[SUBMITTED WITHOUT ORAL ARGUMENT]
11-5288

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT BENNETT, et al.,
Appellant,

v.

SHAUN DONOVAN,
Secretary of the United States Department of
Housing and Urban Development,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

Jean Constantine-Davis
AARP FOUNDATION LITIGATION
601 E Street NW
Washington, DC 20049
Tel: 202-434-2058
Fax: 202-434-6464

Steven A. Skalet
Craig L. Briskin
MEHRI & SKALET, PLLC
1250 Connecticut Avenue NW
Suite 300
Washington, DC 20036
Tel: 202-822-5100
Fax: 202-882-4997

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 26(1), Appellants Robert Bennett, Leila Joseph, and undersigned counsel hereby certify the following:

(A) Parties. Plaintiffs-Appellants in this case are Robert Bennett and Leila Joseph.

Defendant-Appellee in this case is Shaun Donovan, in his capacity as Secretary of the United States Department of Housing and Urban Development.

There were no *amici* or intervenors in the district court proceedings, and to the knowledge of Plaintiffs-Appellants, there are no *amici* or intervenors in this Court.

(B) Rulings Under Review. The rulings on review are the Memorandum Opinion and Order granting Defendants' Motion to Dismiss, entered June 15, 2011, and the Memorandum Opinion and Order denying Plaintiffs' Motion for Reconsideration, entered September 22, 2011.

(C) Related Cases. The case on review has not been previously before this Court or currently pending before any court in the District of Columbia. To the knowledge of Plaintiff-Appellants, there are no cases currently before this Court involving substantially the same parties, or the same or similar issues.

Respectfully submitted,

/s/ Craig L. Briskin
Steven A. Skalet
Craig L. Briskin
Mehri & Skalet, PLLC

Jean Constantine-Davis
AARP Foundation Litigation

Counsel for Appellants

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

GLOSSARY OF ABBREVIATIONS viii

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES 2

STATUTES AND REGULATIONS 2

STATEMENT OF THE FACTS 3

I. INTRODUCTION 3

II. BACKGROUND 6

A. The Home Equity Conversion Program 6

1. HUD's Role as Regulator, Party, and Insurer of HECMs 7

2. HECM Statutory Protections 9

3. Termination of HECM and Sale of Property 11

Plaintiffs 12

Robert Bennett 12

Leila Joseph 14

III. PROCEDURAL HISTORY 15

SUMMARY OF ARGUMENT 19

STANDARD OF REVIEW 20

ARGUMENT 20

The District Court Erred in Holding Plaintiffs' Injuries Are Not Redressable 20

A Favorable Ruling Is Likely To Redress Plaintiffs' Injuries 28

HUD Exercises Total Control Over the HECM Program 28

B. HUD Controls Foreclosures through the Insurance Fund 29

C. Appellants' Claims Are Redressable Because HECM Lenders Are Not Likely to Foreclose If the Court Rules for Appellants on the Merits. 35

III. The District Court Erred In Denying Plaintiffs Leave to Amend Their Complaint. 37

CONCLUSION 38

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

Abigail Alliance for Better Access, 469 F.3d 129 (D.C. Cir. 2006)................................18, 21, 27, 29, 37

Allen v. Wright, 468 U.S. 737, 753 (1984). 24

Block v. Meese, 793 F.2d 1303, 1309 (D.C. Cir. 1986). 24

Cmty. For Creative Non-Violence v. Pierce, 814 F.2d 663, 669 (D.C. Cir. 1987)..................................26

Haase v. Sessions, 835 F.2d 902 (D.C. Cir. 1987) 22

Handling Servs., Inc. v. Def. Automated Printing Servs., 338 F.3d 1024 (D.C. Cir. 2003) 20

Lepelletier v. FDIC, 164 F.3d 37 (D.C. Cir. 1999)...25, 35

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 17, 20, 22, 24, 25

Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1234-35 (D.C. Cir. 1996)...........................24

Nat'l Wrestling Coaches Ass'n. v. Dep't. of Educ., 366 F.3d 930 (D.C. Cir. 2004).. …17, 19, 20, 24, 25, 27, 31, 33, 34, 35

National Parks Conservation Ass'n v. Manson, 414 F.3d 1 (D.C. Cir. 2005)...................................25, 26

Northeast Energy Assocs. v. FERC, 158 F.3d 150 (D.C. Cir. 1998)..25

Renal Physicians Ass'n. v. U.S. Dep't. of Health and Human Serv., 489 F.3d 1267 (D.C. Cir. 2007) 22

Settles v. U.S. Parole Comm'n, 429 F.3d 1098 (D.C. Cir. 2005)...22

Sierra Club v. EPA, 352 U.S. App. D.C. 191, 292 F.3d 895 (D.C. Cir. 2002)......................................22

Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1992)..17, 22, 25

Tozzi v. U.S. Dep't. of Health and Human Serv., 271 F.3d 301, 308 (D.C. Cir. 2001)................24, 26, 27

United States v. SCRAP, 412 U.S. 669 (1973),..23

Utah v. Evans, 536 U.S. 452, 464 (2002) 26

Warth v. Seldin, 422 U.S. 490 (1975) 21, 22, 23

Statutes

5 U.S.C. § 551 .... 5, 15, 16

5 U.S.C. § 553 15

5 U.S.C. § 702 1

5 U.S.C. § 706(2) 16

12 U.S.C. § 1715z-20(a) 7

12 U.S.C. § 1715z-20(b)(1) 7

12 U.S.C. § 1715z-20(c) 8

12 U.S.C. §§ 1715z-20(c) & (h) 7

12 U.S.C. §§ 1715z-20(d)(2)(B);(e) & (f) 9

12 U.S.C. § 1715z-20(d)(4) 9

12 U.S.C. § 1715z-20(d)(7) 9

12 U.S.C. § 1715z-20(d)(8) 9

12 U.S.C. § 1715z-20(d)(9) 7

12 U.S.C. § 1715z-20(i) 31, 37

12 U.S.C. § 1715z-20(j) 2, 4, 7, 10, 36

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

Other Authorities

HECM Handbook § 4235.1 REV-1 (1994) 9

Report 100-21 by the Senate Committee on Banking, Housing and Urban Affairs accompanying S. 825, 100th Congress, Section 135 10

Regulations

24 C.F.R. § 206.1 ... 7

24 C.F.R. § 206.105 ... 8

24 C.F.R. § 206.117 ... 8, 28, 29

24 C.F.R. § 206.121 ... 29

24 C.F.R. § 206.121(b) ... 8, 28

24 C.F.R. § 206.123(a) ... 12

24 C.F.R. §§ 206.123(a)(3) & (4) ... 30

24 C.F.R. § 206.123(a)(3)-(5) ... 8, 11

24 C.F.R. § 206.123(b) ... 11, 29

24 C.F.R. §§ 206.123-29 ... 11, 31

24 C.F.R. § 206.125(a) ... 11

24 C.F.R. § 206.125(a)(2) ... 12

24 C.F.R. § 206.125(c) ... 11, 15, 29, 31

24 C.F.R. § 206.129 ... 11, 31

24 C.F.R. § 206.27 ... 10

24 C.F.R. § 206.27(b)(8) ... 9

24 C.F.R. § 206.27(c) ... 4, 15

24 C.F.R. § 206.3 ... 10

24 C.F.R. § 206.33 ... 7

GLOSSARY OF ABBREVIATIONS

FHA	Federal Housing Administration
HECM	Home Equity Conversion Mortgage
HUD	U.S. Department of Housing and Urban Development
ML	Mortgagee Letter

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT BENNETT, et al.,
Appellant,

v.

SHAUN DONOVAN,
Secretary of the United States Department of
Housing and Urban Development,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331, which confers on district courts exclusive jurisdiction to review any reviewable action of a federal agency, and 5 U.S.C. § 702, which grants a person suffering legal wrong because of agency action to judicial review thereof. This Court has jurisdiction under 28 U.S.C. § 1291 because this appeal is from a final judgment that disposes of all parties' claims.

The district court granted Defendant's Motion to Dismiss on June 15, 2011, and the district court denied Plaintiffs' Motion for Reconsideration on September 22, 2011. Plaintiffs filed a notice of appeal on October 21, 2011, within 30 days of the district court's decision.

STATEMENT OF ISSUES

Plaintiffs are surviving spouses of HECM reverse mortgage borrowers. The HECM statute, 12 U.S.C. § 1715z-20(j), states that Defendant "may not insure a home equity conversion mortgage" unless the mortgage provides that the homeowner's obligation satisfy the mortgage is deferred until one of several events occurs, including the homeowner's death. The statute then states, "For purposes of this subsection, the term 'homeowner' includes the spouse of a homeowner."

1. Did the District Court err in dismissing Plaintiffs' claims under the Administrative Procedure Act, based on its holding that the injury they complain of —foreclosure — would not be redressed by a favorable decision on the merits?

2. Did the District Court err in misconstruing and failing to credit evidence in the record concerning HUD's control over HECM foreclosures, and the action lenders would likely take following a favorable decision for Plaintiffs?

3. Did the District Court err in denying Plaintiffs' motion for leave to amend their complaint?

STATUTES AND REGULATIONS

The HECM statute, 12 U.S.C. § 1715z-20 and pertinent subjections of the HECM regulations, 24 C.F.R. Part 206, appear in the attached addendum.

STATEMENT OF THE FACTS

I. INTRODUCTION

Plaintiff-Appellants Robert Bennett and Leila Joseph are surviving spouses of reverse mortgage borrowers in the Home Equity Conversion Mortgage ("HECM") program. Based on assurances they received from mortgage brokers that they would be protected from displacement, Plaintiffs quitclaimed their interest in homes they had owned jointly with their spouses for decades at the time the HECMs were originated. When their spouses died shortly thereafter, Plaintiffs discovered that the brokers' assurances were false: they faced immediate demands for *full* repayment of the HECMs. Despite the explicit protection from displacement for spouses of HECM borrowers in the HECM statute, HUD has failed to extend that protection in its regulations, practices and procedures.

Congress enacted the HECM program to ease the economic hardship of older homeowners by allowing them to access the equity in their homes while ensuring they could continue living in them. Because this complex financial product carries the potential for confusion and fraud, Congress included explicit protections for seniors, and placed HUD in charge of regulating lenders in the program. The primary way HUD asserts its power is by requiring lenders to comply with HECM rules and regulations as a condition of obtaining reimbursement from a Federal Housing Administration insurance fund. HECM borrowers pay into this fund, both at the inception of the loan, and on a monthly basis thereafter. This insurance protects lenders from the possibility that housing prices will decline so that proceeds from sale of the property are insufficient to repay the mortgage balance. The insurance also protects borrowers, by ensuring that they or their estates will be able to satisfy the mortgage by selling the HECM-financed property at current market value, so that their spouses and family members will not face losing the house if real estate prices fall, as they have in recent years across the country.

Congress included in the HECM statute a prohibition on insuring a mortgage unless it provides that the homeowner's repayment obligation is deferred until the death of the homeowner *and the homeowner's spouse*, the sale of the property, or other events to be specified by HUD. 12 U.S.C. § 1715z-20(j). Appellee HUD has failed to execute this essential part of the HECM program. Instead, HUD regulations state that the mortgage is due and payable upon the death of the "mortgagor," which does not include the non-borrowing spouse. 24 C.F.R. § 206.27(c). Moreover, HUD has explicitly *endorsed* quitclaiming, without requiring that the quitclaiming spouse receive any counseling about how they are compromising their interests. Plaintiffs and other surviving spouses who were not named on the HECM mortgages are being foreclosed on soon after the death of the borrowing spouse.

