ HAMP SD 09-01, p. 17 (“The trial period is three months in duration”).

F. monthly statements requesting payments far in excess of the payments required by the temporary modification put into place by Wilshire. Despite MFY’s advocacy and Ms. F.’s good faith, transfer of servicing from Wilshire to BAC has placed Ms. F. back at square one of the HAMP process.



Courtesy of Shahien Nasiripour, The Huffington Post, June 21, 2010

As the above chart shows, August 2009 saw an increase in temporary modifications from July. However, 9 months later, in May 2010, when the increased number of temporary modifications should be reflected in an increased number of permanent modifications, the number of permanent modifications actually dropped, substantially, and making the two inversely proportional. Going forward, expect that trend to continue.

Servicers Flout HAMP’s Requirements and Subject Homeowners to Constant Harassment

If these statistics are not depressing enough, the stories behind these numbers and the demeaning and drawn-out process servicers subject homeowners to in order to ultimately reject them is downright abysmal.

Servicers Abuse the System, Increasing the Number of Unnecessary Foreclosures

The numbers discussed above show a breakdown in the system between converting temporary modifications to permanent modifications. But HAMP’s failure starts at a much earlier stage – when homeowners initially request to be considered for a temporary modification. A process that is intended to be “bold and swift” in order to “arrest this downward spiral” of foreclosures,⁶ is the complete opposite and reflects a failed system in which servicers take advantage of the homeowners’ vulnerabilities. Homeowners, in applying for a HAMP modification, enter the Kafkaesque world of loan servicing and have no choice but to heed to the servicers’ harassing demands. The servicers make the application process as long and as intricate as possible, repeatedly re-requesting the homeowners’ HAMP application and supporting documents. In fact, we have found in our practice, most servicers will not convert a trial modification to a

⁶ Remarks by the President on the Home Mortgage Crisis, Mesa, Arizona, February 18, 2009 at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-the-mortgage-crisis/.

permanent modification absent a court order tolling interest on the mortgage loan or threatening to haul a representative from the loan servicing company into court.

Take the case of Barbara W.,⁷ a homeowner in Brooklyn, N.Y. who has a mortgage serviced by First Franklin Loan Services (First Franklin). Ms. W, represented by our colleagues at South Brooklyn Legal Services (SBLs), first applied for a HAMP modification in August 2009. With her application, Ms. W submitted the documents required by HAMP: financial information, a hardship letter, 2008 tax returns, six months of bank statements, a letter from one tenant reflecting monthly rent payments of \$1,000 and a lease from another tenant showing rent of \$1,300 a month.⁸

At an August 20, 2009 settlement conference, First Franklin's counsel promised to the court that it would have its HAMP program operating in a few weeks and would consider Ms. W's application. Ms. W never heard back from First Franklin, but in November 2009 she submitted updated financials in order to facilitate the HAMP modification process and get her life back on track. But First Franklin was not interested in assisting Ms. W. In the following months, at various settlement conferences, instead of seriously considering Ms. W's HAMP application for a trial modification, First Franklin continued to request "updated" financials. With no recourse and an increasing fear of losing her home, Ms. W desperately did what the First Franklin requested and diligently sent updated financials.

Ten months after her initial request for a HAMP temporary modification and five resubmissions of financial data later, First Franklin denied Ms. W for a temporary modification in June 2010. First Franklin reported that Ms. W failed the Net Present Value (NPV) test, with a negative NPV result of \$9,462.95.

But Ms. W's negative NPV and ultimate denial was solely the result of First Franklin's dilatory responses to her HAMP application. While waiting for First Franklin to process her HAMP application, Ms. W continued to accrue approximately \$4,000 per month in interest. As the court noted when it ordered First Franklin to toll Ms. W's interest from January through June 2010 and re-evaluate Ms. W for HAMP, it was this ballooning interest that resulted in the negative NPV test. Had First Franklin had reviewed her HAMP application when it was first submitted in 2009, she would not have failed the NPV test and would have qualified for a HAMP modification.

Another example is the case of Ms. O, a homeowner in Staten Island who has a mortgage loan serviced by Chase Home Finance, LLC. Ms. O., represented by MFY, was placed in a trial modification in or about August 2009. The attorney(s) representing Chase Home Finance, LLC

⁷ Names have been shortened to protect homeowners' privacy.

⁸ For a list of the required documents, see HAMP SD 09-07. See also Question 47, Borrower Frequently Asked Questions, revised June 8, 2010 at <http://makinghomeaffordable.gov/borrower-faqs.html#47>.

