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THE ENFORCEMENT OF HUD MORTGAGE FORECLOSURE GUIDELINES: POSSIBLE ILLINOIS COURT INTERPRETATIONS

It is evident that there is a foreclosure crisis in many American cities. At one time in 1974, the Department of Housing and Urban Development (HUD) possessed approximately 78,000 foreclosed single-family dwellings.[1] In Chicago, HUD holds in excess of 2,200 vacant homes with about 5,000 more anticipated vacancies.[2] Many of these properties have been conveyed to HUD by mortgagees holding claims on mortgage insurance policies after they were unable to satisfy outstanding obligations from the proceeds at a foreclosure sale. Some have been foreclosed by the Federal National Mortgage Association (FNMA), a quasi-governmental corporation under HUD which supplements private mortgage funds by buying and selling Federal Housing Administration (FHA) loans. Others are simply abandoned by defaulting mortgagors before or after a foreclosure proceeding has taken place. The foreclosure rate of federally insured mortgages is now one of growing attention and concern.[3]

This article will discuss and analyze the foreclosure of federally insured mortgages with emphasis on the regulation of foreclosure proceedings through HUD guidelines calling for alternatives to foreclosure. The manner in which Illinois courts might be affected by these guidelines in foreclosure cases will be considered. The issue of whether HUD guidelines are binding on the agency and the mortgagees will be discussed in detail, by observing how courts have interpreted them thus far. As a background to the discussion of guidelines affecting foreclosures, those federally insured mortgages which are most commonly susceptible to foreclosure will be briefly examined.

THE SECTION 203 AND 235 MORTGAGES

The most common types of federally insured mortgages which are susceptible to foreclosure are those insured under sections 203 and 235 of the National Housing Act.[4] Section 203 originated as part of the National Housing Act of 1934,[5] which provided insurance of mortgage loans to

1. Brown v. Lynn, 385 F. Supp. 986, 999 (N.D. Ill. 1974).
2. *Id.*, according to John Waner, Chicago Area Director of HUD.
3. *See, e.g.*, Chicago Tribune, Oct. 9, 1975, § 1, at 3, cols. 1-4.
4. Section 203, 12 U.S.C. § 1709 (1970), entitled, *Insurance of Mortgages-Authorization*; section 235, 12 U.S.C. § 1715z (Supp. 1974), entitled, *Homeownership or Membership in Cooperative Association for Lower Income Families—Authorization for Periodic Assistance Payments to Mortgagees.*
5. 12 U.S.C. § 1701 *et seq.* (1970).

finance the purchase of one-to-four-family homes. It was originally enacted as a depression-recovery device to restore the confidence of mortgage lenders in residential mortgages by insuring them against losses from default.[6] The program authorized the insurance of mortgages with relatively low downpayments and extended loan maturities. HUD determines whether an individual is qualified for a mortgage by weighing various factors, including appraisal of the desired property and the buyer's credit standing.[7] The section 203(b) guaranteed home mortgage program imposes a $45,000 limit on a single-family structure with a maximum insurable mortgage based on a statutory dollar limit or the appropriate loan-to-value ratio which applies to the circumstances of the given case.[8] The mortgagor's minimum investment must be equal to the difference between the total cost of acquiring the property and the amount of the mortgage to be insured, but at least 3 percent of the total cost.

Mortgagee approval is initiated by classifying the mortgagee into one of six different categories, the criteria for acceptance varying with each category.[9] All mortgagees must first submit the standard FHA 2001 application, followed by other forms according to their category determination. As service responsibilities HUD and FHA require that the mortgagee ascertain whether there are adequate facilities in the area where the property is located "to enable the mortgagor to receive timely information concerning his account and to enable the mortgagee to take adequate steps to protect the security of its loan," and whether "the holders of insured mortgages service them in accordance with the accepted practices of prudent lending institutions."[10]

The section 235 program, initiated in 1968,[11] is designed to provide insured mortgage subsidies on mortgage payments for the purchase of homes by lower-income families.[12] As long as the income of the mortgagor remains below a certain level, a portion of the mortgage payment is paid directly to the mortgagee by HUD; the balance of the monthly payment for

6. Madway, *A Mortgage Foreclosure Primer*, 8 CLEARINGHOUSE REVIEW 146, 160 (July 1974) [hereinafter referred to as Madway].

7. United States Department of Housing and Urban Development, Mortgagees' Handbook, Application Through Insurance, 4000.2, chs. 5, 6 (March 1975).

8. *Id.* at ch. 1, 2-2 to 2-5.

