Legal Opinion: GPC-0003

Index: 8.900
Subject: Compromise of Claims Against Mortgagees and Servicers

March 5, 1992

MEMORANDUM FOR: Bruce Albright, Assistant General Counsel, Home Mortgage Division, GHH

ATTN: June Auerbach, Senior Attorney

FROM: Sam Rothman, Senior Attorney, GPC

SUBJECT: Compromise of claims against mortgagees and servicers

This replies to your January 22, 1992 memorandum in which you posed several questions regarding the referenced subject. We respond to your questions in the order presented.

1. (a) Does HUD have the authority to compromise claims of $20,000 (to be changed to $100,000) or more against a mortgagee or servicer or must they be done by the Department of Justice?

HUD has the authority to compromise any claim that does not exceed $100,000, exclusive of interest, at the time the claim is determined to be valid and past due. (Although HUD regulations, at 24 CFR 17.74(a), specify a $20,000 maximum, that amount is based on 31 U.S.C. 3711(a)(2), which was amended on November 15, 1990 to raise the $20,000 ceiling to $100,000. Pub. L. 101-552. We are drafting appropriate amendments to Part 17. Pending the regulatory amendment, it is my view that the statutory change is self-executing and supersedes 17.74(a).) Generally, compromise of a claim in excess of $100,000 must be referred to the Justice Department for approval. Keep in mind, however, that the compromise authority of the Debt Collection Act of 1982 and the Federal Claims Collection Standards, 4 CFR Parts 101-105, are intended to cumulate rather than supersede existing authority. Therefore, should HUD have compromise authority under a program statute, then DOJ approval would not be required.

An example of arguably other compromise authority may be found at section 207(l) of the National Housing Act, 12 U.S.C. 1713(l). That paragraph includes the following language:

> notwithstanding any other provision of law, the Secretary shall also have power to pursue to final collection by way of compromise or otherwise all claims assigned and transferred to him in connection with the assignment, transfer, and delivery provided for in this section, and ...to foreclose on any property....

Thus, in the case of a claim against a multifamily mortgagor, it may be argued that the Secretary may compromise that claim without regard to DOJ. Also, the Department's debt management policy is such that the claims collection process does not extend to debts secured by mortgages. See Handbook 1900.25 REV 3, 1-2 b.

However, the claims you mention are for overpayment of mortgage insurance claims and clearly are not secured by mortgages. In fact, these claims arise after the completion of the entire mortgage insurance claim procedure and, in any event, are not "claims assigned or transferred" to the Secretary. Therefore, absent other compromise authority, the compromise of those claims, if more than $100,000, would require DOJ approval.

1. (b) Please outline the procedure of how such claims should be handled.

The first step is to evaluate and quantify the claim. In the case of an audit it is important to scrutinize the audit report because we must be able to prove the debt. Toward that end it is helpful if the audit findings are based on "disallowed costs" rather than "questioned costs."

Assuming the $100,000 threshold is satisfied, an appropriate program official, e.g., a Division Director or Office Director, should prepare a compromise recommendation for the Departmental Claims Officer (DCO). Unless the DCO has questions, he will prepare a recommendation to DOJ relying heavily on the program official's justification. Background material must accompany the recommendation.

The criteria for compromise are set forth in 24 CFR 17.73 and Handbook 1900.25 REV 3 at 4-7, and include cost-effectiveness and the debtor's ability to pay.

Depending on the facts of a given case, the DCO might ask the Program Compliance Division --this office-- to clear his recommendation to DOJ. After its review DOJ will notify the DCO. Absent DOJ objection, the DCO will authorize the compromise and the write-off of the balance to OFA, MIAS or the applicable RAD. As part of this procedure the DCO would send copies of relevant memos to the program official who initiated the compromise.

2. (a) Does anyone in SFH or MIAS have the authority to attempt to collect a claim, regardless of amount, against a mortgagee or servicer? 24 CFR 17.63 seems to indicate that only claims collection officers can attempt to collect claims. Who are the claims collection officers designated by the Assistant Secretary for Housing?

The current situation as to claims collection officers is

uncertain. The list of claims collection officers that I have is woefully outdated. Under Notice 91-0006 ADM (copy attached),

which was issued on July 22, 1991 there is no longer a need for claims collection officers because their responsibilities will be performed by outside collection agencies. The rationale for the CCO scheme, as I understand it, was to provide for someone with specialized collection experience to take over a matter after a program official had tried but failed to collect. As it developed, that process was extremely time-consuming for a number of reasons. I assume that the inefficiency of that process accounts for the policy change eliminating the need for CCO's.

