Borrowers May Not Benefit from the Mortgage Settlement Agreement of 2012 without a True Private Right of Action

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BORROWERS MAY NOT BENEFIT FROM THE MORTGAGE SETTLEMENT AGREEMENT OF 2012 WITHOUT A TRUE PRIVATE RIGHT OF ACTION

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I. INTRODUCTION

The United States government, along with forty-nine states, announced on February 8, 2012 that they had reached a settlement (Settlement Agreement) with five of the largest mortgage servicers in the country for $25 billion, marking the largest consumer protection settlement in history. The government declared that the purpose of the Settlement Agreement was to remedy the injustices that borrowers faced when they qualified for modifications on their underwater homes but were foreclosed on without being given the opportunity for these modifications. While proponents of this Settlement Agreement claim that it will alleviate the rampant foreclosing practice that servicers have promoted by obligating them to change their servicing standards, consumer advocates are skeptical that it will work. These advocates' skepticism arises from the fact that previous programs have failed to help many people that faced foreclosure due, in large part, to a lack of a strong enforcement mechanism. Despite the government's announcement that the Settlement Agreement will not prevent actions brought by individual borrowers, the language of the Settlement Agreement, coupled with courts' treatment of similar programs, seemingly limits enforcement to only the parties named in the Settlement Agreement.


2. See id. (declaring that the agreement provides substantial financial relief to homeowners and establishes significant new homeowner protections for the future).

3. Compare id. (announcing that the agreement will hold mortgage servicers accountable, allow struggling homeowners to benefit from reduced principals and refinancing, and ensure the abuses of the past are not repeated), with Gretchen Morgenson, The Deal Is Done, but Hold the Applause, N.Y. TIMES (Feb. 11, 2012), http://www.nytimes.com/2012/02/12/business/mortgage-settlement-leaves-much-to-be-desired-fair-game.html (noting that the greatest obstacle is how the settlement will be policed since banks have often escaped their promises).


5. Compare Settlement Agreement at *E-15, United States v. Bank of Am., No. 1:12-cv-00361-RMC (D.D.C. Apr. 4, 2012), Docs. 10-14, available at www.nationalmortgagesettlement.com (follow hyperlinks on right column under “Settlement Documents”) [hereinafter Settlement Agreement] (providing enforcement action rights only to parties to the agreement), with Settlement Agreement Announcement, supra note 1 (stating that the individual borrowers who wish to bring
This Recent Development will argue that like in previous agreements between the government and servicers, borrowers will not be able to access courts for violations of the Settlement Agreement because it does not provide borrowers a private right of action (PRA). Part II discusses one of the first government programs to address foreclosure practices, the Home Affordable Modification Program (HAMP), the interpretive case law regarding its lack of a PRA, and the Settlement Agreement’s key provisions on enforcement. Part III analyzes the reasoning in HAMP cases and deduces that courts will find that borrowers will not have a PRA in the Settlement Agreement. Part IV discusses the ramifications of denying borrowers a PRA, highlights inefficiencies within the current enforcement plan designed to assess penalties to servicers, and provides suggestions on how to remedy issues of accountability. Part V concludes that the government is, and has been, hesitant to grant a PRA to borrowers, and as such, the Settlement Agreement risks meeting the same fate as its predecessors.

II. BACKGROUND

A. The Home Affordable Modification Program

Established under the Temporary Asset Relief Program in 2008, HAMP gives the government the authority to use incentive payments to encourage servicers to modify eligible mortgages so that struggling borrowers’ monthly payments are reduced to affordable and sustainable levels. Home mortgage lenders use servicers to collect monthly payments, approve or deny borrowers’ requests to modify any portion of their loan agreement, and begin a foreclosure action on behalf of the lender. The government their own lawsuits may do so).


8. See infra, Part II.

9. See infra, Part III.

10. See infra, Part IV.

11. See infra, Part V.

12. See HOME AFFORDABLE MODIFICATION PROGRAM, HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES MAKING HOME AFFORDABLE (2010), available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook.pdf (describing that as soon as servicers receive compensation, they must promptly apply part of it to the defaulting borrowers’ accounts and remit the rest).

13. See Diane E. Thompson, Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications, 86 WASH. L. REV. 755, 761, 764 (describing that servicers can be an independent company or the lender will have a servicing arm within
began to promote programs like HAMP after the home mortgage crisis ensued because servicers were unwilling to modify loans, and instead foreclosed.\textsuperscript{14} Under HAMP, the government can enter into either a Mortgage Selling and Servicing Contract (MSSC) or a Servicer Participation Agreement (SPA) with participating servicers, which lay out guidelines that banks are required to follow when considering a modification.\textsuperscript{15} Because servicers have not engaged in as many modifications as the government expected and because neither the government nor borrowers can properly enforce HAMP’s guidelines in court, HAMP is largely seen as a failure.\textsuperscript{16}

\textbf{B. HAMP and Its Enacting Agreements Do Not Provide a Private Right of Action for Borrowers}

The majority of courts have vehemently stated that the government did not confer a PRA to borrowers under HAMP because it merely suggests, but does not mandate, that servicers participate.\textsuperscript{17} Reluctant borrowers have tried to sue servicers for violations of HAMP under the theory that they are intended beneficiaries of either the MSSC or the SPA.\textsuperscript{18} However, the majority of courts have found that these derivative contracts also fail to confer a PRA to borrowers because the parties to the agreements never intended to make borrowers the type of beneficiaries that had the ability to sue for violations of these contracts.\textsuperscript{19} In analyzing intent, the court looks

\textsuperscript{14} See 12 U.S.C. § 5219 (2012) (encouraging the servicers of the underlying mortgages to take advantage of available funding programs to minimize foreclosures).


\textsuperscript{16} See id. at *17 (highlighting the lack of an enforcement mechanism as a significant flaw of HAMP); U.S. DEP’T OF THE TREASURY, MAKING HOME AFFORDABLE: PROGRAM PERFORMANCE REPORT THROUGH APRIL 2011, at 2 (2011), http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/April%202011%20MHA%20Report%20FINAL.PDF (reporting that as of April 2011, three years after HAMP’s implementation, nearly 1.8 million trial modifications and about 700,000 permanent modifications were started, where the Treasury’s initial goal was three to four million).