9. *Id.* at ch. 3, 3-1 to 3-3. These groups are: (1) Members of the Federal Reserve System and institutions whose deposits are insured by FSLIC or FDIC; (2) an institution subject to supervision by a governmental agency; (3) non-supervised institutions; (4) loan correspondents that invest in insured mortgages for their own portfolios; (5) charitable or non-profit institutions, pension funds and trusts; and (6) investing mortgagees who invest in real estate mortgages.

10. *Id.* at 3-5. This latter requirement is also found in 24 C.F.R. § 203.9 (Supp. 1975).

11. 12 U.S.C. § 1715z (1970).

12. United States Department of Housing and Urban Development, Mortgagees' Handbook, Application Through Insurance, 4000.2, ch. 2, 2-32 (March 1975).

principal, interest, taxes and insurance after 20 percent of the family's income is applied thereto.[13] The maximum mortgage loan is $25,000.[14] In all cases the family must make a minimum down payment of approximately $200.[15]

HUD publishes a variety of handbooks or guidelines regarding its various housing programs, one being the *HUD Handbook on Administration of Insured Mortgages*.[16] This Handbook details how a mortgage should be serviced by mortgagees in the section 203 and 235 programs. The importance of the Handbook in foreclosure proceedings is that it provides four alternatives to foreclosure.

The first two alternative provisions provide for forebearance relief. The first is voluntary forebearance from foreclosure by the mortgagee for up to one year.[17] During this period the mortgagee could assist the mortgagor by accepting reduced payments or carrying the account in default status.[18] The second alternative calls for special forebearance relief through either reduction or suspension of regular payments for a certain period of time.[19] Suspension of the regular payments could continue for as long as eighteen months after the date of the forebearance agreement, provided the full mortgage obligation is paid by the end of the period of extended or reduced payments.[20]

The third alternative is to recast the mortgage by refinancing it over a longer period of time so as to lower the monthly payments.[21] This is accomplished by increasing the unpaid principal balance of the mortgage (including late charges, etc.) and extending the term of the mortgage for up to ten years.[22]

13. *Id.* *See* 12 U.S.C. § 1715z(c)(2) (1970).

14. 12 U.S.C. § 1715z(2) (1970).

15. Madway, note 6 *supra*, at 161. HUD's Secretary has announced that this minimum will be raised to between $1,500 and $2,000 to discourage foreclosures. Chicago Sun Times, Oct. 21, 1975 at 6.

16. FHA G 4015.9 (April 1970). Some of the provisions found in these guidelines are in 24 C.F.R. 203.340-203.350 (Supp. 1975). This Handbook was replaced by 4191.1 under the same title in April, 1974 during the litigation of Brown v. Lynn [hereinafter referred to as the "Handbook"]. There is occasionally some semantic difficulty regarding handbooks, guides and regulations of federal agencies. Rules and regulations, which can be issued to implement law or state policy, are found in agency circulars, guides and handbooks. *See* 24 C.F.R. 10.3(b) and (c) (Supp. 1975).

17. FHA G 4015.9 (old Handbook) at 17; FHA G 4191.1 (new Handbook) at 47.

18. FHA G 4015.9 at 17.

19. *Id.* at 17; 24 C.F.R. 203.34 (Supp. 1975). Similar provisions appear in FHA G 4191.1 at 48. See 24 C.F.R. 235 (Supp. 1975) for provisions relating to the section 235 program of the National Housing Act.

20. FHA G 4015.9 at 17. As part of its insurance settlement with HUD, the mortgagee also receives mortgage interest, including all amounts accrued prior to the execution of the forebearance agreement.

21. FHA G 4015.9 at 18; 24 C.F.R. 203.342 (Supp. 1975). A similar, expanded provision appears in FHA G 4191.1 at 50-1.

22. FHA G 4015.9 at 18.

The last alternative is the assignment of the mortgage to HUD instead of initiating foreclosure.[23] HUD will accept assignment of mortgages in default when the default is caused by circumstances beyond the mortgagor's control and when HUD directors believe that continued servicing (including forebearance and recasting) will enable the mortgagor to pay the debt in full.[24]

Whether these alternative provisions are legally binding and must be adhered to before a foreclosure can commence, as mortgagors have maintained, or whether they are merely suggestive, as foreclosing mortgagees assert, has been the subject of increasing controversy. While courts have taken varied positions in the past, recent decisions have provided new insight on this issue.

Federal National Mortgage Association v. Huffman

The most important interpretation of the HUD guidelines by Illinois courts to date is *Federal National Mortgage Association v. Huffman*,[25] decided in the Circuit Court of Cook County in April, 1975 and already widely noted.[26] FNMA, as plaintiff-assignee of the section 203 mortgage in question, brought foreclosure proceedings against a mortgagor who raised affirmative defenses, including non-compliance with FNMA regulations[27]

23. *Id.* at 19, where reference to the use of all the alternatives is strongly suggested. A similar but limited provision appears in 24 C.F.R. 203.350 (Supp. 1975). An expanded provision appears in FHA G 4191.1 at 51-2, but without the suggested use of alternative procedures as in FHA G 4015.9.