Plaintiffs brought this action against HUD under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. The district court dismissed their challenge to HUD's regulation, holding that Plaintiffs did not have Article III standing. The court reasoned that even if it ultimately ruled in Plaintiffs' favor on the merits, their injuries – the foreclosures on their homes – would not be redressed because the foreclosures are caused by independent third-party lenders who have the right to foreclose under the terms of the mortgages.

The district court was mistaken. HUD is the regulator, contract drafter, and insurer of the HECM program. It is also a party to every HECM transaction. It is HUD, not independent third-party lenders, whose rules and policies drove Plaintiffs' foreclosures. Record evidence demonstrates that HECM lenders comply with HUD's rules -- and reversals of those rules -- even when that has meant breaching their contracts with borrowers. HUD's control was demonstrated during this litigation when it stepped in and instructed Plaintiffs' spouses' HECM lenders to put the foreclosures on hold pending further notice from HUD. The lenders signaled their immediate compliance by email. These are the not the actions of independent third parties: their actions reflect the control of HUD. The district court discounted HUD's role as "merely" an insurer, but it is this role as insurer that gives life to the HECM program and that has given HUD effective control over lenders, whose primary objective is to comply with HUD's dictates to preserve their FHA insurance claims.

If the Court orders HUD to treat non-borrowing spouses as "homeowners," as the statute says they are, it can also order HUD to exercise its power to postpone foreclosures on surviving spouses. This is a power that HUD has demonstrated in this very case. In addition, it is at the very least *likely* that the lenders would not foreclose on Plaintiffs' homes if they knew they would not be eligible for insurance coverage. This is particularly true for Plaintiff Bennett and many others whose HECM mortgages are "underwater" – *i.e.*, their mortgage balances exceed the current value of the properties. Without insurance, the lenders will be unable to recover the full amount of the loan.

However, if the lenders *do not* call the mortgages due and payable until both "homeowner" spouses have died or otherwise vacated the property, any shortfall will be covered by FHA insurance—that is, the lenders will be made whole. Faced with a merits decision favorable to Plaintiffs, the lenders would likely opt not to foreclose because doing so would be in their financial interest. Such an action would also redress Plaintiffs' injuries because it would keep them in their homes.

II. BACKGROUND

A. The Home Equity Conversion Program

Congress enacted the HECM program in 1988 "to meet the special needs of elderly homeowners by reducing the effect of the economic hardship caused by the increasing costs of meeting health, housing and subsistence needs at a time of reduced income." 12 U.S.C. § 1715z-20(a). To accomplish this purpose, Congress authorized HUD to insure mortgages originated by private lenders that would "permit the conversion of a portion of accumulated home equity into liquid assets." *Id*.

In a "regular" mortgage, the borrower repays the principal and interest on a monthly basis amortized over the loan's term. In a HECM "reverse" mortgage, the lender makes payments to the borrower, and the loan balance increases. The borrower can but is not required to repay the loan, until one of a number of events occurs, including the death of the homeowners and sale of the property. 12 U.S.C. § 1715z-20(j). HECMs are available only to homeowners who are at least 62 years of age. 12 U.S.C. § 1715z-20(b)(1); 24 C.F.R. § 206.33. Borrowers can choose to receive the loan proceeds in a lump sum, on a monthly basis, or through a line of credit periodically as needed. 12 U.S.C. § 1715z-20(d)(9).

1. HUD's Role as Regulator, Party, and Insurer of HECMs

HUD is integral to every aspect of the HECM program. First, HUD administers the program and issues its governing regulations. 12 U.S.C. § 1715z-20(c) & (h); 24 C.F.R. § 206.1 *et seq*. HUD publishes interpretations of the HECM regulations in the HUD Handbook, 4235.1 REV-1 (1994), Home Equity Conversion Mortgages, and in a series of mortgagee letters from HUD to private lenders participating in the program. HUD also issues a standard HECM Note, Deed of Trust/Mortgage, and HECM Loan Agreement and requires their use in every HECM transaction.

Second, HUD is a party to every HECM transaction. Every HECM borrower executes two deeds of trust: one in favor of the primary lender, and another in favor of HUD. Along with the borrower and lender, HUD executes the HECM Loan Agreement, through which HUD commits to making payments to borrowers as required by the loan documents, if and when a lender refuses or is unable to do so. In that event, HUD takes assignment of the mortgage and ultimately collects under the lender's first mortgage and/or under the second mortgage to which it is a party. 24 C.F.R. §§ 206.117, 206.121(b).

Third, HUD insures HECM loans through its FHA insurance program. 12 U.S.C. § 1715z-20(c). For this insurance, borrowers are charged an upfront premium of 2% of the value of the property at closing and additional monthly premiums of 0.5% of the current loan balance. 24 C.F.R. § 206.105. The insurance premiums guarantee lenders that, even if property values decrease over the term of the mortgage, they will be repaid the full mortgage balance. 24 C.F.R. § 206.123(a)(3)-(5) (insurance claim if property is sold for less than the mortgage balance).[1]

[1] In recent years, the premiums in the HECM insurance program have changed. The basic HECM loan premium has increased to 1.25% of the loan balance per month. Other changes to the program are not discussed here, because they do not bear on the issues before the Court.

2. HECM Statutory Protections

The HECM statute conditions a lender's eligibility for insurance on compliance with specific statutory provisions and protections for homeowners. The HECM must contain certain provisions regarding insurance, taxes, foreclosure, etc., as prescribed by HUD, 12 U.S.C. § 1715z-20(d)(8); it may not charge a prepayment fee. 12 U.S.C. § 1715z-20(d)(4). Recognizing that reverse mortgages are complex financial products that carry obligations and risks, Congress required housing counseling for all homeowners considering a HECM and mandated specific disclosures about the rights, limited liability, costs, and other terms of any mortgage HUD would insure under the program. 12 U.S.C. § 1715z-20(d)(2)(B);(e) & (f).

HECMs must be non-recourse loans. The lender cannot seek a deficiency judgment against borrowers or their estates if the proceeds of a sale of the mortgaged property are insufficient to repay the loan.[2] The purpose of these provisions is to relieve older homeowners and their heirs from potentially significant personal liability for reverse mortgage balances that could escalate over time and therefore greatly exceed the home's value. Lenders are protected from

[2] *See* 12 U.S.C. § 1715z-20(d)(7) (stating that homeowner is not liable for any deficiency); 24 C.F.R. § 206.27(b)(8) ("The borrower shall have no personal liability for the payment of the mortgage balance."); HECM Handbook § 4235.1 REV-1, Section 1-3(c) (JA 310). ("the HECM borrower (or his or her estate) will never owe more than the loan balance or the value of the property, whichever is less").

potential losses from these non-recourse provisions through the FHA insurance premiums paid by borrowers.

Finally, Congress protects HECM homeowners and their spouses from displacement:

> **Safeguard to prevent displacement of homeowner.** The Secretary may not insure a [HECM]. . . unless such mortgage provides that the homeowner's obligation to satisfy the loan obligation is deferred until the homeowner's death, sale of the home, or the occurrence of other events . . . [to be determined by HUD]. *For purposes of this subsection, the term "homeowner" includes the spouse of a homeowner*.

12 U.S.C. §1715z-20(j) (emphasis added). The legislative history of Subsection (j) confirms Congress's intent to protect homeowners and spouses: HECM mortgages shall "defer[ ] any repayment obligation until death of the homeowner *and* the homeowner's spouse . . ." (emphasis added).[3]

Although the HECM statute is clear that the death of one homeowner spouse does not trigger the obligation to satisfy the mortgage, HUD's regulations say otherwise. They declare the mortgage due and payable on the death of the "*mortgagor,"* 24 C.F.R. § 206.27, defined as "each original borrower under a mortgage," specifically excluding successors and assigns. 24 C.F.R. § 206.3. There is no way in which this regulation serves as a "safeguard" of the homeowner spouse from displacement, as the statute states and as Congress intended.

[3] Report 100-21 by the Senate Committee on Banking, Housing and Urban Affairs accompanying S. 825, 100th Congress, Section 134 (reporting on Subsection 254(j)) (JA 397).

3. Termination of HECM and Sale of Property

When a HECM loan is terminated by the death of the homeowner, sale of the property, or other specified event, the homeowner or his estate can satisfy the mortgage by: (1) repaying the full mortgage balance; (2) selling the property for at least 95% of its appraised value; or (3) providing the lender with a deed in lieu of foreclosure. 24 C.F.R. §§ 206.123(b); 206.125(a). If the homeowner or the estate chooses to sell the property, they may do so for the lesser of the mortgage balance or 95% of the property's appraised value. 24 C.F.R. §§ 206.123(b); 206.125(c) ("95% Rule"). These options are also included in Section 9(d) of the standard HECM Mortgage. JA 121.

If the property is sold for less than the mortgage balance, HECM lenders are authorized to file a claim with HUD, 24 C.F.R. § 206.123(a)(3)-(5), by following a detailed "Claim Procedure" that includes the notices to be given; appraisal, foreclosure and resale procedures to be followed; costs that will be approved; and timelines for every step of the foreclosure process. 24 C.F.R. §§ 206.123-29. Compliance with these procedures is the predicate for approval of an insurance claim, which will be paid by HUD, "[i]f the claim . . . is acceptable to the Secretary." 24 C.F.R. § 206.129.

In December 2008, HUD issued Mortgagee Letter 2008-38 ("ML 2008-38", JA 38-39), which purported to change HECM regulations that permit the estate of a HECM borrower to satisfy the mortgage by selling the property for the lesser of the mortgage balance or 95% of its appraised value. 24 C.F.R. §§ 206.123(a); 206.125(a)(2). ML 2008-38 stated for the first time that if a HECM secured property is sold for less than the full mortgage balance, the sale must be an "arm's length" transaction, and could not be one between family members (the "arm's length rule"). The effect of ML 2008-38 was to allow the estate to sell the property to a stranger for 95% of its value but to prohibit the estate from selling on the same terms to surviving spouses like Plaintiffs Bennett and Joseph. HUD characterized ML 2008-38 as a "clarification" that was "effective immediately," meaning that it applied to HECMs that predated its issuance.

B. Plaintiffs[4]

1. Robert Bennett

Mr. Bennett and his wife jointly owned their home in Annapolis, Maryland for approximately 27 years.[5] JA 26. In 2008, when they were aged 66 and 76 respectively, Mr. and Mrs. Bennett began receiving calls from mortgage brokers, who advised them to refinance their existing $250,000 mortgage into a reverse mortgage. *Id*. They met a mortgage broker from 1st Continental Mortgage who explained that the reverse mortgage would allow them to stay in their home with no payments for the rest of their lives. *Id*. They applied for a mortgage, never

[4] Three plaintiffs originally appealed. Plaintiff Delores Jeanne Moore subsequently purchased the property from the estate of her deceased husband and does not participate in this appeal.
[5] Citations in this section can be found in the Complaint, JA 7-35.

without knowing that Mr. Bennett's name would be removed from the deed. *Id*. ¶ 112. The housing counseling arranged for the Bennetts by the mortgage broker took place over the telephone; there was no mention that Mr. Bennett would be removed from the deed during counseling. In fact, the Counseling Certificate lists Mr. Bennett as a "homeowner." *Id*. ¶ 113. During the closing of the reverse mortgage in December 2008, Mr. Bennett signed a deed transferring title to the property to Mrs. Bennett. *Id*. ¶ 114.

