SECURING JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT OF DENIALS OF MODIFICATIONS OF MORTGAGES HELD BY FANNIE MAE AND FREDDIE MAC

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Abstract

In 2009, the Obama Administration created a program intended to prevent home mortgage foreclosures by allowing modifications of the mortgages. The program was HAMP – Home Affordable Modification Program. HAMP has been a notorious failure, with a July 2015 report stating that only 30% of homeowners who applied for modifications were successful. Although servicer misconduct in administration of HAMP has been rampant, courts generally have not allowed homeowners to secure judicial review of denials of mortgage modifications.

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I dedicate this article to the memory of David Abraham Grossman, Director of the Harvard Legal Aid Bureau, Clinical Professor of Law at Harvard Law School, and a leader of Project No One Leaves, a powerful anti-foreclosure effort. David's life and work were a worthy tribute to his mentor, Gary Bellow, a founder and stalwart of the legal services and clinical legal education movements. I cherish my "No One Leaves" shirt in admiring respect for David.

This article advances an argument that has not been made in litigation or commentary: that at least for mortgages held or guaranteed by Fannie Mae or Freddie Mac (which comprise more than half the mortgages in the U.S.), judicial review of modification denials is available under the Administrative Procedure Act (APA). This is the case because before HAMP was created, Fannie and Freddie had been put into conservatorship by the Federal Housing Finance Agency, which unquestionably is subject to the APA and is in total control of every aspect of the activities of Fannie and Freddie. Thus, the denials are final agency action subject to judicial review.

Table of Contents

I. Introduction

> "The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."
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> -Louis Jaffe, Judicial Control of Administrative Justice 320 (1965).
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> "A goal of Congress 'was surely to prevent these banks from hoodwinking borrowers . . . .'"
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> -Judge David Hamilton, writing for the court in *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 580 (7th Cir. 2012).

"Housing was at the heart of the [financial] crisis" of 2008,[1] and Congress and the Executive Branch reacted to the challenge with a series of inter-related actions directed at stabilizing the U.S. housing market. On July 30, 2008, Congress passed and President Bush signed into law the Housing and Economic Recovery Act of 2008 (HERA).[2] HERA created a new federal agency, the Federal Housing Finance Agency (FHFA), and authorized it to put into conservatorship Fannie Mae and Freddie Mac, "Government Sponsored Entities" (GSEs) that owned or guaranteed approximately half the mortgages in the United States.[3] On September 6, 2008, at the urging of the Secretary of the

[1] TIMOTHY F. GEITHNER, STRESS TEST: REFLECTIONS ON FINANCIAL CRISES 300 (2014).
[2] Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654 (2008) (codified as amended in scattered sections of 12, 26, 38 and 42 U.S.C.).
[3] FED. HOUS. FIN. AGENCY, 2014 REPORT TO CONGRESS 1 (2015), http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA_2014_Report_to_Congress.pdf, [https://perma.cc/3TTN-VUG9?type=source] ("During 2014, FHFA continued to serve as regulator and conservator of Fannie Mae and Freddie Mac."); JOHN RAO ET AL., FORECLOSURES AND MORTGAGE SERVICING § 5.11.1 n.412 (5th ed. 2014) (stating that when the

Treasury, FHFA imposed the conservatorship, taking total control over Fannie and Freddie.[4] "A key component of the conservatorships" has been the commitment of the U.S. Department of the Treasury "to provide financial support to" the GSEs.[5]

In October 2008, Congress enacted the Emergency Economic Stabilization Act (EESA), which created the Troubled Asset Relief Program (TARP).[6] EESA required the Secretary of the Treasury to, among many other things, "implement a plan that seeks to maximize assistance for homeowners and . . . minimize foreclosures."[7]

On March 4, 2009, the Administration introduced two versions of a mortgage modification program called "HAMP"—Home Affordable Modification Program. One, announced by the Department of the Treasury, was "Non-GSE HAMP," "for mortgage loans that are not owned or guaranteed by Fannie Mae or Freddie Mac . . . ."[8] The

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conservatorship was imposed, Fannie and Freddie "owned or guaranteed almost thirty-one million mortgages, about [58%] of all single-family mortgages"). The formal names of Fannie Mae and Freddie Mac are, respectively, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 932-33 (5th ed. 2007).

[4] HENRY M. PAULSON, JR., ON THE BRINK: INSIDE THE RACE TO STOP THE COLLAPSE OF THE GLOBAL FINANCIAL SYSTEM 1, 2, 6, 162-66 (2010) ("I had proposed that we seize control of the companies."); *see infra* notes 46-50 and the accompanying text (discussing FHFA's total control of Fannie and Freddie).

[5] FED. HOUS. FIN. AGENCY, *supra* note 3, at 1; *see* PAULSON, *supra* note 4, at 165-66; *see also infra* notes 43-45 and the accompanying text.

[6] *See* Emergency Economic Stabilization Act of 2008 (EESA), Pub. L. No. 110-343, §§ 101, 109, 122 Stat. 3765, 3767, 3774 (2008), (codified as amended in12 U.S.C. §§ 5211, 5219 (2012)); Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 556 (7th Cir. 2012) ("In response to rapidly deteriorating financial market conditions in the late summer and early fall of 2008, Congress enacted the Emergency Economic Stabilization Act.").

[7] 12 U.S.C. § 5219(a) (2012); *Wigod*, 673 F.3d at 556.

[8] U.S. DEP'T OF TREASURY, 09-01, SUPPLEMENTAL DIRECTIVE: INTRODUCTION OF THE HOME AFFORDABLE MODIFICATION PROGRAM 1 (2009), https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0901.pdf [https://perma.cc/MCD2-V7SR]; *Wigod*, 673 F.3d at 556; RAO ET AL., *supra* note 3, at § 5.8.2.1 (outlining Fannie Mae and Freddie Mac implementation of the HAMP program); *see also* GEITHNER, *supra* note 1, at 300-02 (discussing the creation of HAMP).

other, GSE HAMP, was announced by the GSEs (which were controlled by FHFA).[9]

Non-GSE and GSE HAMP are similar in many ways, and both are implemented by servicers, agents of the mortgage holders that receive payments from borrowers and make payments with respect to those amounts.[10] Discussions of the two often conflate them, a confusion which is nurtured by the fact that non-GSE HAMP is administered by Fannie and Freddie because Treasury delegated that responsibility to them.[11] Non-GSE and GSE HAMP differ from each

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[9] *See* FANNIE MAE, ANNOUNCEMENT 09-05R 1 (2009), https://www.fanniemae.com/content/announcement/0905.pdf [https://perma.cc/AT44-C4YL] ("This Announcement provides guidance to Fannie Mae servicers for adoption and implementation of the Home Affordable Modification Program."); FREDDIE MAC, BULLETIN NO. 2009-6 1 (2009), http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll096.pdf [http://perma.cc/5999-NVQJ] ("Servicers may begin offering modifications under [HAMP].").

[10] 12 U.S.C. § 2605(i)(2) (2012) (defining servicing as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan"); RAO ET AL., *supra* note 3, § 5.8.2.1; RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

[11] *See* U.S. DEP'T OF TREASURY & FANNIE MAE, FINANCIAL AGENCY AGREEMENT FOR A HOMEOWNERSHIP PRESERVATION PROGRAM UNDER THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008 1 (2009), https://www.treasury.gov/initiatives/financial-stability/procurement/faa /Financial_Agency_Agreements/Fannie%20Mae%20FAA%20021809.pdf [https://perma.cc/8Q9F-99KK]; U.S. DEP'T OF TREASURY & FREDDIE MAC, FINANCIAL AGENCY AGREEMENT FOR A HOMEOWNERSHIP PRESERVATION PROGRAM UNDER THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008 1 (2009), https://www.treasury.gov/initiatives/financial-stability/ procurement/faa/Financial_Agency_Agreements/Freddie%20Mac%20Financial%20Agency%20Agreement.pdf [https://perma.cc/4ZAS-BUQ2]; FED. HOUS. FIN. AGENCY & OFFICE OF INSPECTOR GEN, EVL-2011-003, EVALUATION OF FHFA'S ROLE IN NEGOTIATING FANNIE MAE'S AND FREDDIE MAC'S RESPONSIBILITIES IN TREASURY'S MAKING HOME AFFORDABLE PROGRAM 12 (2011), http://www.fhfaoig.gov/Content /Files/EVL-2011-003.pdf [http://perma.cc/K699-6PYH] [hereinafter REPORT EVL-2011-003] (describing Fannie's role as "program administrator" and Freddie's as "compliance agent"); FED. HOUS. FIN. AGENCY, 2010 REPORT TO CONGRESS 5 (2011), https://www.novoco.com/hottopics/resource_files/lihtc/gses /fhfa_report_061311.pdf [https://perma.cc/B6PM-268X] ("Fannie Mae has

other, however, in several respects, including that servicer participation in GSE HAMP is mandatory and reduction of principal is not permitted.[12] It is notable that it was FHFA that decided that the GSEs would not participate in the HAMP Principal Reduction Alternative (or the Department of Housing and Urban Development's Short Refinance program) with respect to loans they own or guarantee.[13]

Servicers often egregiously violate HAMP requirements.[14] It has been difficult, however, for homeowners to secure review of servicer misconduct. There has been no effective administrative oversight from any agency, and courts generally have refused to permit judicial review of these claims.[15] Some courts have held that there is no private right of action to enforce HAMP; others have held that borrowers do not have standing or third party beneficiary status to enforce the Servicer Participation Agreements (SPAs) between the

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assumed the role of MHA program administrator and Freddie Mac the role of MHA compliance agent.").

[12] FANNIE MAE, *supra* note 9, at 1 (requiring participation); *see also* NAT'L CONSUMER LAW CTR., AT A CROSSROADS: LESSONS FROM THE HOME AFFORDABLE MODIFICATION PROGRAM (HAMP) 27-28 (2013), http://www.nclc.org/images/pdf/foreclosure_mortgage/loan_mod/hamp-report-2013.pdf [http://perma.cc/E6GV-WPU3] ("GSE HAMP rules lag behind HAMP in four areas: 1. Principal reductions are not available; 2. GSE servicers have tight timelines, enforced with monetary sanctions, for initiating and processing foreclosures, and the solicitation standards require much less outreach by servicers before initiating foreclosure; 3. There is no appeals process; and 4. Homeowners in bankruptcy face hurdles."). This was written before the Consumer Financial Protection Bureau (CPFB) rules required an appeals process. *See infra* notes 105-07 and the accompanying text.

[13] *See* REPORT EVL-2011-003, *supra* note 11, at 17 ("FHFA formally notified Treasury of its refusal to permit the Enterprises to participate in both the HAMP Principal Reduction Alternative and the Department of Housing and Urban Development's Short Refinance programs with respect to loans that they own or guarantee.").

[14] NAT'L CONSUMER LAW CTR., *supra* note 12, at 4; *see also infra* notes 69-70 and the accompanying text.

[15] REPORT EVL-2011-003, *supra* note 11, at 7 ("Although the results of these efforts represent a significant improvement over the initial FAAs, the revised agreements do not establish specific procedures for resolving disputes among the parties."); *see infra* notes 71-78 and the accompanying text.

servicers and Fannie Mae.[16] The one situation in which homeowners have had some success in securing judicial review has been with respect to claims that they had been accepted for Trial Period Plans (TPPs) where homeowners performed their obligations under those plans but then, allegedly, had not been granted permanent modifications under HAMP. In some of these cases, courts have held that the homeowners had cognizable contract, state consumer protection, and related claims under the TPP.[17] Courts have not distinguished between GSE and non-GSE HAMP in any of this litigation.

This article considers a principle of judicial review that apparently has not yet been raised in challenges to denials of mortgage modifications: the Administrative Procedure Act (APA), which provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review" and that a person aggrieved by federal agency action "is entitled to judicial review thereof."[18] For GSE HAMP, when a servicer processes a mortgage modification request, it acts as an agent for its principal, which was Fannie or Freddie but now is FHFA, a federal agency that "succeed[ed] to all rights, titles, powers, and privileges of" Fannie and

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[16] Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 559 n.4 (7th Cir. 2012); *see also infra* notes 71-78 and the accompanying text.

[17] *See, e.g.*, *Wigod*, 673 F.3d at 562 ("[A] reasonable person in [promisee's] position would read the TPP as a definite offer to provide permanent modification that she could accept so long as she satisfied the conditions."); Corvello v. Wells Fargo, N.A., 728 F.3d 878, 883 (9th Cir. 2013) (holding that, by the TPP's terms, mortgage modification was impossible before the requirements were met, but a servicer could not "unilaterally and without justification refuse to send the offer"); Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 234 (1st Cir. 2013) (highlighting the mandatory language in the TPP requiring the lender to offer a modification if the borrower continued compliance with the TPP obligations); *In re* Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig., No. 10-MD-02193, 2011 WL 2637222, at *4-7 (D. Mass. July 6, 2011) (denying motion to dismiss contract and state consumer protection claims, among others); Amanda Martin, *Litigating Consumer Protection Acts in the HAMP Context*, 38 SEATTLE U. L. REV. 739, 751-63 (2015) (reviewing cases); Kelly Volkar, *The TPP and Its Broken Promise*, 47 U.C. DAVIS L. REV. 1417, 1420 (2014) (discussing courts' allowance of claims for contract breach, promissory estoppel, deceptive business practices, and fraudulent misrepresentation).

[18] 5 U.S.C. §§ 704, 702 (2012).

Freddie and "*perform[s] all functions of the regulated entity in the name of the regulated entity* which are consistent with the appointment as conservator or receiver . . . ."[19] Thus, the denial of a mortgage modification for a mortgage owned or guaranteed by Fannie or Freddie is an action by their principal, FHFA, and is *prima facie* subject to judicial review under the APA.

Judicial review under the APA also should be available for modification denials under non-GSE HAMP. Since non-GSE HAMP is a program that was created by the U.S. Department of the Treasury to carry out a mandate imposed on Treasury by the Congress, Treasury is responsible for assuring compliance with the standards of the program.[20] Although Treasury established the standards governing HAMP[21] and "Treasury remains ultimately responsible for HAMP's

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[19] 12 U.S.C. §§ 4617(b)(2)(A)(i), (b)(2)(B)(i), (b)(2)(B)(iii), (b)(2)(D) (2012) (emphasis added); *see* Dupuis v. Fed. Home Loan Mortg. Corp., 879 F. Supp. 139, 142-44 (D. Maine 1995) (discussing agency principles and concluding that the servicer is a general agent of Freddie Mac). *Dupuis* and other cases have held that Fannie and Freddie are not liable for their servicers' unlawful acts because under *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), government agencies are not liable for the unauthorized acts of their agents. *See, e.g.*, Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1056 (N.D. Cal. 2013) (requiring agency authorization for the agent's conduct); Johnson v. Fed. Home Loan Mortg. Corp., No. C12-1712, 2013 WL 308957 at *6 (W.D. Wash, Jan. 25, 2013) ("[T]he question . . . whether the alleged breach of contract and breach of fiduciary duty claims are barred by the *Merrill* doctrine[] . . . turns on whether or not the actions of [the agent] were authorized or otherwise ratified by [the government agency].") When the issue of liability—against the federal entities or the servicers—is addressed, *Merrill* may be pertinent, and courts will have to decide whether and to what extent it applies in this situation. *Merrill* does not, however, affect the question whether there is a private right of action under the APA. When the action proceeds, the court can determine the extent of the agent's authority, the significance of the CFPB regulations, and whether *Merrill* protects the agent as well as the principal. In *Paslowski v. Standard Mortgage Corp.*, for example, the court noted that the "harshness" of *Merrill* was "alleviated . . . by the fact that plaintiffs are not left without any recourse. Rather, recovery is sought, and may be had, against those who actually engaged in the conduct at issue—the servicers." 129 F. Supp. 2d 793, 805 (W.D. Pa. 2000).

[20] *See* 12 U.S.C. § 5219(a) (2012).

[21] RAO ET AL., *supra* note 3, §§ 5.8.1, 5.8.2 (discussing standards set in Treasury Supplemental Directives).

execution," Treasury "essentially outsourced" implementation of HAMP to Fannie and Freddie—really, to FHFA, which had taken full control of the GSEs.[22] If Fannie and Freddie were private entities, this might have raised questions about whether this delegation eviscerated rights that HAMP beneficiaries would have had against Treasury.[23] Since, however, Fannie and Freddie had been taken over by FHFA, which itself unquestionably is a federal agency subject to the APA, failure to enforce HAMP standards is action by either Treasury or FHFA and is, in either case, federal agency action prima facie subject to judicial review under the APA.