24. FHA G 4191.1 at 51-52. However, if it appears the acquisition and conveyance of the property to HUD will be inevitable in any regard, assignment will not be accepted.

25. No. 73 Ch. 7453 (Cook County Cir. Ct. April 17, 1975).

26. *See* Federal Nat'l Mortgage Ass'n v. Ricks, 44 U.S.L.W. 2143 (N.Y. Sup. Ct., Kings County, Sept. 15, 1975); Roberts v. Cameron Brown Co., No. 174-62, 5-6 (S.D. Ga. 1975); and 5 Real Estate Law Report, No. 6 at 5 (Nov. 1975).

27. FNMA Servicer's Guide § 128 *et seq.* Section 128 reads in part:

> *Servicing Delinquent Accounts.* The Servicer is responsible for the protection of FNMA's investment in the mortgages by maintaining the maximum possible number of mortgages in a current status, dealing quickly, effectively (yet considerately, if the circumstances warrant) with mortgagors who are delinquent or in default, and accomplishing these objectives without jeopardizing the interests or legal rights of FNMA. . . .
>
> . . . Each servicer must have a program for servicing delinquent mortgages which embraces the accepted standards of loan servicing employed by prudent lenders generally. A well-rounded program should include among other things the following principles:
>
> . . . .
>
> (d) A procedure for the individual analysis of each distressed or chronic delinquent, giving consideration to the effectiveness of sending additional notices, making individual telephone contacts, writing original letters, requiring the mortgagor to visit the Servicer's office, making personal calls to the mortgagor, making an inspection of the mortgaged premises, etc. and continuous follow-up.
>
> FNMA is willing to extend every reasonable consideration to delinquent mortgagors who have met with temporary hardships which prevented payment of

and with the guidelines in the HUD Handbook.[28] The mortgagor alleged that neither the plaintiff nor the assignor of the mortgage followed the guidelines prescribing alternatives to foreclosure, and that this failure should bar the action.[29]

The court relied heavily on *Brown v. Lynn*,[30] a United States District Court case decided in the Northern District of Illinois. *Brown* involved an action by mortgagors for injunctive relief and damages for threatened foreclosure by certain mortgagees and HUD.[31] The court in *Brown* held that although the mortgagees could not be bound by the guidelines,[32] they were binding on HUD.[33] The *Huffman* court cited Brown for the proposition that HUD has been given a congressional mandate to furnish adequate housing for every American and that an interdependency exists between HUD and the mortgagees to extend this benefit to them.[34] As in *Brown*, the court concluded that HUD was ignoring this congressional mandate.[35]

> their mortgage obligation when due, if the mortgagor is cooperative, willing and clearly acting in good faith and able to enter into a temporary arrangement which will cure the default in a reasonably short period of time. When the occasion warrants and the FHA or VA regulations permit, FNMA will agree to enter into forebearance, modifications, etc., to assist the deserving mortgagor in eventually bringing the mortgage to a current status. . . .

28. This was the old HUD Handbook, FHA G 4015.9.

29. No. 73 Ch. 7453 (Cook County Cir. Ct. April 17, 1975) at 2-3.

30. 385 F. Supp. 986 (N.D. Ill. 1974) (*Brown I*); 392 F. Supp. 559 (N.D. Ill. 1975) (*Brown II*). *Brown II* involved a reconsideration of the court's initial decision in the case.

31. 385 F. Supp. at 988. The mortgagors alleged that the mortgagees had instituted foreclosure proceedings without adequate prior notice or hearing, thus violating their fifth amendment due process rights and the contractual relationship between HUD and the mortgagees. *Id.* They also alleged that HUD officials violated their own statutory obligation, the spirit and the letter of the National Housing Act, 42 U.S.C. § 1441 (1970), by allowing the foreclosure proceedings to take place. *Id.* The mortgagors further argued that the mortgagees should pursue the "prudent lending" standard of conduct for mortgagees found in the Code of Federal Regulations at 24 C.F.R. § 203.9 (Supp. 1975), mentioned at note 10, *supra*, contending that the standard had not been met since a prudent lending institution would pursue the alternatives delineated in the HUD Handbook. 385 F. Supp. at 990. In addition to mortgagee non-compliance with the Handbook, the plaintiffs maintained that HUD itself failed to enforce the guidelines therein. *Id.* at 991.