\textsuperscript{17} See, e.g., Markle v. HSBC Mortgage Corp., No. 10-40189-FDS, 2011 U.S. Dist. LEXIS 147349, at *21, 28 (D. Mass. July 12, 2011) (giving examples of district courts from Texas, the District of Columbia, Michigan, and California that found that HAMP did not confer a PRA); Rivera v. Bank of Am. Home Loans, No. 09-cv-2450(LB), 2011 U.S. Dist. LEXIS 43138, at *10 (E.D.N.Y. Apr. 21, 2011) (giving examples of cases from California and Arizona stating there is not a PRA in HAMP).

\textsuperscript{18} See Parker, 2011 Mass. Super. LEXIS 270, at *27 (stating that the servicer did not grant borrowers a modification even though they qualified under the HAMP guidelines).

\textsuperscript{19} See, e.g., Markle, 2011 U.S. Dist. LEXIS 147349, at *21-22 (listing district courts in Massachusetts and Vermont that determined that SPAs and MSSCs do not
first to the express language of the contracts and then to sections of the Restatement of Contracts that deal with intended non-party beneficiaries.20

1. The Express Language of the MSSC and SPA Does Not Confer a PRA

Borrowers have attempted to sue servicers under HAMP servicing contracts like the MSSC and the SPA on the theory that they are beneficiaries to the agreements even though they are not parties to the agreements.21 To determine whether a non-party may maintain an action under HAMP, courts have looked to the parties’ intent.22 In doing so, courts first examine the plain language of the agreement—if the terms of the contract are clear, the contract itself has been found to demonstrate the parties’ intent.23

In Markle v. HSBC Mortgage Corp., the government and HSBC entered into an MSSC, which included an enforcement clause stating, “These rights and remedies are for our benefit and that of our successors and assigns.”24 The MSSC Selling Guide also stated, “No borrower or other third party is intended to be a legal beneficiary of the MSSC or the Selling Guide or Servicing Guide or to obtain any rights or entitlements through Fannie Mae’s lender communications or contracts.”25 The court found that the parties did not intend to give borrowers a PRA because they did not name borrowers as parties to the MSSC, borrowers are not successors or assigns of the parties to the MSSC, and the Selling Guide expressly excluded borrowers from the ability to sue under the agreement.26 Despite being sympathetic to the borrowers’ contract claims, the Parker v. Bank of

extend to homeowners standing to assert a breach of contract claim as non-party beneficiaries); Rivera, 2011 U.S. Dist. LEXIS 43138, at *18-19 (listing district courts in California, Nevada, and Florida that did the same).

20. See Markle, 2011 U.S. Dist. LEXIS 147349, at *19-26 (analyzing first, whether the plain language of the MSSC clearly indentified the borrowers as beneficiaries, then whether the borrowers were intended beneficiaries, and finally, whether they can overcome the presumption of being incidental beneficiaries to government contracts with no power to sue).


22. See Markle, 2011 U.S. Dist. LEXIS 147349, at *17 (citing McCarthy v. Azure, 22 F.3d 351, 362 (1st Cir. 1994)).

23. See id. at *18 (stating that if the contract is unclear, a court may assess the parties’ intent by inquiring into the reasonableness of the putative beneficiary’s reliance on the intent manifested in the promise).

24. See id. at *19 (citing to section XIV of the agreement); see also Rivera, 2011 U.S. Dist. LEXIS 43138, at *18 (E.D.N.Y. Apr. 21, 2011) (finding that the SPA had the same clause and did not confer a PRA to borrowers).


26. See id. at *19-20 (finding that, from the plain language of the agreements, borrowers are not intended to be beneficiaries of the contract).
America court also denied the borrower standing on a direct beneficiary claim of a contract between the government and a servicer because the borrowers were not parties to the SPA.27

2. Borrowers Are Not Intended Beneficiaries of the MSSC or the SPA

Borrowers have also tried to sue servicers for violations of HAMP on the theory that they are intended "non-party" or "third-party" beneficiaries, those who have enforcement powers, to the MSSC and the SPA.28 With very few exceptions, district courts that have considered this question have rejected the borrowers' position.29 To determine whether enforcement is permissible by a non-party to a government contract, courts look to the Restatement of Contracts because federal—and most state—contract laws follow it.30 The Restatement (Second) of Contracts section 302(1) provides that an "intended beneficiary" is one who has "a right to performance by the promisee and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

An intended beneficiary, whether a named party or not, has the right to sue under the contract, and an incidental beneficiary, a non-party who indirectly benefits from the contract, does not have that right.32 Under the Restatement (Second) of Contracts section 313(2), however, citizens are presumed to be incidental beneficiaries of government contracts, unless a non-party to the government agreement shows that the terms of the contract itself or the policy underlying it would clearly support the classification as an intended beneficiary who can sue the promisor directly.33

In Markle, the court agreed that the government intended to provide

27. See Parker v. Bank of Am., NA, No. 11-1838, 2011 Mass. Super. LEXIS 270, at *10-11 (Dec. 15, 2011) (dismissing the action based on insufficient evidence that there was an existing contract between the borrower and defendants).

28. See, e.g., id. at *11 (explaining that the borrower is suing under violation of HAMP's SPA as a third-party beneficiary); Rivera, 2011 U.S. Dist. LEXIS 43138, at *9; Markle, 2011 U.S. Dist. LEXIS 147349, at *11 (explaining that the borrower is suing under a violation of HAMP's MSSC as a third-party beneficiary).

29. See Markle, 2011 U.S. Dist. LEXIS 147349, at *21-22 (listing district courts around the country that determined that government agreements under HAMP do not extend to homeowners standing as non-party beneficiaries).


31. See Restatement (Second) of Contracts § 302(1) (1981) (stating the elements needed to prove an individual is an intended beneficiary).