This article focuses on GSE HAMP and concludes that denials of mortgage modifications under that program are subject to judicial review under the APA. The principles would apply equally to other loss mitigation programs administered by FHFA for Fannie and Freddie. Part II below discusses Fannie, Freddie, FHFA, and HAMP. Part III addresses the APA and shows that there is no preclusion or limitation of judicial review of challenges to denials of mortgage modifications for GSE HAMP.

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[22] CONG. OVERSIGHT PANEL, NO. 62-622, DECEMBER OVERSIGHT REPORT: A REVIEW OF TREASURY'S FORECLOSURE PREVENTION PROGRAMS 5, 65, 73 (2010), http://cybercemetery.unt.edu/archive/cop/20110402010243/http://cop.senate.gov/documents/cop-121410-report.pdf [http://perma.cc/9HQQ-ZG7B].

[23] *See, e.g.*, Nina A. Mendelson, *Six Simple Steps to Increase Contractor Accountability*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 241, 258-60 (Jody Freeman & Martha Minow, eds. 2009) (urging expanded APA application to contractors); Alfred C. Aman Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L. J. 1477, 1477 (2001) (analyzing government service privatization through a global lens); Alfred C. Aman Jr., *The Globalizing State: A Future Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy*, 31 VAND. J. TRANSNAT'L L. 780 (1998) (examining the effects of globalization on domestic law and how it affects global competition and states roles in the international system); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L. J. 17, 125-38 (2000) (discussing application of the APA's rulemaking requirements to a purportedly private entity); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 *passim* (2003) (discussing the application of agency principles to private entities acting on behalf of government agencies).

II. Fannie, Freddie, FHFA, and HAMP

Although discussions of HAMP usually begin with the EESA, which authorized its creation, full understanding of HAMP requires seeing it in the context of the federal government's previously having taken control of Fannie and Freddie under HERA.[24] HAMP was created in and for a context in which it would be administered by FHFA, which had taken control of Fannie and Freddie; HAMP was not created until after FHFA had put Fannie and Freddie into receivership.[25] More generally, actions aimed at helping the housing market necessarily took (and take) into account the large percentage of mortgages held or guaranteed by Fannie and Freddie. As then Treasury Secretary Timothy Geithner said "[t]he largest and most important housing initiative" announced with HAMP, "although it wasn't widely viewed as housing policy at the time, was a new $200 billion capital commitment for Fannie and Freddie . . . ."[26]

Originating in response to the Great Depression of 1929, Fannie and Freddie nurture housing finance by purchasing mortgage loans so that loan originators have more capital with which to make more mortgage loans.[27] Fannie and Freddie hold some of these mortgages in their portfolios, but "most mortgages are placed in mortgage pools to support MBS [mortgage-backed securities]."[28] MBS issued by Fannie and Freddie may be held by those

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[24] *See* Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 236 n.9 (1st Cir. 2013) (explaining that HERA also "was designed to aid families facing foreclosure").

[25] *See infra* notes 36-54 and the accompanying text.

[26] GEITHNER, *supra* note 1, at 303.

[27] *Government Sponsored Enterprises, A Framework for Strengthening GSE Governance and Oversight: Testimony Before the S. Committee on Banking, Housing, and Urban Affairs*, 108th Cong. 4 (2004) [hereinafter *Government Sponsored Enterprises*] (statement of David M. Walker, Comptroller General of the United States). For fuller discussions of Fannie and Freddie, see Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 AM. U. L. REV. 1489, 1494 (2011); Robin Paul Malloy, *The Secondary Mortgage Market—A Catalyst for Change in Real Estate Transactions*, 39 SW. L. J. 991, 991 (1986); Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 208 (D.D.C. 2014).

[28] *Government Sponsored Enterprises*, *supra* note 27, at 4-5.

entities or sold to investors; Fannie and Freddie "guarantee the timely payment of interest and principal on MBS that they issue."[29]

Congress created Fannie in 1938 as "the Federal National Mortgage Association (FNMA), wholly owned and administered by the federal government."[30] In 1954, Congress made Fannie a "'mixed ownership' corporation, owned partly by private shareholders."[31] In 1968, FNMA was divided into the Government National Mortgage Association (GNMA), "a pure federal agency," and Fannie Mae, "a privately owned and managed corporation, although with certain ties to the federal government."[32]

Congress created Freddie Mac in 1970; in 1989, in the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), Congress "privatize[d]" Freddie to make it very much like Fannie.[33] Thus, from 1970 until September 6, 2008, Fannie and Freddie were Government Sponsored Entities (GSEs), operating under combinations of private ownership, public and private board management, and federal regulatory supervision.[34]

In 2008, as part of the crisis that afflicted the U.S. mortgage market generally, Fannie and Freddie were in grave financial trouble.[35]

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[29] *Id*. at 5.
[30] NELSON & WHITMAN, *supra* note 3, at 932.
[31] *Id.*
[32] *Id*. at 932-33.
[33] *Id*. at 933-34; Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 731, 103 Stat. 430 (1989) (codified as amended at 12 U.S.C. §§ 1811-1833e) (establishing Freddie Mac and its governing rules); *see* Liberty Mortg. Banking, Ltd. v. Fed. Home Loan Mortg. Corp., 822 F. Supp. 956, 958 (E.D.N.Y. 1993) (reviewing the legislative history and stating that "[t]he legislative history of FIRREA suggests that the purpose of the 1989 amendments was to privatize the management and operations of Freddie Mac" in the way that Fannie had been privatized in 1968).
[34] NELSON & WHITMAN, *supra* note 3, at 933-34; *see id.* at 933-35 (describing the variety of government objectives Fannie and Freddie were to advance).
[35] PAULSON, *supra* note 4, at 142-47 (2010) (stating that Fannie and Freddie "lost almost half of their value" in one week in July 2008); FIN. CRISIS INQUIRY COMM'N, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 311-14 (2011), http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf [http://perma.cc/6TF5-6NPS] (acknowledging the losses incurred

At the urging of Treasury Secretary Henry Paulson, on July 30, 2008 Congress passed HERA.[36] HERA created a new federal agency, FHFA, and authorized it to put Fannie and Freddie into receivership or conservatorship.[37]

In September 2008, Secretary Paulson concluded that Fannie and Freddie should be put into conservatorship.[38] With the concurrence of other administration officials and President George W. Bush, he persuaded FHFA to impose the conservatorship.[39] FHFA did this on September 6, 2008, "succeed[ing] to all rights, titles, powers, and privileges of [Fannie and Freddie] . . . and [their] assets."[40]

HERA authorized FHFA to "take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity *and conduct all business of the regulated entity*;" as conservator, FHFA was vested with the power to "take such action as may be . . . appropriate to carry on the business of the regulated entity" and, inter alia, to "*perform all functions of the regulated entity in the name of the regulated entity*

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by Fannie and Freddie); CONG. OVERSIGHT PANEL, *supra* note 22, at 73 ("In 2008, Fannie Mae and Freddie Mac combined lost more than $108 billion.").

36 PAULSON, *supra* note 4, at 143-44, 147 (stating that President Bush "said it was unthinkable to let Fannie and Freddie fail—they would take down the capital markets and the dollar, and hurt the U.S. around the world"). *See generally* HERA, Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12, 26, 38, and 42 U.S.C.).

37 FED. HOUS. FIN. AGENCY, *supra* note 3, at 1.

38 PAULSON, *supra* note 4, at 1, 162-64 (stating that his initial conclusion had been that they should be put into receivership, but he then was persuaded that conservatorship was preferable).

39 *Id*. at 1, 2 ("[O]nly FHFA had the statutory power to put Fannie and Freddie into conservatorship. We had to convince its people that this was the right thing to do, while making sure to let them feel they were still in charge."); *id.* at 165-66 ("Any Treasury investment would be conditioned on conservatorship.").

40 12 U.S.C. § 4617(b)(2)(A)(i) (2012); *see also* PAULSON, *supra* note 4, at 170; *Statement by Secretary Henry M. Paulson, Jr. on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers*, U.S. DEP'T OF TREASURY (Sept. 7, 2008), http://www.treasury.gov/press-center/press-releases/Pages/hp1129.aspx [https://perma.cc/4LTM-6SNH].

which are consistent with the appointment as conservator or receiver."[41]

HERA also authorized the Department of the Treasury "to lend or invest an unlimited amount of money" in Fannie and Freddie.[42] "Treasury represented the only feasible entity—public or private—capable of injecting sufficient liquidity into and serving as a backstop for the GSEs within the short timeframe necessary to preserve their existence in September 2008."[43] Through 2014, Treasury invested more than $187.5 billion in these GSEs.[44] Fannie and Freddie are "effectively owned by the government; Treasury has guaranteed their debts and FHFA has all the powers of the management, board, and shareholders of the GSEs."[45]

As FHFA says, "FHFA as Conservator has been responsible for the conduct and administration of all aspects of the operations, business, and affairs of both Enterprises since September 6, 2008."[46] FHFA appointed new chief executive officers at each entity and changed the officers' compensation levels.[47] FHFA introduced new guarantee fees and standards for data collection, property sales,

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[41] 12 U.S.C. §§ 4617(b)(2)(B)(I), 4617(b)(2)(D) (2012) (emphasis added).
[42] N. ERIC WEISS ET AL., HOUSING AND ECONOMIC RECOVERY ACT OF 2008 1-2 (2008), http://fpc.state.gov/documents/organization/113245.pdf [http://perma.cc/TE7N-FAW6?type=live]; *see* 12 U.S.C. § 1719(g)(1)(A) (2012) (governing loans and investments to Fannie); 12 U.S.C. § 1455(*l*)(1)(A) (governing loans and investments to Freddie); *see also* Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 216 (D.D.C. 2014) ("On December 24, 2009, the parties executed the Second Amendment, which permitted the GSEs to continue to 'draw unlimited sums from Treasury.'").
[43] *Perry Capital LLC*, 70 F.Supp.3d at 232.
[44] FED. HOUS. FIN. AGENCY, *supra* note 3, at 1 ("Through December [2014], the Enterprises have paid the . . . Treasury a total of $225.4 billion in dividends on senior preferred stock, which pursuant to the PSPAs [Preferred Stock Purchase Agreements] do not constitute a repayment of the $187.5 billion in draws.").
[45] CONG. OVERSIGHT PANEL, *supra* note 22, at 73.
[46] Conservatorship and Receivership, 76 Fed. Reg. 35,714, 35,725 (June 20, 2011).
[47] Zachary A. Goldfarb, *FHFA Appoints New Fannie and Freddie Chairmen*, WASH. POST (Sept. 17, 2008), http://www.washingtonpost.com /wp-dyn/content/article/2008/09/16/AR2008091603437.html [http://perma.cc/5GCD-2YKW].

counterparties, and foreclosures;[48] FHFA "exclude[d] principal forgiveness from its menu of loss mitigation tools" and "directed" Fannie and Freddie to "refrain from purchasing mortgage loans secured by properties" with first-lien obligations for energy retrofit programs.[49] FHFA litigates on behalf of Fannie and Freddie.[50] As a result of the conservatorship, "FHFA completely controls Fannie Mae and Freddie Mac."[51]

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[48] Melvin L. Watt, Prepared Remarks of Melvin L. Watt, Director, FHFA at the Greenlining Inst. 22nd Annual Economic Summit, FED. HOUS. FIN. AGENCY (May 8, 2015), http://www.fhfa.gov/Media/PublicAffairs/Pages/Prepared-Remarks-FHFA-Director-at-Greenlining-Institute-22nd-Annual-Economic-Summit.aspx [http://perma.cc/D5JL-XEHG].

[49] *Principal Forgiveness*, FED. HOUSING FIN. AGENCY, http://www.fhfa.gov/PolicyProgramsResearch/Policy/Pages/Principal-Foregivness.aspx [https://perma.cc/U4ND-8DSE]; Fed. Hous. Fin. Agency, PACE Programs, Opinion Letter (Feb. 28, 2011), http://www.nlc.org/documents/Influence%20Federal%20Policy/Advocacy/Regulatory/stmt-fhfa-guidance-pace-feb2011.pdf [https://perma.cc/96GJ-HZTJ]; *see also* Town of Babylon v. Fed. Hous. Fin. Agency, 699 F.3d 221, 226 (2d Cir. 2012).

[50] FED. HOUS. FIN. AGENCY, 2012 REPORT TO CONGRESS, 11-12, 70 (2013), http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2012_AnnualReportToCongress_508.pdf [https://perma.cc/U9C3-GEXY?type=source]; *see also* FED. HOUS. FIN. AGENCY, *supra* note 3, at 8 (detailing other ways in which FHFA controls Fannie and Freddie); Fed. Hous. Fin. Agency v. Nomura Holding America, 60 F. Supp. 3d 479, 482 (S.D.N.Y. 2014) (deciding the case initiated by the FHFA as conservator for the GSE against financial institutions involved in the packaging, marketing, and sale of residential mortgage-backed securities purchased by these entities).

[51] *See* Oakland Cnty. v. Fed. Nat'l Mortg. Ass'n, 276 F.R.D. 491, 494, 497 (E.D. Mich. 2011) (agreeing that FHFA is entitled to intervene in cases involving Fannie or Freddie); *see also* County of Oakland v. Fed. Hous. Fin. Agency, 716 F.3d 935 (6th Cir. 2013); *In re* Countrywide Fin. Corp. MBS Litig., 900 F. Supp. 2d 1055, 1058 (C.D. Cal. 2012) ("As conservator, FHFA has succeeded to all of the legal rights of Fannie Mae and Freddie Mac."). There are many other decisions that treat FHFA as the actor. *See, e.g.*, Town of Babylon v. Fed. Hous. Fin. Agency, 699 F.3d 221, 227-28 (2d Cir. 2012); Kuriakose v. Fed. Home Loan Mortg. Corp., 897 F.Supp.2d 168, 181-82 (S.D.N.Y. 2012); Kuriakose v. Fed. Home Loan Mortg. Corp., 2011 WL 1158058, at *2 (S.D.N.Y. 2011); Kuriakose v. Fed. Home Loan Mortg. Corp., 674 F. Supp. 2d 483, 493 (S.D.N.Y. 2009). Although an interlocutory district court opinion in *Herron v. Fannie Mae*, 857 F. Supp. 2d 87 (D.D.C. 2012) held that even after FHFA had imposed the conservatorship, actions by

Enacted on October 3, 2008, the EESA created, among other things, TARP and "included a mandate that TARP funds be used in a manner that 'protects home values' and 'preserves homeownership.'"[52] The statute authorized the U.S. Department of the Treasury to purchase certain troubled assets, including mortgages, and directed Treasury "to implement a plan that seeks to maximize assistance for homeowners and . . . encourage the servicers of the underlying mortgages . . . to take advantage of . . . available programs to minimize foreclosures."[53] EESA also authorized the Secretary of the Treasury to "use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures."[54] "Pursuant to this authority, the Secretary [of the Treasury] created an array of

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Fannie were not federal government actions, I have argued in detail that this decision (and those following it) are inconsistent with established precedent, scholarly analysis, and good reasoning. Florence Wagman Roisman, *Protecting Homeowners from Non-Judicial Foreclosure of Mortgages Held by Fannie Mae and Freddie Mac*, 43 REAL EST. L.J. 125, 175-79 (2014). My analysis is strengthened by a subsequent Supreme Court decision, *Dep't of Transportation v. Ass'n of American Railroads*, 135 S. Ct. 1225 (2015). *See* Florence Wagman Roisman, *Mortgages Held by Fannie Mae and Freddie Mac May Not Be Foreclosed by Non-Judicial Foreclosure,* 29 PROB. & PROP. 13, 16 (2015) (concluding that in cases involving Fannie and Freddie, FHFA is the true party at interest).

52 CONG. OVERSIGHT PANEL, *supra* note 21, at 7; *see also* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008) (codified as amended at 12 U.S.C. §§ 5201-5253 (2012)); Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 556 (7th Cir. 2012) (describing TARP as the "centerpiece of the Act . . . ."); SPECIAL INSPECTOR GENERAL FOR THE TROUBLED ASSET RELIEF PROGRAM, QUARTERLY REPORT TO CONGRESS 99 (July 29, 2015), https://www.sigtarp.gov/ Quarterly%20Reports/July_29_ 2015_Report_to_Congress.pdf [https://perma.cc/YDW9-9K4D] [hereinafter SIGTARP] (referring to HAMP as the "signature TARP housing program" and emphasizing Congress's determination that "the need to help families keep their homes" be honored in TARP).

53 EESA § 109, 12 U.S.C. § 5219(a)(1); *see also* Young v. Wells Fargo, N.A., 717 F.3d 224, 228 (1st Cir. 2013) ("EESA authorized the secretary to, *inter alia*, 'implement a plan that seeks to maximize assistance for homeowners and . . . encourage the servicers of the underlying mortgages' to minimize foreclosures."); Corvello v. Wells Fargo N.A., 728 F.3d 878, 880 (9th Cir. 2013) (outlining the purpose of the HAMP program). *See generally* SIGTARP, *supra* note 51 (summarizing the HAMP program).

