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B-127167, Jul. 15, 1970

Number: B-127167

Date: 1970-07-15

B-127167, JUL. 15, 1970

MISCELLANEOUS -- HOUSING LOANS -- LIMITATION DECISION TO CERTIFYING OFFICER OF FEDERAL HOUSING ADMIN., HUD, CONCERNING AUTHORITY TO WAIVE LOSSES UNDER INSURED LOANS THAT EXCEEDED STATUTORY LIMITATION. LOSSES SUSTAINED ON HOUSING LOANS THAT EXCEEDED THE STATUTORY PER STRUCTURE LIMITATION IN 12 U.S.C. 1703 IS NOT A MATTER THAT COMES WITHIN THE REGULATION WAIVER AUTHORITY AND 12 U.S.C. 1703(E) WHICH MERELY AUTHORIZES WAIVER OF COMPLIANCE WITH REGULATIONS BUT DOES NOT AUTHORIZE THE WAIVER OF COMPLIANCE WITH STATUTORY PROVISIONS OR LIMITATIONS.

TO MR. W. BEVERLEY MASON:

YOUR LETTER OF MAY 22, 1970 (REFERENCE: FEDERAL HOUSING ADMINISTRATION TITLE I CLAIMS NOS. 6-269536 THROUGH 6-269541), CONCERNS SIX VOUCHERS PRESENTED TO YOU FOR CERTIFICATION. THE VOUCHERS, PAYABLE TO THE FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION (FIRST FEDERAL), HOT SPRINGS, ARKANSAS, AS LENDER, IN THE TOTAL AMOUNT OF $10,871.84, COVER LOSSES SUSTAINED ON ACCOUNT OF TITLE I LOANS MADE BY FIRST FEDERAL TO PAUL E. AND MARGARET RYAN FRANCIS.

VOUCHERS NUMBERED 5171, 5172, 5173, 5267 AND 5268 COVER CLAIMS NUMBERED 6 -269538, 6-269540, 6-269541, 6-269536 AND 6-269537 (INADVERTENTLY DESIGNATED 6-269637 IN YOUR LETTER), RESPECTIVELY, ON LOANS WHICH WERE REPORTED FOR INSURANCE BY THE LENDER UNDER ITS CONTRACT WITH THE FEDERAL HOUSING ADMINISTRATION (FHA) PURSUANT TO TITLE I OF THE NATIONAL HOUSING ACT, AS AMENDED, AND THE REQUISITE INSURANCE CHARGES WERE PAID. HOWEVER, YOU STATE THAT AT THE TIME THE LOANS WERE MADE THEY EXCEEDED THE PERMISSIBLE AMOUNTS PER STRUCTURE AS FIXED BY 12 U.S.C. 1703. AT THE TIME THE LOANS WERE MADE THE CITED CODE SECTION PROVIDED, IN PERTINENT PART, AS FOLLOWS:

" *** (III) THE SECRETARY IS HEREBY AUTHORIZED AND DIRECTED BY SUCH REGULATIONS OR PROCEDURES AS HE SHALL DEEM ADVISABLE, TO PREVENT THE USE OF ANY FINANCIAL ASSISTANCE UNDER THIS SECTION *** (2) WHICH WOULD, THROUGH MULTIPLE LOANS RESULT IN AN OUTSTANDING AGGREGATE LOAN BALANCE WITH RESPECT TO THE SAME STRUCTURE EXCEEDING THE DOLLAR AMOUNT LIMITATION PRESCRIBED IN THE SUBSECTION FOR THE TYPE OF LOAN INVOLVED *** .

"(B) NO INSURANCE SHALL BE GRANTED UNDER THIS SUBSECTION TO ANY SUCH FINANCIAL INSTITUTION WITH RESPECT TO ANY OBLIGATION REPRESENTING ANY SUCH LOAN, ADVANCE OF CREDIT OR PURCHASE BY IT (1) IF THE AMOUNT OF SUCH LOAN, ADVANCE OF CREDIT OR PURCHASE EXCEEDS $3,500 *** ."