32. See id. at § 302(2) (“An incidental beneficiary is a beneficiary who is not an intended beneficiary.”).

33. See id. § 313(2) (explaining that a promisor who contracts with a government is not subject to contractual liability to a member of the public for damages resulting from performance or failure to perform).
borrowers a benefit by implementing HAMP, but found that borrowers are not intended beneficiaries because the borrowers did not offer evidence of a clear intent sufficient to overcome the presumption of being mere incidental beneficiaries to government contracts under HAMP, the MSSC, and the MSSC Selling Guide.\textsuperscript{34} On the other hand, the MSSC and the MSSC Selling Guide are very clear as to who were the parties and beneficiaries to the agreement.\textsuperscript{35} The court also warned that allowing such an indefinite and broad class of non-party beneficiaries would be contrary to the clear intent standard for government contracts as recognized by the Restatement.\textsuperscript{36} Similarly, \textit{Rivera v. Bank of America Home Loans} also found that borrowers are intended to benefit from HAMP and its agreements.\textsuperscript{37} However, the court found that borrowers could not overcome the presumption of being only incidental beneficiaries because the terms of the agreement preclude borrowers from enforcing the SPA as the SPA’s provisions do not expressly allow borrowers to enforce the agreement and provide that remedies are solely available to the government.\textsuperscript{38}

A handful of courts, including the \textit{Parker} court, have found that borrowers are intended non-party beneficiaries.\textsuperscript{39} These courts found that borrowers are “undeniably” intended beneficiaries because, following the Restatement (Second) of Contracts section 302(1), servicers are required to perform under the SPA and that performance is intended to directly benefit borrowers struggling to pay first mortgages on their residences.\textsuperscript{40} The court also found that borrowers overcame the presumption that they were merely incidental parties because the SPA did not expressly prevent borrowers from suing and borrowers had no other forum to bring their claims, which

\textsuperscript{34} See \textit{Markle}, 2011 U.S. Dist. LEXIS 147349, at *21 (arguing that the borrowers have not offered evidence to overcome the presumption of incidental beneficiary).

\textsuperscript{35} See \textit{id.} at *20 (stating that it appears clear through the contract language that the contracting parties did not intend to extend enforcement rights to non-parties).

\textsuperscript{36} See \textit{id.} at *19 (citing \textit{RESTATMENT (SECOND) OF CONTRACTS § 313(2)}).


\textsuperscript{38} See \textit{id.} at *17-18 (reciting from the SPA that the enforcement clause only permitted parties and its successors to enforce the agreement, and the remedies for default were only available to Fannie Mae).


\textsuperscript{40} See \textit{Parker}, 2011 Mass. Super. LEXIS 270, at *22 (reasoning this was the entire purpose of enacting HAMP).
demonstrated a “clear intent to the contrary” that they were intended beneficiaries. The Parker court based most of its argument on Marques v. Wells Fargo Home Mortgage, Inc., which found that borrowers could sue servicers on a non-party beneficiary theory. Only three courts have cited to Parker but all three stopped short of following the case, and one criticized the opinion. Almost every other court, including those in the same district as Parker, has refused to view borrowers as non-party beneficiaries.

C. Behind the Settlement Agreement: Its Enforcement Power and the Role of Borrowers

The Settlement Agreement is a part-federal, part-state government contract whose purpose is to provide more modifications to a greater number of borrowers by obligating servicers to comply with new servicing standards. These standards include requiring servicers to notify borrowers of modification options, offering modifications rather than initiating foreclosure, and expediting the conversion of trial modifications to permanent ones. The borrowers from the forty-nine participating states who will benefit from this Settlement Agreement are those currently seeking a home loan modification or who will seek one in the future. The five servicers who are parties to the agreement are the largest servicers of home mortgage loans found to have committed violations of fair lending

41. See id. at *26-27 (opining that the denial of non-party beneficiary status to persons aggrieved by such violations would mock the very goals of the program that the contract was intended to further).


45. See Settlement Agreement Announcement, supra note 1 (stating that the agreement was a joint state and federal government effort to come to terms that servicers have to follow in order to provide borrowers modifications).

46. See Settlement Agreement, supra note 5, at *3, *4, *A-4 (using metrics that calculate that the servicer is following these procedures and allowing more modifications).

47. See Settlement Agreement Announcement, supra note 1 (claiming that the agreement will benefit the borrowers).
practices laws.\textsuperscript{48} 

The Settlement Agreement was filed in the United States District Court of the District of Columbia as a Consent Judgment.\textsuperscript{49} The enforcement clause of the agreement states, "An enforcement action under this Consent Judgment may be brought by any Party to this Consent Judgment or the Monitoring Committee."\textsuperscript{50} The parties to the agreement are the U.S. government, forty-nine states and the District of Columbia, and the five servicers.\textsuperscript{51} The Settlement Agreement confers oversight power to an independent government Monitor who will set up a "Work Plan" to determine whether the servicer is meeting its obligations, largely relying on information provided by the servicer.\textsuperscript{52} A servicer has a right to cure violations, but if a violation goes uncured past the allotted cure period, the parties or the Monitor may bring an enforcement action seeking specific performance, and the court may impose civil fines.\textsuperscript{53} 