54 12 U.S.C. § 5219(a)(1); *see also Young*, 717 F.3d at 228.

programs designed to identify likely candidates for loan modifications and encourage lenders to renegotiate their mortgages. HAMP is one of these programs."[55]

For FHFA, EESA required that it "implement a plan to maximize assistance to homeowners; use its authority to encourage the servicers of Fannie Mae and Freddie Mac mortgages to take advantage of federal programs to minimize foreclosures; coordinate within the federal government concerning homeowner assistance plans; and submit monthly reports to Congress detailing the progress of its efforts."[56]

On February 18, 2009, "President Obama announced the Homeowner Affordability and Stability Plan" to help to avert foreclosures.[57] On March 4, 2009, "Treasury issued uniform guidance for loan modifications across the mortgage industry."[58] On the same date, March 4, 2009, Fannie issued guidelines for GSE HAMP for mortgages owned, securitized, or guaranteed by Fannie and Freddie and sent instructions to its servicers regarding mortgages owned, securitized, or guaranteed by Freddie.[59] For mortgages they own, securitize, or guarantee, Fannie and Freddie have established detailed standards which are contained in Fannie's Seller and Servicing Guides, with periodic updates, and Freddie's Single Family Seller/Servicer Guide.[60] While servicer participation in non-GSE

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[55] *Young*, 717 F.3d at 228.

[56] REPORT EVL-2011-003, *supra* note 11, at 10; *see also* 12 U.S.C. § 5220.

[57] *See* U.S. DEP'T OF TREASURY, *supra* note 8, at 1.

[58] *Id*.

[59] *See* FANNIE MAE, *supra* note 9, at 1; FREDDIE MAC, *supra* note 9, at 1.

[60] RAO ET AL., *supra* note 3, at § 5.11.1 ("As the largest investors in the mortgage marketplace, the two corporations set the industry standard on workout options. Fannie Mae's policies are outlined in the company's Selling and Servicing Guides together with their periodic updates."); *see also* Massachusetts v. Fed. Hous. Fin. Agency, 54 F. Supp. 3d 94, 97 (D. Mass. 2014); U.S. DEP'T OF TREASURY, 15-04, SUPPLEMENTAL DIRECTIVE: MAKING HOME AFFORDABLE® PROGRAM –MHA PROGRAM EXTENSION AND ADMINISTRATIVE CLARIFICATIONS 1 (2015), https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1504.pdf [https://perma.cc/96ZK-Z4V6] (announcing the extension of the HAMP and other Making Home Affordable programs "at least through December 31, 2016, and stating that standards relating to GSE loans (those owned, securitized, or guaranteed by Fannie or Freddie), are governed by "the GSEs' respective servicing guides, announcements and bulletins"). Fannie's Single-

HAMP is, at least in theory, voluntary, servicer participation in GSE HAMP is mandatory.[61]

On April 6, 2009, Treasury provided detailed guidance for HAMP for mortgages not owned or guaranteed by Fannie or Freddie.[62] Treasury delegated implementation of this "non-GSE HAMP" to Fannie and Freddie.[63]

HAMP has been notoriously unsuccessful. In December 2010, echoing grave concerns expressed previously, the Congressional Oversight Panel noted that "the program has failed to help the vast majority of homeowners facing foreclosure" and that "if current trends hold, HAMP will prevent only 700,000 to 800,000 foreclosures—far fewer than the 3 to 4 million foreclosures that Treasury initially aimed to stop, and vastly fewer than the 8 to 13 million foreclosures expected by 2012."[64] In 2013, the National Consumer Law Center concluded that, "HAMP works well when it is implemented, but it is

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Family Servicing Guide is available at www.fanniemae.com/content/guide/servicing/index.html [https://perma.cc/5GAE-KNWY?type=image]; periodic updates through Lender Announcements and Lender Letters are available at www.fanniemae.com/singlefamily/originating-underwriting [https://perma.cc/7BJU-UYZS?type=image]. Freddie's Single-Family Seller/Servicer Guide is available at http://freddiemac.com/singlefamily/guide [https://perma-archives.org/warc/ N2PU-TW9G/http://www.freddiemac.com/singlefamily/guide/]; it is brought up to date with Bulletins and Industry Letters, which are available at http://freddiemac.com/singlefamily/guide [https://perma-archives.org/warc/N2PU-TW9G/http://www.freddiemac.com/singlefamily/guide/]

[61] COMMITMENT TO PURCHASE FINANCIAL INSTRUMENT AND SERVICER PARTICIPATION AGREEMENT, www.hmpadmin.com/portal/programs /docs/hamp_servicer/servicerparticipationagreement.pdf [https://perma.cc/M39S-EA84] (detailing the terms of servicer participation).

[62] *See generally* U.S. DEP'T OF TREASURY, *supra* note 8 (providing an overview of HAMP).

[63] *See* U.S. DEP'T OF TREASURY & FANNIE MAE, *supra* note 11 (outlining the terms of the delegation of non-GSE HAMP implementation); U.S. DEP'T OF TREASURY & FREDDIE MAC, *supra* note 11 (outlining the terms of the delegation of non-GSE HAMP implementation); REPORT EVL-2011-003, *supra* note 11, at 12 (describing Fannie's role as program administrator and Freddie's as compliance enforcer); FED. HOUS. FIN. AGENCY, *supra* note 11, at 14 ("Fannie Mae has assumed the role of MHA program administrator and Freddie Mac the role of MHA compliance agent.").

[64] CONG. OVERSIGHT PANEL, *supra* note 21, at 4.

implemented for far too few homeowners."[65] The 2013 National Consumer Law Center report said that since September 2008, almost four million homes had been lost to foreclosure, that as of May 2012 one million were in some stage of the foreclosure process, and that ten million more homes might be added, while "HAMP has reached only a small fraction of the homes entering foreclosure."[66] In 2013, the Ninth Circuit noted that, "the program seems to have created more litigation than it has happy homeowners."[67] In 2014, former Treasury Secretary Timothy Geithner acknowledged that earlier estimates about the number of homeowners who would be helped by HAMP had been "overly optimistic."[68] In July 2015, the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) reported that HAMP had been a massive failure, with servicers rejecting "four million borrowers' requests for help, or 72 percent of their applications" and granting only 887,001 modifications in the six years of the program; it "appear[ed] that the program has allowed big banks to run roughshod over borrowers again and again."[69]

The central reason for the failure of HAMP has been widespread defiance by servicers of the standards set for HAMP[70] and

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[65] NAT'L CONSUMER LAW CTR., *supra* note 12, at 26.

[66] *Id.*

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

[68] GEITHNER, *supra* note 1, at 302.

[69] Gretchen Morgenson, *A Slack Lifeline for Drowning Homeowners*, N.Y. TIMES, Aug. 2, 2015, at BU1. *See generally* SIGTARP, *supra* note 51 (outlining the aftermath of HAMP).

[70] *See* NAT'L CONSUMER LAW CTR., *supra* note 12, at 4 (stating that "HAMP's failure to reach its intended scale has one root cause: massive servicer noncompliance. Almost every official evaluation of HAMP has noted widespread servicer noncompliance and the concurrent failure of the . . . Treasury . . . to engage in meaningful enforcement"). National Consumer Law Center emphasized that "[a]lmost every official evaluation of HAMP has noted poor servicer compliance. Judges reviewing servicer behavior in individual cases have been scathing." *Id.* at 30; *see also* Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 238 (1st Cir. 2013) (referencing the "bank's dilatory and careless conduct," which included "wrongly stating that [the homeowner] was ineligible for a permanent modification" and taking five months to correct the mistake); Charest v. Fed. Nat'l Mortg. Ass'n, 9 F. Supp. 3d 114, 126 (D. Mass. 2014) (stating that the servicer "required unnecessary information and documents it already possessed, miscalculated . . . income, repeatedly misrepresented . . . eligibility for a loan modification and denied

the lack of meaningful enforcement by either general monitoring or response to complaints, even when those complaints indicate the possibility of illegal activity.[71] When homeowners have sought relief in court, courts usually have held that the question of compliance with HAMP cannot be raised in litigation. Courts have based these denials on a variety of theories—that there is no private right of action to

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applications based on incorrect facts"); Nathalie Martin & Max Weinstein, *Addressing the Foreclosure Crisis Through Law School Clinics*, 20 GEO. J. POVERTY L. & POL'Y 531, 540 (2013) (describing "numerous, redundant requests for verification of borrower information" and initiative of foreclosure during modification); *About the Settlement*, JOINT STATE-FEDERAL NAT'L MORTGAGE SERV. SETTLEMENTS, http://www.nationalmortgagesettlement.com/about [https://perma.cc/D9YN-HBE2] (reporting on the February 2012 settlement of abusive servicing charges among a coalition of forty-nine state attorneys general, the U.S. Departments of Justice and of Housing and Urban Development, and the five largest mortgage servicers).

71 *See* NAT'L CONSUMER LAW CTR., *supra* note 12, at 30 ("[H]omeowners have been unable and Treasury unwilling to hold servicers accountable for performance or compliance with the program's rules."). National Consumer Law Center explained that "[a]lmost every official evaluation of HAMP has noted lack of enforcement by the Department of the Treasury and its agents." *Id.* at 36; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-433, MORTGAGE FORECLOSURES: DOCUMENTATION PROBLEMS REVEAL NEED FOR ONGOING REGULATORY OVERSIGHT 1 (2011), http://www.gao.gov/new.items/d11433.pdf [http://perma.cc/DKV7-L7FW] ("Banking regulators conducted a coordinated review of 14 mortgage servicers and identified pervasive problems with their document preparation and oversight of foreclosure processes . . . ."); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-367R, TROUBLED ASSET RELIEF PROGRAM 5 (2011), http://www.gao.gov/new.items/d11367r.pdf [http://perma.cc/B9PT-PCT7] (reporting that a survey showed that 76% of responding housing counselors with the national foreclosure mitigation counseling program characterized borrowers' experience with HAMP as negative or very negative, largely because of failure to enforce HAMP standards); JOHN RAO ET AL., *supra* note 3, §§ 2.8.3.4.1, 2.8.3.4.3; *Case Escalation*, HOME AFFORDABLE MODIFICATION PROGRAM, https://www.hmpadmin.com/portal/resources/advisors/escalation.jsp [https://perma.cc/K75L-46DR] (advising homeowners that if they consider denial of relief improper, they should first attempt to contact the servicer, and then contact one of several government hotlines).

enforce HAMP[72] or that borrowers do not have third party beneficiary status to enforce the contracts between Fannie Mae and the servicers.[73] Some courts have, however, allowed state law contract, fraud, or unfair and deceptive acts and practices claims with respect to the Trial Period Plans.[74] Courts rejecting judicial review have expressed concern about "opening the door to potentially 3-4 million homeowners filing individual claims[75] and have justified the denial of judicial consideration of HAMP claims by asserting that claims under

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[72] *See* Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 555, 559 n.4 (7th Cir. 2012) ("Courts have uniformly rejected [claims arising under HAMP] . . . because HAMP does not create a private federal right of action for borrowers against servicers."); *see also* Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 236 n.10 (1st Cir. 2013) (noting but not passing on the conclusion expressed in *Wigod*); Kozaryn v. Ocwen Loan Servicing, LLC, 784 F. Supp. 2d 100, 102 (D. Mass. 2011) (discussing cases that deny a private right of action under HAMP).

[73] *See Wigod*, 673 F.3d at 559 n.4 (discussing cases and stating that district courts have "correctly . . . foreclose[d] claims by homeowners seeking HAMP modifications as third-party beneficiaries of SPAs"); Arthur B. Axelson & Heather C. Hutchings, *Mortgage Servicing Developments*, 68 BUS. LAW. 571, 580-82 (2013) (discussing cases holding that borrowers do not have third-party beneficiary status).

[74] *Wigod*, 673 F.3d at 574-76, 576 n.14 (allowing state law contract claims based on the TPP and discussing other cases); Corvello v. Wells Fargo Bank, N.A., 728 F.3d 878, 883 (9th Cir. 2013) (agreeing with reasoning of *Wigod*); *Young*, 717 F.3d at 240-41 (noting that this claim "extends beyond the alleged breaches of the TPP and includes defendants' handling of her entire case, beginning with the negotiations surrounding her forbearance agreement"); Charest v. Fed. Nat'l Mortg. Ass'n, 9 F. Supp. 3d 114, 125-27 (D. Mass. 2014) (discussing a possible cause of action under Section 93A); Okoye v. Bank of N.Y. Mellon, No. 10-11563, 2011 WL 3269686, at *9 (D. Mass. July 28, 2011) (dismissing due to failure to allege distinct damages). *But see* Miller v. Chase Home Fin., LLC, 677 F.3d 1113, 1116 (11th Cir. 2012) (concluding that there is no implied right of action); Parent Pennington v. HSBC Bank USA, N.A., 493 Fed. Appx. 548, 553 (5th Cir. 2012) (holding that there is no private right of action under HAMP). *See generally* Harry N. Arger & Brett J. Natarelli, *Support for Dismissal of State Law Based HAMP TPP Cases*, 2013 BUS. L. TODAY (2013) (discussing *Wigod*, *Miller*, and *Pennington*).

[75] Marks v. Bank of Am., N.A., No. 03:10-cv-08039, 2010 WL 2572988, at *4 (D. Ariz. 2010).

HAMP are "enforceable only through an administrative process."[76] In general, courts have not distinguished between loans held by private lenders and loans held by Fannie or Freddie. One decision explained:

> [B]orrowers denied a loan modification can contact the Homeowner's HOPE Hotline and speak with a trained housing counselor regarding the HAMP program. If the counselor believes that the borrower's application was improperly denied, the counselor can refer the concern to the servicer's senior-level management. If that senior-level official cannot resolve the issue, the counselor can further escalate the case to a designated team at Fannie Mae whose responsibility includes resolving individual and systemic problems. In addition, to monitor participating servicers' compliance with the HAMP, Freddie Mac, at the direction of Treasury, instituted a second-look process in which it audits a sample of loan modification applications that have been denied to minimize the likelihood that borrower applications are overlooked or inadvertently denied. . . . Secretary of the Treasury issued S[upplemental] D[irective] 09-06 which requires, in part, servicers to furnish Treasury and Fannie Mae with the specific reason for denial.[77]

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[76] Wright v. Bank of Am., N.A., No. CV 10-01723 JF (HRL), 2010 WL 2889117, at *4 (N.D. Cal. 2010).

[77] *Id.* at *5 (quoting Williams v. Geithner, No. CIV.09-1959 ADM/JJG, 2009 WL 3757380, at *3 (D. Minn. Nov. 9, 2009)); *see also Marks*, 2010 WL 2572988, at *4,*6-7 (stating that "[c]ongressional intent expressly indicates that compliance authority was delegated solely to Freddie Mac" and that "legislative history indicates that the right to initiate a cause of action lies with the Secretary via the Administrative Procedure Act"); *cf. Charest*, 9 F. Supp. 3d at 136 (rejecting Fannie's argument that an adequate remedy for servicer misconduct is the possibility of a suit by Treasury or Fannie against the servicer "for specific performance of contractual obligations relating to

A recent decision agrees that

> If there was a violation of federal law with respect to . . . handling of . . . HAMP requests, that is a matter better addressed by the U.S. Treasury Department as the administrator of that program. We cannot perceive that by enacting HAMP, the federal government intended for persons rejected for HAMP assistance to have a private cause of action against the mortgage lender or servicer . . . .[78]

There has been no effective "administrative process" at the Department of the Treasury, FHFA, Fannie, Freddie, or even the new Consumer Financial Protection Bureau. In general, these agencies leave the administration of HAMP entirely in the hands of the loan servicers and do not enforce the standards that theoretically bind the servicers. In July 2015, the Special Inspector General for the TARP said that "[w]e are constantly seeing problems with the way servicers are treating homeowners and not following the rules . . . . I don't understand why there hasn't been a stronger policing from Treasury on servicers."[79] Consumer advocates agree that "there is no effective appeals process."[80]

Although FHFA, as it has acknowledged, "operates under a statutory mandate . . . to implement a plan aimed at maximizing

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HAMP violations"). The *Charest* court noted that Fannie "fails to attest or even represent that it will file such a suit." *Id.* at 137 n.35.

[78] Jaffri v. JPMorgan Chase Bank, N.A., 26 N.E. 3d 635, 640 (Ind. Ct. App. 2015) (citing, inter alia, Spaulding v. Wells Fargo Bank, N.A., 714 F.3d 769 (4th Cir. 2013)).

