

FHA Servicing Requirements

Protections for Borrowers in Default

Overview and General Points

FHA servicing is highly regulated, and includes important protections for borrowers in default

Mortgagees and Servicers **MUST** follow HUD standards and procedures

Noncompliance may be a potential defense to foreclosure

HUD Policy

Legislative goal of FHA:

- To make loans to low and middle income families
- To “assist in providing a decent home and suitable living environment for every American family”
 - 12 USC § 1708(a)(7)(B)

HUD understands FHA borrowers are more vulnerable to default

- Specified requirements for early default intervention and loss mitigation
- Limited Lender’s authority to commence foreclosure until requirements are met

Primary Sources

Federal statute

- National Housing Act , 12 USC § 1715(u)
- Code of Fed Regulations , 24 CFR §§ 203.500 -.681

Private contract

- Note and Mortgage

Court interpretation

- In NY: *HSBC Bank USA, NA v. Teed*

Secondary Sources

HUD Handbooks (HUD's administrative regulations)

- 4000.1 – FHA Single Family Housing Policy Handbook
- 4330.1 – Administration of Insured Home Mortgages

Mortgagee Letters (HUD provides clarity or changes)

NOTE: Servicer/Investor internal rules and procedures that conflict are in violation, and have NO FORCE

Authority to assist mortgagors in default

12 USC § 1715(u) – emphasis added

“Upon default or imminent default...***mortgagees shall engage in loss mitigation*** actions for the purpose of providing an alternative to foreclosure...”

Mortgage servicing generally

24 CFR § 203.500 – emphasis added

“It is the intent of the Department that ***no mortgagee shall commence foreclosure or acquire title*** to a property until the requirements of this subpart have been followed.”

Contact with the mortgagor

24 CFR § 203.604(b) – emphasis added

“The mortgagee ***must have a face-to-face interview*** with the mortgagor, ***or make a reasonable effort to arrange*** such a meeting, before three full monthly installments due on the mortgage are unpaid.”

Contact with the mortgagor

24 CFR § 203.604(d) – emphasis added

“A reasonable effort to arrange a face-to-face meeting with the mortgagor ***shall consist at a minimum of one letter sent to the mortgagor certified*** by the Postal Service as having been dispatched.”

Continued...

Contact with the mortgagor

24 CFR § 203.604(b) – emphasis added

...Continued

“Such a reasonable effort to arrange a face-to-face meeting ***shall also include at least one trip to see the mortgagor at the mortgaged property***, unless the mortgaged property is more than 200 miles from the mortgagee, its servicer, or a branch office of either, or it is known that the mortgagor is not residing in the mortgaged property.”

Question:

Have any of your FHA clients either... ?

- Attended a Face-to-Face Meeting, or
- Received a certified letter *AND* a visit to arrange a Face-to-Face Meeting

Click the “Yes” or “No” button

Exceptions to Face-to-Face

24 CFR § 203.604(c)

A face-to-face meeting is not required if:

- Mortgagor does not reside in property
- Property is not within 200 miles of the mortgagee, its servicer, or branch office of either
- Mortgagor clearly indicated he will not cooperate
- Repayment plan is entered into and payments are current
- Reasonable effort to arrange a meeting is unsuccessful

Duty to mitigate

24 CFR § 203.605(a)

Before four full payments are due and unpaid the mortgagee shall:

- Evaluate all of the loss mitigation techniques provided to determine which is appropriate; and
- Take appropriate loss mitigation action

Pre-foreclosure review

24 CFR § 203.606(a) (emphasis added)

Before initiating foreclosure, the mortgagee must ensure that *all servicing requirements of this subpart have been met.*

No Private Right of Action (!)