With regard to borrowers, the Settlement Agreement provides, "Servicer[s] must remediate any material harm to particular borrowers identified through work conducted under the Work Plan."\textsuperscript{54} Additionally, if this type of error exceeds a threshold rate decided by the Monitor, the "[s]ervicer shall, under the supervision of the Monitor, identify other borrowers who may have been harmed by such noncompliance and remediate all such harms to the extent that the harm has not been otherwise remediated."\textsuperscript{55} Borrowers may contact their respective state attorneys general if they believe they are eligible for relief under the Settlement Agreement; however, this avenue currently only permits claims for cash restitutions for being improperly foreclosed on.\textsuperscript{56} Furthermore, the

\begin{itemize}
\item \textsuperscript{48} See id. (providing that the agreement will resolve certain violations of civil law based on mortgage loan servicing activities).
\item \textsuperscript{49} Settlement Agreement, supra note 5, at *1.
\item \textsuperscript{50} See id. at *E-15.
\item \textsuperscript{51} See id. at *1 (naming all states except Oklahoma).
\item \textsuperscript{52} See id. at *4, *E-3 (describing that the monitor's duty is to determine whether the servicer upholds the servicing standards and the methodologies to be utilized to monitor will be set up through a "Work Plan"); id. at *E-7 to E-9 (stating that the monitor will collect quarterly reports and the servicer should alert the monitor of any wrongdoing).
\item \textsuperscript{53} See id. at *E-11 ("Servicer shall have a right to cure any Potential Violation."); id. at *E-15 (describing that the remedies are up to $1 million for the first violation and $5 million for the second).
\item \textsuperscript{54} See id. at *E-12 (obligating the servicer to remediate any material harm to borrowers caused by non-compliance).
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Who May Be Eligible for Assistance, NAT'L MORTGAGE SETTLEMENT, www.nationalmortgagesettlement.com/help (last visited Apr. 26, 2012) (telling borrowers that attorneys general will be their contact and will be sending them claim forms).
\end{itemize}
Department of Justice announcement of the Settlement Agreement explains, “The agreement does not prevent any action by individual borrowers who wish to bring their own lawsuits,” without specifying the origin of this right. 57

III. ANALYSIS

The government’s contention that the Settlement Agreement does not prevent individual action is misleading because, under HAMP case law, the Settlement Agreement does not provide a PRA and does not aggrandize borrowers’ ability to take action against servicers. 58 HAMP and the Settlement Agreement are government initiatives that are practically identical in their purpose and method of implementation. 59 Most notably, both the Settlement Agreement and HAMP came about because servicers were not providing sufficient modifications to borrowers before forcing them into foreclosure. 60 Both outline what a servicer should consider when assessing a borrower’s application for a modification and the steps to take in implementing a modification—HAMP does so through SPAs and MSSCs, while the Settlement Agreement does so through provisions on servicing standards. 61 Both agreements are between governmental parties and servicers of mortgage loans. 62 Additionally, the Settlement Agreement, 57. See Settlement Agreement Announcement, supra note 1 (listing certain parties, like state attorneys general, whose right to sue will be affected by the agreement); see also Dayen, supra note 4 (explaining that the releases do not affect homeowners’ ability to sue over foreclosure fraud and other abuses).

58. See, e.g., Markle v. HSBC Mortgage Corp., No. 10-40189-FDS, 2011 U.S. Dist. LEXIS 17349, at *20 (D. Mass. July 12, 2011) (recognizing that HAMP does not provide a right of action because its express language says that only parties to the agreement may bring an enforcement action); see also Settlement Agreement, supra note 5, at *E-15 (stating that only parties to the agreement may bring an enforcement action).

59. Compare 12 U.S.C. §§ 5219, 5219a (2012) (providing that HAMP’s purpose is to maximize assistance to homeowners and decrease foreclosures and that servicers will follow guidelines to determine whether a borrower will qualify for a modification), with Settlement Agreement Announcement, supra note 1 (claiming that the Settlement Agreement’s purpose is to address mortgage loan servicing and foreclosure abuses and servicers will be required to follow new servicing standards when determining whether to grant a borrower a modification).

60. See 12 U.S.C. § 5219 (seeking to maximize assistance to homeowners by encouraging servicers to take advantage of programs that minimize foreclosures); Settlement Agreement, supra note 5, at *2 (stating that the intention of the agreement is to remediate harms upon borrowers caused by the servicers).

61. Compare 12 U.S.C. § 5219a (demonstrating a manner in which servicers should value when making their determination to modify or foreclose), with Settlement Agreement, supra note 5, at *3, *4, *A-4 (requiring that servicers perform several steps before they initiate foreclosure).

as well as HAMP and derivative agreements such as SPAs and MSSCs, serve to benefit borrowers who qualify for a modification under the government’s suggested guidelines. However, under HAMP and the Settlement Agreement, if the servicers do not comply with established guidelines and deny a loan modification that should have been granted, borrowers do not have a PRA to sue the servicer because this right is not expressly provided and borrowers have not been deemed intended non-party beneficiaries.

A. Borrowers Will Not Be Able to Sue Servicers Who Do Not Comply with the Settlement Agreement Because the Settlement Agreement Does Not Expressly Confer a PRA to Borrowers

Courts will almost certainly continue to find that the government did not intend to provide borrowers with a PRA in the Settlement Agreement, as it did not make borrowers parties nor expressly provide borrowers a separate cause of action for violations of the agreement. In Markle, Parker, and Rivera, the courts held that borrowers could not bring actions for violations of the HAMP agreements without being a party to the agreement.

Based on precedent, courts will find that the terms of the Settlement Agreement are clear and will ascertain the parties’ intent that borrowers cannot sue for violations of the Settlement Agreement. Under a Markle analysis, the plain language of the Settlement Agreement fails to name borrowers as parties and to confer an express right to the borrowers in its

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63. Compare Markle, 2011 U.S. Dist. LEXIS 147349, at *20 (“Plaintiffs are undoubtedly correct that they are within the class of individuals that Congress and the Treasury Department intended to benefit by... creating HAMP.”), with Settlement Agreement, supra note 5, at *2 (“[T]he intention of the United States and the States in effecting this settlement is to remediate harms allegedly resulting from the alleged unlawful conduct of the [Servicer].”).

64. Compare Rivera v. Bank of Am. Home Loans, No. 09-cv-2450(LB), 2011 U.S. Dist. LEXIS 43138, at *20-21 (E.D.N.Y. Apr. 21, 2011) (stating that borrowers under HAMP are not intended beneficiaries, but merely incidental beneficiaries because the SPA does not include them as parties and the SPA’s remedies are reserved to the parties), with Settlement Agreement, supra note 5, at *E-15 (reserving the cause of action and remedies to parties to the agreement).

