

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,                   :       CIVIL ACTION  
    Plaintiff,                                :  
  :  
    v.   :  
  :  
GEORGE A. DAVID, et al.,                   :  
    Defendants.                               :  
  :       NO.94-CV-7191

MEMORANDUM & ORDER

J.M. KELLY, J.

OCTOBER           , 1998

The United States of America, on behalf of the Department of Housing and Urban Development ("HUD"), has filed the present motion seeking reconsideration of this Court's Memorandum and Order of June 29, 1998. At that time, on cross-motions for summary judgment, the Court denied HUD's motion for summary judgment and granted Defendants' motion for summary judgment in part. Specifically, the Court granted summary judgment to the Defendants on HUD's claims pursuant to 12 U.S.C. § 1715z-4a (1994) for all payments occurring after Defendants' mortgages were assigned to GNMA.<sup>1</sup> The Court's holding was based upon a statement in the Regulatory Agreement, drafted by HUD, which stated "this Agreement will continue so long as the contract of coinsurance remains in force."

HUD now urges reconsideration based upon: 1) a section

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<sup>1</sup>HUD conceded that all but one of the challenged payments were not subject to the Federal Priority Statute, 31 U.S.C. § 3713 (1994), and summary judgment was granted on those claims.

of 12 U.S.C. § 1715z-4a not previously considered by the Court; 2) the requirement contained in 24 C.F.R. § 207.17(a) that private mortgagors be regulated as long as the Commissioner of the Federal Housing Administration has a financial interest in the mortgage loan; and 3) assuming, as the Court found, that the Regulatory Agreement expired upon the termination of coinsurance, the coinsurance did not terminate until the notes were endorsed for full insurance.

### BACKGROUND

Defendants are four partnerships that owned four HUD financed projects, the managing general partner of one of those partnerships, the manager of the properties, a partner in each of the partnerships and George A. David. Each project<sup>2</sup> was financed in the mid-1980s under a HUD coinsurance program by York Associates, Inc. ("York"). On each project, the borrower signed a mortgage, note and Regulatory Agreement, each of which HUD drafted. In July 1990, York withdrew from HUD's coinsurance program and assigned the mortgages to the Government National Mortgage Association ("GNMA"). HUD alleges that \$326,500 was distributed to owners from rents on the four projects while the mortgages were in default. HUD therefore seeks double damages

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<sup>2</sup>All of the properties are subject to an individual mortgage, note and Regulatory Agreement; however, there are no property-specific distinctions relevant to the disposition of this motion.

pursuant to 12 U.S.C. § 1715z-4a.

## DISCUSSION

### I. Legal Standard

"[T]he purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). A district court will grant a party's motion for reconsideration for any of three reasons: (1) the development of an intervening change in the law; (2) the emergence of new evidence not previously available; or (3) to correct a clear error of law or prevent manifest injustice. Cohen v. Austin, 869 F. Supp. 320, 321 (E.D. Pa. 1994).

HUD now presses the argument that 12 U.S.C. § 1715z-4a allows for double damages for Defendants' violation of a HUD regulation, even absent a Regulatory Agreement. HUD also argues that 24 C.F.R. § 207.17(a) requires that the Regulatory Agreement continues in force as long as HUD has an interest in the mortgage, contradicting the language of the Regulatory Agreement. The Court held in its June 29, 1998, Memorandum and Order that the plain language of the Regulatory Agreement could be avoided if it was contradicted by an applicable regulation. HUD urges that examination of these issues is appropriate on a motion for reconsideration because the Court failed to address these issues, which were part of HUD's original argument.

Review of HUD's Opposition to the Defendants' Motion for Summary Judgment indicates that HUD used its present regulatory argument as a heading for its statutory argument and as a "further indication" in support of its extensive argument to excise the termination clause from the Regulatory Agreement. HUD also asserted that it is entitled to double damages for violation of a HUD regulation, even absent an effective regulatory agreement, in its discussion of the standard on a motion for summary judgment. This was also stated as a goal of the Regulatory Agreement.

These issues formerly were hardly the major issues that HUD now asserts. It cannot be said that their omission from the June 29, 1998, Memorandum and Order was a manifest error of law. Notwithstanding the propriety of the Court's omission of these issues previously, the Court shall now address these issues, as their resolution will narrow issues for the imminent trial of this matter.