(Chase) promised that Chase would convert Ms. O's temporary modification to a permanent modification under the HAMP by November 2009 at the latest. Unfortunately, Chase did not convert the temporary modification to a permanent modification as promised. Ms. O continued to make temporary modification payments until April 2010, when Chase finally converted the temporary modification to a permanent modification.

Ms. O. had to appear 6 times in court, make approximately 9 temporary modification payments, and obtain an order from the presiding judge in March 2010 prohibiting interest from accruing on the principal balance before a permanent HAMP modification was put in place by Chase in April 2010.

Ms. O. was recently contacted by Chase and told that Chase had cancelled the permanent modification agreement and that she must start the HAMP evaluation process from the beginning.

Homeowners Cannot Challenge NPV Test Denials

Many homeowners' requests for modifications under the HAMP are denied because they fail the Net Present Value (NPV) test. Homeowners and their advocates are not given access to the NPV test to double check whether a servicer's determination that the homeowner failed the NPV test is true and accurate. When homeowners' requests under the HAMP are denied due to a NPV failure, they are entitled to know only some of the data that the servicer used in running the NPV test. Treasury permits servicers to keep portions of the NPV data veiled in secrecy, preventing homeowners from properly challenging denials based upon NPV. Treasury should modify the HAMP to (1) allow homeowners and their advocates access to the NPV model being used by servicers and (2) require servicers to provide homeowners with all data used in performing the NPV test.

Homeowners Have Little to No Recourse to Fight the Servicers' HAMP Violations

Unfortunately, the stories of Ms. F., Ms. W and Ms. O are not unique, and BAC, First Franklin and Chase are not alone in their transgressions. Many of the major servicers subject homeowners to the same infuriatingly frustrating process. From our experiences, Bank of America, Wells Fargo, and Chase Home Finance, LLC are particularly egregious.

Luckily for the homeowners described above, they are in a judicial foreclosure state and appeared before judges who took an interest in ensuring that servicers followed the HAMP. Absent judicial action, homeowners are left with no recourse when servicers violate HAMP's guidelines. There is no express private right of action under the HAMP, which would give homeowners the ability to enforce HAMP's requirements and level the playing field between the servicers and the homeowners.

Instead, the only recourse homeowners have is to file a request for assistance with the HAMP Support Center at escalations@hmpadmi.org. But the Support Center has resolved few of the problems we have reported. The Support Center's "investigator" does not investigate whether the servicer's explanation is accurate, make any attempt to determine whether a servicer is violating HAMP guidelines or demand corrective action when HAMP violations are clear. Indeed, it has become abundantly clear during the last year that there is little oversight and there are no real consequences for servicers' non-compliance under HAMP, leaving homeowners vulnerable to unnecessarily losing their homes to foreclosure. As we have found, the Support Center usually serves as the mouthpiece of the servicer and not the unbiased arbitrator of alleged HAMP violations.

In one case, on December 1, 2009, SBLS submitted an inquiry to the HAMP Support Center about a denial that was based on an apparently incorrect income calculation. The homeowner had been denied a HAMP modification, ostensibly because his income was insufficient. In explaining the denial, the servicer stated to SBLS that the homeowner's documented rental income had been substantially discounted in calculating his income because of the loss he had reported on Schedule E to his 2008 tax returns. Such a discount is not authorized by the HAMP Program Guidelines. SBLS reported it to the Support Center in hopes that the erroneous calculation would be corrected.

Two days later, SBLS received the following response from the HAMP Support Center:

"Per the Servicer:

"The loan shows that they cannot afford the property. The loan is 27 months delinquent. We offered the Forbearance to Mod plan on 9/12/08. They broke the plan on 12/2/08 due to non-payment. We first ran HAMP on 8/17, a denial was given as failing NPV. Adjusted income and reran income on 9/18/09 and 9/30/09 with the same results. They cannot afford the property.

"Thank you

"HAMP Solutions Center"

The same day, an attorney from SBLS responded to this email as follows:

"Dear Sir or Madam,

"I appreciate your reply, but it does not respond to the problem we presented to you. To be clear, we have heard from the servicer its reason for denial, but we have explained in our email to you (form attached again here) why we find the servicer's reasons inadequate or erroneous. Are you able to provide a response to the request we made? I reproduce it below for your convenience, and I eagerly await your substantive reply.

“[W]e request that Treasury determine whether the reason given for the denial of [the homeowner’s] application—that losses related to rental property reported on 1040 Schedule E constitute a basis for discounting current, documented rental income—is valid or erroneous.”

“Thank you.”

SBLS did not receive a response to this email until an SBLS attorney followed up with the Service Center on January 6, 2010 after the homeowner received another HAMP denial letter. SBLS received the following response from the Support Center:

“This is the last servicer update on 12/7/09.