65. See Settlement Agreement, supra note 5, at *E-15 (stating that any party to the agreement or the monitor may bring an enforcement action under this agreement).

66. See Markle, 2011 U.S. Dist. LEXIS 147349, at *20 (providing that borrowers are not parties to MSSCs and cannot bring an action unless the parties intended them to be beneficiaries to the agreement); Parker, 2011 Mass. Super. LEXIS 270, at *10-11 (denying the borrower standing to bring a first-party claim to the SPA); Rivera, 2011 U.S. Dist. LEXIS 43138, at *17 (dismissing the action because the SPA did not name the borrowers).

67. See Markle, 2011 U.S. Dist. LEXIS 147349, at *18 (citing to the rule that states that if the language is unclear, the court may look for the parties’ intent on the reasonableness of the putative beneficiary’s reliance of the promise).
The enforcement clause in the Settlement Agreement, like the enforcement clause in the MSSC, does not give borrowers the right to enforce the agreement; it only gives this power to the parties to the agreement and the Monitor. Courts applying the Rivera analysis would come to the same conclusion about the Settlement Agreement’s enforcement clause, because in that case, the court found that the SPA’s enforcement clause also precludes borrowers from bringing an action by failing to name them.

Borrowers may point to another part of the Settlement Agreement that obligates servicers to compensate borrowers for harm that servicers have caused for failing to follow the terms of the Settlement Agreement. Borrowers may argue that this clause does not go as far as the MSSC clause that expressly excludes borrowers from bringing actions, and thus, it supports a finding that the parties intended to give borrowers enforcement rights. However, this clause does not give borrowers a right of action under the law established by Markle and Rivera because it expressly gives the Monitor and the servicer the sole power to identify the borrower and provides the Monitor the ability to collect damages when it brings an enforcement action. Courts will look to the identity of the parties in the Settlement Agreement as well as the plain meaning of its clauses, as courts have done with HAMP and its agreements; likely, the courts will not find that the Settlement Agreement gives borrowers any enforcement rights, even if they stand to be harmed by violations.

68. See id. at *19-20 (citing from the agreement that no borrower is intended to be a legal beneficiary of the MSSC or to obtain any rights through Fannie Mae’s lender contracts).

69. Compare id. at *19 (“These rights and remedies are for our benefit and that of our successors and assigns.”), with Settlement Agreement, supra note 5, at *E-15 (“An enforcement action under this Consent Judgment may be brought by any Party to this Consent Judgment or the Monitoring Committee.”).

70. See Rivera, 2011 U.S. Dist. LEXIS 43138, at *17 (holding that the SPA’s provisions did not expressly grant the borrower enforce power and remedies were solely available to the government).

71. See Settlement Agreement, supra note 5, at *E-12 (obligating servicers to pay reparations to borrowers in addition to the civil penalties they have to pay for identified violations).

72. See Settlement Agreement, supra note 5, at *E-12 (“Servicer must remediate any material harm to particular borrowers identified through work conducted under the Work Plan.”). Contra Markle, 2011 U.S. Dist. LEXIS 147349, at *20 (citing to section A2-1-01 of the selling guide where the agreement expressly prohibited borrowers from suing servicers).

73. Compare Markle, 2011 U.S. Dist. LEXIS 147349, at *19-20 (stating that the plain language of the clause does not give borrowers rights under the MSSC), and Rivera, 2011 U.S. Dist. LEXIS 43138, at *18 (noting that remedies to the agreement were solely available to the government), with Settlement Agreement, supra note 5, at *E-12 (recognizing that the government will supervise the repARATION).

74. See Markle, 2011 U.S. Dist. LEXIS 147349, at *19-20 (looking to the plain language of the MSSC); Rivera, 2011 U.S. Dist. LEXIS 43138, at *17-18 (looking to
B. Borrowers Will Not Be Able to Sue Servicers Who Did Not Perform According to the Settlement Agreement Because Borrowers Will Not Be Deemed Intended Non-Party Beneficiaries

Courts will also analyze the Settlement Agreement using the Restatement of Contracts because it is a part-federal and part-state government contract.\textsuperscript{75} Based on established case law that uses the Restatement to analyze HAMP’s agreements, borrowers under the Settlement Agreement are not intended “third-party” or “non-party” beneficiaries with enforcement powers because, even though the government intended that they benefit from the Settlement Agreement, they will not be able to overcome the presumption that they are only incidental parties to a government contract.\textsuperscript{76} Borrowers who are set to benefit from the Settlement Agreement will be unlikely to be able to overcome this presumption as well because the Settlement Agreement and the policy behind it do not support a borrower’s status as an intended beneficiary.\textsuperscript{77}

Even though borrowers under the Settlement Agreement may be able to meet the Restatement’s designation of “intended beneficiary,” courts will presume them to be incidental beneficiaries under the Restatement, which provides that members of the public are incidental beneficiaries.\textsuperscript{78} The precedent established by Markle, Rivera, and Parker indicates that courts will likely find that the government intended to provide a benefit to borrowers through the Settlement Agreement under the Restatement the enforcement clause of the SPA and finding that the makers of the agreement did not mention borrowers).

\textsuperscript{75} \textit{See Markle}, 2011 U.S. Dist. LEXIS 147349, at *14, 16 (noting that federal common law controls the interpretation of contracts entered into pursuant to federal law and to which the United States is a party and that Massachusetts and federal common law both follow the Restatement); \textit{Rivera}, 2011 U.S. Dist. LEXIS 43138, at *12 (finding that whether a plaintiff is a beneficiary to a government agreement is a question of federal law, which follows the Restatement).

\textsuperscript{76} \textit{Compare Markle}, 2011 U.S. Dist. LEXIS 147349, at *21 (finding that there is a difference between parties that are incidental, and therefore benefit from an agreement, and parties who are not beneficiaries who have rights under the agreement), \textit{and Rivera}, 2011 U.S. Dist. LEXIS 43138, at *15, 17 (finding that HAMP intended to give borrowers the benefit from the agreement but not contractual rights under the agreement), \textit{with Settlement Agreement Announcement, supra note 1} (announcing that the purpose of the agreement was to help borrowers receive more modifications on their home loans).