HUD insured the Bennett reverse mortgage, charging an initial premium believed to be approximately $7,500, as well as monthly premiums of approximately $120. *Id.* ¶ 115. Mrs. Bennett died just one month after the closing. *Id.* ¶ 116. In March 2010, mortgage servicer James B. Nutter & Co. sent Mr. Bennett a letter stating its intent to foreclose on the home within 30 to 60 days. *Id.* ¶ 119. In December 2010, Mr. Bennett, through counsel, advised Nutter that he was a "homeowner" under the HECM statute and thus protected from displacement. He also informed Nutter that he had the right to purchase the property for 95% of its appraised value. *Id.* ¶ 120. Nonetheless, James B. Nutter & Co. denied Mr. Bennett's asserted rights, stating, "as a servicer, we follow HUD guidelines for repayment of these loans."[6] It initiated foreclosure proceedings on December 14, 2010. At the time the Complaint was filed, the balance owing on

[6] Complaint ¶ 121; JA 240.

the Bennett HECM was approximately $295,000; the appraised value was approximately $200,000. *Id.* ¶ 125.

2. Leila Joseph

Mrs. Joseph and her husband owned their Brooklyn, New York home jointly for approximately 25 years. Complaint ¶¶ 85-86. Mr. Joseph was diagnosed with Alzheimer's disease in August 2006. *Id.* ¶ 87. In 2009, the Josephs were behind in their mortgage payments and were receiving constant calls from telemarketers. *Id.* ¶ 88. In February 2009, Mr. Joseph agreed to meet with a representative of First Franklin Financial d/b/a Senior Funding Group. *Id.* The representative urged them to transfer title to Mr. Joseph, so they would be eligible for a larger loan. *Id.* ¶ 88-89. Mrs. Joseph was concerned about the wisdom of this advice and asked what would happen if her husband died before her. The representative assured her the monthly check would be greater if it was titled in Mr. Joseph's name, and that Mrs. Joseph would be able to stay in her home after her husband's death. *Id.* ¶ 90.

Despite the fact that Mr. Joseph had dementia, he received counseling via telephone, and Mrs. Joseph did not. *Id.* ¶ 91. HUD insured the Joseph reverse mortgage, charging an initial premium believed to be approximately $8,750, as well as monthly premiums of approximately $150. *Id.* ¶ 93.

Mr. Joseph died on August 30, 2009. *Id.* In early 2010, counsel for Mrs. Joseph contacted MetLife, who now owns the mortgage, regarding the mortgage broker's misrepresentations and Mr. Joseph's lack of capacity, and provided medical records documenting Mr. Joseph's condition. *Id.* ¶ 100. On September 28, 2010, MetLife denied it had done anything improper, and initiated foreclosure proceedings. *Id.* ¶ 101-02. At the time the Complaint was filed, the balance owing on the Joseph reverse mortgage was $390,732. The current value of the property is unknown. Zillow, a real estate valuation website, valued it at $397,000 at the time of filing. *Id.* ¶¶ 98, 99.

III. PROCEDURAL HISTORY

In March 2011, Plaintiffs filed a Complaint against Shaun Donovan in his official capacity as Secretary of the U.S. Department of Housing and Urban Development ("HUD"), lodging claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq*. JA 7-35.

First, Plaintiffs alleged that ML 2008-38 violated the APA, 5 U.S.C. §§ 553 and 551, because it retroactively changed, without notice or the opportunity for public comment, 24 C.F.R. § 206.125(c), which permits the estate of a HECM borrower to satisfy the mortgage by selling the property for the lesser of the mortgage balance or 95% of its appraised value. Plaintiffs also allege that 24 C.F.R. § 206.27(c), which terminates a HECM on the death of "mortgagors," instead of both homeowner/spouses, violates the HECM statute's protection from displacement.

Plaintiffs claimed that ML 2008-38 and 24 C.F.R. § 206.27(c) were arbitrary, capricious, or otherwise not in accordance with law under the APA, 5

U.S.C. § 706(2); that they were issued in excess of HUD's authority, under the APA, 5 U.S.C. § 706(2); and that ML 2008-38 was issued in violation of the APA's prohibition on retroactive rulemaking, 5 U.S.C. § 551.

Plaintiffs sought a declaratory judgment that (1) HUD had violated the APA's notice-and-comment provisions; (2) HUD had illegally sought to give retroactive effect to the arm's length rule; (3) issuance of the arm's length rule was arbitrary and capricious or otherwise not in accordance with law (4) HUD's interpretation of Subsection (j) was illegal; and (5) Plaintiffs are "homeowners" entitled to protection from displacement under Subsection (j).

On March 31, 2011, Plaintiffs filed a motion for preliminary injunction to suspend ML 2008-38 and order HUD to halt their pending foreclosure actions. JA 79-271. Less than a week later, HUD issued ML 2011-16, which rescinded ML 2008-38 and its arm's length rule. JA 345-346. HUD also contacted the companies that service Plaintiffs' spouses' HECMs and instructed each to place the foreclosures on Plaintiffs' homes on hold during the pendency of this litigation. The lenders immediately complied. JA 347-360.

HUD then filed a motion to dismiss the Subsection (j) claim. JA 272-360. It argued that (1) Plaintiffs did not have standing because their injuries (the foreclosures) are not caused by HUD's interpretation of Subsection (j), but by the terms of their spouses' HECM mortgages with private lenders, about which the Court could do nothing, making their claims not redressable; (2) the only agreements that could be voided by Plaintiffs' interpretation of Subsection (j) are the insurance contracts between the lenders and HUD; and (3) HUD's interpretation of Subsection (j) was correct.

On July 15, 2011, the district court granted HUD's motion to dismiss, holding that Plaintiffs' claims are not redressable. JA 427-40. The Court concluded that Plaintiffs had failed to establish that it is "likely, as opposed to merely speculative, that the injury [the foreclosures] will be redressed by a favorable decision on the merits."[7] It reasoned that the pending foreclosure proceedings against Plaintiffs were independent of government policy and were caused by the choices of third party lenders over whom the court had no control.[8] The Court rejected Plaintiffs' contention that HUD's pervasive control over the HECM program and HECM lenders effectively triggered the foreclosures on their homes. Concluding that HUD is merely the insurer of HECMs with no legal relationship to the mortgagors and no control over the foreclosure actions of lenders, the Court stated that Plaintiffs had failed to show that HUD had any power or duty to stop the foreclosures, and that any suggestion that the lenders would halt their

---

[7] JA 434. (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 38, 43 (1992)).
[8] *Id.* at 435(citing *Nat'l Wrestling Coaches Ass'n. v. Dep't. of Educ.,* 366 F.3d 930, 938, 941 (D.C. Cir. 2004)).

foreclosure efforts in response to a favorable ruling on the merits was pure speculation.[9]

On August 12, 2011, Plaintiffs filed a motion to alter or amend the judgment under Rule 59(e), contending that (1) because HUD is a party to every HECM transaction and exercises control over all aspects of the HECM program, including foreclosures, HECM lenders are not "independent actors"; (2) Plaintiffs' standing does not depend on establishing that the invalidity of HUD's interpretation of the mortgages will alter the terms of the HECM contracts with lenders but only on showing that it is likely that the foreclosures on their homes will not go forward if there is a favorable decision on the merits; (3) faced with a favorable ruling on Subsection (j), the lenders' pecuniary interest would make them unlikely to foreclose on Plaintiffs' "underwater" homes, because such a ruling would prohibit HUD from paying their FHA insurance claims until after the death of both "homeowner" spouses. *See Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach*, 469 F.3d 129, 135 (D.C. Cir. 2006) (plaintiffs' claims redressable because the relief they seek would make it in the third party's "pecuniary interests" to eliminate the harm). JA 441-497.

On September 22, 2011, the district court denied Plaintiffs' motion for reconsideration. JA 511-515. The Court reaffirmed its earlier conclusion that Plaintiffs' arguments that their claims are redressable were speculative; that it did

[9] JA 438-449.

not matter what relationship HUD has with borrowers; and that *Abigail Alliance* was inapt because it was not in the lenders' "pecuniary interest" to postpone foreclosures. JA 512-514. The district court likened Plaintiffs' allegations to those in *National Wrestling Coaches Association*, where this Court found the claims of wrestling coaches and others that the Secretary of Education's rules enforcing Title IX were illegal were not redressable because, even if the Court ruled in plaintiffs' favor on the merits, plaintiffs had offered "nothing but speculation" that the "requested change in government policy [would] alter the behavior" of schools that had made decisions "truly independent of government policy" to discontinue their wrestling programs. *Nat'l Wrestling Coaches Ass'n. v. Dep't. of Educ.,* 366 F.3d at 937. JA 512-513. Finally, the Court denied Plaintiffs' request for leave to amend their complaint ruling because final judgment had been entered and plaintiffs had failed to satisfy Rule 59(e)'s stringent standards for setting aside a judgment. JA 514.

SUMMARY OF ARGUMENT

The district court ruled that Plaintiffs had failed to show that their injury was redressable, because the foreclosures they complained of were initiated by third parties, not HUD. This ruling disregards the control that HUD exerts over the HECM program, including its control over foreclosures. Specifically, HUD administers and maintains discretion to reimburse lenders for any shortfall resulting from the foreclosure or sale of HECM-financed properties. For this reason, when HUD speaks, lenders listen. In addition, HUD has demonstrated in this very case that it *can* postpone foreclosures instantly and indefinitely. This is a far cry from the cases the district court cited, where the government agency has no such power to command a third party. These specific allegations are more than sufficient to satisfy Plaintiffs' standing burden on a motion to dismiss. Lastly, in the event that this Court deems Plaintiffs' allegations insufficient to demonstrate redressability, Plaintiffs can and should be able to amend their complaint to include additional allegations and evidence, consistent with the district court's opinion.

STANDARD OF REVIEW

The Court reviews the district court's decision on standing *de novo*.[10] Construing standing and injury, the Court of Appeals, like the district court, must accept factual allegations as true, and must "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan,* 504 U.S. at 561.

ARGUMENT

I. The District Court Erred in Holding Plaintiffs' Injuries Are Not Redressable.

The district court erred in holding that Plaintiffs' injuries are not redressable because a ruling in their favor is unlikely to stop the third-party lenders from

[10] *Nat'l Wrestling Coaches Ass'n.,* 366 F.3d 937-38 (citing *Handling Servs., Inc. v. Def. Automated Printing Servs.*, 338 F.3d 1024, 1029 (D.C. Cir. 2003)).

foreclosing on their homes. On the contrary, if the Court finds that Plaintiffs are "homeowners" under Subsection (j), it is likely that the lenders would *not* foreclose, because the ruling would prohibit HUD from paying insurance claims to lenders who foreclosed on homeowner spouses. This result is especially clear in situations like those of Plaintiffs and many others, whose houses are "underwater." For example, the fair market value of Mr. Bennett's property was roughly $200,000 when the Complaint was filed, and the mortgage balance was $295,600. JA 22. While the ultimate relief remains for disposition on the merits, a court ruling for Plaintiffs could order it to refrain from paying an insurance claim if the lender foreclosed while they remain in their homes. The lender could recover the full mortgage balance only if it waited until the death of both homeowner spouses. If it did not wait, it would lose around $100,000. If Plaintiffs prevail on the merits, it will be in the lender's "pecuniary interest" to postpone foreclosure on Mr. Bennett's home. *Abigail Alliance*, 469 F.3d at 136.

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III" of the Constitution. *Lujan,* 504 U.S. at 560. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute . . ." *Warth v. Seldin*, 422 U.S. at 498.

> [T]he irreducible constitutional minimum of standing contains three elements. First the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual imminent, not 'conjectural' or 'hypothetical,'". . . Second, there must be a causal connection

> between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. . . Third, it must be "likely" as opposed to merely "speculative" that the injury will be "redressed by a favorable decision.

Lujan, 504 U.S. at 555 (quoting *Simon*, 426 U.S. at 41-42) (internal citations omitted).