32. 385 F. Supp. at 998. The holding was reaffirmed in *Brown II*, 392 F. Supp. at 561. The court believed that the guidelines were couched in non-mandatory terms, and that HUD should have published them in the Federal Register according to HUD regulation 24 C.F.R. § 10 (Supp. 1975). Because they were not so published, they could not bind the mortgagees. In addition, the court pointed to Faggins v. Kassler, 72 C 125 (N.D. Ill. 1972), and FHA v. Morris Plan Co. of California, 211 F.2d 756 (9th Cir. 1954), two cases where a mortgagor could not sue a mortgagee under certain FHA regulations. *See* Baker v. Northland Mortgage Co., 344 F. Supp. 1385 (N.D. Ill. 1972); Gibson v. First Federal Savings & Loan Ass'n of Detroit, 504 F.2d 826 (6th Cir. 1974); and Boston Public Housing Tenants' Policy Council, Inc. v. Lynn, 388 F. Supp. 493 (D. Mass. 1974).

33. 385 F. Supp. at 998-1001.

34. No. 73 Ch. 7453 (Cook County Cir. Ct. April 17, 1975) at 6.

35. *Id.* at 12-13.

However, it went even further and extended, by way of dicta, the holding in *Brown*. The *Huffman* court found that FNMA disregarded its own guidelines and those of HUD;[36] it also decided that the guidelines were binding on the original mortgagee. The court recognized that it was not necessary to decide if the original mortgagee was bound by the HUD guidelines, but felt it best to do so.[37] The court noted:

> [T]he social repercussions involved here are so crucial and the obligations and interest of the private mortgagee are so intertwined with the obligation and interests of HUD and FNMA, that we would only further confuse an already disastrous housing situation by deciding only part of this issue.[38]

Therefore, the court decided that it would rule on whether the guidelines would bind the mortgagee-assignor. In doing so it again looked to *Brown*.

Dicta in the conclusion of the second *Brown* opinion[39] stated that even though the Handbook was not binding on the original mortgagees, mortgagors might raise the non-compliance of the guidelines in a foreclosure suit and that a court of equity could restrict a mortgagee who did not, in good faith, attempt to follow them.[40] In addition, *Brown* suggested that an equity court hearing a foreclosure suit might even deny a foreclosure where the guidelines were flagrantly violated.[41] *Huffman* agreed with this dicta, indicating that equity courts might exercise their powers by refusing to grant foreclosures where mortgagees have flagrantly disregarded the guidelines.[42] The court evidently believed that equitable considerations should be applied to situations where the mortgagees and FNMA fail to comply with the guidelines.

The court in *Huffman* noted that *Brown* had distinguished an action in the form of positive relief for damages and an injunction against a mortgagee under the guidelines, the situation in *Brown*, from a case where a court of equity might refuse to grant a foreclosure by a mortgagee when the guidelines are used as a defense to show non-compliance, the situation in *Huffman*.[43] Because the same equitable considerations were involved, however, the court in *Huffman* saw no distinction between the two situations. It stated that either a positive duty to abide by the guidelines exists in *all* situations, the failure to perform that duty constituting both a cause of action for damages and a bar to foreclosure, or there is no such duty.[44] Presumably, these equitable considerations would be the "clean hands doctrine"[45]

36. *Id.* at 11, 13.
37. *Id.*
38. *Id.*
39. 392 F. Supp. 559 (N.D. Ill. 1975).
40. *Id.* at 563.
41. *Id.* at 562.
42. No. 73 Ch. 7453, at 13-14.
43. *Id.* at 14. *See* 385 F. Supp. at 998; 392 F. Supp. at 563.
44. No. 73 Ch. 7453, at 14.
45. *See, e.g.*, New York Football Giants, Inc. v. Los Angeles Chargers Football

and the maxim that "he who seeks equity must do equity."[46] By these doctrines, the mortgagee cannot foreclose its lien through an equity court when it has not abided by the spirit and purpose of the federally insured mortgage act: to give every American a chance to own *and keep* a decent home. Thus the guideline alternatives express this spirit and should be followed by any mortgagee, if at all possible, in order to "do equity." The court noted that the guidelines are not expressed in mandatory terms, but that their existence implies use, and that unless a mortgagee is obligated to attempt to follow the alternatives when the situation so merited, the guidelines and the purpose of the housing program would become meaningless.[47]