THE FIVE CLAIMS WERE DENIED AND FIRST FEDERAL HAS APPEALED THE DENIAL. IN EFFECT YOU RAISE THE QUESTION AS TO WHETHER THE SUBSTANTIAL COMPLIANCE COMMITTEE, UNDER

THE AUTHORITY OF 12 U.S.C. 1703(E) (24 CFR 200.89) CAN WAIVE THE VIOLATIONS OF THE $3,500 STATUTORY LIMIT FOR LOANS ON ANY ONE STRUCTURE; AND IF THE COMMITTEE DOES SO WHETHER THE VOUCHERS COVERING THE FIVE CLAIMS MAY BE CERTIFIED FOR PAYMENT.

12 U.S.C. 1703(E) PROVIDES AS FOLLOWS:

"(E) THE SECRETARY IS AUTHORIZED TO WAIVE COMPLIANCE WITH REGULATIONS HERETOFORE OR HEREAFTER PRESCRIBED BY HIM WITH RESPECT TO THE INTEREST AND MATURITY OF AND THE TERMS, CONDITIONS, AND RESTRICTIONS UNDER WHICH LOANS, ADVANCES OF CREDIT, AND PURCHASES MAY BE INSURED UNDER THIS SECTION AND SECTION 6, IF IN HIS JUDGMENT THE ENFORCEMENT OF SUCH REGULATIONS WOULD IMPOSE AN INJUSTICE UPON AN INSURED INSTITUTION WHICH HAS SUBSTANTIALLY COMPLIED WITH SUCH REGULATIONS IN GOOD FAITH AND REFUNDED OR CREDITED ANY EXCESS CHARGE MADE, AND WHERE SUCH WAIVER DOES NOT INVOLVE AN INCREASE OF THE OBLIGATION OF THE SECRETARY BEYOND THE OBLIGATION WHICH WOULD HAVE BEEN INVOLVED IF THE REGULATIONS HAD BEEN FULLY COMPLIED WITH."

ALTHOUGH 12 U.S.C. 1703(E) AUTHORIZES THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT TO WAIVE COMPLIANCE WITH REGULATIONS PRESCRIBED BY HIM, NEITHER THAT SECTION NOR ANY OTHER PART OF THE ACT VESTS ANY AUTHORITY IN THE SECRETARY TO WAIVE COMPLIANCE WITH A STATUTORY PROVISION OR LIMITATION. SEE B-131963, JULY 17, 1957; B-149800, SEPTEMBER 28, 1962; AND B-164118, NOVEMBER 19, 1969. THEREFORE, SINCE THE DOLLAR AMOUNT OF THE LOANS (PER STRUCTURE) EXCEEDED THE STATUTORY LIMITATION, THE SECRETARY'S WAIVER AUTHORITY WOULD NOT APPLY. ACCORDINGLY, THE FIVE VOUCHERS REPRESENTING CLAIMS NUMBERED 6-269536, 6 269537, 6-269538, 6- 269540 AND 6-269541 MAY NOT BE CERTIFIED FOR PAYMENT, EVEN IF THE SUBSTANTIAL COMPLIANCE COMMITTEE WOULD MAKE A DECISION IN THE MATTER FAVORABLE TO THE LENDER, AND IN EFFECT, APPROVE THE CLAIMS.

IN CONNECTION WITH THE DEFAULTED LOAN REPRESENTED BY CLAIM NO. 6 269539 (VOUCHER NO. 5175), IT APPEARS FROM THE RECORD BEFORE US THAT THE LENDER WAS NOT IN COMPLIANCE WITH THE FOLLOWING PERTINENT FHA REGULATIONS:

24 CFR 201.5(E) PROVIDES:

"(E) PRIOR APPROVAL BY COMMISSIONER. IN CONNECTION WITH ALL CLASS 1 AND CLASS 2 LOANS, THE APPROVAL OF THE COMMISSIONER IS REQUIRED PRIOR TO DISBURSING ANY LOAN WHICH WILL INCREASE THE TOTAL OBLIGATION OF A BORROWER, OR OF A COMAKER OR COSIGNER OF THE NOTE, TO MORE THAN $5,000 EXCLUSIVE OF FINANCING CHARGES."