[79] Morgenson, *supra* note 68 (quoting Special Inspector General Christy L. Romero).

[80] NAT'L CONSUMER LAW CTR., *supra* note 12, at 40 (stating that "Treasury created a weak appeals process for non-GSE loans" while for "GSE loans, homeowners . . . can call a general toll-free number" but staff who answers the telephone often cannot help and that advocates for homeowners with GSE loans sometimes try to use the non-GSE HAMP appeals process because the "limited appeals process built into HAMP is better than the nothing that exists elsewhere").

assistance for homeowners in order to minimize foreclosures,"[81] it has disclaimed responsibility for enforcing the HAMP standards. FHFA takes the position that Fannie and Freddie, "not FHFA, should handle complaints."[82] An audit by FHFA's Office of Inspector General (OIG) included a senior manager's proposal that consumer complaints be met with "a stiffly worded" statement that the matter has been referred to "an appropriate party."[83] This would be followed by transmission of "the email trail to Fannie . . . and simply say we are passing along this communication *for your information*. You may take whatever action you deem appropriate. *We plan no followup*."[84]

In response to the OIG draft audit report, FHFA told the OIG on June 6, 2011 that it agreed with the recommendation that it should "develop and implement written policies, procedures, and controls" with respect to consumer complaints, but that the written policy will be that FHFA will "redirect[] cases to an appropriate entity, while making clear that the agency has limited mandate and ability to impact the outcome of the vast majority of individual consumer issues."[85] In the wake of the audit report, FHFA has not changed its public statement that complaints should go to Fannie and Freddie, not to FHFA. It told the public that "[u]nder conservatorship, FHFA has delegated certain authorities to Fannie Mae and Freddie Mac, including responsibility for day-to-day business operations. FHFA

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[81] FED. HOUS. FIN. AGENCY, *supra* note 11, at 4; *see also* REPORT EVL-2011-003, *supra* note 11, at 6 ("FHFA has statutory responsibilities under EESA to assist homeowners to avoid foreclosures and to coordinate within the federal government to improve loan modification and restructuring efforts.").

[82] FED. HOUS. FIN. AGENCY & OFFICE OF INSPECTOR GEN., AUDIT OF THE FEDERAL HOUSING FINANCE AGENCY'S CONSUMER COMPLAINTS PROCESS 6 (2011), http://www.fhfaoig.gov/Content/Files/AUD-2011-001.pdf [http://perma.cc/Z3ZL-ZBTQ] [hereinafter AUDIT REPORT]. The Audit Report suggests that the FHFA's discussions may have been prompted by the OIG audit. *Id.* at 7 n.10.

[83] *Id.* at 5-6.

[84] *Id*. at 6 (emphasis added).

[85] *Id.* at 20-21. FHFA adds that "[i]n the event any trends can be discerned from the limited pool of inquiries that FHFA receives, the information received may be shared with the agency's examination staff" and that the FHFA Office of General Counsel "will review identified consumer complaints alleging fraud to determine if appropriate action was taken or needs to be taken." *Id.* at 21. FHFA conceded that during the audit period "no complaints were referred to law enforcement authorities." *Id.* at 5.

generally does not intervene in matters involving individual mortgages, property sales or transfers, foreclosures, or other actions."[86]

The OIG disagreed with FHFA's limited view of its responsibilities with regard to consumer complaints, noting that, "pursuant to 12 U.S.C. § 4513(a)(1)(B), FHFA has the authority to ensure that the Enterprises comply with FHFA's rules, regulations, guidelines, and orders, and that they operate in a fashion consistent with the public interest."[87] FHFA apparently does not dispute this, but "delegates" its authority to the GSEs it controls.

FHFA's "delegation" of enforcement to Fannie and Freddie is totally ineffective since Fannie and Freddie provide no forum for inviting, accepting, considering, or resolving homeowners' complaints. Fannie and Freddie have no established process for considering homeowners' claims that servicers are violating HAMP's provisions or for entertaining homeowners' requests that Fannie or Freddie exercise the considerable discretion the agencies have to provide relief from foreclosure. Homeowners who have access to the Internet may find their way to a page that advises the homeowner:

> All Fannie Mae homeowners have access to our Mortgage Help Network for free mortgage assistance provided by one of our national or community based nonprofit partners. You'll work directly with a housing advisor who will review your

[86] *Id.* at 6 (quoting the FAQs then available on the Agency's website). Although this sloughing off responsibility to Fannie and Freddie was criticized in the FHFA OIG's Audit Report of June 21, 2011, this language on FHFA's website remained almost unchanged. On November 29, 2015, the language was essentially the same, now reading: "[FHFA] ha[s] delegated certain authorities to Fannie Mae and Freddie Mac, including responsibility for day-to-day operations, which involves the handling of consumer complaints. Fannie Mae and Freddie Mac each have a review process to evaluate situations that arise involving their mortgages or property transactions." *Complaints, Concerns & Questions*, FED. HOUSING FIN. AGENCY, http://www.fhfa.gov/Homeownersbuyer/MortgageAssistance /Pages/ComplaintsConcernsQuestions.aspx [https://perma.cc/6YAW-WEWS?type=source]. FHFA has not determined what if any "role it should play in overseeing the . . . resolution of complaints" by Fannie and Freddie. AUDIT REPORT, *supra* note 82, at 6.

[87] *Id.* at 22.

> situation, explain your options, and work with your mortgage company throughout the process.[88]

FHFA acknowledges that the loan modification practices of Fannie and Freddie are critically important to the taxpayers as well as homeowners.[89] FHFA states that it "supervises and oversees the Enterprises' compliance with and performance and payments under the agreements with Treasury, as well as the Enterprises' adoption of MHA-related loss mitigation programs."[90] Nonetheless, although Fannie and Freddie have promulgated standards governing the provision of HAMP relief, neither FHFA, Fannie, nor Freddie has provided any internal administrative process for allowing or reviewing appeals from servicers' decisions or for handling complaints by consumers, even for mortgages owned by Fannie or Freddie. Indeed, a June 2011 Audit Report by the OIG of FHFA specifically criticized FHFA for not having "a sound internal control environment governing consumer complaints, including formal policies and procedures for complaints received by FHFA and the Enterprises."[91] The OIG noted that FHFA "did not refer potentially criminal allegations to law enforcement authorities."[92] Moreover, "[a]lthough FHFA's standard referral letter to [Fannie and Freddie] requested copies of disposition documentation . . . . Of the 470 complaints referred . . . FHFA actually

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88 *Know Your Options*, FANNIE MAE, http://www.knowyouroptions.com/find-resources/mortgage-assistance/fannie-mae-mortgage-help-network [https://perma.cc/8FRF-PMLB]. The inadequacy of the consumer complaint process is not unique to FHFA. *See* ELIZABETH WARREN, A FIGHTING CHANCE 183-84 (2014) (discussing problems with consumer complaint departments).

89 FED. HOUS. FIN. AGENCY, *supra* note 11, at 4 ("The Enterprises' loan modification efforts are critical to minimizing their credit losses, because a loan modification is often a lower cost resolution to a delinquent mortgage than foreclosure. . . . loan modification efforts also help restore stability to the housing market, which directly benefits the Enterprises by reducing credit exposure.").

90 *Id.* at 5. The report adds that "FHFA's focus has been on how the Enterprises' obligations and performance . . . affect their safety and soundness and their consistency with the conservatorship goals of preserving and conserving assets." *Id.*

91 AUDIT REPORT, *supra* note 82, at 1.

92 *Id.*

obtained all correspondence and disposition documentation *in only 2 instances*."[93]

FHFA did not know the total number of consumer complaints it received, though it conceded that it had received an "increased number of repeat complaints and increased number of consumers who claim Fannie Mae or Freddie Mac are not responsive."[94] The complaints included allegations of fraud, waste, and abuse, including potential criminal activity.[95] "Many of these allegations involved possible improper foreclosure actions on single family residential mortgages, which is an area of considerable risk because of the potential adverse impact on the consumer," the OIG Audit Report stated.[96] Some of these complaints included "more than a year's worth of written correspondence and documentation, sometimes including complete loan packages."[97] The OIG concluded that "FHFA tolerated an inefficient, decentralized complaints process" and therefore "lost track of more than two years of written, telephone, and email complaints and lacks assurance regarding the adequacy of responses."[98]

FHFA said that it would, by December 31, 2011, "develop and implement written policies, procedures, and controls to address the receipt, processing, and disposition of consumer

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[93] *Id*. at 12 (emphasis added).

[94] *Id*. at 2-3. FHFA told the OIG that it "began to receive an elevated level of public inquires and complaints" after 2008, and that the "volume of calls and inquiries further increased upon deployment of" the HAMP program in mid-2009. *Id.* at 19.

[95] *Id*. at 2 ("For purposes of this report, consumer complaints include, but are not limited to, those involving allegations of fraud, waste, or abuse."). Of the email complaints FHFA produced for the Inspector General, 95 alleged fraud or improper mortgage foreclosure or both. *Id.* at 10.

[96] *Id*. at 3.

[97] *Id*. at 10.

[98] *Id*.

inquiries."[99] What FHFA has done, however, is to reassert that complaints are to be handled by Fannie and Freddie themselves.[100]

In 2013, the Bureau of Consumer Financial Protection (CFPB) promulgated Mortgage Servicing Rules that became effective in January 2014.[101] "FHFA . . . required" Fannie and Freddie "to update their servicing requirements . . . to be consistent with" these Servicing Regulations.[102] These rules require servicers to "exercise reasonable

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[99] *Id.* at 22-23. FHFA told the OIG "that the established, informal complaints process was expected to be temporary in nature and was not integral to the core regulatory responsibilities of the Agency." *Id.* at 22. FHFA also told the OIG "that it has a limited mandate regarding consumer complaints." *Id.* The OIG, however, responded that "pursuant to 12 U.S.C. § 4513(a)(1)(B), FHFA has the authority to ensure that the Enterprises comply with FHFA's rules, regulations, guidelines, and orders, and that they operate in a fashion consistent with the public interest. FHFA—in its discretion—decided to implement this authority to handle consumer complaints." *Id.*

[100] *Complaints, Concerns & Questions*, *supra* note 86.

[101] Amendments to the 2013 Mortgage Rules Under the Equal Credit Opportunity Act (Regulation B), Real Estate Settlement Procedures Act (Regulation X), and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 60,382 (Oct. 1, 2013) (to be codified as 12 C.F.R. pt. 1002, 1024, and 1026); Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), and Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z) 78 Fed. Reg. 10,696, 10,902 (Feb. 14, 2013) (to be codified as 12 C.F.R. pt. 1024 and 1026); *see* Axelson & Hutchings, *supra* note 72, at 575-80 (discussing the proposed rules). In December 2014, CFPB proposed further amendments to these rules: Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 74,176 (Dec. 15, 2014) (to be codified as 12 C.F.R. pt. 1024 and 1026). The official name of the agency is the Bureau of Consumer Financial Protection, but it and others refer to it as the Consumer Financial Protection Bureau, or CFPB.

[102] FED. HOUS. FIN. AGENCY, 2013 ANNUAL REPORT TO CONGRESS 4 (2014), http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA_2013_Report_to_Congress.pdf [https://perma.cc/4KHJ-UJJH?type=source]. *See generally* FANNIE MAE, SERVICING GUIDE ANNOUNCEMENT SVC-2013-20 (2013), https://www.fanniemae.com/content/announcement/svc1320.pdf [https://perma.cc/P9HV-HG3G] (explaining updates in servicing requirements related to the CFPB's mortgage servicing rules); FREDDIE MAC, UPDATES IN RESPONSE TO THE CFPB MORTGAGE SERVICING FINAL RULE, BULL. NO. 2013-21 (2013), http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1321.pdf [http://perma.cc/23ZD-PERM] (explaining updates in response to the CFPB's mortgage servicing rules.

diligence in obtaining documents and information to complete a loss mitigation application[,]"[103] and detail specific steps that a servicer shall take, and set deadlines for doing so.[104]

The rules provide that under specified circumstances servicers must allow homeowners to appeal denials of loan modifications; the appeals are made to the servicer, but are to be reviewed by personnel different from those who made the original denial.[105] The rules specify that "[a] servicer's determination [of the appeal] is not subject to any further appeal."[106] The CFPB rules also provide that

> A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f)). Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option. Nothing in § 1024.41 should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option or to eliminate any such right that may exist pursuant to applicable law.[107]

The first sentence of this section appears to create a private right of action to enforce these loss mitigation rules, but the cause of action seems to be limited to enforcing the procedures specified in the rule, not the substance of any decision.[108] The only relief available under

[103] 12 C.F.R. § 1024.41(b)(1) (2015).
[104] 12 C.F.R. § 1024.38(a).
[105] 12 C.F.R. § 1024.41(c)(ii) (requiring each servicer to notify each borrower "that the borrower has the right to appeal the denial of any loan modification option as well as the amount of time the borrower has to file such an appeal and any requirements for making an appeal").
[106] 12 C.F.R. § 1024.41(h)(4).
[107] 12 C.F.R. § 1024.41(a).
[108] *See* Cataldi v. New York Cmty. Bank, No. 1:13-CV-3972-RWS-JSA, 2014 WL 359954, *2 (N.D. Ga 2014); Laura M. Greco & Lauren E. Campisi, *Understanding CFPB's Final Mortgage Servicing Rules and their Impact on*

RESPA is damages, not injunctive relief, and the damages are limited to $2000 per person.[109] Moreover, some important provisions of the CFPB rules are not made privately enforceable at all.[110]

There has been regulatory action to enforce the mortgage servicing rules. In September 2014, the CFPB acted against Flagstar Bank, requiring the bank to pay $27.5 million to approximately 6,500 consumers who had been injured by Flagstar's actions.[111] In April 2015,
CFPB and the Federal Trade Commission took enforcement action against another servicer, Green Tree.[112]

The promulgation of the rules and agency enforcement actions have not ended widespread servicer violation of the rules.[113] Indeed,

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Foreclosures and Bankruptcies, 131 BANKING L.J. 165, 174-76 (2014). The commentators, however, stated that the Dodd-Frank Act, which created the CFPB, "does not specifically regulate loss mitigation activities at all." *Id*. at 174; *see also* Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (doubting the ability of an agency to create a private right of action by regulation if the private right of action has not been created by the statute).

[109] Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2605(f) (2012).

[110] *See* NAT'L CONSUMER LAW CTR., COMMENTS TO THE CFPB REGARDING AMENDMENTS TO THE 2013 MORTGAGE RULES UNDER THE REAL ESTATE SETTLEMENT PROCEDURES ACT AND THE TRUTH IN LENDING ACT 9 (2015), https://www.nclc.org/images/pdf/rulemaking/comments-servicing-cfpb-march16-15.pdf [https://perma.cc/VCM3-3KCG] [hereinafter NCLC COMMENTS] ("[T]he provisions of § 1024.38 are not privately enforceable.").

[111] *See Consumer Financial Protection Bureau Takes Action Against Flagstar Bank for Violating New Mortgage Servicing*, CONSUMER FIN. PROTECTION BUREAU (Sept. 29, 2014), http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-flagstar-bank-for-violating-new-mortgage-servicing-rules/ [https://perma.cc/8N96-HG3J?type=source].

[112] *National Mortgage Servicing Company Will Pay $63 Million to Settle FTC, CFPB Charges*, FED. TRADE COMMISSION (Apr. 21, 2015), https://www.ftc.gov/news-events/press-releases/2015/04/national-mortgage-servicing-company-will-pay-63-million-settle [https://perma.cc/G9T8-8F72?type=source].

[113] *See* NAT'L CONSUMER LAW CTR., NCLC SURVEY REVEALS ONGOING PROBLEMS WITH MORTGAGE SERVICING 1 (2015), http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/ib-servicing-issues-2015.pdf [http://perma.cc/VDG7-ZTG9] ("While the CFPB's mortgage servicing regulations have made important progress in standardizing industry practices, enhancing procedural transparency, and improving servicer

in June 2015, the Office of the Comptroller of the Currency reported that six banks, including Wells Fargo and JPMorgan, which have the largest servicing portfolios in the United States, have failed to correct errors they agreed in 2011 to remedy.[114] As the National Consumer Law Center and others have pointed out, the CFPB's enforcement authority "is necessarily limited by resources as well as delayed from the time at which a homeowner needs the servicer to act in order to prevent foreclosure."[115] Therefore, the availability of a cause of action under the APA continues to be important to homeowners challenging denials of modifications for mortgages held by Fannie Mae or Freddie Mac.[116]

III. FHFA is a Federal Agency Subject to the APA; There is No Preclusion of Judicial Review and No Bar to Granting Injunctive Relief for Homeowners who Prove Injury Caused by Denials of Mortgage Modifications for Mortgages Owned, Securitized, or Guaranteed by Fannie or Freddie

HAMP was created by the Treasury Department to be administered by entities—Fannie and Freddie—that had been put

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accountability, many challenges remain."); NAT'L COUNCIL OF LA RAZA AND NAT'L HOUS. RESOURCE CTR., ARE MORTGAGE SERVICERS FOLLOWING THE NEW RULES? A SNAPSHOT OF COMPLIANCE WITH CFPB SERVICING STANDARDS 2 (2015), http://www.nclr.org/images/uploads /publications/ mortgageservicesreport 11215.pdf [http://perma.cc/WYQ4-FKDE] ("The survey results show that aspects of the rules substantially mitigated bad practices in mortgage servicing, while other servicing practices still need improvement."); NCLC COMMENTS, *supra* note 110, at 6-7, 10 (detailing the various types of servicer noncompliance).