In addition to the concept of an all-encompassing equitable duty to bind the mortgagee, the *Huffman* court also relied on the contract theory of the mortgagor as a third party beneficiary of the mortgage insurance agreement between FHA and the mortgagee, and the contract between FNMA and the mortgagee.[48] The court pointed to HUD and FNMA regulations which provide that their provisions become part of the contracts between the mortgagee and FHA-FNMA.[49] Since the housing programs were initiated to benefit the mortgagor, he or she becomes a third party beneficiary and the guidelines, as part of the contract, bind the mortgagee.[50] Thus the HUD guidelines would be binding on the mortgagee if HUD, rather than FNMA, had sued to foreclose, with a similar result: the action being barred due to non-compliance. Through the application of equitable principles and the third party beneficiary concept, *Huffman* has clearly extended *Brown* by deciding that mortgagees are bound by the alternative HUD guidelines.[51]

Both *Huffman* and *Brown* found that HUD and other federal agencies should have primary responsibility in enforcing the alternative guidelines to foreclosure. But once this has been decided, the question arises as to what HUD can actually do to enforce them. HUD cannot prevent a foreclosure action which has already been initiated. It can only suspend or terminate the

Club, Inc., 291 F.2d 471, 473 (5th Cir. 1961); Booth v. Edwards, 322 Ill. 489, 491, 153 N.E. 677, 678 (1926).

46. *See, e.g.*, Grove v. Chicago Title & Trust Co., 25 Ill. App. 2d 402, 409, 166 N.E.2d 630, 634 (1960); *In re* Thomas, 204 F.2d 788, 794 (7th Cir. 1953).

47. No. 73 Ch. 7453, at 16.

48. *Id.* at 15.

49. *Id.* HUD guide FHA G 4005.8 at 1-4; FNMA Servicer's Guide, Part I, § 101 at 1.

50. No. 73 Ch. 7453, at 15-16.

51. In the aftermath of the opinion in *Huffman*, the precedential value of the case may be blunted because it seemed questionable whether the mortgagor herself came into court with "clean hands," due to possible violations of FHA Regulations, Title II, § 203 11,603.340, 24 C.F.R. 203.340 (Supp. 1975), in that she owned two properties insured by HUD-FHA, and the alleged filing of false statements in obtaining the mortgage. Interview with Robert Stastny, Regional Counsel for FNMA, on Jan. 13, 1976. *See* Record of 73 Ch. 7453 on Sept. 29, 1975 at 4-5. The defendant mortgagor in *Huffman* ultimately brought her past mortgage payments current. However, the court's opinion regarding the guidelines should still be given effect as to future actions.

lender's acceptability as a HUD-approved mortgagee.[52] Such economic pressure on mortgagees who do a large volume of business with HUD-FHA mortgages might be significant, but actual direct action against a non-complying mortgagee is apparently not even within HUD's jurisdiction.[53] Because HUD lacks this power, the courts must ultimately decide the fate of a foreclosure proceeding where mortgagees violate the guidelines.

OTHER POSSIBLE COURT INTERPRETATIONS OF THE GUIDELINES

Although *Huffman* appears to be an important position taken by Illinois courts thus far on the HUD guidelines, it would be helpful to analyze decisions on the guidelines from other jurisdictions which Illinois courts might choose to follow.

One case following the logic of the *Huffman* decision to a great extent is *Federal National Mortgage Association v. Ricks*,[54] where mortgagors asserted the HUD Handbook as an affirmative defense, contending that the requirements therein are conditions precedent to the foreclosure of an FHA mortgage.[55] As in *Brown*, the court stated that the Handbook did not have the force and effect of law because of non-publication in the Federal Register and HUD's non-compliance with its own publication guidelines.[56] However, as in *Huffman*, the dicta in *Brown* regarding the refusal of courts to grant foreclosure relief where mortgagees flagrantly violate the alternative guideline provisions were cited. *Huffman* was cited as following *Brown* for the proposition that equitable principles in the guidelines obligate mortgagees to seek alternatives to foreclosure. Applying the maxim "he who seeks equity must do equity," the court ruled that "any conduct on the part of the mortgagee that is considered *unconscionable* or oppressive will operate to deny it the aid of the court of equity."[57] The court found that by ignoring the guideline alternatives the mortgagees are permitted to make a mockery of the National Housing Act, and that failing to follow guidelines in the event of default may constitute unconscionable conduct so as to deny foreclosure relief.[58] *Ricks*, however, rejected the contention that the mortgagees must follow a "prudent lending" standard, specifically citing *Brown* for support.[59]

52. HUD Handbook 4191.1 at 1, 24 C.F.R. §§ 203.7(a), 203.9, *incorporated by* 24 C.F.R. § 235.1 (Supp. 1975).

53. Roberts v. Cameron Brown Co., No. 174-62, (S.D. Ga. 1975) at 12.

54. 44 U.S.L.W. 2143 (N.Y. Sup. Ct., Kings County, Sept. 15, 1975).

55. *Id.* The requirements consist of the consideration of the alternative provisions.