24 CFR 201.5(C) PROVIDES IN PART:

"(C) OUTSTANDING FHA AND DIRECT FEDERAL OBLIGATIONS. THE PROCEEDS OF A LOAN SHALL NOT BE DISBURSED IF THE INSURED HAS KNOWLEDGE THAT THE BORROWER IS PAST DUE MORE THAN 15 DAYS AS TO EITHER PRINCIPAL OR INTEREST WITH RESPECT TO AN OBLIGATION OWING TO, OR INSURED BY, ANY DEPARTMENT OR AGENCY OF THE FEDERAL GOVERNMENT, PROVIDED THAT NOTHING CONTAINED HEREIN SHALL PREVENT THE MAKING OF A LOAN OTHERWISE ELIGIBLE, EVEN THOUGH THE BORROWER IS IN DEFAULT UNDER SUCH AN OBLIGATION BY REASON OF HIS MILITARY SERVICE AND THE APPROVAL OF THE COMMISSIONER IS OBTAINED."

24 CFR 201.5(A) PROVIDES:

"(A) CREDIT APPLICATION. PRIOR TO MAKING A LOAN THE INSURED SHALL OBTAIN A DATED

CREDIT APPLICATION EXECUTED BY THE BORROWER ON A FORM APPROVED BY THE COMMISSIONER. A SEPARATE CREDIT APPLICATION IS REQUIRED FOR EACH LOAN MADE OR NOTE PURCHASED. IN ADDITION, THE LOAN FILE SHALL CONTAIN EITHER A COMMERCIAL CREDIT REPORT ON THE BORROWER OR EVIDENCE OF THE LENDER'S INVESTIGATION OF THE BORROWER'S CREDIT." ALSO, THE RECORD INDICATES THAT INVESTIGATIVE REPORTS DISCLOSED THAT THE LENDER WAS CARELESS IN ITS HANDLING OF THESE PARTICULAR LOANS IN THAT THE TITLE I LOAN APPLICATIONS WERE COMPLETED BY THE LENDER FOR THE BORROWER WITHOUT ASKING THE BORROWER FOR A STATEMENT OF HIS OBLIGATIONS, AND WITHOUT HAVING THE BORROWER SIGN THE APPLICATION.

THE RECORD FURTHER DISCLOSES THAT CLAIM NO. 6-269539 WAS SUBMITTED TO THE SUBSTANTIAL COMPLIANCE COMMITTEE FOR CONSIDERATION OF A WAIVER OF 24 CFR 201.5(A) AND (E) UNDER THE AUTHORITY OF 12 U.S.C. 1703(E) (QUOTED ABOVE); AND THAT THE COMMITTEE DECIDED THAT A WAIVER SHOULD NOT BE GRANTED. THIS CONNECTION, WE NOTE THAT 12 U.S.C. 1703(E) AUTHORIZES THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT TO WAIVE COMPLIANCE WITH THE REGULATIONS IF, IN HIS JUDGMENT, ENFORCEMENT OF THE REGULATIONS WOULD IMPOSE AN INJUSTICE ON AN INSURED INSTITUTION "WHICH HAS SUBSTANTIALLY COMPLIED WITH SUCH REGULATIONS IN GOOD FAITH *** ." THUS, BASED ON THE RECORD BEFORE US, THE ACTION OF THE SUBSTANTIAL COMPLIANCE COMMITTEE IN DENYING WAIVER IN THE INSTANT CASE WOULD APPEAR TO BE A PROPER EXERCISE OF THE DISCRETION GRANTED BY 12 U.S.C. 1703(E).

IN ANY EVENT, SINCE THE SUBSTANTIAL COMPLIANCE COMMITTEE DID NOT IN ITS DISCRETION WAIVE COMPLIANCE WITH THE PERTINENT REGULATIONS, VOUCHER NO. 5175 MAY NOT BE CERTIFIED FOR PAYMENT.

AS REQUESTED, THE VOUCHERS AND CLAIM FILES ARE RETURNED HEREWITH.