The plaintiff's showing of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* The court may consider facts in the record beyond the complaint to determine standing.[11]

> As the Supreme Court explained in [*Lujan*], the burden of production a plaintiff must bear in order to show it has standing to invoke the jurisdiction of the district court varies with the procedural context of the case. At the pleading stage, 'general factual allegations of injury resulting from the defendant's conduct may suffice,' and the court 'presum[es] that general allegations embrace the specific facts that are necessary to support the claim.'"[12]

The issue of standing under the APA may require further evidence, and not be susceptible to dismissal on the pleadings. In *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), plaintiffs alleged injury resulting from an IRS provision

---

[11] *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005) (quoting *Haase v. Sessions*, 835 F.2d 902, 908 (D.C. Cir. 1987)); *Warth v. Seldin*, 422 U.S. 490, 502 (1975).

[12] *Renal Physicians Ass'n. v. U.S. Dep't. of Health and Human Serv.,* 489 F.3d 1267, 1273 (D.C. Cir. 2007) (quoting *Sierra Club v. EPA*, 352 U.S. App. D.C. 191, 292 F.3d 895, 898-99 (D.C. Cir. 2002) (quoting *Lujan*, 504 U.S. at 561)).

that gave favorable tax treatment to hospitals that did not serve indigents. The district court denied defendants' motion to dismiss on standing grounds, and decided the matter on summary judgment. While the Supreme Court disagreed that the complaint was sufficient to withstand a motion to dismiss, it conveyed the difference between a motion to dismiss and summary judgment in an APA case. Analyzing its prior decision in *United States v. SCRAP*, 412 U.S. 669 (1973), it stated, "Such a complaint withstood a motion to dismiss, although it might not have survived challenge on a motion for summary judgment." *Id.* at 46. On summary judgment, the court could consider affidavits to "supply the missing link." *Id.* Even at the motion to dismiss stage, if there is doubt as to plaintiff's standing, "it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Warth v. Seldin*, 422 U.S. 490, 501-502 (U.S. 1975).

The concepts of causation and redressability are related, and are often discussed together. "To the extent there is a difference, it is that [causation] . . . examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas [redressability] examines the causal connection between the alleged injury and the judicial relief requested."[13] Establishing causation requires a showing that the injuries alleged are "fairly traceable" to the challenged action, but this Court has "never applied a 'tort' standard of causation to the question of traceability."[14] The government's action need not be the sole or even direct cause of plaintiff's injury.[15] A plaintiff suing the government for an allegedly illegal action can more readily demonstrate causation and redressability if he is an object of the action. *Lujan,* 504 U.S. at 561. There is little question here that HUD is the cause of Plaintiffs' injury, through its regulations and HECM loan documents that fail to explicitly protect the surviving spouse.

This Court's jurisprudence on redressability establishes a more expansive standard than the district court applied in the instant case. This Court and others use the word "possibility" or "likelihood" as the standard for redressability: the plaintiff must allege facts showing that there is "a substantial **likelihood** that the third party directly injuring the plaintiff would cease doing so as a result of the relief the plaintiff sought."[16] Plaintiffs can establish standing "where the record demonstrate[s] a causal relationship between the government policy and the third-

---

[13] *Allen v. Wright,* 468 U.S. 737, 753 (1984).
[14] *Tozzi v. U.S. Dep't. of Health and Human Serv.,* 271 F.3d 301, 308 (D.C. Cir. 2001) (citing *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986).
[15] *Id.; Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1234-35 (D.C. Cir. 1996) (incremental risk of forest fires from Forest Service's action supported standing, despite existence of other causal factors).
[16] *Nat'l Wrestling Coaches Ass'n.,* 366 F.3d at 942-44 (emphasis added).

party conduct, leaving little doubt as to causation and the **likelihood** of redress."[17] Collins English Dictionary defines "likelihood" as "the state of being likely or probably; probability," and "a probability or chance of something," suggesting that "likely" is imprecise and can be further qualified, as in "substantial likelihood" in *National Wrestling Coaches*. Particularly telling is *Lujan's* description of the standard as "**likely**, as opposed to merely **speculative**, that the injury will be redressed by a favorable decision" on the merits.[18] No authority requires a "high" probability, and *Lujan* establishes a probability that is more than "merely speculative," or a "substantial factor."[19]

This Court has extended the "likelihood" standard to situations where a third party's decisions are involved. In *National Parks Conservation Ass'n v. Manson*, 414 F.3d 1 (D.C. Cir. 2005), this Court held that conservation organizations had standing to challenge an opinion letter stating that a power plant would not affect visibility in Yellowstone Park, where the letter appeared to be influential in pending state permit proceedings for an electric power plant. The court noted, "the ultimate source of injury is two steps removed from the alleged procedural defect," and that although a ruling in favor of the plaintiff "would not directly determine

[17] *Id.* at 941 (emphasis added)
[18] *Lujan*, 504 U.S. at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1992).
[19] *See also Lepelletier v. FDIC,* 164 F.3d 37 (D.C. Cir. 1999) (quoting *Northeast Energy Assocs. v. FERC,* 158 F.3d 150, 154 (D.C. Cir. 1998)) (emphasis added) (stating that the "**possibility** of [relief], 'though not a certainty, is sufficient to meet the redressability requirement.'").

whether the Roundup Plant will get its permit, the effect of such a ruling would not be far removed." *Id.* at 5-6. This was because the state permitting process was ongoing, and a ruling by the federal court "would significantly affect these ongoing proceedings. That is enough to satisfy redressability. "'**A significant increase in the likelihood** that the plaintiff would obtain relief that directly redresses the injury suffered' will suffice for standing."[20]

Nor does plaintiff have to establish that the agency's action is the only factor underlying a third party's behavior. In *Tozzi v. HHS,* 271 F.3d 301 (D.C. Cir. 2001), a manufacturer of dioxin challenged the government's action placing the chemical on a list of known carcinogens. *Id*. at 308. The plaintiff's claimed injury — loss of profits from the sale of PVC plastic products — did not flow directly from the agency's action, but from the independent actions of third parties who allegedly would no longer purchase plaintiff's products containing dioxin. The Court found that the plaintiff had established causation because it was only required to show that "the agency action is at least a **substantial factor** in the third parties' action."[21] The court held that plaintiff's injuries were redressable because "the record left little doubt that the Government's authoritative statement . . . was a substantial factor motivating the decision of the third parties that were the direct

[20] *Id.* at 6-7 (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)) (emphasis added).
[21] *Id.* (citing *Cmty. For Creative Non-Violence v. Pierce,* 814 F.2d 663, 669 (D.C. Cir. 1987)) (emphasis added).

source of plaintiff's injuries."[22] There clearly were other "substantial" factors affecting plaintiff's sales, including an environmental anti-dioxin movement, and whatever other market forces were in play. Indeed, plaintiffs generally base their Article III standing on "competitive injury," which by definition exists in a dynamic marketplace. This Court noted Congress' intention that the report serve as an "authoritative statement" on carcinogenicity for federal and state regulatory authorities. This Court also noted that the FDA was the only federal agency to label dioxin as a "known" carcinogen. *Tozzi,* 271 F.3d at 309-10.

This Court also found the redressability requirement satisfied in *Abigail Alliance for Better Access,* 469 F.3d 129 (D.C. Cir. 2006), where a group representing terminally ill persons challenged FDA rules that, it alleged, unduly limited their members' access to experimental drugs that had not been approved but that might prove beneficial to them. Addressing redressability, the FDA argued that even if it changed its restrictive regulations, it was "merely speculation" that the drug companies would sell their experimental drugs to plaintiff's members. The Court disagreed, holding that plaintiff's claims were redressable, because expanding access to their experimental drugs would be in the drug companies' "**pecuniary interests**." *Id* at 135. "This makes the question of redressability a hardly-speculative exercise in naked capitalism, and our skepticism from *National Wrestling Coaches Ass'n.* need not transfer." *Id.*

---

[22] *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 941.

II. A Favorable Ruling Is Likely To Redress Plaintiffs' Injuries.

The district court stated, "plaintiffs have not explained how their interpretation of subsection (j) could possibly require the Secretary to act, and have failed to show 'a substantial likelihood' that their proposed interpretation of the statute would prompt the Secretary to act to prevent foreclosure." JA 439. With due respect to the district court, this is incorrect.

A. HUD Exercises Total Control Over the HECM Program.

Plaintiffs have demonstrated the pervasive influence HUD exerts over HECM lenders. JA 374-377. ("HUD Directs and Controls the Entire HECM Program"). Among other things, HUD is the author of the HECM Note, Mortgage/Deed of Trust and HECM Loan Agreement. In addition, HUD is a party to every transaction, as an executing party on the HECM Loan Agreement. All HECM borrowers execute a second Deed of Trust on which HUD is the beneficiary. 24 C.F.R. § 206.117. According to the HECM Loan Agreement and the HECM regulations, if and when lenders refuse or are unable to make payments to borrowers as required, HUD assumes that responsibility, takes assignment of the mortgage and ultimately collects under the lender's first mortgage and/or under the second mortgage to which it is a party. 24 C.F.R. §§ 206.117; 206.121(b); *see also* JA 122 (HECM Loan Agreement ¶ 13).

HUD also speaks authoritatively regarding how borrowers should exercise their property interests in the HECM program. Among other things, HUD issued

Mortgagee Letter 2006-25, JA 398-402, in which it endorses the "quitclaiming" that resulted in Plaintiffs and others signing away their interest in their homes without knowing that HUD would not protect them from displacement. At the same time, HUD only *recommended*, but did not require, counseling for non-borrower spouses. JA 400. This hardly speaks well of HUD's duty to "safeguard" homeowner spouses from displacement. Indeed, Mrs. Joseph received no counseling. *See* Complaint ¶ 91.

B. HUD Controls Foreclosures through the Insurance Fund.

A ruling in Plaintiffs' favor is likely to redress their injuries, because it would then be in the lenders' "pecuniary interests" to respect the HECM spousal protection provision so that they can obtain insurance money. *Abigail Alliance*, 469 F.3d at 135. In the case of Mr. Bennett, the lender's pecuniary interest is around $100,000. That is a far more compelling and tangible allegation than those that this Court credited in *National Parks Conversation Association*, *Abigail Alliance* and *Tozzi*, discussed above.

The insurance of HECMs serves several functions. First, it guarantees borrowers that neither they nor their heirs will be required to repay the mortgage for more than the value of the property. 24 C.F.R. §§ 206.123(b); 206.125(c). Second, it provides borrowers protection in case the lender defaults on its obligations under the mortgage. *See* 24 C.F.R. §§ 206.117, 206.121. Third, and critically here, it guarantees lenders that even if property values decrease over the term of the mortgage, they will be repaid any difference between the sale price of the house and the mortgage balance. 24 C.F.R. § 206.123(a)(3) & (4) (insurance claim if "mortgagor sells property for less than the mortgage balance," or "mortgagee acquires title by foreclosure . . . and sells for" less than the mortgage balance).

The ability to seek reimbursement from the FHA insurance fund when a HECM mortgage balance exceeds the home's value has been central from the program's inception. It is this insurance that has made it possible for lenders and borrowers to assume the financial risk that reverse mortgages entail. A Senate Report stated, "There have been very few [reverse] mortgages issued since their conception because [lenders] are reluctant to use a mechanism on which there is so little statistical basis for estimating the risks. The demonstration program would encourage banks and borrowers to use HECM's by insuring a lender against default . . ."[23] FHA insurance was and is the primary inducement for lenders to extend HECMs.