[114] Nathaniel Popper, *Banks That Failed to Fix Mortgage Services Face Restrictions*, N.Y. TIMES, June 18, 2015, at B5; *Correcting Foreclosure Practices*, OFF. COMPTROLLER CURRENCY (June 17, 2015), http://www.occ.gov/topics/consumer-protection/foreclosure-prevention/correcting-foreclosure-practices.html [https://perma.cc/L3JU-C278].

[115] NCLC COMMENTS, *supra* note 110, at 10.

[116] *Id.* ("The CFPB has recognized the important of private enforceability by making most sections of its mortgage servicing rules privately enforceable. Protections for successors should be no exception.").

under the absolute and total dominion of FHFA.[117] FHFA has entire control over whether and in what ways the GSEs participate in HAMP.[118] Thus, to take a pertinent example, on May 8, 2015, the Director of FHFA announced that "FHFA has decided to extend the Enterprises' participation in the Home Affordable Modification Program (HAMP) and the Home Affordable Refinance Program (HARP) for an additional year, until the end of 2016."[119] While the servicers who administer GSE HAMP have been said to be agents of Fannie or Freddie, those servicers are in reality agents of FHFA.[120] When a modification is denied by a servicer who is an agent of FHFA, the denial is FHFA's.

There is no doubt that FHFA is an agency subject to the APA.[121] Prima facie, this means that homeowners denied modifications with respect to loans held by Fannie and Freddie are entitled to judicial review under § 702 of the APA, which provides that "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof."[122] There is a strong presumption that judicial review is available: as the Supreme Court wrote in *Abbott Laboratories v. Gardner*, "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."[123] The only

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[117] *See supra* notes 47-51 and the accompanying text.
[118] *Id.*
[119] Watt, *supra* note 48 (announcing also that "this will be the final extension that FHFA will make for the Enterprises' participation in HAMP").
[120] *See* Charest v. Fed. Nat'l Mortg. Ass'n, 9 F. Supp. 3d 114, 127 (D. Mass. 2014) (stating that the servicer of a mortgage held by Fannie is an agent of Fannie); *see also* RESTATEMENT (THIRD) OF AGENCY, § 1.01 (AM. LAW INST. 2006); *supra* notes 10, 19 and the accompanying text (discussing FHFA's control over the servicers with respect to the administration of HAMP and other loss mitigation programs).
[121] *See* 12 U.S.C. § 4511(a) (2012) ("There is established the Federal Housing Finance Agency, which shall be an independent agency of the Federal Government."); Administrative Procedure Act, 5 U.S.C. § 551 (2012) (defining agency).
[122] 5 U.S.C. § 702.
[123] Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967); *see also* Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986) (stating that Chief Justice Marshall "insisted that '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

exceptions to this are when "agency action is committed to agency discretion by law" and when "statutes preclude judicial review."[124]

Agency action is generally considered "committed to agency discretion by law" only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[125] While the § 701(a)(2) is not pellucid, the statutes governing mortgage servicing and underlying HAMP and the agency directives governing loss mitigation procedures provide "meaningful standard[s] against which to judge the agency's exercise of discretion."[126] Section 701(a)(2), therefore, does not seem to be a bar to review of mortgage modification denials under GSE HAMP.

Statutory preclusion under §701(a)(1), however, requires further discussion. The standards governing statutory preclusion are well established. The Supreme Court has emphasized that the APA's "'generous review provisions' must be given a 'hospitable' interpretation . . . [and] only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."[127] The Court has admonished that "where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling."[128]

While APA review of GSE mortgage modification decisions seems not to have been raised in litigation, there are decisions in other kinds of cases brought under HERA that suggest that judicial review of FHFA's actions may be precluded by 12 U.S.C. § 4617(f), which

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[124] 5 U.S.C. § 701(a)(1-2).
[125] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong. 26 (1945)); Webster v. Doe, 486 U.S. 592, 599 (1988). *But see Webster*, 486 U.S. at 607 (Scalia, J., dissenting) ("'Commit[ment] to agency discretion by law' includes, but is not limited to, situations in which there is 'no law to apply.'").
[126] Heckler v. Chaney, 470 U.S. 821, 830 (1985); *see also* Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 527 (2007) ("[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.").
[127] *Abbott Labs.*, 387 U.S. at 140-41 (quoting Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955) and Rusk v. Cort, 369 U.S. 367, 379-80 (1962)); *see also Bowen*, 476 U.S. at 670-73 (stating that there is a "strong presumption that Congress intends judicial review of administrative action").
[128] *Bowen*, 476 U.S. at 682 n.3 (quoting Block v. Cmty. Nutrition Inst., 467 U.S. 340, 350-51 (1984)).

says that "[e]xcept as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver."[129] The discussion below considers whether proponents of this position could "discharge[] 'the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review'" of mortgage modification denials made on behalf of FHFA.[130] Section A discusses the pertinent provisions of HERA; section B, the recent FHFA cases; and section C, the seminal Supreme Court ruling, *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corporation (FSLIC)*.[131] Section D analyzes this material and concludes that HERA does not preclude judicial review of or limit injunctive relief for denials of mortgage modifications under GSE HAMP.

A. HERA's Provisions With Regard to Judicial Review

HERA has several provisions regarding judicial review, largely copied from FIRREA. Some of them deal only with FHFA as receiver, a situation that does not exist.[132] Thus, for example, in § 4617(b)(5), which deals with the authority of the receiver to determine claims, subsection (5)(D) gives the receiver authority to disallow claims and subsection (5)(E) precludes judicial review of agency determinations under (5)(D); § 4617(b)(6) provides for judicial determination of claims.[133] But all of § 4617(b)(5) and (6) deal with receivership only, not conservatorship, and receivership only is addressed by § 4617(b)(11)(D), which provides that

> Except as otherwise provided in this subsection, no court shall have jurisdiction over—

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[129] HERA § 1145(a), 12 U.S.C. § 4617(f) (2012).
[130] *Bowen*, 476 U.S. at 672 (quoting Dunlop v. Bachowski, 421 U.S. 560, 567 (1975)).
[131] 489 U.S. 561 (1989).
[132] *See supra* notes 38-39 and the accompanying text.
[133] 12 U.S.C. §4617(b).

> (i) any claim or action for payment from or any action seeking a determination of rights with respect to the assets or charter of any regulated entity for which the Agency has been appointed receiver, or
>
> (ii) any claim relating to any act or omission of such regulated entity or the Agency as receiver.[134]

With respect to conservatorship, there is no preclusion of judicial review.[135] Indeed, HERA has several provisions expressly authorizing judicial review under conservatorship. A regulated entity can secure judicial review of the decision to appoint the Agency as conservator or receiver.[136] Furthermore,

> After the appointment of a conservator . . ., the conservator . . . may, in any judicial action or proceeding to which such regulated entity is or becomes a party, request a stay for a period not to exceed–
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> (i) 45 days, in the case of any conservator . . . .[137]

And § 4617(b)(10)(B) directs that "any court with jurisdiction of such action or proceeding . . . shall grant such stay."[138] Section 4617(b)(18)(A) discusses payment of "any final and unappealable judgment for monetary damages entered against the conservator or receiver for the breach of an agreement executed or approved in writing by the conservator or receiver . . . ."[139]
Most significantly, with respect to current litigation, § 4617(f) provides that "[e]xcept as provided in this section or at the request of

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134 12 U.S.C. § 4617(b)(11)(D). Section 4617(d)(8)(B) "Certain qualified financial contracts" also refers to "any judicial action or proceeding brought against any receiver . . .."

135 *Contra* 12 U.S.C. § 4617(b)(11)(D).

136 § 4617(a)(5).

137 § 4617(b)(10)(A).

138 § 4617(b)(10)(B).

139 § 4617(b)(18)(A).

the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver."[140]

Thus, HERA treats conservatorship very differently from receivership. This is not surprising, as FIRREA and HERA define the agencies' duties very differently in each capacity.[141] For FHFA as conservator, there is no preclusion of judicial review, though there is the "anti-injunction" language of § 4617(f).

B. The FHFA Cases

While several cases have interpreted the "anti-injunction" language of § 4617(f), most of those that have reached the courts of appeals involve "PACE"—Property Assessed Clean Energy—programs created by some local governments to provide financing for environmentally beneficial home improvements.[142] Homeowners have to repay this financing, and some of these programs make the local

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[140] § 4617(f).

[141] *See* Homeland Stores v. Resolution Tr. Corp., 17 F.3d 1269, 1275 (10th Cir. 1994) (stating that FIRREA "defines the RTC's duties as conservator and as receiver differently" and concluding that actions taken under RTC's powers as conservator are not within the jurisdictional bar applied to receivership); James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1090 (D.C. Cir. 1996) ("The principal difference between a conservator and receiver is that a conservator may operate and dispose of a bank as a going concern, while a receiver has the power to liquidate and wind up the affairs of an institution.").

[142] County of Sonoma v. Fed. Hous. Fin. Agency, 710 F.3d 987, 988 (9th Cir. 2013) (holding that FHFA's directive to Freddie Mae and Freddie Mac regarding PACE liens was insulated from judicial review and not subject to APA rulemaking requirements); Town of Babylon v. Fed. Hous. Fin. Agency, 699 F.3d 221, 228 (2d Cir. 2012) (holding in part that the FHFA's regulation of PACE programs was not subject to judicial review due to the agency's status as conservator of Fannie Mae and Freddie Mac pursuant to HERA); Leon Cnty. v. Fed. Hous. Fin. Agency, 700 F.3d 1273, 1273 (11th Cir. 2012) (holding that FHFA's directive to Fannie Mae and Freddie Mac not to purchase mortgages for properties with PACE liens was insulated from judicial review). A different issue involving § 4617(f) was addressed in *In re Federal Home Loan Mortgage Corporation Derivative Litigation*, 643 F. Supp. 2d 790, 799 (E.D. Va. 2009), *aff'd per curiam sub nom. La. Mun. Police Emps. Ret. Sys. v. Fed. Hous. Fin. Agency*, 434 F. App'x 188, 190 (4th Cir. 2011).

government's lien for repayment superior to any other lien, including pre-existing mortgage liens.[143] After FHFA imposed the conservatorship on Fannie and Freddie, it issued a Directive instructing Fannie and Freddie to protect themselves against risks from such first-lien PACE programs.[144] Fannie and Freddie then declared that they would no longer purchase mortgages on properties subject to first lien PACE obligations, and FHFA then directed Fannie and Freddie to "continue to refrain" from purchasing such mortgages.[145] Several local governments and environmental groups challenged these actions on various grounds, but the courts of appeals that have considered the question—the Second, Ninth, and Eleventh Circuits—have held that judicial review is precluded by § 4617(f) (HERA).[146]

As all these decisions recognized, and as the Second Circuit said explicitly in the first of these cases, *Town of Babylon v. Federal Housing Finance Agency*, § 4617(f) (HERA) derives from "a virtually identical" provision of § 1821(j) (FIRREA), which governed receiverships by the Federal Deposit Insurance Corporation (FDIC) and Resolution Trust Corporation (RTC) over failing private depository institutions, particularly savings and loan (S&L) associations.[147] In *Town of Babylon*, the Second Circuit relied on its

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143 *Town of Babylon*, 699 F.3d at 225 (explaining that, for repayment purposes, liens from PACE programs have "priority over any other lien attached to the property, including new and preexisting mortgage liens").

144 *Id.* at 225-26 (reciting that Fannie Mae and Freddie Mac should "take prudential actions . . . to protect themselves against safety and soundness concerns—risks—raised by PACE programs").

145 *Id.* at 226 ("[T]he FHFA . . . directed Fannie Mae and Freddie Mac to 'continue to refrain from purchasing new mortgage loans secured by properties with outstanding first-lien PACE obligations,' and 'undertake other steps as may be necessary to protect their safe and sound operations from these first-lien PACE programs.'").

146 *Id.* at 222 (holding that the "federal statute addressing FHFA's powers as conservator did not authorize judicial review" of FHFA's directive to Fannie Mae and Freddie Mac); *Leon Cnty.*, 700 F.3d at 1273 (holding that FHFA's directive was "insulated from judicial review"); *County of Sonoma*, 710 F.3d at 988 (holding that FHFA's directive was "not subject to judicial review" or APA rulemaking requirements).

147 *Town of Babylon*, 699 F.3d at 228 (citing Volges v. Resolution Tr. Co., 32 F.3d 50, 52 (2d Cir. 1994) (comparing § 4617(f) to a "virtually identical jurisdictional bar" in the FIRREA)); *see* Costa v. Resolution Tr. Co., 789 F. Supp. 43, 45 (D. Mass. 1991) (explaining that although the language of the

decision in *Volges v. Resolution Trust Corp.*, which interpreted § 1821(j).[148] In *Volges*, the Second Circuit had recognized, as all courts did, that the test of § 1821(j) (FIRREA) was whether the agency was "asserting some power beyond those granted to it as a conservator."[149] In *Town of Babylon*, the Second Circuit concluded with respect to PACE that "[d]irecting protective measures against perceived risks is squarely within FHFA's powers as a conservator."[150]

In the Eleventh Circuit's PACE decision, *Leon County v. Federal Housing Finance Agency*, addressing the argument that FHFA's action had been taken as regulator, not as conservator, the court emphasized the seriousness of a preclusion of judicial review, stating "[t]he FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp. . . . . Moreover, 'if the FHFA were to act beyond statutory or constitutional bounds in a manner that adversely impacted the rights of others, § 4617(f) would not bar judicial oversight or review of its actions.'"[151]

In *Leon County*, the Eleventh Circuit concluded that FHFA's directive was an act of conservatorship, not regulation, because

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statute specifies only the FDIC, the anti-injunction language applies also to the RTC because 12 U.S.C. § 1441a(b)(4) gives the RTC the same powers and rights with respect to depository institutions insured by the FSLIC before the enactment of FIRREA as the FDIC has with respect to insured depository institutions under the Federal Deposit Insurance Act); Richard B. Gallagher, Annotation, *Construction and Application of Anti-Injunction Provision of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) (12 USCS §1821(j))*, 126 A.L.R. Fed. 43, 54 n.9 (1995) (discussing *Costa*). FIRREA provides that "except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." 12 U.S.C. § 1821(j) (2012).

[148] *Volges*, 32 F.3d 52-53 (quoting *Costa*, 789 F. Supp. at 45).

[149] *Id.* (discussing "the difference between the exercise of a function or power that is clearly outside the statutory authority of the RTC on the one hand, and improperly or even unlawfully exercising a function or power that is clearly authorized by statute on the other").

[150] *Town of Babylon*, 699 F.3d at 227.

[151] Leon Cnty. v. Fed. Hous. Fin. Agency, 700 F.3d 1273, 1278 (11th Cir. 2012) (quoting *In re* Fed. Home Loan Mortg. Corp. Derivative Litig., 643 F. Supp. 2d 790, 799 (E.D. Va. 2009), *aff'd per curiam sub nom*. La. Mun. Police Emps. Ret. Sys. v. Fed. Hous. Fin. Agency, 434 F. App 188 (4th Cir. 2011)).