\textsuperscript{77} \textit{See Markle}, 2011 U.S. Dist. LEXIS 147349, at *21-22 (listing numerous courts that did not find that parties to the MSSC and SPA were intended beneficiaries); \textit{Settlement Agreement, supra note 5, at *E-15} (giving enforcement power only to the parties of the agreement, without mentioning borrowers).

\textsuperscript{78} \textit{See Restatement (Second) of Contracts § 302(1) (1981)} (providing that an “intended beneficiary” is one who has a right to performance by the promisee and “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance”); \textit{see also Markle}, 2011 U.S. Dist. LEXIS 147349, at *19 (stating that the restatement presumes a citizen benefitting from a government contract is an incidental beneficiary absent clear intent to the contrary).
Servicers who are parties to the Settlement Agreement are required to perform under its provisions and the servicers intend to give borrowers the benefit of this performance. This, however, does not give borrowers enforcement rights under the Settlement Agreement because of the incidental-beneficiaries analysis.

Borrowers under the Settlement Agreement will be presumed incidental beneficiaries under the Restatement, which states that public citizens—as the court found the borrowers in Markle and Rivera to be—are incidental parties. As incidental beneficiaries, borrowers under the Settlement Agreement are not entitled to enforcement rights.

Borrowers under the Settlement Agreement have the opportunity to rebut the presumption that they are not mere incidental beneficiaries under the Restatement but, based on precedent, courts will find that the Settlement Agreement itself or the policy behind it, like with the MSSC and the SPA, does not support a borrower’s status as an intended non-party beneficiary.

79. Compare Restatement (Second) of Contracts § 302(1) (defining an intended beneficiary as a person who is owed a promise of performance and to whom the promisor intends to give the benefit of the promise), with Settlement Agreement Announcement, supra note 1 (stating that the servicers will be required to review every borrower’s qualifications for a modification and provide one if the borrower meets the criteria).

80. See Markle, 2011 U.S. Dist. LEXIS 147349, at *20 (“Plaintiffs are undoubtedly correct that they are within the class of individuals that Congress and the Treasury Department intended to benefit by enacting the EESA and creating HAMP.”); Rivera, 2011 U.S. Dist. LEXIS 43138, at *15 (“This Court agrees that the Agreement ‘expresses a clear intent to directly benefit the eligible borrowers.’”); Parker v. Bank of Am., NA, No. 11-1838, 2011 Mass. Super. LEXIS 270, at *22 (Dec. 15, 2011) (“It seems undeniable that the performance required of servicers who entered into SPAs was intended for the direct benefit of borrowers struggling to pay first mortgages . . . .”); Settlement Agreement Announcement, supra note 1 (“[T]he servicers are required to collectively dedicate $20 billion toward various forms of financial relief to borrowers[, including] . . . reducing the principal on loans for borrowers who . . . are either delinquent or at imminent risk of default and owe more on their mortgages than their homes are worth.”).

81. Rivera, 2011 U.S. Dist. LEXIS 43138, at *12-14 (examining first the section in the Restatement regarding the difference between intended and incidental beneficiaries, and then the section of the Restatement regarding government contracts).

82. Compare Markle, 2011 U.S. Dist. LEXIS 147349, at *18 (stating that if the terms of the contract are clear, the contract itself should ascertain the parties’ intent), and Rivera, 2011 U.S. Dist. LEXIS 43138, at *17 (“[T]he terms of the Agreement make plain that the parties to the Agreement did not intend for borrowers to enforce the contract.”), with Settlement Agreement, supra note 5, at *E-15 (recognizing that the parties to the agreement may enforce it).

83. See Markle, 2011 U.S. Dist. LEXIS 147349, at *18 (distinguishing incidental beneficiaries who do not have enforcement powers and intended beneficiaries who do); Restatement (Second) of Contracts § 313(2) (providing that to overcome the presumption, a non-party to the government agreement must show that the contract itself or the policy behind it would support the status of intended beneficiary).

84. See Markle, 2011 U.S. Dist. LEXIS 147349, at *21 (“Finding such a broad and indefinite a class of third-party beneficiaries would be inconsistent with the clear intent standard for government contracts . . . .”).
Applying the precedent set forth in *Markle*, the Settlement Agreement, like the MSSC, is clear as to who are the parties to the agreement and does not expressly give borrowers a right of action.\(^8\)^ Similar, applying the holding established in *Rivera*, the Settlement Agreement, like the SPA, does not expressly allow borrowers to enforce the Agreement and the remedies listed are solely available to the government.\(^6\) Although the Settlement Agreement is intended to benefit borrowers, its policy of restricting borrower litigation by not naming them parties is consistent with the Restatement.\(^7\)

It is highly unlikely that courts will follow *Parker*—a case that has not been formally overturned but has been rendered functionally immaterial—which found that borrowers have standing to bring an action for breach of the Settlement Agreement based on a non-party beneficiary theory.\(^8\) The finding in *Parker* may lead courts to determine that borrowers under the Settlement Agreement meet the requirements of the Restatement’s definition of intended beneficiary because servicers are required to perform under the Settlement Agreement and that performance is intended for the direct benefit of borrowers struggling to pay their mortgages.\(^9\) The *Parker* court, however, did not give the government contracts section of the Restatement proper support, and instead, exclusively focused on the section of the Restatement that defined an intended beneficiary.\(^9\) The law established in *Parker*, which has since been rendered irrelevant, does not establish that borrowers benefitting from the Settlement Agreement can overcome the presumption that they are merely incidental beneficiaries.

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\(^8\) See id. at *20 (holding that even if the MSSC intended to benefit the borrowers, it did not intend to give them enforcement rights that belonged to the parties that enter the agreement); Settlement Agreement, *supra* note 5, at *E-15 (noting that only the governmental parties and the servicers can bring causes of action under the agreement). 