HUD did not address the effective date of the termination of coinsurance in its response to Defendants' motion for summary judgment. HUD now argues that if, as the Court found, the Regulatory Agreement terminated along with the coinsurance, the coinsurance didn't end until the notes were endorsed for full insurance by HUD. If HUD's argument is correct, to allow Defendants to escape liability for payments

made during the time period between when York withdrew from the coinsurance program until HUD endorsed the notes for full insurance would amount to a manifest injustice. Accordingly, the Court shall consider this issue from HUD's Motion for Reconsideration.

II. Requirements of 12 U.S.C. § 1715z-4a

When the payments at issue were made, 12 U.S.C. § 1715z-4a(a)(1) provided that HUD may seek double damages for recovery of "any assets or income used by any person in violation of . . . (B) any applicable regulation." HUD urges that Defendants violated 24 C.F.R. § 207.17(a), which states that a private mortgagor shall be regulated by HUD as long as HUD has an interest in the mortgage. Similarly, HUD also argues that 24 C.F.R. § 207.17(a) contradicts the termination clause of the Regulatory Agreement, therefore the Regulatory Agreement remains effective after the termination of coinsurance. Both of HUD's arguments rest upon § 207 of the National Housing Act ("NHA") being applicable to the coinsurance program.

HUD argues that there is no new provision for coinsurance in § 244 of the NHA. Rather, the authority to issue coinsurance is provided in § 207. 24 C.F.R. § 255.1

(1990)(repealed Nov. 12, 1990) stated:

(a)(1) Section 307 of the Housing and Community Development Act of 1974 amended the National Housing Act (the Act) by adding a new section 244 entitled, "Coinsurance". Section 244 authorizes the Department

to insure, under a Coinsurance Contract, any Mortgage otherwise eligible for insurance under Title II of the Act. . . .

\* \* \*

(c) This part provides for coinsurance of Mortgages under Section 207 of the National Housing Act (pursuant to sections 223(f) and 244 of the Act) which cover existing multifamily projects meeting the requirements of this part.

Contrary to HUD's assertion, 24 C.F.R. § 255.1(a)(1) specifically provides that HUD's power to issue coinsurance arises from § 244. Further, upon reading § 255.1(c), it appears that HUD has selectively read the first part of this section of the regulation to support its position while ignoring the meaning of the paragraph taken as a whole. Section 255.1(c) allows HUD to convert fully insured existing mortgages under § 207 to coinsured mortgages under § 244. Accordingly, coinsurance is authorized by § 244 of the NHA and regulated at §§ 255.1 - 255.828. Coinsurance is not authorized by § 207 of the NHA.

The position adopted by the Court today is consistent with the position taken by HUD and adopted by the court in D.R.G. Funding Corp. v. United States, 898 F.2d 205 (D.C. Cir. 1990). In D.R.G. Funding, the plaintiff, a mortgage banking institution, sought a declaratory judgment that it was owed debentures on defaulted loans from the date of default rather than the date of settlement. Id. at 207. D.R.G. sought to apply 24 C.F.R. § 207.259(e), which provided for debentures to be issued and bear

interest from the date of default. D.R.G. Funding, 898 F.2d at 207. D.R.G. based its argument upon § 244 not providing separate insurance authority, but rather piggy-backing on § 207. D.R.G. Funding, 898 F.2d at 208. HUD claimed "that the subsequently enacted § 244 of the National Housing Act, which permits coinsurance 'in addition to' and 'notwithstanding' the Act's provision of insurance under other sections, is an independent grant of authority to provide insurance and that § 207 is therefore not applicable to coinsurance." Id. The court held that HUD's interpretation was a reasonable interpretation of the source of authority to issue coinsurance. Id. The Court agrees that this interpretation of the source of authority for the coinsurance program is correct.

HUD has taken opposite positions as to the source of its authority to coinsure mortgages between D.R.G. Funding and the present case. The doctrine of judicial estoppel is intended to prevent a party from taking a position contradictory to a position taken in a prior proceeding. McCarron v. FDIC, 111 F.3d 1089, 1097 (3d Cir. 1997). "The law of this circuit bar[s] switches of position of this kind." Murray v. Silberstein, 882 F.2d 61, 66 (3d Cir. 1988). Judicial estoppel prevents a party from playing fast and loose with the courts by advancing inconsistent positions. United States v. Vastola, 989 F.2d 1318, 1324 (3d Cir. 1993). It is manifest that § 244 provides a source

of coinsurance independent of § 207. HUD, however, is barred by the doctrine of judicial estoppel from asserting that § 244 is an independent source of authority for coinsurance in D.R.G. Funding, and then reversing its field here and arguing that § 244 piggy backs off of the authority of § 207.