> the powers of the directors, officers, and shareholders of the entity in conservatorship are transferred to the conservator, and those powers include marshalling, protecting, and managing assets. Part of managing the assets and assuring the solvency of a mortgage-purchasing entity is considering the degree of risk entailed by the acquisition of particular mortgages. It is fully within the responsibilities of a protective conservator, acting as a prudent business manager, to decline to purchase a mortgage when its lien will be relegated to an inferior position for repayment.[152]

In the third of the PACE appellate decisions, *County of Sonoma v. Federal Housing Finance Agency*, the Ninth Circuit said the question was "whether FHFA's directive to the Enterprises to discontinue purchasing PACE-encumbered mortgages is a lawful exercise of its authority as conservator of the Enterprises—rather than, as the district court concluded, an improper exercise of its power as a regulator."[153] As had the Eleventh Circuit, the Ninth Circuit recognized "that FHFA's power has limits"–"FHFA cannot evade judicial review and the APA's requirements . . . simply by invoking its authority as conservator."[154] The court acknowledged that "the anti-judicial review provision is inapplicable when FHFA acts beyond the scope of its conservator power."[155] The court held, however, that "FHFA's decision to cease purchasing mortgages on PACE-encumbered properties is a lawful exercise of its statutory authority as conservator . . . ."[156]

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[152] *Leon Cnty.*, 700 F.3d at 1278-79.
[153] *County of Sonoma*, 710 F.3d at 992.
[154] *Id.* at 994 (referring to APA's rulemaking requirements).
[155] *Id.* at 992 (citing Sharpe v. Fed. Deposit Ins. Corp., 126 F.3d 1147, 1155 (9th Cir. 1997) (holding that statutory limitations on judicial review of FDIC's actions in a capacity of a conservator or receiver do not preclude "injunctive relief when the FDIC has acted beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions")).
[156] *County of Sonoma*, 710 F.3d at 989.

Several district court decisions also interpret § 4617(f) (HERA) in similar ways, sometimes drawing on cases interpreting § 1821(j) (FIRREA).[157] Two cases that contain some analysis of that section are *Perry Capital LLC v. Lew*[158]and *Massachusetts v. Federal Housing Finance Agency*.[159]

In *Perry Capital*, investors sued FHFA and Treasury for losses in the value of the investors' stock in Fannie and Freddie because of the 2012 Third Amendment to the Senior Preferred Stock Purchase Agreements (PSPAs) between Treasury and the GSEs.[160] The district court held that § 4617(f) (HERA) barred all claims for declaratory, injunctive, or other equitable relief.[161] Drawing on cases interpreting 12 U.S.C. § 1821(j) (FIRREA) the court held that the critical question was whether "plaintiffs sufficiently plead that FHFA acted beyond the scope of its statutory 'powers or functions . . . as a conservator" in executing the Third Amendment.[162] The court held that plaintiffs had not carried that burden, as FHFA actions were within "FHFA's uncontested authority to determine how to conserve the viability of the GSEs," a classic conservatorship function.[163]

In *Massachusetts v. Federal Housing Finance Agency*, Massachusetts maintained that FHFA's "Arms-Length Transaction" and "Make-Whole" restrictions on sales of pre- and post-foreclosure homes violated the Non-profit Buyback Provisions of the Massachusetts Foreclosure Law.[164] Relying on the PACE cases, FHFA argued that the anti-injunction provision of HERA barred relief because FHFA's restrictions were "within the scope of its powers and duty as conservator to 'preserve and conserve' the GSEs' assets."[165]

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[157] *See, e.g.*, Gail C. Sweeney Estate Marital Tr. v. U.S. Treasury, 68 F. Supp. 3d 116, 125 (D.D.C. 2014) (describing the "anti-injunction provision" as one that "strips courts of jurisdiction to hear challenges to the 'lawful exercise of FHFA's power as conservator'"); Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 221 (D.D.C. 2014); Massachusetts v. Fed. Hous. Fin. Agency, 54 F. Supp. 3d 94, 101-02 (D. Mass. 2014); Kuriakose v. Fed. Home Loan Mortg. Corp., 674 F. Supp. 2d 483 *passim* (S.D.N.Y. 2009).

[158] 70 F. Supp. 3d 208 (D.D.C. 2014).

[159] 54 F. Supp. 3d 94 (D. Mass. 2014).

[160] *Perry Capital LLC*, 70 F. Supp. 3d at 223.

[161] *Id.* at 222.

[162] *Id.* at 221.

[163] *Id.* at 223.

[164] 54 F. Supp. 3d 94 (D. Mass. 2014).

[165] *Id.* at 97.

As in *Perry*, the district court acknowledged that "FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp."[166] The court noted that FHFA as regulator must follow the notice and comment requirements of the APA.[167] Massachusetts argued that FHFA's restrictions bore the characteristics of rulemaking "because they apply willy-nilly to all pre-foreclosure and REO [real estate owned] sales."[168] FHFA maintained that the directives were "'protective measures against perceived risks [that fall] squarely within FHFA's power as conservator.'"[169]

The district court held that FHFA's "Arms-Length Transaction" and "Make-Whole" restrictions satisfied the judicial standards for conservatorship actions: "directive[s] to an institution in conservatorship to mitigate or avoid a perceived financial risk"; "discreet management decision[s] by a conservator"; actions that "evaluate[] the risks of certain business transactions and take[] prudential action to avoid those that it deems undesirable."[170] The court concluded that FHFA's decision to reject the provisions of the state law "may be fairly characterized as a business judgment intended to 'preserve and conserve [the GSEs'] assets and property'" and therefore within the protection of the anti-injunction provision of § 4617(f) (HERA).[171]

C. Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp.

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[166] *Id.* at 99 ("The Commonwealth is certainly correct in its assertion that that '[t]he FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp.'" (quoting Leon Cnty. v. Fed. Hous. Fin. Agency, 700 F.3d 1273, 1278 (11th Cir. 2012)).

[167] *Id.* at 100 n.5 ("When the FHFA promulgates rules in its role as the GSEs' regulator, it must adhere to the notice and public comment requirements of the Administrative Procedure Act of 1946.").

[168] *Id.* at 100 ("The Commonwealth argues that the ALT and Make–Whole restrictions bear the stigma of broad rulemaking because they apply willy-nilly to all pre-foreclosure and REO sales.").

[169] *Id.* (quoting Town of Babylon v. Fed. Hous. Fin. Agency, 699 F.3d 221, 227 (2d. Cir. 2012)).

[170] *Id.* (quoting *Town of Babylon*, 699 F.3d at 227-28).

[171] *Id.* at 100-02 (highlighting Congress' decision to remove the power to second-guess the FHFA's business judgment from the purview of the court); *see also* Leon Cnty. v. Fed. Hous. Fin. Agency, 700 F.3d 1273, 1279 (11th Cir. 2012).

The Supreme Court decision that is central to understanding § 4617(f) (HERA) is *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp*.[172] *Coit* involved the anti-injunction language of the Financial Institutions Supervisory Act of 1966 (FISA), 12 U.S.C. § 1464(d)(6)(C), which became § 1821(j) (FIRREA) and then § 4617(f) (HERA).[173]

FISA authorized the Federal Home Loan Bank Board, acting ex parte and without notice, to appoint a conservator or receiver for a savings and loan association; FISA also allowed the affected savings and loan association to, "within 30 days, bring an action . . . 'for an order requiring the Board to remove such conservator or receiver.'"[174] It was, the Supreme Court said, "in this context" that the anti-injunction language "first appeared," as 12 U.S.C. § 1464(d)(6)(C), stating that "[e]xcept as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver."[175]

In this case, Coit had sued FirstSouth, a savings and loan association, in state court, seeking damages and declaratory relief.[176] Two months later, the Federal Home Loan Bank Board declared FirstSouth insolvent and appointed the FSLIC receiver.[177] FSLIC

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[172] 489 U.S. 561 (1989).
[173] *Id.* at 570-71. For cases in which the interpretation of § 1464(d)(6)(C) (FISA) has been applied in cases involving FIRREA, see *National Trust for Historic Preservation v. Federal Deposit Insurance Corp.*, 21 F.3d 469, 471 n.1 (D.C. Cir. 1994); *United Liberty Life Insurance Corp. v. Ryan*, 985 F.2d 1320, 1328-29 (6th Cir. 1993), *on remand, motion granted on other grounds*, 149 F.R.D. 558 (S.D. Ohio 1993).
[174] *Coit*, 489 U.S. at 570 (quoting Financial Institutions Supervisory Act of 1966 (FISA), Pub. L. No. 89-695, § 101, 80 Stat. 1028, 1033 (1966)).
[175] *Id.* at 571 (quoting FISA § 101, 80 Stat. at 1033). It is important to note that, in its original form and subsequently, the "anti-injunction" language was not absolute; it applied only to relief sought in forms other than what was "otherwise provided" in the legislation. The same is true of subsequent versions of the language, including § 4617(f) (HERA), which provides that "*Except as provided in this section or at the request of the Director*, no court may take any action, etc." 12 U.S.C. § 4617(f) (2012) (emphasis added). The same is true of the "jurisdictional bar" language. § 4617(b)(2)(D)(ii).
[176] *Coit*, 489 U.S. at 565.
[177] *Id.*

removed Coit's case to federal district court and moved to dismiss for lack of subject matter jurisdiction.[178] The district court granted the motion on the basis of the Fifth Circuit's decision in *North Mississippi Savings & Loan Ass'n v. Hudspeth*.[179]

The *Hudspeth* decision was based on two statutory provisions: 12 U.S.C. § 1729(d), which gave FSLIC as receiver power "to settle, compromise, or release claims in favor of or against the insured institutions," and § 1464(d)(6)(C), the anti-injunction language.[180] Interpreting these two provisions, the Fifth Circuit concluded that FSLIC was authorized to adjudicate claims against the S&L, that "[judicial] resolution of even the facial merits of claims . . . would delay the receivership function of distribution of assets[,]" and that "such a delay is a 'restraint' within the scope of the statute."[181]

The Fifth Circuit in *Hudspeth* therefore held that FSLIC as receiver "has exclusive jurisdiction to adjudicate claims against the assets of an insolvent savings and loan association . . . subject first to review by the Bank Board and then to judicial review under the Administrative Procedure Act."[182]

On Coit's appeal from the district court's application of *Hudspeth*, the Fifth Circuit acknowledged that *Hudspeth* conflicted with a Ninth Circuit decision in *Morrison-Knudsen Co. v. CHG International, Inc*.[183] The Fifth Circuit, however, adhered to *Hudspeth* and affirmed the dismissal in *Coit* for lack of subject matter jurisdiction.[184] When *Coit* reached the Supreme Court, the justices reversed the Fifth Circuit, rejected the reasoning of *Hudspeth* in favor of the Ninth Circuit's view, and upheld the ability of courts to entertain

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[178] *Id.* at 565-66.

[179] *Id.* (citing N. Miss. Sav. & Loan Ass'n v. Hudspeth, 756 F.2d 1096 (5th Cir. 1985)).

[180] *Hudspeth*, 756 F.2d at 1101.

[181] *Id.* at 1102.

[182] *Coit*, 489 U.S. at 565 (citing *Hudspeth*, 765 F.2d at 1003).

[183] Coit Indep. Joint Venture v. FirstSouth, F.A., 829 F.2d 563, 564 (5th Cir. 1987); *see also* Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1212 (9th Cir. 1987) ("FSLIC has no power to adjudicate creditor claims . . . [and] exhaustion of administrative remedies may be a basis for dismissal or stay of proceedings, and remand for further consideration."), *cert. dismissed sub nom.* Fed. Sav. & Loan Ins. Corp. v. Stevenson Assocs., 488 U.S. 935 (1988).

[184] *Coit*, 829 F.2d at 565.

de novo creditors' claims against institutions that had been taken over by the FSLIC as receiver.[185]

The Fifth Circuit had held in *Hudspeth* that "[judicial] resolution of even the facial merits of claims . . . would delay . . . the distribution of assets" and that "such a delay is a 'restraint' within the scope of the statute."[186] (The court would have allowed judicial review under the APA.)[187] The Ninth Circuit disagreed, holding that Congress had not given the FSLIC authority to adjudicate creditors' claims and therefore judicial consideration of those claims would not interfere with any authority granted by Congress to the FSLIC.[188] The Ninth Circuit said:

> What has not been conferred cannot be derived by pointing to the time-consuming tasks that FSLIC as a receiver must undertake. At bottom FSLIC merely asserts that it could do its job faster and more efficiently if it had adjudicatory power. Perhaps true, but if Congress did not provide that adjudication would be among FSLIC's receivership functions, the agency may not use section 1464(d)(6)(C) to achieve that result.[189]

It is noteworthy that in *Morrison-Knudsen*, the Ninth Circuit acknowledged that FSLIC had adjudicatory authority in its role as supervisor of thrift institutions, as distinguished from its role as receiver. In that case, the court stated that "in the role of supervising ongoing thrift associations, FSLIC and the Board have been empowered by Congress to adjudicate violations of federal law, to issue cease-and-desist orders, to remove offending officers, and to impose civil penalties."[190] With respect to this adjudicatory authority,

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[185] *Coit*, 489 U.S. at 568.
[186] *Hudspeth*, 756 F.2d at 1102.
[187] *Id.* at 1103.
[188] *Morrison-Knudsen*, 811 F.2d at 1217 ("[A] receiver's ordinary functions do not include adjudication. Judicial adjudication, to repeat, does not restrain or affect a receivership; it simply determines the existence and amount of claims that a receiver is to honor in its eventual distribution of assets.").
[189] *Id.*
[190] *Id.* at 1219-20.

the statutory provisions gave "detailed, exact, and comprehensive measures, precisely delineating agency procedure, the remedies available, and judicial review. They make explicit reference to review under the APA."[191]

The Ninth Circuit found the "inference . . . irresistible" that if Congress had intended to authorize FSLIC to adjudicate in its receivership role, it would have enacted similar provisions for that situation.[192]

The Supreme Court ruled in *Coit* that Congress had not conferred upon FSLIC as receiver "the power to adjudicate creditors' claims."[193] The Court held that

> the directive that FSLIC as receiver "shall pay all valid credit obligations of the association" cannot be read to confer upon FSLIC the power to adjudicate claims . . . subject only to review under the Administrative Procedure Act. This provision . . . does not give FSLIC the power to adjudicate claims with the force of law; nor does it preclude claimants from resorting to the courts for a determination of the validity of their claims.[194]

The Court said that when Congress "meant to confer adjudicatory authority on FSLIC it did so explicitly and set forth the relevant procedures in considerable detail[,]" specifying "the agency procedures to be followed and the remedies available, with explicit reference to judicial review under the Administrative Procedure Act."[195] Congress had not done so with respect to creditors' claims against the FSLIC as receiver.[196]

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[191] *Id.* at 1220.
[192] *Id.*
[193] Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp., 489 U.S. 561, 572 (1989) ("Congress granted FSLIC various powers in its capacity as receiver, but they do not include the power to adjudicate creditors' claims.").
[194] *Id.* at 573.
[195] *Id.* at 574.
[196] *Id.*

The Solicitor General argued in the Supreme Court that, although Congress had not created a claims process, the Bank Board and FSLIC were authorized to use regulatory authority to establish a claims procedure for creditors and to require creditors to exhaust that procedure before seeking judicial review.[197] The Supreme Court held that those regulations exceeded statutory authority (1) because they "purport to confer adjudicatory authority on FSLIC and on the Bank Board to make binding findings of fact and conclusions of law, subject only to 'judicial review' presumably under the Administrative Procedure Act as opposed to *de novo* judicial determination," and (2) "the regulations do not place a clear and reasonable time limit on FSLIC's consideration of whether to pay, settle, or disallow claims."[198] This administrative establishment of a claims procedure and requirement that it be exhausted before judicial review exceeded statutory authority, the Court held, noting that "[a]dministrative remedies that are inadequate need not be exhausted."[199] The Court supported its interpretation of the statute as not giving adjudicatory authority to FSLIC by noting that adjudication by FSLIC subject only to APA review would raise "serious constitutional difficulties" under *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, and related cases interpreting Congress's authority under Article III of the Constitution to limit access to Article III courts.[200]

In *Coit*, the issue was whether creditors could secure de novo judicial review or only review under the APA. By holding "that FSLIC

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[197] *Id.* at 579.
[198] *Id.* at 586.
[199] *Id.* at 587.
[200] *Id.* (citing N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)). In this discussion the *Coit* Court also cited *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986) and *Crowell v. Benson*, 285 U.S. 22 (1932). Subsequent decisions have illuminated the limitations on Congress's ability to limit the ability of Article III courts to review adjudication by administrative agencies. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 54-55 (1989); *see* Stern v. Marshall, 131 S. Ct. 2594, 2601 (2011); *see also* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1942, 1949 (2015). Without engaging the argument, it is pertinent to emphasize that even the cases that allow Congress to limit judicial review of agency adjudication do not authorize Congress to eliminate Article III court involvement altogether without the acquiescence of the parties. *See, e.g.*, *Schor*, 478 U.S. at 848; Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2174 (2014); *Crowell*, 285 U.S. at 54.

has not been granted adjudicatory authority by Congress and that Coit is entitled to *de novo*" review, the Court did not need to "reach Coit's claim that adjudication by FSLIC subject only to judicial review under the Administrative Procedure Act" would be unconstitutional.[201] The Court said that the statute properly can and should be read to avoid "serious constitutional difficulties."[202]