\(^6\) Compare *Rivera*, 2011 U.S. Dist. LEXIS 43138 at *17-18 (noting that the SPA’s enforcement clause only permitted parties and their successors to enforce the agreement and the remedies for default were only available to the government), with Settlement Agreement, *supra* note 5, at *E-15 (stating that the parties to the agreement can bring enforcement action and receive relief in the form of specific performance and civil penalties).

\(^7\) See Restatement (Second) of Contracts § 313(2) (1981) (maintaining that non-parties to government agreements are incidental parties unless they overcome this presumption).

\(^8\) See *supra* note 43 (naming the only three courts that have cited to *Parker* but not directly followed it).

\(^9\) See Settlement Agreement Announcement, *supra* note 1 (maintaining that the agreement would remedy the injustices that borrowers faced when they qualified for modifications on their underwater homes).

\(^9\) See *Parker* v. Bank of Am., NA, No. 11-1838, 2011 Mass. Super. LEXIS 270, at *22 (Dec. 13, 2011) (reasoning that the SPA intended to make borrowers beneficiaries and additional but incidental benefits would accrue to the economy as a whole).
because there is no clear intent to the contrary.\textsuperscript{91} A court, like the court in \textit{Parker}, may find that the Settlement Agreement clearly intends to make borrowers intended beneficiaries by not expressly preventing borrowers from suing as the MSSC did in \textit{Markle}, but borrowers are not parties to the Settlement Agreement and have no contract remedies under a \textit{Rivera} analysis.\textsuperscript{92} The second reason that the \textit{Parker} court gave for finding a clear intent to make borrowers beneficiaries, that they did not have an alternative forum to bring their claims, is not present under the Settlement Agreement because borrowers can bring claims to their state attorney general’s attention.\textsuperscript{93}

For the above reasons, arguments that the government intended to make borrowers parties fail, even in sympathetic courts, because the law is clear.\textsuperscript{94} The reasoning set forth in \textit{Markle} and \textit{Rivera} has broad support from district courts across the country, while \textit{Parker} does not.\textsuperscript{95} The analysis in \textit{Parker} is not only based on overturned law, but borrowers must also overcome the presumption that they are not merely incidental parties to government contracts according to current case law.\textsuperscript{96}

\begin{itemize}
\item \textsuperscript{91} See \textit{id}. at *25-28 (finding a clear intent, in that the SPA did not expressly prevent borrowers from suing and borrowers had no other forum to bring their claims).
\item \textsuperscript{92} Compare Markle v. HSBC Mortgage Corp., No. 10-40189-FDS, 2011 U.S. Dist. LEXIS 147349, at *19-20 (D. Mass. July 12, 2011) (acknowledging that the MSSC expressly said that borrowers cannot sue), and Rivera v. Bank of Am. Home Loans, No. 09-cv-2450(LB), 2011 U.S. Dist. LEXIS 43138, at *17-18 (E.D.N.Y. Apr. 21, 2011) (finding that the parties expressly did not give borrowers enforcement rights and ability to seek remedies), with Settlement Agreement, supra note 5, at *E-12 (giving borrowers an alternative forum in which to bring claims outside the enforcement of the agreement).
\item \textsuperscript{93} Compare Markle, 2011 U.S. Dist. LEXIS 147349, at *20 (citing to the MSSC Selling Guide that precluded borrowers from suing servicers), and Rivera, 2011 U.S. Dist. LEXIS 43138, at *17-18 (citing the SPA that the enforcement clause only permitted parties to enforce the agreement), with Parker, 2011 Mass. Super. LEXIS 270, at *25-28 (opining that borrowers without a forum would mock the goals of a program intended to benefit them), and Who May Be Eligible for Assistance, supra note 56 (instructing borrowers to contact their respective state attorney general if they believe they are eligible for relief).
\item \textsuperscript{94} See Rivera, 2011 U.S. Dist. LEXIS 43138, at *2 (expressing that a borrower seeking a modification from an unresponsive bank represents “an unfortunate, but all too common set of circumstances in the world today[,]” before dismissing the case).
\item \textsuperscript{95} See supra note 17 (listing cases from across the country supporting \textit{Markle} and \textit{Rivera} and few but non-binding support for \textit{Parker}).
\item \textsuperscript{96} See Cade v. BAC Home Loans Servicing, LP, No. H-10-4224, 2011 U.S. Dist. LEXIS 65045, at *3 (S.D. Tex. June 20, 2011) (recognizing that the relied-upon cases has been reversed by the Supreme Court in \textit{County of Santa Clara v. Astra USA, Inc.}, 131 S. Ct. 1342 (2011)); see also Marques v. Wells Fargo Home Mortgage, Inc., No. 09-cv-1985-L(RBB), 2010 U.S. Dist. LEXIS 81879, at *19 (S.D. Cal. Aug. 12, 2010); \textsc{Restatement (Second) of Contracts} § 313(2) (1981) (indicating that the contract itself or the policy behind it would support the status of intended beneficiary).
IV. POLICY IMPLICATIONS

The Settlement Agreement must overcome the problems created by the lack of private enforcement that were also present in HAMP and in settlements geared to alleviate borrowers’ fear of foreclosure because they can no longer afford their homes. The government failed to oversee HAMP’s progress from its implementation and did not fully use its enforcement power to penalize banks that improperly foreclosed on borrowers. In order for the Settlement Agreement to succeed, it will have to avoid the implementation and enforcement failures experienced by HAMP, but there are already several issues in the Settlement Agreement’s text that have the potential to weaken its authority.

The first issue deals with the topic of this Recent Development: borrowers lack the right to self-enforce the Settlement Agreement. The government has not shown that it properly enforces these types of agreements and the Settlement Agreement has troubling provisions that will delay its enforcement. For example, the government has and will spend too much time setting up a “Work Plan” to determine whether a servicer violated the Settlement Agreement, will first allow the servicer to cure a violation, and will seek remedies for uncured violations only after the cure period has run out. In addition, the remedies the government

97. See Parker, 2011 Mass. Super. LEXIS 270, at *18-19 (Dec. 15, 2011) (designating the lack of an enforcement as a significant flaw of HAMP); Paul Kiel, Secret Docs Show Foreclosure Watchdog Doesn’t Bark or Bite, PROPUBLICA (Oct. 4, 2011, 11:26 AM), http://www.propublica.org/article/secret-docs-on-foreclosure-watchdog (explaining that HAMP has been ineffective because the government’s supervision has been severely lacking); Dayen, supra note 4 (naming several other lawsuits and settlement agreements where the servicer failed to follow its obligations due to lack of enforcement).

98. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-634, TROUBLED ASSET RELIEF PROGRAM, FURTHER ACTIONS NEEDED TO FULLY AND EQUITABLY IMPLEMENT FORECLOSURE MITIGATION PROGRAMS 14 (2010) (finding that the government had yet to establish specific consequences for HAMP violations, making enforcement inconsistent); Kiel, supra note 97 (reporting that documents showed that the government had not audited a servicer for the first eight months of a program and when it finally did, the audit showed severe violations but the government did not force the servicer to reverse any foreclosure); Office of the Special Inspector Gen. for the Troubled Asset Relief Program, Factors Affecting Implementation of the Home Affordable Modification Program 9 (2010), available at http://www.sigtarp.gov/reports/audit/2010/Factors_Affecting_Implementation_of_the_Home_AffordableModificationProgram.pdf (criticizing that program’s projected goal of helping three to four million Americans receive modifications on their loans is an overstatement due to poor implementation, and the actual number of people it will help is closer to one and one-half to two million, some of which will likely re-default on their loan).

99. See Settlement Agreement, supra note 5, at *E-15 (conveying that only parties to the agreement can bring an enforcement action).

100. See supra note 98 (listing articles and government summaries reporting that numerous programs and other settlement agreements have failed).

101. See Settlement Agreement, supra note 5, at *E-3 (delegating a monitor to
can seek may not be strong deterrents against non-compliance. For example, the Settlement Agreement has a section granting servicers the right to cure violations and another section providing that the court "may" impose penalties for continuous violations. Critics rightly note that violating the law has merely become a banker's cost of doing business, and such provisions incentivize servicers to test the limits of their compliance before the government subjects them to any penalties. For this reason, the government should have provided a more robust private enforcement mechanism in this Settlement Agreement or should enact legislation that has more immediate consequences for servicers in violation of the agreement in order to deter recurring non-compliance. Although the Markle court makes a well-taken point that giving borrowers such a power would open servicers to much litigation, it may be the only viable solution to this enforcement issue unless the government truly stands behind its enforcement power.

Even though the Settlement Agreement has tried to address HAMP's lack of an alternative forum to remedy the harm that befalls borrowers when servicers wrongfully deny them modifications, by obligating servicers to do so, it first allows servicers to cure the violation and then self-identify the harmed borrowers. This method of enforcement lacks accountability because, first, there is no clear complaint filing mechanism that the government has provided to harmed borrowers, and second, the government will determine compliance through servicer self-

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102. See Barry Ritholtz, Foreclosure Settlement a Failure of Law, a Triumph for Bank Attorneys, WASH. POST (Feb. 25, 2012), http://www.washingtonpost.com/foreclosure-settlement-a-failure-of-law-a-triumph-for-bank-attorneys/2012/02/23/glQ Ae77eaR_story.html (arguing that a monetary fine will not do enough to cover the crime committed).

103. See Settlement Agreement, supra note 5, at *E-11 (granting servicers the right to cure any potential violation); id. at *E-15 (stating that the court may impose civil penalties where the final uncured Potential Violation involves widespread noncompliance).

104. See Kiel, supra note 97 (stating that the government under HAMP sent mixed messages about how they would penalize servicers for violations).


106. See Settlement Agreement, supra note 5, at *E-12 (obligating servicers to pay damages to borrowers in addition to the civil penalties). Contra Markle, 2011 U.S. Dist. LEXIS 147349, at *21 (stating that HAMP did not provide borrowers a forum to have their claims heard).
assessments. The website of the Settlement Agreement provides borrowers the only indication regarding filing a claim for relief, but it deals with past actions. The fact that this misconduct has continued for four years garners distrust amongst borrowers and calls into question the legitimacy of self-assessments. Granting borrowers a right of action will remedy the lack of servicer accountability because borrowers already have a forum, the courts, and access to the Settlement Agreement that can be used to identify wrongdoing.

V. CONCLUSION

Based on settled precedent regarding a PRA under HAMP, the government's promise that borrowers are not prevented from bringing their own lawsuits is an empty one if the borrowers' actions are based on violations of the Settlement Agreement. Although drafters of the Settlement Agreement attempted to address the lack of enforcement that brought down its predecessors, the Settlement Agreement's own provisions contain flaws that will very likely cause it to join other failing initiatives, like HAMP. A law with a PRA would most likely resolve this problem, but the government is currently not willing to take this step, leaving borrowers to question whether they will truly benefit from the Settlement Agreement, as unequivocally intended.

107. See Dayen, supra note 4 (critiquing that the quarterly self-assessment from the banks will take time to review and take action against).

108. See Who May Be Eligible for Assistance, supra note 56 (concerning cash restitutions for borrowers who have been foreclosed on during the past three years).

109. See Morgenson, supra note 3 (claiming it will be hard for borrowers to restore their trust in servicers given what borrowers came to know about their practices).

110. See, e.g., Markle, 2011 U.S. Dist. LEXIS 147349, at *20, 21-22 (holding that HAMP did not confer to borrowers the right of action to violations of an agreement between a servicer and the government and that the majority of courts agree).

111. See Dayen, supra note 4 (listing programs and settlement agreements that have failed due to lack of enforcement in their implementation).

112. See, e.g., Parker v. Bank of Am., NA, No. 11-1838, 2011 Mass. Super. LEXIS 270, at *26 (Dec. 15, 2011) (holding that denying borrowers the status of a non-party beneficiary under HAMP would "mock the very goals of the program that the contract was intened to further, placing its 'legitimacy . . . in grave doubt'" (internal citations omitted)).