HUD controls this insurance fund, and maintains the discretion to approve or deny any request. HUD's regulations prescribe a detailed "Claim Procedure" to be followed by lenders after the termination of a HECM mortgage, including the notices to be given; appraisal, foreclosure and resale procedures to be followed;

[23] Report of Senate Committee on Banking, Housing and Urban Affairs on S. 825, Mar. 24, 1987, at 10 (JA 516-517).

costs that will be approved; and timelines for every step of the foreclosure process. 24 C.F.R. §§ 206.123-129. Compliance with these procedures is the predicate for approval of an insurance claim, which will be paid, "[i]f the claim . . . is acceptable to the Secretary." 24 C.F.R. § 206.129. Because HUD dictates the language of the HECM Mortgages on which the lenders' foreclosure actions are premised and predicates insurance coverage on strict adherence to its foreclosure schedule and procedures, the HECM lenders' foreclosure actions are not "truly independent of government policy." *Nat'l Wrestling Coaches Ass'n. v. Dep't. of Educ.*, 366 F.3d at 941. Moreover, HUD has the discretion to make payments to the lender under the mortgage or its contract with the lender as required. *See* 12 U.S.C. § 1715z-20(i) (granting HUD discretion to take any action necessary to provide the lender with funds it is entitled to under the mortgage or its contract with HUD).

Further compelling evidence of HUD's control over the HECM program comes from its handling of the "arm's length rule." HECM regulations and the HECM itself have always stated that when the mortgage becomes due and payable, the borrower or his/her estate can satisfy it by selling the property for the lesser of the mortgage balance or 95% of its current value. Complaint ¶¶ 21; 24-52; 24 C.F.R. § 206.125(c); JA 121 (HECM Mortgage ¶ 9(d)). But in December 2008, HUD issued Mortgagee Letter 2008-38, in which it said for the first time that any sale for 95% of the home's value (rather than the full mortgage balance) must be an "arm's length" transaction. JA 37-39. The effect of ML 2008-38 was to prohibit the estate of a deceased borrower from selling the property to a surviving spouse for 95% of its value but to allow the exact same sale to a stranger.

Did any lender contest this unilateral change as completely contrary to law, and contrary to the lenders' existing contracts with borrowers? The record contains no evidence of it; HUD has provided none in this case. On the contrary, the experience of Plaintiffs reflects that HECM lenders complied without a word. Explicitly citing HUD's policy change, Plaintiff' spouses' lenders and others refused to allow HECMs to be satisfied by sale of the homes to surviving spouses or heirs for 95% of their value. For example, when plaintiff Delores Moore attempted to purchase her family home for 95% of its value, lender Financial Freedom returned her check because of "supporting documentation obtained from [HUD] indicating that a short sale/short payoff [under the 95% rule] is not an option for family members/heirs of the estate." JA 234-235. Similarly, Mr. Bennett's lender rejected his request for a 95% sale, explaining, "as a servicer, we follow HUD guidelines for repayment of these loans." JA 240.

Thus, the record shows that given a choice between the mortgage contract and a mortgagee letter, the lenders followed the mortgagee letter without question. It is inconsistent, to say the least, for HUD to claim the power to unilaterally change the terms of existing mortgage contracts, and yet to claim before this Court that it has no power over lenders.

Just days after Plaintiffs filed a motion for preliminary injunction to challenge ML 2008-38, HUD rescinded it. Through ML 2011-16, JA 345-46, HUD restored the longstanding rule allowing HECM properties to be sold *to anyone* – including surviving spouses and heirs – for the lesser of the mortgage balance or 95% of the property's current value. Conforming their conduct yet again to HUD's dictates, HECM lenders did an about-face and began allowing surviving spouses and heirs to purchase for 95% of the properties' value. These are clearly not the actions of independent third parties who are actions are independent of government policy. *Nat'l Wrestling Coaches Assoc.*, 366 F.3d at 941. Instead, they demonstrate that HUD's actions and directives are, at the very least, a "substantial factor motivating" the conduct of HECM lenders.

The record demonstrates that HUD controls foreclosures as well. Indeed, HUD has admitted, in a sworn employee declaration submitted to the district court, "[M]y [HUD] staff and I will, when circumstances warrant, also *instruct* a mortgage lender or its servicer to put a foreclosure on hold and stop the proceedings until further notice from HUD." (JA 350 ¶ 5) (emphasis added). Ms. Bene's affidavit included exhibits showing that HUD called off Plaintiffs' pending foreclosures indefinitely, through no more than an email to the lender. JA 352-360. Ms. Bene evinces no doubt that the lenders will comply with HUD's dictates, rather than engage in "independent choices of a third party," as the district court characterized them.

Similarly, HUD issued guidance making it clear that no foreclosure based on the borrower's failure to pay taxes and insurance would proceed until FHA gave the go-ahead. *See* ML 2011-01, JA 388-393. In ML 2011-01, HUD insists that lenders, whose mortgages authorize them to foreclose if the borrower fails to keep current on taxes and insurance, work with borrowers to bring the payments current before HUD will authorize a foreclosure. HUD guarantees lenders that, if these efforts fail, they may bill HUD for the overdue taxes and insurance. JA 392. And again, according to HUD, lenders comply with its requests to halt foreclosure because HUD "pays the currently accruing interest on the loan in default." JA 415 n.7.

This is a far different picture from that of *National Wrestling Coaches*, on which the district court so heavily relied. In that case, plaintiffs claimed injury from elimination of men's collegiate wrestling programs, resulting from the institutions' efforts to comply with Title IX. The court held that plaintiffs did not have standing to sue the Department of Education, because they failed to show that an order vacating the agency's policy statements would alter the schools' independent decision about whether to eliminate or retain their wrestling programs. *Nat'l Wrestling Coaches Ass'n. v. Dep't. of Educ.,* 366 F.3d at 939. The district court noted that the Secretary of Education in that case could have personally asked university presidents to revive their wrestling programs but that did not mean the Secretary was in control. JA 438.

Here, HUD did not "prevail upon" the lenders; by HUD's own account, it *instructed* them to stop the foreclosures pending further notice, and they all complied instantly. If HECM lenders are to remain eligible for FHA insurance coverage, they have no choice about whether or when to foreclose. The HECM lenders' immediate compliance with HUD's instruction to stop the foreclosures on Plaintiffs' homes demonstrates that the lenders' actions are not "truly independent of government policy." *Nat'l Wrestling Coaches Ass'n. v. Dep't. of Educ.,* 366 F.3d at 941. Instead, they are controlled by HUD, whose control of the purse strings of the FHA insurance fund is the "bottom line." HUD has demonstrated that it can change the material terms of HECM mortgages, indefinitely postpone foreclosures, impose an "arm's length rule" that violates its own regulations, and restrict foreclosures for non-payment of taxes and insurance. HUD, not the lenders, is in the driver's seat on Plaintiffs' foreclosures. Even the "possibility of relief"[24] should be sufficient, but Plaintiffs have demonstrated far more than that here.

C. Appellants' Claims Are Redressable Because HECM Lenders Are Not Likely to Foreclose If the Court Rules for Appellants on the Merits.

The HECM statute, 12 U.S.C. § 1715z-20, conditions a lender's eligibility for insurance on compliance with its many provisions and protections for homeowners. The "[s]afeguard to prevent displacement of homeowner," 12 U.S.C.

[24] *Lepelletier v. FDIC*, 164 F.3d 37 (D.C. Cir. 1999).

§ 1715z-20(j), is one of those protections. Plaintiffs have argued before the district court, and have set out herein, how HUD controls HECM foreclosures, and can effectuate the protection from displacement that the HECM statute commands. Indeed, the district court acknowledged this: "There is no doubt that the Secretary 'can influence the lenders' execution of their contractual rights and responsibilities' and that 'lenders are generally willing to accede to HUD's requests to halt foreclosure' so long as HUD pays the interest on the loan in default." JA 438. (quoting Def. Reply Br. at 10 & n.7). The district court credited Defendant's statement that there was a difference between its ability to postpone Plaintiffs' foreclosures, and "quite another for HUD to assume losses on an unknown number of loans for indefinite periods of time (that could be decades)." JA 415. But this is a difference of degree, not of kind. And it shows that HUD can effectuate the relief Plaintiffs seek.

HUD argues that if Plaintiffs' understanding of Subsection (j) is accepted, " the Secretary should not have insured the mortgages taken out by Plaintiff' spouses." JA 295. "[V]oiding of the insurance agreements between HUD and private lenders – the only agreements implicated by Subsection (j) -- would render those lenders self-insured . . ." JA 296. The agreements between HUD and the insurers were not before the district court. Indeed, discovery of these agreements may well be instructive as to what options are available to redress Plaintiffs' injuries. Regardless of the ultimate reading of Subsection (j), all the Court need to decide is whether Plaintiff have made a sufficient showing that their injury is redressable.

If the district court ultimately determines that HUD acted illegally in failing to protect Plaintiff surviving spouses, it can order HUD to provide relief to Plaintiffs. This could come through an order forbidding HUD from paying insurance to the lender until the surviving spouse no longer lives in the home. Or the court could order HUD to issue guidance on how to comply with the HECM statute's protections for surviving spouses in order to obtain insurance funds, and it can compensate lenders in the interim. *See* 12 U.S.C. § 1715z-20(i). In any event, Plaintiffs have established that HECM lenders will do that which is in their "pecuniary interests," if HUD adheres to its obligation to protect surviving spouses from displacement. *Abigail Alliance*, 469 F.3d at 135.

III. The District Court Erred In Denying Plaintiffs Leave to Amend Their Complaint.

In the event that this Court affirms the district court's judgment concerning redressability, Plaintiffs should be permitted leave to amend their complaint. Despite the fact that it dismissed Plaintiffs' claims *without* prejudice, JA 427, the district court denied Plaintiffs' motion for leave to amend their complaint, reasoning that it must do so because it had rejected Plaintiffs' Rule 59(e) motion for reconsideration. JA 514. The district court's opinion is based on its conclusion that Plaintiffs had not offered sufficient allegations that the order they request would alter the behavior of third-party lenders. JA 436. The district court also analyzed "several opinions that suggest other ways plaintiffs may show that the relief they seek would likely redress their injuries," including the provision of evidence from third parties of what they would do in response to a favorable result for plaintiffs. JA 437. On remand, Plaintiffs should be permitted to file a motion for leave to amend, showing that they can satisfy the district court's instructions to provide sufficient allegations and evidence concerning their standing to bring this action.

CONCLUSION

Plaintiffs ask this Court to reverse the judgment of the District Court, and remand the case for further proceedings.

Respectfully submitted,

/s/ Craig L. Briskin
Steven A. Skalet
Craig L. Briskin
Mehri & Skalet, PLLC

Jean Constantine-Davis
AARP Foundation Litigation

Counsel for Appellants

<u>**CERTIFICATE OF COMPLIANCE**</u>

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C), I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: the type face is fourteen-point Times New Roman font, and the number of words (excluding exempt material) is 9,162 according to the word count of Microsoft Word.