“the loan failed our Net Present Value (NPV) test. Each loan that is at risk of imminent default or at least 60 days late will be processed through our NPV test. The NPV test compares the net present value of cash flows with modification and without modification. If the test is positive meaning that the net present value of expected cash flow is greater in the modification scenario then [the servicer] will be able to offer a loan modification. If the test is negative, as it is in this case, the customer will not qualify for a loan modification.

“I am not sure on what exactly you are asking for. The file is in active review again for HAMP and I just went over the financials with the A3P and we are right on the money. I have postponed the f/c sale date for 30 days to ensure time for review process. I hope that helps.”

Not only did the Support Center fail to forward the response it received from the servicer on December 7 until almost a month later; it also failed to do anything to obtain information from the servicer that would constitute a meaningful response to the actual inquiry that SBLS directed to the Support Center. All it did was copy and paste the self-serving, non-responsive “update” from the servicer into an email. This case is unfortunately far from atypical of advocates’ experience with the Support Center.

HAMP’s Problems are Systemic and Cannot be Fixed

The problems with HAMP’s implementation are pervasive. The Treasury Department continues to issue multiple directives in an attempt to breathe some form of life into its dying Program. But these attempts have fallen flat since HAMP’s failure is primarily the result of the servicers who have done a “terrible job” in this foreclosure crisis.⁹

⁹ Testimony of Treasury Secretary Timothy Geithner, Congressional Oversight Panel Hearing, June 22, 2010 at <http://cop.senate.gov/hearings/library/hearing-062210-geithner.cfm>.

HAMP's problems cannot be fixed because as it currently stands, HAMP completely ignores the current incentives servicers have to force foreclosure. HAMP's measly \$1,000 modification fee and the annual \$1,000 success for performance fee fall far short of the fees incurred by servicers through their contractual obligations. Under the Pooling and Servicing Agreements ("PSAs") of most securitized mortgages, servicers are required to pay the Trustee the monthly payments for every defaulted mortgage. These monthly payments come from the servicers' own pockets and can be substantial. But most servicers are not permitted to recover these "principal and interest" advances unless the property is foreclosed upon and sold.¹⁰

Even if the HAMP financial incentives were increased to overcome servicers' contractual costs under the PSAs, servicers are ill-equipped to handle the individualized and complex modification process that HAMP requires. With the high level of default in today's foreclosure crisis, servicers do not have the manpower, skills or sophistication to handle the loan modification process.

Alternative Solution to the Foreclosure Crisis

From the witnesses sitting before you today, you will likely hear a tale of HAMP's effectiveness and success in preventing foreclosures. You will not hear of the misery and failure that befall most homeowners when they seek a HAMP modification. HAMP was not intended to save every homeowner and cannot now be made to do so. But the fact that the vast majority of homeowners are not saved by HAMP – either because denied a temporary modification or because pushed out before being granted a permanent one – is telling and reflective of the Program's failure.

As the sheer number of "tweaks" to the Program show, HAMP's problems are not easily solved. In fact, with the current servicer-friendly approach to the problem, HAMP can never be made to work for homeowners. If Congress truly wants to help homeowners, prevent a slew of foreclosures, and get our economy back on track, it is necessary to change the Bankruptcy Code. Under the current Code, bankruptcy judges are forbidden from modifying a homeowner's mortgage on his or her primary residence. This exclusion from a bankruptcy judge's renegotiation abilities makes no sense, particularly in light of their authority to oversee modification of mortgage loans on commercial property and second homes. Bankruptcy judges have the skills and expertise necessary to renegotiate debt, and mortgage loans should be no exception. A Chapter 13 Bankruptcy allows for an individualized assessment that can take into consideration a homeowner's specific situation as well as the equities involved in any principal forbearance. The high failure rate found in today's Chapter 13 bankruptcies – almost 70% - may

¹⁰ O. Max Gardner III, "HAMP – Is It Really All About the Money?," *Credit Slips*, August 12, 2009 at <http://www.creditslips.org/creditslips/2009/08/hampis-it-really-all-about-the-money.html>.

well be a result of the fact that a person's greatest debt, his or her mortgage, is outside the jurisdiction of bankruptcy judges.¹¹

To help struggling homeowners and stem the foreclosure crisis, Congress needs to find the courage to fix the foreclosure problem by amending the bankruptcy code and stop wasting homeowners' time by trying to patch up the ill-fated HAMP.

Thank you.

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¹¹ Katie Porter, "Cramdown Controversy #2 – Will I 'Succeed'," Credit Slips, January 12, 2009 at <http://www.creditslips.org/creditslips/2009/01/cramdown-controversy-2will-i-succeed.html>.