56. *Id.* at 2143-44.

57. *Id.*

58. *Id.* The court also ruled that the mortgagees failed to follow directives contained in the *Veteran's Administration Lender's Handbook* which should also be given a mandatory effect.

59. *See* 385 F. Supp. at 986.

The concept of measuring the mortgagee's conduct as so unconscionable as to deny foreclosure relief was not specifically mentioned in *Huffman*, and it is arguable whether or not the court there intended such a stringent standard as an affirmative defense for the mortgagor to assert. However, the concept of unconscionable conduct by the mortgagee is still another theory Illinois courts might use in interpreting the HUD guidelines in foreclosure actions.[60]

Another case which cited both *Huffman* and *Brown* was the United States District Court case of *Roberts v. Cameron Brown Co.*,[61] involving a mortgagor who purchased property under a section 235 mortgage. The mortgagor brought an action and sought a partial summary judgment because of non-compliance with the HUD Handbook. The court cited *Huffman* and *Brown* in stating that HUD had not complied with the objectives of the National Housing Act.[62] As in *Huffman*, the third party beneficiary concept was found important in determining that the plaintiffs had standing *and* the right to seek civil remedies.[63] The Handbook guidelines were then considered in depth, with the court concluding that they impose mandatory servicing requirements on section 235 mortgages.[64]

The case expands the parameter of the guidelines, however, by ultimately finding that the Handbook was *legally* binding and enforceable in an action by mortgagors. Although this factual situation was not before the *Huffman* court, it had mentioned that such a circumstance should merit a decision consistent with the position taken where the guidelines are used as a defense; a plaintiff-mortgagor could use them just as a defendant-mortgagor could. In *Roberts*, the court was presented with a suit brought by a mortgagor and did find that a mortgagor could sue upon the violation of the guidelines. The court relied on a theory that was rejected in *Brown* and *Ricks*: the "prudent lending" standard of 24 C.F.R. § 209.9. Because of the mortgagors' often precarious situation in the section 235 program, the court stated that the "prudent lending" standard requires more than the normal procedural standards followed in traditional mortgage foreclosure situations.[65] Since this standard was reflected by the various provisions in the HUD Handbook, the court held that the Handbook should control the servicing practices of the mortgagee because it constitutes a valid administra-

60. One source has indicated that if "unconscionability" is to be considered and determined by circumstances, as *Ricks* states, that more conscionable conduct might be expected of FNMA than of a lesser mortgagee. 5 Real Estate Law Report, No. 6 at 5 (Nov. 1975).

61. No. 174-62 (S.D. Ga. 1975). A first order, entered in the case on February 4, 1975, found for the plaintiffs on alleged due process violations because of the power of sale provisions in the mortgage in question, but held that the HUD Handbook created no personal rights on behalf of mortgagors to sue for failure to comply with its provisions.

62. No. 174-62 at 5-7.

63. *Id.* at 15-16.

64. *Id.* at 16-21.

65. *Id.* at 25. As the court stated: "If the lenders participating in the section 235

tive interpretation of that standard as found in 24 C.F.R. § 209.9.[66] *Roberts* would thus support an action by a mortgagor against a mortgagee, basing the strength of that action on non-compliance with the HUD guidelines. The end result is the same as in *Huffman* and *Ricks*: the mortgagor is prevented from foreclosing, as was initially attempted in *Roberts* before the plaintiff-mortgagor brought an action. The ultimate significance of *Roberts* is that it extends the meaning and importance of the guidelines. Since *Roberts* interprets the guidelines as being legally enforceable, they can now be a device used by mortgagors as plaintiffs.

THE FUTURE APPLICABILITY OF THE GUIDELINES

What emerges from the cases is a pattern of referral to the HUD guidelines as binding in foreclosure situations. The cases differ on the methods used in reaching this concept of adherence. Third party beneficiary considerations, equitable principles, the concept of unconscionability and the "prudent lending" standard have all been used to demonstrate that adherence to the guidelines is required by HUD and the mortgagees.[67] Whether Illinois courts will find the guidelines to be non-binding, mandatory when used as an affirmative defense in a foreclosure proceeding, or legally enforceable in a separate action is still debatable. *Brown* and the cases cited therein[68] seemed to take the first position; *Ricks* would favor the second; while *Huffman* and *Roberts* would support the third, which ironically enough, began in dicta from *Brown*. The trend seems to support *Huffman*, an Illinois case, albeit from a county circuit court. The situation is further complicated because the basis of the decision in *Roberts* which held the guidelines legally enforceable was the "prudent lending" standard. Yet this reasoning was specifically rejected in *Brown* and *Ricks*.