HUD argues that because Defendants' loans were assigned to GNMA under procedures set forth in 24 C.F.R. § 255.827, HUD's endorsement of the mortgages for full insurance made the provisions of § 207 applicable to Defendants' mortgages. HUD relies upon the following language:

(d) The Commissioner will endorse any Mortgage assigned to GNMA as provided by this section for full insurance effective as of the date of assignment in accordance with the appropriate provisions of 24 CFR Part 207. Any future insurance claim by GNMA or any assignment of the fully insured Mortgage will be governed by the appropriate provisions of 24 CFR Part 207. . . .

Section 255.827 addresses GNMA's rights against a defaulting lender. GNMA is required to attempt to assign a coinsured mortgage that is not in default to another lender, otherwise GNMA can assign the mortgage to itself. Id. § 255.827(a). Once GNMA assigns a loan to itself, HUD endorses the formerly coinsured mortgage for full insurance. Id. § 255.827(d). Section 255.827 specifically addresses the relationship between a defaulting lender and GNMA, and then the relationship between GNMA and HUD. The relationship between the mortgagor and HUD is not addressed. Section 255.827(d) evokes Part 207 to set a date for when full

insurance for GNMA will become applicable and to set forth a means for governing further assignments of the mortgage. There is no indication in this regulation that it is somehow intended to revive a Regulatory Agreement that has expired upon assignment of a mortgage to GNMA by its explicit language.

HUD also argues that endorsement panels on the notes and HUD's practice support that coinsured mortgages were governed by § 207. As the Court holds that § 244 regulations provide a separate authority for coinsurance and that HUD is judicially estopped from asserting that § 207 authorizes coinsurance, these arguments also fail.

### III. Effective Date of Termination of Coinsurance

HUD argues that coinsurance remains in place until HUD endorses a mortgage for full insurance, even though that endorsement is retroactive to the date that GNMA assigned the loan to itself. Here, because the coinsurance program had been terminated by then HUD Secretary Jack Kemp, there was no gap between the time that York assigned these mortgages to GNMA and when HUD's endorsement of the mortgages became effective. HUD does not suggest a reason, other than extension of the present Regulatory Agreements, to have this double insurance coverage. 24 C.F.R. § 255.827 was clearly intended to ensure that a mortgage was covered by some insurance and selected the date of endorsement as the date of assignment to GNMA. This makes sense

because that is the date where a portion of the mortgage would become uninsured if it only was covered by coinsurance. Accordingly, I will follow the plain meaning of § 255.827(d) and hold that the coinsurance terminated when the full insurance became effective, upon assignment of the mortgages to GNMA.

#### **CONCLUSION**

The first two issues raised in HUD's Motion for Reconsideration do not rise to the level of a manifest error of law that is normally required for a motion for reconsideration. Because resolution of these issues, however, will narrow the issues remaining for trial in this matter, the Court has determined that it should address these issues at this time. The Court finds that HUD's coinsurance program was authorized by § 244 of the FHA rather than § 207, therefore § 207 regulations do not apply to coinsurance. The Court believes that it would be a manifest error of law to allow Defendants to escape liability for illegal disbursements made prior to the termination of coinsurance if coinsurance did not terminate until the mortgages were endorsed for full insurance. A reading of the applicable regulation, however, demonstrates that HUD's endorsement of full insurance was retroactive to the date that York assigned the mortgages to GNMA. Coinsurance terminated at the time of that assignment.

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                  v.                               :  
  :  
  :  
GEORGE A. DAVID, et al.,                   :  
                  Defendants.                   :     NO.94-CV-7191

**O R D E R**

AND NOW, this            day of October, 1998, upon  
consideration of the Motion for Reconsideration of the United  
States of America, on behalf of the Department of Housing and  
Urban Development, and Defendants' Response thereto, it is  
ORDERED that the Motion for Reconsideration is DENIED.

BY THE COURT:

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JAMES MCGIRR KELLY, J.