Courts consistently hold: “No expressed or implicit cause of action for Homeowners” to sue on regulations alone

HUD regs only permit HUD (not Homeowners) to impose penalties against Mortgagees

- See *In Re Miller*, 124 F. App'x 152, 155-56 (4th Cir. 2005)

Homeowners can prevail on other theories

Theories of Liability

- **Statutory Violation**

- Regulations impose a condition precedent to foreclosure, which is not satisfied

- **Breach of Contract**

- FHA regulations incorporated into the Note and Mortgage
- Lender's remedies are subject to HUD regulations

- **Equitable Principle**

- HUD Policy to intervene early and resolve quickly
- Mortgagee benefits greatly from FHA protections
- If Mortgagee had followed Early Default servicing guidelines as required, we may not be here today (*Teed*)

Typical Arguments by Lenders

**Homeowner's "breach of contract" claim is just a
*"private right of action" claim in disguise!***

- Courts can tell the difference (usually); claims can be distinguished
 - See *Kersey v. PHH Mortg. Corp*, 682 F.Supp.2d 588, 593 (E.D. Va. 2010)

Typical Arguments by Lenders

We're exempt from the face-to-face meeting because there's *no branch office within 200 miles!*

- Relies on HUD website statement that “branch office” really means “servicing office”
- Courts have consistently rejected reliance on HUD website ; no substitute for full rulemaking
 - See *Mathews v. PHH Mortgage Corporation*, 724 S.E.2d 196, 204 (2012) (“The term ‘branch office’ in the Regulation is unambiguous.”)

Typical Arguments by Lenders

Homeowners can't claim breach of contract because *they caused the first breach!*

- Some courts have accepted; many found it absurd
 - *Mullins v. GMAC Mortgage Limited Liability Company*, No. 1:09-cv-00704, 2011 U.S. Dist. LEXIS 35210 (S.D. W. Va. March 31, 2011) (“To hold that the first breach rules precludes such a suit would effectively render the [contract provision requiring the lender] to abide by HUD regulations ineffective and unenforceable.”)
 - *Sinclair v. Donovan*, No. 1:11-CV-00010 (S.D. Ohio, Nov 04, 2011) (Absurd to “ignore the contract terms drafted to govern post-default conduct on the grounds that mortgagors have defaulted.”)

Typical Arguments by Lenders

Homeowners have *no damages*, and have been *living in the home for free!*

- Completely ignores noncompliance issue, AND fails to recognize that lender refuses monthly payments
- Critical to plead compensatory damages
 - Including punitive / emotional distress, where available
 - Show how interest, fees, and costs compound to preclude loss mitigation
- Relief
 - Toll interest from point of noncompliance (e.g. 3rd month)
 - Restore account to point where loss mitigation is possible

New York Case Law

Not many cases in New York

Some courts have held failure to comply with FHA loss mitigation is an affirmative defense to foreclosure

- ***HSBC USA, N.A. v. Teed***, 2014 WL 9094527 at *2 (Sup. Ct. Steuben Cty, Nov. 14, 2014)
- ***Fed. Nat. Mortgage Ass'n v. Ricks***, 83 Misc.2d 814, 371 N.Y.S.2d 485, 497 (Sup. Ct. Kings Cty 1975)
- **But see *U.S. Bank Nat'l. Ass'n v. Waters***, 43 Misc. 3d 1235(A), 998 N.Y.S. 2d 102 (Sup. Ct. Queens Cty 2014)

HSBC v. Teed

Court found Lender's failure to make reasonable effort for face-to-face was a failure of condition precedent

Clearly connects legislative purpose of Nat'l Housing Act and HUD's notice requirements

- “[T]he importance of making reasonable efforts to arrange for a face-to-face meeting cannot be overstated.”
- “[R]egulations require mortgagees, who benefit greatly from the protections afforded them through the issuance of FHA backed mortgage loans, to work with mortgagors to give them a chance to take the reasonable steps necessary to save their homes.”

Summary

Answer Summons / Complaint to preserve FHA claims

- Refer to legal services / clinics immediately
- Use the Pro Se Answer Form

Leverage potential FHA claims into modifications whenever possible

Select good cases to build good law in New York

- Use the statute and contract to establish good faith
- Show that noncompliance resulted in damages

HUD website

HUD online portal

- www.HUD.gov

Keyword search hints:

- “HUDCLIPS” for all publications
- “Loss Mitigation Mortgagee Letters” for list of all loss mitigation letters

Questions/Comments

Trina Kokalis

Staff Attorney

Long Island Housing Services

631-567-5111 x 325

trinakokalis@lifairhousing.org

Steven Sharpe

Senior Attorney

Legal Aid Society of Southwest Ohio

513-362-2788

ssharpe@lascinti.org