<u>*/s/* Craig L. Briskin</u>
Craig L. Briskin

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2012, I filed an electronic copy of the foregoing brief and joint appendix through this Court's appellate CM/ECF system. The following participants in the case will be served by first class mail:

Shaun Donovan
Secretary of the U.S. Department of
Housing and Urban Development
451 7th Street S.W.
Washington, D. C. 20410

Tony West
Assistant Attorney General
U.S. Department of Justice
Civil Division
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

William C. Lane
Bruce S. Albright
Jessica M. Shapiro
United States Department
Of Housing and Urban Development
451 7th Street, S.W.
Washington, D.C. 20410

Michael Sitcov
Assistant Director
Jeffery M. Smith
Senior Counsel
United States Department of Justice
20 Massachusetts Ave., N.W.
Room 7144
Washington, D.C. 20001

/s/ Craig L. Briskin
Craig L. Briskin

Counsel for Appellants

ADDENDUM

TABLE OF CONTENTS

Item	Page
12 USCS § 1715z-20 (excerpts)………………………………………………..	Add. 1
24 C.F.R. § 206.3………………………………………………………….	Add. 7
24 C.F.R. § 206.27..………………………………………………………	Add. 7
24 C.F.R. § 206.33……………………….………………………………..	Add. 9
24 C.F.R. § 206.105………………………………………………………	Add. 9
24 C.F.R. § 206.117………………………………………………………	Add. 9
24 C.F.R. § 206.121………………………………………………………	Add. 9
24 C.F.R. § 206.123………………………………………………………	Add. 10
24 C.F.R. § 206.125………………………………………………………	Add. 11
24 C.F.R. § 206.127………………………………………………………	Add. 13
24 C.F.R. § 206.129………………………………………………………	Add. 13

12 USCS § 1715z-20 (excerpts)

§ 1715z-20. Insurance of home equity conversion mortgages for elderly homeowners

(a) Purpose. The purpose of this section is to authorize the Secretary to carry out a program of mortgage insurance designed--

(1) to meet the special needs of elderly homeowners by reducing the effect of the economic hardship caused by the increasing costs of meeting health, housing, and subsistence needs at a time of reduced income, through the insurance of home equity conversion mortgages to permit the conversion of a portion of accumulated home equity into liquid assets; and

(2) to encourage and increase the involvement of mortgagees and participants in the mortgage markets in the making and servicing of home equity conversion mortgages for elderly homeowner.

(b) Definitions. For purposes of this section:

(1) The terms "elderly homeowner" and "homeowner" mean any homeowner who is, or whose spouse is, at least 62 years of age or such higher age as the Secretary may prescribe.

(2) The terms "mortgagee", "mortgagor", "real estate," and "State" have the meanings given such terms in section 201 [12 USCS § 1707].

(3) The term "home equity conversion mortgage" means a first mortgage which provides for future payments to the homeowner based on accumulated equity and which a housing creditor (as defined in section 803(2) of the Garn-St Germain Depository Institutions Act of 1982 [12 USCS § 3802(2)]) is authorized to make (A) under any law of the United States (other than section 804 of such Act [12 USCS § 3803]) or applicable agency regulations thereunder; (B) in accordance with section 804 of such Act [12 USCS § 3803], notwithstanding any State constitution, law, or regulation; or (C) under any State constitution, law, or regulation.

(4) Mortgage. The term "mortgage" means a first mortgage or first lien on real estate, in fee simple, a first or subordinate mortgage or lien on all stock allocated to a dwelling unit in a residential cooperative housing corporation, or a first mortgage or first lien on a leasehold--

(A) under a lease for not less than 99 years that is renewable; or

(B) under a lease that has a term that ends no earlier than the minimum number of years, as specified by the Secretary, beyond the actuarial life expectancy of the mortgagor or comortgagor, whichever is the later date.

(5) First mortgage. The term "first mortgage" means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate or a first or subordinate lien on all stock allocated to a dwelling unit in a residential cooperative housing corporation, under the laws of the State in which the real estate or dwelling unit is located, together with the credit instruments, if any, secured thereby.

(c) Insurance authority. The Secretary may, upon application by a mortgagee, insure any home equity conversion mortgage eligible for insurance under this section and, upon such terms and conditions as the Secretary may prescribe, make commitments for the insurance of such mortgages prior to the date of their execution or disbursement to the extent that the Secretary determines such mortgages--

(1) have promise for improving the financial situation or otherwise meeting the special needs of elderly homeowners;

(2) will include appropriate safeguards for mortgagors to offset the special risks of such mortgages; and

(3) have a potential for acceptance in the mortgage market.

(d) Eligibility requirements. To be eligible for insurance under this section, a mortgage shall--

(1) have been originated by a mortgagee approved by the Secretary;

(2) have been executed by a mortgagor who--

(A) qualifies as an elderly homeowner;

(B) has received adequate counseling, as provided in subsection (f), by an independent third party that is not, either directly or indirectly, associated with or compensated by a party involved in--

(i) originating or servicing the mortgage;

(ii) funding the loan underlying the mortgage; or

(iii) the sale of annuities, investments, long-term care insurance, or any other type of financial or insurance product;

(C) has received full disclosure, as prescribed by the Secretary, of all costs charged to the mortgagor, including costs of estate planning, financial advice, and other services that are related to the mortgage but are not required to obtain the mortgage, which disclosure shall clearly state which charges are required to obtain the mortgage and which are not required to obtain the mortgage; and

(D) meets any additional requirements prescribed by the Secretary;

(3) be secured by a dwelling that is designed principally for a 1- to 4-family residence in which the mortgagor occupies 1 of the units;

(4) provide that prepayment, in whole or in part, may be made without penalty at any time during the period of the mortgage;

(5) provide for a fixed or variable interest rate or future sharing between the mortgagor and the mortgagee of the appreciation in the value of the property, as agreed upon by the mortgagor and the mortgagee;

(6) contain provisions for satisfaction of the obligation satisfactory to the Secretary;

(7) provide that the homeowner shall not be liable for any difference between the net amount of the remaining indebtedness of the homeowner under the mortgage and the amount recovered by the mortgagee from--

(A) the net sales proceeds from the dwelling that are subject to the mortgage (based upon the amount of the accumulated equity selected by the mortgagor to be subject to the mortgage, as agreed upon by the mortgagor and mortgagee); or

(B) the insurance benefits paid pursuant to subsection (i)(1)(C);

(8) contain such terms and provisions with respect to insurance, repairs, alterations, payment of taxes, default reserve, delinquency charges, foreclosure proceedings, anticipation of maturity, additional and secondary liens, and other matters as the Secretary may prescribe;

(9) provide for future payments to the mortgagor based on accumulated equity (minus any applicable fees and charges), according to the method that the mortgagor shall select from among the methods under this paragraph, by payment of the amount--

(A) based upon a line of credit;

(B) on a monthly basis over a term specified by the mortgagor;

(C) on a monthly basis over a term specified by the mortgagor and based upon a line of credit;

(D) on a monthly basis over the tenure of the mortgagor;

(E) on a monthly basis over the tenure of the mortgagor and based upon a line of credit; or

(F) on any other basis that the Secretary considers appropriate;

(10) provide that the mortgagor may convert the method of payment under paragraph (9) to any other method during the term of the mortgage, except that in the case of a fixed rate mortgage, the Secretary may, by regulation, limit such convertibility; and

(11) have been made with such restrictions as the Secretary determines to be appropriate to ensure that the mortgagor does not fund any unnecessary or excessive costs for obtaining the mortgage, including any costs of estate planning, financial advice, or other related services.

(e) Disclosures by mortgagee. The Secretary shall require each mortgagee of a mortgage insured under this section to make available to the homeowner--

(1) at the time of the loan application, a written list of the names and addresses of third-party information sources who are approved by the Secretary as responsible and able to provide the information required by subsection (f);

(2) at least 10 days prior to loan closing, a statement informing the homeowner that the liability of the homeowner under the mortgage is limited and explaining the homeowner's rights, obligations, and remedies with respect to temporary absences from the home, late payments, and payment default by the lender, all conditions requiring satisfaction of the loan obligation, and any other information that the Secretary may require;

(3) on an annual basis (but not later than January 31 of each year), a statement summarizing the total principal amount paid to the homeowner under the loan secured by the mortgage, the total amount of deferred interest added to the principal, and the outstanding loan balance at the end of the preceding year; and

(4) prior to loan closing, a statement of the projected total cost of the mortgage to the homeowner based on the projected total future loan balance (such cost expressed as a single average annual interest rate for at least 2 different appreciation rates for the term of the mortgage) for not less than 2 projected loan terms, as the Secretary shall determine, which shall include--

(A) the cost for a short-term mortgage; and

(B) the cost for a loan term equaling the actuarial life expectancy of the mortgagor.

(f) Counseling services and information for mortgagors. The Secretary shall provide or cause to be provided adequate counseling for the mortgagor, as described in subsection (d)(2)(B). Such counseling shall be provided by counselors that meet qualification standards and follow uniform counseling protocols. The qualification standards and counseling protocols shall be established by the Secretary within 12 months of the date of enactment of the Building American Homeownership Act of 2008 [enacted July 30, 2008]. The protocols shall require a qualified counselor to discuss with each mortgagor information which shall include--

(1) options other than a home equity conversion mortgage that are available to the homeowner, including other housing, social service, health, and financial options;

(2) other home equity conversion options that are or may become available to the homeowner, such as sale-leaseback financing, deferred payment loans, and property tax deferral;

(3) the financial implications of entering into a home equity conversion mortgage;

(4) a disclosure that a home equity conversion mortgage may have tax consequences, affect eligibility for assistance under Federal and State programs, and have an impact on the estate and

heirs of the homeowner; and
(5) any other information that the Secretary may require.

The Secretary shall consult with consumer groups, industry representatives, representatives of counseling organizations, and other interested parties to identify alternative approaches to providing consumer information required by this subsection that may be feasible and desirable for home equity conversion mortgages insured under this section and other types of reverse mortgages. The Secretary may, in lieu of providing the consumer education required by this subsection, adopt alternative approaches to consumer education that may be developed as a result of such consultations, but only if the alternative approaches provide all of the information specified in this subsection.

(g) Limitation on insurance authority. The aggregate number of mortgages insured under this section may not exceed 275,000. In no case may the benefits of insurance under this section exceed the maximum dollar amount limitation established under section 305(a)(2) of the Federal Home Loan Mortgage Corporation Act [12 USCS § 1454(a)(2)] for a 1-family residence.

(h) Administrative authority. The Secretary may--
(1) enter into such contracts and agreements with Federal, State, and local agencies, public and private entities, and such other persons as the Secretary determines to be necessary or desirable to carry out the purposes of this section; and
(2) make such investigations and studies of data, and publish and distribute such reports, as the Secretary determines to be appropriate.

(i) Protection of homeowner and lender.
(1) Notwithstanding any other provision of law, and in order to further the purposes of the program authorized in this section, the Secretary shall take any action necessary--
(A) to provide any mortgagor under this section with funds to which the mortgagor is entitled under the insured mortgage or ancillary contracts but that the mortgagor has not received because of the default of the party responsible for payment;
(B) to obtain repayment of disbursements provided under subparagraph (A) from any source; and
(C) to provide any mortgagee under this section with funds not to exceed the limitations in subsection (g) to which the mortgagee is entitled under the terms of the insured mortgage or ancillary contracts authorized in this section.
(2) Actions under paragraph (1) may include--
(A) disbursing funds to the mortgagor or mortgagee from the Mutual Mortgage Insurance Fund;
(B) accepting an assignment of the insured mortgage notwithstanding that the mortgagor is not in default under its terms, and calculating the amount and making the payment of the insurance claim on such assigned mortgage;
(C) requiring a subordinate mortgage from the mortgagor at any time in order to secure repayments of any funds advanced or to be advanced to the mortgagor;
(D) requiring a subrogation to the Secretary of the rights of any parties to the transaction against any defaulting parties; and
(E) imposing premium charges.

(j) Safeguard to prevent displacement of homeowner. The Secretary may not insure a home equity conversion mortgage under this section unless such mortgage provides that the homeowner's obligation to satisfy the loan obligation is deferred until the homeowner's death, the sale of the home, or the occurrence of other events specified in regulations of the Secretary. For purposes of this subsection, the term "homeowner" includes the spouse of a homeowner. Section 137(b) of the Truth in Lending Act (15 U.S.C. 1647(b)) and any implementing regulations issued by the Board of Governors of the Federal Reserve System shall not apply to a mortgage insured under this section.

* * * * *

(l) Funding for counseling. The Secretary may use a portion of the mortgage insurance premiums collected under the program under this section to adequately fund the counseling and disclosure activities required under subsection (f), including counseling for those homeowners who elect not to take out a home equity conversion mortgage, provided that the use of such funds is based upon accepted actuarial principles.