What is certain is that the guidelines must now be taken into consideration as a definite factor in ruling on a mortgage foreclosure under the section 203 and 235 mortgages. This is true whether the Illinois courts follow the lead of *Huffman*, or choose the alternate theories of the other cases discussed.

A major difficulty lies in enforcement. Even if the guidelines are said to be mandatory or legally binding on mortgagees, they have not been so enforced to any degree by HUD. As mentioned earlier, HUD can only

program were to follow prudent conventional servicing practices, low income mortgagers, who could never have obtained a conventional mortgage in the first place, would frequently lose their homes, thus frustrating the purpose of the Act." *Id.*

66. *Id.* at 25-26.

67. *Huffman, Ricks* and *Roberts* show a trend toward totally abandoning the idea that a mortgagor cannot seek enforcement of the guidelines against a mortgagee, whether the mortgagor is a plaintiff or defendant, a theory expressed in *Brown* and in the cases at note 32 *supra.*

68. *See* note 32 *supra.*

exert economic pressure on a mortgagee and cannot itself bring an action to intervene in a foreclosure. But HUD seems to be lax in regard to any kind of enforcement over mortgagee servicing practices. Both *Brown* and *Huffman* condemned HUD for its failure to take responsible action, and commented at length on the policy issue of abandoned housing and the obligation of HUD to follow the goals of the National Housing Act. The mortgagors in *Brown* were, in effect, denied relief because of HUD's mistake in not policing the FHA programs involved. As two authorities stated in an article on the subject:

> We are thus presented with the peculiar spectacle of an insurance company, HUD, agreeing with a potential claimant, the mortgagee, that the claimant need not take responsible steps to avoid bringing about circumstances, which in all probability, will give rise to a claim against the insurance company.[69]

Lack of enforcement shows lack of responsibility. In all the decisions interpreting the guidelines, courts have ultimately stressed the fact that responsibility is needed in servicing federally assisted and insured mortgages. That responsibility should rest with all concerned: the mortgagor, the mortgagee and especially HUD. In the past, it has not, leaving the courts with the ultimate burden of enforcing the guidelines and determining what HUD policy should be in this regard.

CONCLUSION

In response to public pressure, HUD has finally decided to interpret its guidelines in the Handbook as having more force and effect than was previously advocated by the agency, as in *Brown*. The Secretary of HUD recently announced that the guidelines will probably be changed soon to have the force and effect of law.[70]

According to the most recent HUD Mortgagee Letter on the guidelines from the Office of the Assistant Secretary,[71] which HUD is following in conjunction with the Handbook, the guidelines or "requirements" as the letter states, "are not intended as legal prerequisites to foreclosure action" because foreclosures are governed by the terms of mortgage documents and state laws.[72] From this language, it would seem that HUD is reiterating its position that the guidelines are not mandatory and is again refusing to assert

69. D. Madway & D. Pearlman, *Mortgage Forms and Foreclosure Practices: Time For Reform*, 9 ABA REAL PROPERTY PROBATE AND TRUST JOURNAL 560, 563 (1974) [hereinafter cited as Madway and Pearlman].

70. Chicago Sun Times, Oct. 21, 1975, p. 6, according to George Leondeis, spokesman for the Chicago HUD Office, commenting on remarks made by Carla Hills, Secretary of HUD, while in Chicago to address a mortgage and citizen's group.

71. United States Department of Housing and Urban Development Mortgagee Letter 75-10, Oct. 4, 1975.

72. *Id.* at 1.

any positive enforcement of its guidelines. While it is true that foreclosure procedures are governed by state statutes (within constitutional limitation), the federal guidelines can still be considered enforceable in state proceedings, as *Huffman* and *Ricks* have demonstrated.

Although it appears that HUD has not attempted to have the guidelines declared legally enforceable by the courts, it has shown recent concern in overseeing mortgagee servicing practices. According to the HUD mortgagee letter mentioned above, HUD has affirmed its position that mortgagees who do not follow guideline procedures can expect to have their approval as HUD mortgagees either suspended or withdrawn.[73] The mortgagee must also establish certain written procedures and controls to promptly respond to inquiries by mortgagors.[74] For example, a mortgagee may not begin foreclosure until at least three full monthly installments are due and unpaid, unless the property is abandoned by the mortgagor.[75]

HUD's Secretary also announced that a Mortgage Review Board with authority to act on consumer complaints regarding federally insured mortgages will soon be established.[76] The agency thus appears to be exercising a more assertive role in the regulation of foreclosure proceedings.