In *Coit*, the Supreme Court also rejected the *Hudspeth* ruling that allowing judicial review of creditors' claims "'would delay the receivership function of distribution of assets' and that 'such a delay is a "restraint" within the scope of the statute.'"[203] Analyzing the anti-injunction language in its statutory context, the Supreme Court noted that § 1464(d)(6)(A) "authorizes associations placed in receivership to bring suit . . . to challenge the receiver's appointment."[204] "Following the provision for a court challenge to remove the receiver comes" the anti-injunction language.[205] Thus, the Supreme Court said, "When read in its statutory context, this provision prohibits untimely challenges to the receiver's appointment or collateral attacks attempting to restrain the receiver from carrying out its basic functions."[206] "In sum," the Court wrote, allowing de novo judicial consideration of the claims "simply would not 'restrain or affect' FSLIC's exercise of its receivership functions within the meaning of § 1464(d)(6)(C)."[207]

In 1989, Congress enacted FIRREA to address "the massive losses occurring in the nation's savings and loan institutions and the

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[201] *Coit*, 489 U.S. at 578 (stating that Coit's constitutional claims were (1) that denial of de novo review would violate Article III of the Constitution under *Northern Pipeline,* and (2) that FSLIC-only adjudication of state law claims would violate the Due Process Clause and the Seventh Amendment).
[202] *Id.* at 579.
[203] *Id.* at 566, 574.
[204] *Id.* at 575.
[205] *Id.* at 576.
[206] *Id.* at 575 (adding that the anti-injunction language "does not divest state and federal courts of subject matter jurisdiction to determine the validity of claims against institutions under a FSLIC receivership"). The Supreme Court explained that although FSLIC had made a jurisdictional argument (and may have continued to make it in other cases), the Solicitor General "concede[d] . . . that the District Court had subject matter jurisdiction over Coit's claim." *Id.* at 572 & n.1
[207] *Id.* at 577.

deposit insurance fund protecting their depositors."[208] To fill the void that *Coit* had noted in FISA, FIRREA added § 1821(d)(3) creating an administrative procedure for bringing claims against the FDIC as receiver.[209] Section 1821(d)(6)(A) provides for judicial review under the APA of the FDIC's resolution of those claims.[210] Section 1821(d)(13)(D), titled "Limitation of judicial review," provides that "except as otherwise provided in this subsection, no court shall have jurisdiction over" certain claims against the agency as receiver.[211] Although this expressly negates jurisdiction, "every court that has addressed the issue has interpreted § 1821(d)(13)(D) 'as imposing a statutory exhaustion requirement rather than an absolute bar to jurisdiction.'"[212] As the District of Columbia Circuit stated, "to

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[208] Resolution Tr. Corp. v. W.W. Dev. & Mgmt., Inc., 73 F.3d 1298, 1303 (3d Cir. 1996); *accord* Rosa v. Resolution Tr. Corp., 938 F.2d 383, 388 (3d Cir. 1991) ("Congress recently enacted FIRREA as a response to the crisis in the savings and loan industry that has commanded so much public attention in recent years."); *see* O'Melveny & Myers v. Fed. Deposit Ins. Corp., 512 U.S. 79, 82 n.1 (1994). *See generally* United States v. Winstar Corp., 518 U.S. 839, 844-58 (1996) (discussing the background to the enactment of FIRREA, and earlier, unsuccessful attempts to bolster the savings and loan industry).

[209] *W.W. Dev. & Mgmt., Inc.*, 73 F.3d at 1303 n.9 & 1306 n.15 (stating that Congress "designed FIRREA to be consistent with" the decision in *Coit*, providing what *Coit* had held was lacking for—FSLIC authority for the agency to adjudicate claims against failed institutions, "a reasonable time limit on the corporation's ability to postpone judicial review," and a requirement that the agency procedure be exhausted before judicial review); Homeland Stores, Inc. v. Resolution Tr. Corp., 17 F.3d 1269, 1274 n.5 (10th Cir. 1994) ("[S]etting up the FIRREA claims process, Congress intended to be responsive to the constitutional concerns raised by the Supreme Court in *Coit*."). In his concurrence in *Coit*, Justice Scalia had cited the pending congressional consideration of FIRREA and said that "instead of the dicta in Part IV of the opinion, we should have remanded FSLIC to that legislative process." *Coit*, 489 U.S. at 592 (Scalia, J., concurring). (A similar procedure is provided in HERA. *See* 12 U.S.C. § 4617(b)(3) (2012)).

[210] 12 U.S.C. § 1821(d)(6)(A) (2012).

[211] 12 U.S.C. § 1821(d)(13)(D).

[212] Village of Oakwood v. State Bank & Tr. Co., 539 F.3d 373, 385-86 (6th Cir. 2008) (citing cases from the Third, Fourth, Fifth, Eighth, and D.C. Circuits); *see* Sharpe v. Fed. Deposit Ins. Corp., 126 F.3d 1147, 1152 n.1 (9th Cir. 1997) (stating that "only" if a clamant did not request "administrative review of a claim determined by the FDIC" would the court review that claim de novo); Stamm v. Paul, 121 F.3d 635, 639-642 (11th Cir. 1997) (stating that

foreclose judicial jurisdiction altogether [would be] . . . a result troubling from a constitutional perspective and certainly not the goal of FIRREA."[213]

The Tenth Circuit agreed, interpreting the preclusion of judicial review as an exhaustion requirement and holding that the district court did have jurisdiction to consider a claim against the receiver for matters not included in the claims process.[214] The Tenth Circuit said:

> [W]ere we . . . to find these claims included in the jurisdictional bar of § 1821(d)(13)(D), Homeland would have neither an administrative nor a judicial forum for the claims. Such an outcome raises constitutional problems [citing *Coit*]. . . . . In this case the outcome would be that much more problematic [than in *Coit*] because Homeland would not only be denied timely judicial review, but all review.[215]

D. HERA Does Not Preclude Judicial Review or the Provision of Injunctive or Other Equitable Relief Under the APA with Respect to Improper Denials of Mortgage Modifications

As we have seen above, there is no preclusion of judicial review of actions taken when FHFA is conservator of Fannie and

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extension of administrative claims procedure by RTC and FDIC to post-receivership claims requires claimants to exhaust that procedure before seeking judicial review); Freeman v. Fed. Deposit Ins. Corp., 56 F.3d 1394, 1399 (D.C. Cir. 1995) (stating that the section bars courts from exercising jurisdiction over claims against the FDIC as receiver "unless the claimant first exhausts his administrative remedies by filing claims under the FDIC's administrative claims process."); Gallagher, *supra* note 147, at 43 (analyzing federal cases construing § 1821(j) and concluding that this section "limits the types of court actions that can be initiated against either [the FDIC or the RTC] [, but] [a]s indicated by Ward v. Resolution Trust Corp. . . . this protection from certain types of court action is not absolute").

[213] Auction Co. of Am. v. Fed. Deposit Ins. Corp., 141 F.3d 1198, 1200 (D.C. Cir. 1998).

[214] *Homeland Stores, Inc.*, 17 F.3d at 1276.

[215] *Id.* at 1274 n.5.

Freddie. There is an anti-injunction provision, § 4617(f), which says that "except as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver."[216]

Section 4617(f) certainly does not immunize every action of FHFA from judicial review. It explicitly contemplates review "provided in this section or at the request of the Director."[217] Moreover, it applies only when FHFA is acting "as a conservator or receiver."[218] In addition, it applies "only when the agency acts within the scope of its authorized powers."[219] Courts generally agree that "if the FHFA were to act beyond statutory or constitutional bounds in a manner that adversely impacted the rights of others, § 4617(f) would not bar judicial oversight or review of its actions."[220] The discussion below explores three reasons why § 4617(f) does not preclude review or equitable relief under the APA for denials of mortgage

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[216] 12 U.S.C. § 4617(f) (2012). Some courts discuss the section as if it were a jurisdictional bar. *See* Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 228 n.22 (D.D.C. 2014) (noting that the D.C. Circuit considers the provision "as a bar on relief," but that the Second, Ninth, and Eleventh Circuits interpret it as a jurisdictional bar); *In* re Fed. Home Loan Mortg. Corp. Derivative Litig., 643 F. Supp. 2d 790, 799 (E.D. Va. 2009) (concluding that § 4617(f) is an anti-injunction provision), *aff'd per curiam sub nom.* La. Mun. Police Emps. Ret. Sys. v. Fed. Hous. Fin. Agency, 434 F. App'x 188 (4th Cir. 2011). There is disagreement about whether the anti-injunction language applies to rescission, declaratory judgments, and other non-injunctive forms of equitable relief. *See, e.g.*, Heno v. Fed. Deposit Ins. Corp., 996 F.2d 429, 432 n.6 (1st Cir. 1993) (noting in dicta that the "express language does not appear to bar *non*injunctive equitable relief against the FDIC"), *withdrawn*, 20 F.3d 1204 (1st Cir. 1994); Rechler P'ship v. Resolution Tr. Corp., No. 90-3091, 1990 WL 711357, at *7 (D. N.J. Sept. 7, 1990) (allowing declaratory judgment action). *But see* Nat'l Tr. for Historic Pres. v. Fed. Deposit Ins. Corp., 21 F.3d 469, 471 n.2 (D.C. Cir. 1994) (stating that distinguishing declaratory from injunctive relief for this purpose is foreclosed by *California v. Grace Brethren Church*, 457 U.S. 393, 408-09 (1982)).

[217] 12 U.S.C. § 4617(f) (2012).

[218] *Id.*

[219] James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1093 (D.C. Cir. 1996).

[220] Leon Cnty. v. Fed. Hous. Fin. Agency, 700 F.3d 1273, 1278 (11th Cir. 2012) (quoting *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d at 799); *accord* County of Sonoma v. Fed. Hous. Fin. Agency, 710 F.3d 987, 992 (9th Cir. 2013) (citing Sharpe v. Fed. Deposit Ins. Corp., 126 F.3d 1147, 1155 (9th Cir. 1997)).

modifications: first, FHFA's actions in this regard are taken as regulator, not as conservator; second, adjudication of these requests is not within the authority Congress has given to FHFA as conservator; and, third, judicial oversight would not "restrain or affect" the powers of FHFA as conservator.[221]

1. When FHFA Denies Mortgage Modifications for GSE Mortgages, It Is Acting as Regulator, not Conservator, of Fannie and Freddie

Courts agree that "FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp."[222] As the Eleventh Circuit wrote in *Leon County*, "Congress did not intend that the nature of the FHFA's actions would be determined based upon the FHFA's self-declarations because the distinction between regulator and conservator would be one without a meaning or effect."[223]

"FHFA's power has limits. . . . FHFA cannot evade judicial review and the APA's requirements . . . simply by invoking its authority as conservator. Analysis of any challenged action is necessary to determine whether the action falls within the broad, but not infinite, conservator authority."[224]

The PACE cases and *Massachusetts v. Federal Housing Finance Agency* analyzed whether a general directive issued by FHFA were a regulatory or conservatorship action.[225] The Eleventh Circuit said that when FHFA issues a directive "that applies across the board to an entire category of cases, it contains an aspect of rulemaking and should therefore be carefully examined to assure that the FHFA is not simply attempting to avoid its responsibility to give notice and provide an opportunity for public comment."[226] As the Eleventh Circuit stated, courts "must consider all relevant factors pertaining to the directive . .

[221] U.S.C. § 4617(f) (2012).
[222] *Leon Cnty.*, 700 F.3d at 1278; *accord County of Sonoma*, 710 F.3d at 994.
[223] *Leon Cnty.*, 700 F.3d at 1278.
[224] *County of Sonoma*, 710 F.3d at 994.
[225] Town of Babylon v. Fed. Hous. Fin. Agency, 699 F.3d 221 (2d Cir. 2012); *Leon Cnty.*, 700 F.3d at 1273; Massachusetts v. Fed. Hous. Fin. Agency, 54 F. Supp. 3d 94, 100 (D. Mass. 2014).
[226] *Leon Cnty.*, 700 F.3d at 1278.

. includ[ing] . . . its subject matter, its purpose, its outcome, and whether it involves a matter in which public comment might be relevant, appropriate, useful, or intended by Congress."[227] A directive that "establish[es] a general set of criteria to be applied across the board by Fannie Mae and Freddie Mac to their mortgage transactions in general" would be a regulatory action.[228] On the other hand, conservatorship actions are "discreet management decision[s];" actions that "evaluate[] the risks of certain business transactions and take[] prudential action to avoid those that it deems undesirable;" "directive[s] to an institution in conservatorship to mitigate or avoid a perceived financial risk;" "business judgment[s] intended to 'preserve and conserve [the GSEs'] assets and property.'"[229]

In the PACE cases, the courts held that FHFA's decision "not to purchase a class of mortgages that it believes pose excessive risk" is "'within the responsibilities of a protective conservator, acting as a prudent business manager, to decline to purchase a mortgage when its lien will be relegated to an inferior position for payment.'"[230] The Second Circuit described the PACE directive as "an FHFA directive to an institution in conservatorship to mitigate or avoid a perceived financial risk."[231]

The issue here does not regard FHFA's general directives (although Fannie's Single-Family Servicing Guide and Freddie's Single-Family Seller/Servicer Guide might well be required to be subject to the rulemaking requirements of the APA).[232] The issue here is whether adjudication of homeowners' claims for mortgage

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[227] *Id.*
[228] *Id.*
[229] *Massachusetts*, 54 F.3d at 100-02; *see also* County of Sonoma v. Fed. Hous. Fin. Agency, 710 F.3d 987, 989 (9th Cir. 2013); *Town of Babylon*, 699 F.3d 221, 227-28 (2d. Cir. 2012); *Leon Cnty.*, 700 F.3d at 1278-79; Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 222 (D.D.C. 2014).
[230] *County of Sonoma*, 710 F.3d at 993 (quoting *Leon Cnty.*, 700 F.3d at 1279).
[231] *Town of Babylon*, 699 F.3d at 228.
[232] *See* 5 U.S.C. § 551(4) (2012) (defining a "rule" as including "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015) (referencing "much scholarly and judicial debate" about when "rules" must be subject to notice-and-comment procedures); Texas v. United States, 809 F.3d 134, 176-77 (5th Cir. 2015), as revised (Nov. 25, 2015), *cert. granted*, No. 15-674, 2016 WL 207257 (U.S. Jan. 19, 2016).

modifications is conservatorship action: that is, "discreet management decision[s]" that "evaluate[] the risks of certain business transactions and take[] prudential action to avoid those that it deems undesirable," "business judgment[s] intended to 'preserve and conserve [the GSEs'] assets and property.'"[233]

When homeowners challenge the failure of FHFA, Fannie, Freddie, and their servicers to adhere to HAMP standards, the homeowners are not asking the court to address "the exercise of powers or functions of the Agency *as conservator*."[234] The purpose of the anti-injunction language in HERA and FIRREA has been to avoid the courts' interference with the conservator's or receiver's supervision of failed financial institutions.[235] The anti-injunction language was not intended to immunize FHFA from judicial review of its disregard of the standards governing mortgage modifications under HAMP.[236]

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[233] *Massachusetts*, 54 F.3d at 100-02; *see Town of Babylon*, 699 F.3d at 227-28; *see also* Londoner v. Denver, 210 U.S. 373 (1908) (showing the unclear distinction between rulemaking and adjudication); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (holding that due process concerns attach only to adjudications, and not to rulemaking).

[234] 12 U.S.C. § 4617(f) (2012) (emphasis added).