(m) Authority to insure home purchase mortgage.

(1) In general. Notwithstanding any other provision of this section, the Secretary may insure, upon application by a mortgagee, a home equity conversion mortgage upon such terms and conditions as the Secretary may prescribe, when the home equity conversion mortgage will be used to purchase a 1- to 4-family dwelling unit, one unit of which the mortgagor will occupy as a primary residence, and to provide for any future payments to the mortgagor, based on available equity, as authorized under subsection (d)(9).

(2) Limitation on principal obligation. A home equity conversion mortgage insured pursuant to paragraph (1) shall involve a principal obligation that does not exceed the dollar amount limitation determined under section 305(a)(2) of the Federal Home Loan Mortgage Corporation Act [12 USCS § 1454(a)(2)] for a 1-family residence.

* * * * *

24 C.F.R. § 206, Selected Sections

§ 206.3 Definitions.

As used in this part, the following terms shall have the meaning indicated.

* * * * * *

Home Equity Conversion Mortgage (HECM) counselor means an individual who provides statutorily required counseling to clients who may be eligible for or interested in obtaining an FHA-insured HECM. This counseling assists elderly homeowners who seek to convert equity in their homes into income that can be used to pay for home improvements, medical costs, living expenses, or other expenses.

Insured mortgage means a mortgage which has been insured as evidenced by the issuance of a mortgage insurance certificate.

* * * * * *

Mortgage means a first lien on real estate under the laws of the jurisdiction where the real estate is located. If the dwelling unit is in a condominium, the term mortgage means a first lien covering a fee interest or eligible leasehold interest in a one-family unit in a condominium project, together with an undivided interest in the common areas and facilities serving the project, and such restricted common areas and facilities as may be designated. The term refers to a security instrument creating a lien, whether called a mortgage, deed of trust, security deed, or another term used in a particular jurisdiction. The term mortgage also includes the credit instrument, or note, secured by the lien, and the loan agreement between the mortgagor, the mortgagee and the Secretary.

Mortgagee. (See section 255(b)(2) of NHA).

Mortgagor means each original borrower under a mortgage. The term does not include successors or assigns of a borrower.

* * * * * *

Principal residence means the dwelling where the mortgagor maintains his or her permanent place of abode, and typically spends the majority of the calendar year. A person may have only one principal residence at any one time.

§ 206.27 Mortgage provisions.

(a) Form. The mortgage shall be in a form meeting the requirements of the Secretary.

(b) Provisions. The mortgage shall explain how payments will be made to the mortgagor, how interest will be charged and when the mortgage will be due and payable. It shall also contain provisions designed to ensure compliance with this part and provisions on the following additional matters:

(1) Payments by the mortgagee under the term or tenure payment options shall be mailed to the mortgagor or electronically transferred to an account of the mortgagor on the first business day of each month beginning with the first month after closing. Payments under the line of credit payment option shall be mailed to the mortgagor or electronically transferred to an account of the mortgagor within five business days after the mortgagee has received a written request for payment by the mortgagor.

(2) The mortgagor shall maintain hazard insurance on the property in an amount acceptable to the Secretary and the mortgagee.

(3) The mortgagor shall not participate in a real estate tax deferral program or permit any liens to be recorded against the property, unless such liens are subordinate to the insured mortgage and any second mortgage held by the Secretary.

(4) A mortgage may be prepaid in full or in part in accordance with § 206.209.

(5) The mortgagor must keep the property in good repair.

(6) The mortgagor must pay taxes, hazard insurance premiums, ground rents and assessments in a timely manner, except to the extent such property charges are paid by the mortgagee in accordance with § 206.205.

(7) The mortgagor shall be charged for the payment of monthly MIP.

(8) The mortgagor shall have no personal liability for payment of the mortgage balance. The mortgagee shall enforce the debt only through sale of the property. The mortgagee shall not be permitted to obtain a deficiency judgment against the mortgagor if the mortgage is foreclosed.

(9) If the mortgage is assigned to the Secretary under § 206.121(b), the mortgagor shall not be liable for any difference between the insurance benefits paid to the mortgagee and the mortgage balance including accrued interest, owed by the mortgagor at the time of the assignment.

(10) If State law limits the first lien status of the mortgage as originally executed and recorded to a maximum amount of debt or a maximum number of years, the mortgagor shall agree to execute any additional documents required by the mortgagee and approved by the Secretary to extend the first lien status to an additional amount of debt and an additional number of years and to cause any other liens to be removed or subordinated.

(c) Date the mortgage comes due and payable. (1) The mortgage shall state that the mortgage balance will be due and payable in full if a mortgagor dies and the property is not the principal residence of at least one surviving mortgagor, or a mortgagor conveys all or his or her title in the property and no other mortgagor retains title to the property. For purposes of the preceding sentence, a mortgagor retains title in the property if the mortgagor continues to hold title to any part of the property in fee simple, as a leasehold interest as set forth in § 206.45(a), or as a life estate.

(2) The mortgage shall state that the mortgage balance shall be due and payable in full, upon approval of the Secretary, if any of the following occur:

(i) The property ceases to be the principal residence of a mortgagor for reasons other than death and the property is not the principal residence of at least one other mortgagor;

(ii) For a period of longer than 12 consecutive months, a mortgagor fails to occupy the property because of physical or mental illness and the property is not the principal residence of at least one other mortgagor; or

(iii) An obligation of the mortgagor under the mortgage is not performed.

(d) Second mortgage to Secretary. Unless otherwise provided by the Secretary, a second mortgage to secure any payments by the Secretary as provided in § 206.121(c) must be given to the Secretary before a Mortgage Insurance Certificate is issued for the mortgage.

§ 206.33 Age of mortgagor.

The youngest mortgagor shall be 62 years of age or older at the time the mortgagee submits the application for insurance.

§ 206.105 Amount of MIP.

(a) Initial MIP. The mortgagee shall pay to the Secretary an initial MIP of two percent of the maximum claim amount.

(b) Monthly MIP. Monthly MIP will accrue daily on the mortgage balance at a rate equivalent to one-half of one percent per annum and shall be added to the mortgage balance when paid to the Secretary.

§ 206.117 General.

The Secretary is required by statute to take any action necessary to provide a mortgagor with funds to which the mortgagor is entitled under the mortgage and which the mortgagor does not receive because of the default of the mortgagee. The Secretary may hold a second mortgage to secure repayment by the mortgagor under § 206.27(d) or may accept assignment of the first mortgage.

§ 206.121 Secretary authorized to make payments.

(a) Investigation. The Secretary will investigate all complaints by a mortgagor concerning late payments. If the Secretary determines that the mortgagee is unable or unwilling to make all payments required under the mortgage, including late charges, the Secretary shall pay such payments and late charges to the mortgagor.

(b) Reimbursement or assignment. The Secretary may demand that within 30 days from the demand, the mortgagee reimburse the Secretary, with interest from the date of payment by the Secretary, or assign the insured mortgage to the Secretary. Interest shall be paid at a rate set in conformity with the Treasury Financial Manual. If the mortgagee complies with the reimbursement demand, then the contract of insurance shall not be affected. If the mortgagee complies by assigning the mortgage for record within 30 days of the demand, then the Secretary shall pay an insurance claim as provided in § 206.129(e)(3) and assume all responsibilities of the mortgagee under the first mortgage. If the mortgagee fails to comply with the demand within 30 days, the contract of insurance will terminate as provided in § 206.133(c).

(c) Second mortgage. If the contract of insurance is terminated as provided in § 206.133(c), all payments to the mortgagor by the Secretary will be secured by the second mortgage, if any. Payments will be due and payable in the same manner as under the insured first mortgage. The liability of the mortgagor under the first mortgage shall be limited to payments actually made by the mortgagee to or on behalf of the mortgagor (including MIP), and shall exclude accrued interest, whether or not it has been included in the mortgage balance, and shared appreciation, if any. Interest will stop accruing on the first mortgage when the Secretary begins to make payments under the second mortgage. The first mortgage will not be due and payable until the second mortgage is due and payable.

§ 206.123 Claim procedures in general.

(a) Claims. Mortgagees may submit claims for the payment of the mortgage insurance benefits if:

(1) The conditions of § 206.107(a)(1) pertaining to the optional assignment of the mortgage by the mortgagee have been met and the mortgagee assigns the mortgage to the Secretary;

(2) The mortgagee is unable or unwilling to make the payments under the mortgage and assigns the mortgage to the Secretary pursuant to the Secretary's demand, as provided in § 206.121(b);

(3) The mortgagor sells the property for less than the mortgage balance and the mortgagee releases the mortgage of record to facilitate the sale, as provided in § 206.125(c);

(4) The mortgagee acquires title to the property by foreclosure or a deed in lieu of foreclosure and sells the property as provided in § 206.125(g) for an amount which does not satisfy the mortgage balance or fails to sell the property as provided in § 206.127(a)(2); or

(5) The mortgagee forecloses and a bidder other than the mortgagee purchases the property for an amount that is not sufficient to satisfy the mortgage balance, as provided in § 206.125(e).

(b) Expanded definition of mortgagor. The term mortgagor as used in this subpart shall have the same meaning as stated in § 206.3, except that in reference to a sale by the mortgagor, the term shall also mean the mortgagor's estate or personal representative.

§ 206.125 Acquisition and sale of the property.

(a) Initial action by the mortgagee. (1) The mortgagee shall notify the Secretary whenever the mortgage is due and payable under the conditions stated in § 206.27(c)(1), or one of the conditions stated in § 206.27(c)(2) has occurred.

(2) After notifying the Secretary, and receiving approval of the Secretary when needed, the mortgagee shall notify the mortgagor that the mortgage is due and payable, unless the mortgage is due and payable by reason of the mortgagor's death. The mortgagee shall require the mortgagor to (i) pay the mortgage balance, including any accrued interest and MIP, in full; (ii) sell the property for at least 95% of the appraised value as determined under § 206.125(b), with the net proceeds of the sale to be applied towards the mortgage balance; or (iii) provide the mortgagee with a deed in lieu of foreclosure. The mortgagor shall have 30 days in which to comply with the preceding sentence, or correct the matter which resulted in the mortgage coming due and payable, before a foreclosure proceeding is begun.

(3) Even after a foreclosure proceeding is begun, the mortgagee shall permit the mortgagor to correct the condition which resulted in the mortgage coming due and payable and to reinstate the mortgage, and the mortgage insurance shall continue in effect. The mortgagee may require the mortgagor to pay any costs that the mortgagee incurred to reinstate the mortgagor, including forclosure costs and reasonable attorney's fees. Such costs shall be paid by adding them to the mortgage balance. The mortgagee may refuse reinstatement by the mortgagor if:

(i) The mortgagee has accepted reinstatement of the mortgage within the past two years immediately preceeding the current notification to the mortgagor that the mortgage is due and payable;

(ii) Reinstatement will preclude foreclosure if the mortgage becomes due and payable at a later date; or

(iii) Reinstatement will adversely affect the priority of the mortgage lien.

(b) Appraisal. The mortgagee shall obtain an appraisal of the property no later than 30 days after the mortgagor is notified that the mortgage is due and payable, or no later than 30 days after the mortgagee becomes aware of the mortgagor's death, or upon the mortgagor's request in connection with a pending sale. The property shall be appraised no later than 15 days before a foreclosure sale. The appraisal shall be at the mortgagor's expense unless the mortgage is due and payable. If the mortgage is due and payable, the appraisal shall be at the mortgagee's expense but the mortgagee shall have a right to be reimbursed out of the proceeds of any sale by the mortgagor.