HUD is also obligated to act by provisions in the Emergency Homeowners' Relief Act,[77] enacted by Congress in July of 1975 in reaction to the foreclosure crisis. Under the Act, standby measures are to take effect if the level of home mortgages which are delinquent sixty days or more reaches 1.2 percent.[78] The Act would then provide two forms of assistance to homeowners who were at least three months in arrears and threatened with foreclosure: insurance of additional private loans and direct federal payments.[79] The loans can continue for one year, with the homeowners starting repayment of the principal within the following twelve months, and repayment of the interest within six months of the last payment. The mortgagor is given a maximum of ten years to fully repay the additional loan

73. *Id.*

74. *Id.* at 2. For example, the mortgagee must have a personal interview with the mortgagor or attempt to arrange such a meeting before the loan becomes 60 days delinquent. *Id.* at 3.

75. *Id.* at 6. *See* FHA G 4191.1 at 57, which prescribes the maximum periods of delay before the mortgagee must start foreclosure.

76. Chicago Sun Times, Oct. 21, 1975, p. 6. This remedy would have been provided by a provision in the Federal Mortgage Foreclosure Act, section 405, which was included in the original Senate version of the 1974 Housing Act, but dropped in conference. Section 405 would have provided that a foreclosure commissioner meet with an objecting mortgagor to discuss the default. The commissioner may request the mortgagee to attend the conference. In addition, fair notice provisions are contained in this section from mortgagee to mortgagor to HUD. *See* Madway and Pearlman, note 69 *supra*, at 564, 567.

77. 12 U.S.C. § 2701 (Supp. 1975).

78. *See* 12 U.S.C. § 2701-2 (Supp. 1975).

79. *Id.* Homeowners must be in danger of foreclosure because of reduced incomes but must have a reasonable chance of meeting future payments.

with all principal and interest.[80] HUD's responsibility is to initially publicize the availability of these programs to the mortgage lenders.[81] When implemented, HUD would be notified by the mortgagor and mortgagee for application under the program[82] and oversee the program in general.[83]

These recent actions by Congress and HUD to reduce the foreclosure rate are somewhat encouraging. If HUD is now sincere about fulfilling its responsibility by prescribing stronger guidelines, undertaking effective initial monitoring of foreclosures through a review board, and implementing an emergency program, the task of the courts in this area will no doubt be alleviated. The courts could then concentrate on the facts of the individual foreclosure cases, rather than struggle with whether or not the alternative guideline provisions were intended to be legally enforced by the court, by HUD, or by a mortgagor. Because of the courts' past preoccupation with deciding that the guidelines must at least be adhered to in fairness to all parties, the foreclosure trend of federally insured and assisted mortgages should decline. It would be ironic, however, if judicial interpretation of a federal agency's guidelines, rather than any impetus from the agency itself, caused this decline. It is thus encouraging to see that HUD has shown a recent concern to change this situation and provide reform on mortgage foreclosures from within.[84]

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80. *Id.*

81. *Id.* HUD's commitment to this program has been reiterated by various departmental releases. *See, e.g.*, United States Department of Housing and Urban Development HUD Release No. 75-344, August 29, 1975.

82. 12 U.S.C. § 2903 (Supp. 1975). Notification by the mortgagee may be waived by HUD.

83. Section 111 of The Emergency Homeowners' Relief Act (12 U.S.C. § 2701 (Supp. 1975)) shows particular congressional concern by requiring the Secretary of HUD to make a report on the state of delinquencies and foreclosures, the extent of voluntary forebearance by mortgagees, and action taken by HUD and other governmental agencies in reducing foreclosures.

84. Since the preparation of this article, HUD has significantly changed its position on the enforcement of its guidelines. Pursuant to HUD HM Mortgagee Letter 76-9 from Assistant Secretary James L. Young, May 17, 1976, the guideline provision on forebearance by assignment (HUD Handbook 4191.1 ¶ 126, at 51-2) has been changed to allow HUD to accept assignment of *any* fully HUD-insured single family mortgage which has not been voluntarily abandoned if all of the following criteria are met: (1) The mortgagee indicates an intent to foreclose; (2) three full monthly installments are due; (3) the mortgaged property is the principal residence of the mortgagor; (4) the mortgagor owns no other property insured by HUD; (5) the default is caused by circumstances beyond the mortgagor's control which temporarily render the family financially unable to cure the delinquency; (6) the mortgagor will be able to resume full payments at some time; and (7) the mortgagee did everything reasonable to avoid foreclosure. The mortgagee *must* request assignment to HUD if all these criteria are met. Notice must be given to HUD and the mortgagor in all cases. Mortgagees cannot foreclose unless HUD has made a decision on the assignment. In addition, any mortgages now in the process of judicial foreclosure which have not reached the decretal stage are now stayed until the mortgagees determine if the mortgages are eligible for assignment.