[235] *See, e.g.*, Hindes v. Fed. Deposit Ins. Corp., 137 F.3d 148, 160 (3d Cir. 1998) ("[A]nti-injunction provision intended to permit the FDIC to perform its duties as conservator or receiver promptly and effectively without judicial interference."). *Hindes* gives a very expansive reading to the anti-injunction provision of § 1821(j) (FIRREA) holding that it "can preclude relief even against a third party . . . where the result is such that the relief 'restrains or *affects* the exercise of powers . . . by an agency without being aimed directly at it." *Id.* (emphasis in original). Nonetheless, *Hindes* notes that the anti-injunction language would not apply where the effect of the court order "would be of little consequence to [the agency's] overall functioning as a receiver." *Id.* at 161. The court notes also that its holding "does not deny appellants a judicial remedy for an appropriate damages claim." *Id.*

[236] *See* Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1219 (9th Cir. 1987) (discussing the difference between the FSLIC's "role as a receiver as compared to its role as a supervisor of thrift institutions"), *cert. dism'd sub nom.* Fed. Sav. & Loan Ins. Corp. v. Stevenson Assocs., 488 U.S. 935 (1988); Glen Ridge I Condominiums, Ltd. v. Fed. Sav. & Loan Ins. Corp., 734 S.W.2d 374, 382 (Tex. App. 1986) (stating that this dispute "does not concern those processes that FSLIC was chiefly designed to promote" but rather "concerns . . . preventing FSLIC from exercising [a] . . . power of foreclosure, which constitute[s] matters outside those processes that are the chief function

Adjudication of mortgage modification claims is not the action of a conservator. What makes absolutely clear that FHFA's administration of GSE HAMP is an action of FHFA as regulator, and not as conservator, is the fact that FHFA also administers non-GSE HAMP, which governs all the mortgages that are not held, securitized, or guaranteed by Fannie and Freddie. What FHFA does for non-GSE HAMP it does unquestionably in its capacity as regulator. The nature of FHFA's administration of HAMP is not different for GSE HAMP. As FHFA's administration of non-GSE HAMP is the action of FHFA as regulator, its administration of GSE HAMP is also the action of FHFA as regulator, not conservator.[237] Those regulatory actions plainly are not within § 4617(f).[238]

2. When FHFA Adjudicates Mortgage Modifications for GSE Mortgages, It is Acting Outside Its Statutory Authority as Conservator

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of FSLIC and situations arising after those processes have broken down"), *writ of error denied*, 750 S.W.2d 757 (Tex. 1988), *cert. denied*, 490 U.S. 1004 (1989).

[237] In the case that became *County of Sonoma* on appeal, the district court had held that FHFA's PACE directives were actions of FHFA as regulator, not conservator, relying in part on the fact that FHFA's PACE directives applied to the Federal Home Loan Banks (which were not in conservatorship) as well as to Fannie and Freddie. California *ex rel.* Harris v. Fed. Hous. Fin. Agency, 894 F. Supp. 2d 1205, 1218 (N.D. Cal. 2012), *vacated sub nom.* County of Sonoma v. Fed. Hous. Fin. Agency, 710 F.3d 987 (9th Cir. 2013). The Ninth Circuit rejected this argument because FHFA had "directed the Enterprises and the Federal Home Loan Banks to do different things: . . . the . . . [b]anks were directed only to review their collateral policies." *County of Sonoma*, 710 F.3d at 994. The Ninth Circuit said "[t]hat FHFA treated different entities differently undermines . . . the conclusion that it was undertaking regulatory activity applicable to all the entities under its regulatory purview." *Id.*; *see also Town of Babylon*, 699 F.3d at 228 n.5. With respect to HAMP, however, FHFA is treating all homeowners and servicers similarly—purporting to provide dispositive adjudication, with no judicial review, for all mortgage modification claims.

[238] *See* 12 U.S.C. § 4617(f) (2012) ("[N]o court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver").

The anti-injunction provision applies "only when the agency acts within the scope of its authorized powers."[239] "[I]f the FHFA were to act beyond statutory or constitutional bounds in a manner that adversely impacted the rights of others, § 4617(f) would not bar judicial oversight or review of its actions."[240] This principle was established under FIRREA and has been acknowledged as binding in the HERA cases as well.[241]

Comparing FHFA's actions with respect to HAMP to the FSLIC actions at issue in *Coit* shows that in adjudicating homeowners' claims for mortgage modifications, FHFA is acting outside the authority Congress has given to it. In *Coit*, the FSLIC claimed that, subject to judicial review under the APA, it had authority to adjudicate creditors' claims against institutions the FSLIC had put into receivership. The Supreme Court held that Congress had not given that authority to the FSLIC, stating that

> the directive that FSLIC as receiver "shall pay all valid credit obligations of the

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239 James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1093 (D.C. Cir. 1996).

240 Leon Cnty. v. Fed. Hous. Fin. Agency, 700 F.3d 1273, 1278 (11th Cir. 2012) (quoting *In re* Fed. Home Loan Mortg. Corp. Derivative Litig., 643 F. Supp. 2d 790, 799 (E.D. Va. 2009), *aff'd per curiam sub nom*. La. Mun. Police Emps. Ret. Sys. v. Fed. Hous. Fin. Agency, 434 Fed. App'x 188 (4th Cir. 2011)).

241 *See, e.g.*, Sharpe v. Fed. Deposit Ins. Corp., 126 F.3d 1147, 1155 (9th Cir. 1997) (explaining that FIRREA anti-injunction provision "shields only the exercise of powers or functions Congress gave to the FDIC; the provision does not bar injunctive relief when the FDIC has acted beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions'" (quoting Nat'l Tr. for Historic Pres. v. Fed. Deposit Ins. Corp., 995 F.2d 238, 240 (D.C. Cir. 1993)), *judgment vacated*, 5 F.3d 567 (D.C. Cir. 1993), *reinstated in relevant part*, 21 F.3d 469, 472 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1065 (1994); *James Madison Ltd.*, 82 F.3d at 1093-94 ("We thus read § 1821(j) to prevent courts from interfering with the FDIC on when the agency acts within the scope of its authorized powers."); Freeman v. Fed. Deposit Ins. Corp., 56 F.3d 1394, 1398 (D.C. Cir. 1995); Fischer v. Resolution Tr. Corp., 59 F.3d 1344, 1349 (D.C. Cir. 1995); Volges v. Resolution Tr. Corp., 32 F.3d 50, 53 (2d Cir. 1994); Nat'l Union Fire Ins. Co. v. City Savings, F.S.B., 28 F.3d 376, 389-91 n.16 (3d Cir. 1994); Ward v. Resolution Tr. Corp., 996 F.2d 99, 103 (5th Cir. 1993). For a discussion of HERA, see *Leon Cnty.*, 700 F.3d at 1278; *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 220 (D.D.C. 2014).

> association" cannot be read to confer upon FSLIC the power to adjudicate claims . . . subject only to review under the Administrative Procedure Act. This provision . . . does not give FSLIC the power to adjudicate claims with the force of law; nor does it preclude claimants from resorting to the courts for a determination of the validity of their claims.[242]

The Court said that when Congress "meant to confer adjudicatory authority, 'it did so explicitly and set forth the relevant procedures in considerable detail, [specifying] . . . the agency procedures to be followed and the remedies available, with explicit reference to judicial review under the Administrative Procedure Act.'"[243] Congress had not done so with respect to creditors' claims against the receiver (involved in *Coit*) and Congress has not done so with respect to homeowners' claims for modification of GSE mortgage loans.

In this situation, FHFA takes a position far more radical than that of the FSLIC in *Coit*. In *Coit*, FSLIC acknowledged that claimants could secure review under the APA of FSLIC's decisions.[244] Here, however, FHFA claims that homeowners are not entitled to any judicial supervision of FHFA's decisions—neither APA review nor de novo review.[245] Such an interpretation of HERA raises obvious and grave constitutional problems.

Coit claimed that adjudication by the FSLIC subject only to judicial review under the APA, denying de novo review, would violate Article III of the Constitution under *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[246] the Due Process Clause, and the Seventh Amendment.[247] By holding "that FSLIC has not been granted adjudicatory authority by Congress and that Coit is entitled to *de novo*"

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[242] Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp., 489 U.S. 561, 573 (1989).
[243] *Id.* at 574.
[244] *Id.*
[245] *See supra* notes 142-71 and the accompanying text.
[246] 458 U.S. 50 (1982).
[247] *Coit* 489 U.S. at 578; *see* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 117 (1982).

review, the Court was able to avoid these "serious constitutional difficulties."[248]

These "serious constitutional difficulties" appear with even more force here, where FHFA claims the power to make dispositive decisions without any judicial involvement whatsoever, and *Northern Pipeline's* powerful protections of the judicial power vested in Article III courts have been reinforced by *Granfinanciera v. Nordberg* and *Stern v. Marshall*,[249] and other decisions of the Supreme Court.[250] The Supreme Court has been steadfast in its determination to prohibit Congress from "impermissibly threaten[ing] the institutional integrity of the Judicial Branch" or "emasculat[ing] constitutional courts and thereby prevent 'the encroachment or aggrandizement of one branch at the expense of the other.'"[251] Even in the decisions that allowed some exercise of adjudicatory power by agencies, the Supreme Court emphasized that some action by Article III courts continued to be required.[252]

The language of the financial regulation statutes does not give to FHFA, Treasury, Fannie, or Freddie authority to adjudicate these claims by homeowners. Section 4617(b)(5), added by HERA, deals with the authority of the receiver to determine claims, § 4617(b)(5)(D) gives the receiver authority to disallow claims, and § 4617(b)(5)(E)

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[248] *Coit*, 489 U.S. at 578-79.
[249] 492 U.S. 33 (1989); 131 S. Ct. 2594 (2011).
[250] Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting) ("Although Congress may assign some bankruptcy proceedings to non-Article III courts, there are limits on that power.").
[251] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850-51 (1986); *see Wellness Int'l*, 135 S. Ct. at 1944 (quoting *Schor*).
[252] *See, e.g.*, Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2172 (2014) ("[E]ven though bankruptcy courts are statutorily authorized to enter final judgment on a class of bankruptcy-related claims, namely, those labeled by Congress as 'core,' Article III of the Constitution prohibits bankruptcy courts from finally adjudicating certain of those claims, including a common-law counterclaim for tortious interference against a creditor to the estate."); *Schor*, 478 U.S. at 853 ("CFTC orders . . . are enforceable only by order of the district court."); Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 450 n.7 (1977) (referencing agency adjudication "as an adjunct to an Art. III court"); Crowell v. Benson, 285 U.S. 22, 54 (1932) (holding it is essential to "preserv[e] [the] complete authority [of courts] to insure the proper application of the law").

precludes judicial review of agency determinations under (5)(D).[253] Section 4617(b)(6) provides for judicial determination of claims.[254] But all of § 4617(b)(5) and (6) deal with receivership only, not conservatorship, and receivership only is addressed by § 4617(b)(11)(D), which provides that

> Except as otherwise provided in this subsection, no court shall have jurisdiction over –
>
> (i) any claim or action for payment from or any action seeking a determination of rights with respect to, the assets or charter of any regulated entity for which the Agency has been appointed receiver; or
>
> (ii) any claim relating to any act or omission of such regulated entity or the Agency as receiver.[255]

When FHFA acts as conservator, the statute does not provide an elaborate procedure for resolving claims, as it does with respect to receivership. Section 4617(b)(2)(H), regarding "[p]ayment of valid obligations," gives the agency authority to "determin[e] any claim against the regulated entity,"[256] but this is similar to the provision found inadequate in *Coit*, where the Supreme Court held that

> the directive that FSLIC as receiver "shall pay all valid credit obligations of the association" cannot be read to confer upon FSLIC the power to adjudicate claims . . . subject only to review under the Administrative Procedure Act. This provision . . . does not give FSLIC the power

[253] 12 U.S.C. § 4617(b)(5) (2012)
[254] § 4617(b)(6).
[255] § 4617(b)(11)(D). Section 4617(d)(8)(B), regarding "Certain qualified financial contracts," also refers to "any judicial action or proceeding brought against any receiver."
[256] § 4617(b)(2)(I)(i)(I).

> to adjudicate claims with the force of law; nor does it preclude claimants from resorting to the courts for a determination of the validity of their claims.[257]

There is no reason to believe that Congress had any intention to confer on FHFA dispositive adjudicatory authority over mortgage modification claims. To avoid such "serious constitutional difficulties" as the Supreme Court identified in *Coit*, the statutes should be interpreted in accordance with their language, which makes no provision for agency adjudication of these claims. There is, therefore, no basis for concluding that judicial consideration of such claims would interfere with or restrain any actions within the authority Congress has given to FHFA.[258]

FHFA's position with respect to this issue is startling: that it can create a program that allows mortgage foreclosure relief to some homeowners but denies it to many others and that a homeowner dissatisfied with FHFA's administration of this program cannot secure

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[257] Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp., 489 U.S. 561, 573 (1989).

[258] *See* Glen Ridge I Condominiums, Ltd. v. Fed. Sav. & Loan Ins. Corp, 734 S.W.2d 374, 376 (Tex. App. 1986) (holding that 12 U.S.C. § 1464(d)(6)(C), barring a court from "restrain[ing] or affect[ing] the exercise of powers or functions of a receiver," unconstitutionally vests in the FSLIC power to adjudicate a request to enjoin foreclosure), *writ of error denied*, 750 S.W.2d 757 (Tex. 1988), *cert. denied*, 490 U.S. 1004 (1989); *see also* Nat'l Tr. for Historic Pres. v. Fed. Deposit Ins. Corp., 995 F.2d 238, 239 n.1 (D.C. Cir. 1993). The *National Trust* panel, *per curiam*, emphasized that the case involved the FDIC's "performing a routine 'receivership' function"; the panel majority said: "Deciding only the clear case before us, we do not reach further to consider whether § 1821(j) covers every other case a legal mind could conjure." *Id.* at 240. Judge Wald dissented from the panel's deciding the issue on a motion for a stay, eschewing full briefing and argument. She noted that considerations of congressional intent, and in particular indications of "congressional concern for the availability of alternative remedies," should be taken into account. *Id.* at 242 n.2. She wrote that the record before the court "shows no congressional intent, reflected in the legislative history, to grant the FDIC virtually unprecedented authority to carry out its statutory responsibilities . . . unfettered by any judicial intervention." *Id.* at 243. When the Court of Appeals subsequently reheard the case, it accepted this analysis by Judge Wald. Nat'l Tr. for Historic Pres. v. Fed. Deposit Ins. Corp., 21 F.3d 469, 470 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1065 (1994).

judicial review of the actions (or inactions) by or on behalf of the agency.[259] Congress did provide in § 4617(b) (HERA) a "sweeping ouster of courts' power to grant equitable remedies"; this "may appear drastic."[260] This apparent grant of "immense discretion" to the agency has been justified as in service to Congress's determination to allow a crisis to be resolved expeditiously by a conservator or receiver.[261] It does not and cannot justify a grant of vast, unreviewable discretion to an agency that is setting standards and applying them to mortgages held not only by the institutions that are in conservatorship but to all institutions that hold or guarantee mortgages.

3. Allowing Injunctive Relief for Mortgage Modification Denials that Violate Program Standards Would Not "Restrain or Affect" the Power of FHFA as Conservator

Finally, even if the anti-injunction language were thought to apply to the actions of Fannie and Freddie in the administration of HAMP, the language bars only claims that "restrain or affect" the operations of the conservator.[262] Requiring adherence to HAMP's standards would not "restrain or affect" the conservatorship. *Coit* is very much on point here. In *Coit*, Congress had not given the agency authority to adjudicate creditors' claims against the institution in receivership; here, Congress has not given the agency authority to adjudicate homeowners' modification claims against the institution in conservatorship.[263] In *Coit*, the Supreme Court held that Congress's failure to provide for agency consideration of those claims meant that de novo judicial review of those claims was appropriate.[264] And in *Coit*

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[259] *See supra* notes 15-17, 71-78, 142-71 and the accompanying text.
[260] Freeman v. Fed. Deposit Ins. Corp., 56 F.3d 1394, 1398-99 (D.C. Cir. 1995) (addressing an equivalent provision of FIRREA); *see also* Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 220 n.12 (D.D.C. 2014).
[261] *Perry Capital LLC*, 70 F. Supp. 3d at 225; *see Freeman*, 56 F.3d at 1399.
[262] 12 U.S.C. § 4617(f) (2012).
[263] Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp., 489 U.S. 561, 575 (1989) ("[N]one of the statutes governing FSLIC and the Bank Board confer upon FSLIC the power to adjudicate claims against an insolvent savings and loan over which FSLIC has been appointed receiver.").
[264] *Id.*

the Court said that judicial resolution of such claims would not restrain or interfere with the powers and functions of the receiver.[265]

Moreover, that judicial review might cause some delay in final determination of modification requests does not ipso facto mean that judicial review will "restrain or affect" the powers of FHFA as conservator. In *James Madison Ltd.*, for example, the D.C. Circuit said that causing some delay in the agency's actions "would not necessarily frustrate Congress's goal of winding up the affairs of troubled institutions expeditiously," and emphasized that the statute has other purposes as well, including an intention "to protect the rights of financial institutions by allowing them to appeal their seizures."[266] Similarly, HERA evidences strong congressional concern to protect the interests of homeowners and to prevent unnecessary foreclosures.

For all these reasons, the anti-injunction language of HERA does not bar federal courts from reviewing claims that the servicers handling loans owned by Fannie Mae and Freddie Mac have violated the standards governing HAMP. Homeowners making those claims are entitled to judicial review under the APA.

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[265] *Id.* ("[A]t the time of the statute's enactment it was well established at common law that suits establishing the existence or amount of a claim against an insolvent debtor did not interfere with or restrain the receiver's possession of the insolvent's assets or its exclusive control over the distribution of assets to satisfy claims.").

[266] James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1094 (D.C. Cir. 1996).