(c) Sale by mortgagor. Whether or not the mortgage is due and payable, the mortgagor may sell the property for at least the lesser of the mortgage balance or the appraised value (determined under § 206.125(b)). If the mortgage is due and payable at the time the contract for sale is executed, the mortgagor may sell the property for at least the lesser of the mortgage balance or five percent under the appraised value. The mortgagee shall satisfy the mortgage of record (and the Secretary will satisfy the second mortgage required under § 206.27(e) of record) in order to facilitate the sale, provided that there are no junior liens (except the mortgage to secure payments by the Secretary under § 206.27(e)) and all the net proceeds from the sale are paid to the mortgagee.

(d) Initiation of foreclosure. (1) The mortgagee shall commence foreclosure of the mortgage within six months of giving notice to the mortgagor that the mortgage is due and payable, or six months from the date of the mortgagor's death if applicable, or within such additional time as may be approved by the Secretary.

(2) If the laws of the State in which the mortgaged property is located or if Federal bankruptcy law does not permit the commencement of the foreclosure within six months from the date of the notice to the mortgagor that the mortgage is due and payable, the mortgagee shall commence foreclosure within six months after the expiration of the time during which such foreclosure is prohibited by such laws.

(3) The mortgagee must give written notice to the Secretary within 30 days after the initiation of foreclosure proceedings, and must exercise reasonable diligence in prosecuting the foreclosure proceedings to completion and in acquiring title to and possession of the property. A time frame that is determined by the Secretary to constitute "reasonable diligence" for each State is made available to mortgagees.

(4) The mortgagee shall bid at the foreclosure sale an amount equal to the appraised value of the property.

(e) Other bidders at foreclosure sale. If a party other than the mortgagee is the successful bidder at the foreclosure sale, the net proceeds of sale shall be applied to the mortgage balance.

(f) Deed in lieu of foreclosure. (1) In order to avoid delays and additional expense as a result of instituting and completing a foreclosure action, the mortgagee shall accept a deed in lieu of foreclosure from the mortgagor if the mortgagee is able to obtain good and marketable title from the mortgagor.

(2) In exchange for the executed and delivered deed, the mortgagee shall cancel the credit instrument and deliver it to the mortgagor and satisfy the mortgage of record.

(g) Sale of the acquired property. (1) Upon acquisition of the property by foreclosure or deed in lieu of foreclosure, the mortgagee shall take possession of, preserve and repair the property and shall make diligent efforts to sell the property within six months from the date the mortgagee acquired the property. Repairs shall not exceed those required by local law and, in cases where the sale is made with a mortgage insured by the Secretary or guaranteed by the Secretary of Veterans Affairs, those necessary to meet the objectives of the property standards required for mortgages insured by the Secretary. No other repairs shall be made without the specific advance approval of the Secretary. The mortgagee shall sell the property for an amount not less than the appraised value (as provided under paragraph (b) of this section) unless written permission is obtained from the Secretary authorizing a sale at a lower price.

(2) Repairs shall not exceed those required by local law or the requirements of the Secretary of HUD or the Secretary of Veterans Affairs if the sale of the property is financed with a mortgage insured by the Secretary of HUD or guaranteed, insured or taken by the Secretary of Veterans Affairs.

(3) The mortgagee shall not enter into a contract for the preservation, repair or sale of the property with any officer, employee, owner of ten percent or more interest in the mortgagee or with any other person or organization having an identity of interest with the mortgagee or with any relative of such officer, employee, owner or person.

§ 206.127 Application for insurance benefits.

(a) Mortgagee acquires title. (1) The mortgagee shall apply for the payment of the insurance benefits within 15 days after the sale of the property by the mortgagee. Application shall be made by notifying the Secretary of the sale of the property, the sale price, and income and expenses incurred in connection with the acquisition, repair and sale of the property.

(2) If the property will not be sold within six months from the date the mortagee acquired title, the mortgagee shall, at least 15 days prior to the expiration of the six month period, request the Secretary to cause another appraisal of the property to be made. Within 15 days of receipt of the appraisal, the mortgagee shall apply for the insurance benefits as provided in paragraph (a) of this section, substituting the appraised value for the sale price. The mortgagee shall bear the cost of the appraisal.

(b) Party other than the mortgagee acquires title. The mortgagee shall apply for the payment of the insurance benefits within 15 days after a party other than the mortgagee acquires title to the property. Application shall be made by notifying the Secretary of the sale of the property and the sale price.

(c) Mortgagee assigns the mortgage. The mortgagee shall file its claim for the payment of the insurance benefits within 15 days after the date the mortgage is assigned for record to the Secretary. The application for the payment of the insurance benefits shall include the items listed in § 203.351(a) of this chapter and the certification required under § 203.353 of this chapter.

§ 206.129 Payment of claim.

(a) General. If the claim for the payment of the insurance benefits is acceptable to the Secretary, payment shall be made in cash in the amount determined under this section.

(b) Limit on claim amount. In no case may the claim paid under this subpart exceed the maximum claim amount. The interest allowance provided in paragraphs (d)(2)(iii), (e)(2) and (f)(2) of this section shall not be included in determining the limit on the claim amount.

(c) Shared appreciation mortgages. The terms mortgage balance and accrued interest as used in this section do not include interest attributable to the mortgagee's share of the appreciated value of the property.

(d) Amount of payment -- mortgagee acquires title or is unsuccessful bidder. This paragraph describes the amount of payment if the mortgagee acquires title by purchase, foreclosure, or deed in lieu of foreclosure, or when a party other than the mortgagee is the successful bidder at the foreclosure sale.

(1) The amount of the claim shall be computed by (i) totalling the mortgage balance, (including any accrued interest and MIP which have been added to the mortgage balance) and any accrued interest which has not been added to the mortgage balance as of the due date (defined in the following sentence), and allowances for items set forth in paragraph (d)(2) of this section, and (ii) subtracting from that total the amount for which the property was sold (or the appraised value determined under § 206.127(a)) and the items set forth in paragraph (d)(3) of this section. Due date means the date when the mortgagee notifies the Secretary under § 206.27(c)(1) that the mortgage became due and payable, or, if applicable, the date the Secretary granted approval under § 206.27(c)(2) for the mortgage to become due and payable.

(2)(i) Items listed in § 203.402 (a), (b), (c), (d), (e), (g), (j), and (s), and § 204.322(l) of this chapter.

(ii) Foreclosure costs or costs of acquiring the property actually paid by the mortgagee and approved by HUD, in an amount not in excess of two-thirds of such costs or $ 75, whichever is the greater. For mortgages insured after March 1, 1997, HUD may reimburse a percentage of foreclosure costs or costs of acquiring the property, which percentage shall be determined in accordance with such conditions as HUD shall prescribe.

(iii) An amount equal to the interest allowance which would have been earned, from the due date to the date when payment of the claim is made, if the claim had been paid in debentures, except that when the mortgagee fails to meet any one of the applicable requirements of §§ 206.125 and 206.127 of this subpart within the specified time, and in a manner satisfactory to the Secretary (or within such further time as the Secretary may approve in writing), the interest allowance in such cash payment shall be computed only to the date on which the particular required action should have been taken or to which it was extended. The provisions of §§ 203.405 through 203.411 of this chapter pertaining to debentures are incorporated by reference.

(iv) Costs of any appraisal obtained under §§ 206.125 or 206.127, provided that the appraisal was obtained after the mortgage became due and payable and that the mortgagee is not otherwise reimbursed for such costs.

(v) Reasonable payments made by the mortgagee for:

(A) Preservation and maintenance of the property;

(B) Repairs necessary to meet the objectives of the property standards required for mortgages insured by the Secretary, those required by local law, and such additional repairs as may be specifically approved in advance by the Commissioner; and

(C) Expenses in connection with the sale of the property including a sales commission at the rate customarily paid in the community and, if the sale to the buyer involves a mortgage insured by the Secretary or guaranteed by the Secretary of Veterans Affairs, a discount at a rate not to exceed the maximum allowable by the Commissioner, as of the date of execution of the discounted loan, on sales of properties acquired by the Commissioner pursuant to §§ 203.295 through 203.426 of this chapter.

(vi) A certification that the property is undamaged in accordance with § 203.380 of this chapter.

(3) There shall be deducted from the amount computed in paragraph (d)(1)(i) of this section:

(i) The items listed in § 203.403 of this chapter; and

(ii) Any adjustment for damage or neglect to the property pursuant to §§ 203.377, 203.378, and 203.379 of this chapter.

(e) Amount of payment -- assigned mortgages. This paragraph describes the amount of payment if the mortgagee assigns a mortgage to the Secretary under § 206.107(a)(1) or § 206.121(b).

(1) When a mortgagee assigns a mortgage which is eligible for assignment under § 206.107(a)(1), the amount of payment shall be computed by subtracting from the mortgage balance on the date of assignment the items set forth in § 203.404(b) of this chapter and any adjustments for damage or neglect to the property pursuant to §§ 203.377, 203.378 and 203.379 of this chapter.

(2) The claim shall also include:

(i) Reimbursement for such costs and attorney's fees as the Secretary finds were properly incurred in connection with the assignment of the mortgage to the Secretary, and

(ii) An amount equivalent to the interest allowance which will have been earned from the date the mortgage was assigned to the Secretary to the date the claim is paid, if the claim had been paid in debentures, except that if the mortgagee fails to meet any of the requirements of § 206.127(c), or § 206.131 if applicable, within the specified time and in a manner satisfactory to the Secretary (or within such further time as the secretary may approve in writing), the interest allowance in the payment of the claim shall be computed only to the date on which the particular required action should have been taken or to which it was extended. The provisions of §§ 203.405 through 203.411 of this chapter pertaining to debentures are incorporated by reference.

(3) When a mortgagee assigns a mortgage under § 206.121(b) after demand by the Secretary, the mortgagee will not receive the entire claim payment as contained in paragraphs (e)(1) and (2) of this section. The amount of the claim shall be computed by (i) totalling the payments made by the mortgagee to the mortgagor or for the benefit of the mortgagor (including MIP), and subtracting from the total (ii) the items set forth in § 203.404(b) of this chapter and any

adjustments for damage or neglect to the property pursuant to §§ 203.378 and 203.379 of this chapter. The claim shall also be reduced by an amount determined by the Secretary to reimburse the Secretary for administrative expenses incurred in assuming the mortgagee's responsibility under the mortgage, which may include expenses for staff time. If more than one mortgage is assigned to the Secretary, the administrative expenses incurred for all the mortgages assigned shall be allocated among the mortgages as determined by the Secretary. The claim shall not include accrued interest whether or not it has been included in the mortgage balance.

(f) Amount of payment-mortgagor sells the property. This paragraph describes the amount of payment if the mortgagor sells the property to one other than the mortgagee for less than the mortgage balance, and the mortgagee releases the mortgage to facilitate the sale.

(1) The amount of the claim shall be computed by (i) totalling the mortgage balance (including any accrued interest and MIP which have been added to the mortgage balance) and any accrued interest which has not been added to the mortgage balance on the date the deed is recorded, and allowances for items set forth in paragraphs (d)(2)(i) and (iv) of this section as applicable, and subtracting from the total (ii) the net proceeds of the sale paid to the mortgagee and the items set forth in paragraph (d)(3) of this section.

(2) The claim shall also include an amount equivalent to the interest allowance which would have been earned from the date the deed is recorded to the date when payment of the claim is made, if the claim had been paid in debentures, except that when the mortgagee fails to meet any of the applicable requirements of §§ 206.125 and 206.127 of this subpart within the specified time (or within such further time as the Secretary may approve in writing), and in a manner satisfactory to the Secretary, the interest allowance in such cash payment shall be computed only to the date on which the particular action should have been taken or to which it was extended. The provisions of §§ 203.405 through 203.411 of this chapter pertaining to debentures are incorporated by reference.