It seems to me that there still is a role for HUD personnel to play, and I do not see 17.63 as an impediment. The authority who designated a claims collection officer does not lose his authority because the designee is removed. Thus, as a practical matter, any responsible program official may initiate a collection case. By "collection case" I mean an enforcement action in an administrative or litigation forum, not the type of activity a collection agency would perform as described in Notice 91-0006 ADM.

In any event, the authority to collect is rarely the issue; it is the authority to collect less than the amount owed that is the issue.

2. (b) Assuming that SFH or MIAS has the authority to attempt to collect claims in general, does anyone in SFH or MIAS have the authority to compromise claims under $20,000 (to be changed to $100,000) against a mortgagee or servicer? Has there been some delegation of authority from the Assistant Secretary of Administration to SFH or MIAS to compromise?

As indicated in our response to 2.(a), SFH or MIAS may initiate a collection case for any amount. The compromise authority of those offices is limited to $100,000 and then only as to Title I loans and tenant rents in HUD-owned properties. (Debts secured by mortgages are excluded from these requirements, and SFH or MIAS may compromise claims against mortgagors through $100,000. Whether HUD has the authority to compromise secured claims in excess of $100,000 is arguable but is not in issue here.) Proposed compromises for all other claims must be cleared by the DCO. There has been no other delegation of compromise authority of which I am aware.
Thus, the compromise of any claim against a mortgagee or a servicer as you described would require the DCO's approval.

2. (c) Assuming again that SFH or MIAS has the authority to attempt to collect claims, please outline the procedure of how compromise offers should be handled. Specifically, once the amount of a claim has been determined by SFH or MIAS, what procedure should be followed when they receive a compromise

offer? Does a representative from SHF or MIAS act as an intermediary between the debtor and the Assistant Secretary of Administration (for not-small claims) or a claims collection officer (for small claims)?

As mentioned above, the authority to collect and the authority to compromise are not co-extensive. SFH or MIAS would serve as the negotiator; when it reached a position, it would prepare a recommendation and forward it to the DCO with complete background materials. As a practical matter, it might expedite the DCO's handling if communication were made prior to or during negotiations, particularly if the compromise would result in a small recovery of a large claim. Since the DCO's staff would be the contacts for SFH or MIAS, the size of the claims would be irrelevant.

While negotiating, it is imperative that SFH or MIAS inform the debtor that any agreement is subject to DOJ approval. Aside from informing the other party that time for approval will be needed and from preventing embarrassment to HUD should DOJ object, the DOJ approval requirement allows legitimate "wiggle" room should HUD fail to recognize some aspect of the deal during negotiations that it wishes to correct before binding itself to an obligation.

2. (d) What amount has been set by the Assistant Secretary for Administration for small claims under 24 CFR 17.65(a)? Who are the claims collection officers referred to in that section? Are they the same ones referred to in 17.63?

CCO's were authorized to compromise claims that did not exceed $2,500 (Handbook 1900.25 REV 3, 3-10). However, that information, as well as the answers to the others posed in 2. (d) is not longer relevant in light of the policy announced in Notice 91-0006 ADM (See response to question 2. (a)).

2. (e) Does the Department have a Department Claims Officer in accordance with 17.66? If so, would such officer have a role in collecting or compromising claims such as those described here?

The Department has a Department Claims Officer in accordance with 17.66. He is Albert M. Miller, the Deputy Director of the Office of Finance and Accounting. Yes, he would have a role in compromising the type of claims you describe. That role is described in our response to question 1. (b).

3. Is it correct to say that the Debt Collection Act does not apply to the "determination" of the amount owed, but once the amount is determined the Act does apply to any offer to pay a lower amount?

Yes. However, both the HUD regulations (17.62 and 17.100) and the Federal Claims Collection Standards (4 CFR 101.6 and 102.3) prohibit the subdividing of claims to avoid the $100,000 ceiling for compromise and require that a claim be an amount certain if it is to be collected by administrative offset.

4. Under what authority does SFH or MIAS have, if any, to

perform administrative offsets under 24 CFR 17.72(b) and 17.100, et seq?

Section 17.100(b) directs the Secretary to use administrative offset in all cases in which offset is legal and feasible. "Secretary" is defined in 17.60(b) to include the Secretary's designee. I do not know whether there are written designations for offset or other collection authority other than those in Part 17, subpart C. However, it seems to me that the tenor of the regulations, including for example the DAS responsibility at 17.109, is such that the authority of a given program office is clearly implied to the extent that it is not expressed.

The authority to collect, while theoretically implemented through the CCO's, does not preclude the persons who had delegated that authority in the first place from exercising it, regardless of the existence of a CCO system. Also, remember that the Debt Collection Act and its implementing regulations, are supplements to whatever collection and compromise authority existed when the Act became effective. The agencies' view is that a common law remedy of offset has always existed; the major impact of the Debt Collection Act was to impose certain due process requirements on the use of offset as a remedy.

Attachment