

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-201669

DATE: November 26, 1985

MATTER OF: Department of Housing and Urban Development,
Applicability of Statute of Limitations to
Payment of Distributive Shares from Mutual
Mortgage Insurance Fund

DIGEST:

Unrefunded distributive share is held by Department of Housing and Urban Development (HUD) in Mutual Mortgage Insurance Fund as trustee on behalf of persons entitled thereto. If HUD cannot locate persons in order to make payment, amounts should be cleared from the Fund's account and transferred to the credit of the Treasury trust account entitled "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown" in accordance with procedures set forth in Treasury Department Fiscal Requirements Manual for Guidance of Federal Agencies Vol. I, Part 6, Chapter 3000. Statutes of Limitations generally do not run against claims by beneficiaries for amounts held by the Government as trustee in the trust account for "Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown." B-103575, August 27, 1951. Failure to transfer unpaid distributive shares in manner specified does not serve to render the trust amounts subject to statutes of limitations.

This advance decision is in response to a request submitted by Judith L. Tardy, Assistant Secretary for Administration, Department of Housing and Urban Development (HUD), asking whether a Public Voucher for Refunds (SF 1047-FHA Case No. 56-190267-203) in the amount of \$728.60 payable to John and Mary Binder may be certified for payment. This amount is the distributive share^{1/} which became payable to the Binders upon termination of the HUD/FHA insurance on their mortgage. HUD has previously denied their request for payment since it was not received until more than 6 years after the termination of the insurance on their mortgage. For the reasons stated below, we hold that the voucher may be certified for payment.

^{1/} The distributive share is a refund of a portion of premium payments made by mortgagors for HUD/FHA insurance issued to protect mortgagees.

BACKGROUND

Under section 203 of the National Housing Act (Act), as amended, 12 U.S.C. § 1709, the Federal Housing Administration (FHA), within HUD insures mortgagees (lenders) on eligible mortgages against the risk of loss incurred as a result of foreclosures taken against property of defaulting mortgagors (borrowers). The Secretary of HUD fixes premiums for insurance which are paid by the mortgagee and passed on to the mortgagor. These premiums are deposited to the credit of the Mutual Mortgage Insurance Fund (Fund) established as a revolving fund by section 202 of the Act, as amended, 12 U.S.C. § 1708. Investment income is deposited to the Fund and operating expenses are paid out of the Fund. Sections 204 and 206 of the Act, as amended, 12 U.S.C. §§ 1710 and 1712.

Within the Fund, the law establishes two accounts: the General Surplus Account and the Participating Reserve Account. Semiannually, the Secretary of HUD credits or charges to either or both of these accounts the aggregate net income received or net loss sustained in such a manner and in such amounts as the Secretary determines to be in accord with sound actuarial and accounting practice. Section 205(a) and (b) of the Act, as amended, 12 U.S.C. § 1711(a) and (b).^{2/}

The law authorizes the Secretary to distribute a share of the Participating Reserve Account to the mortgagor upon termination of the insurance obligation. The Secretary determines the amount of the distributive share in accordance with sound actuarial and accounting practices. Section 205(c) of the Act, as amended, 12 U.S.C. § 1711(c).

Finally, the law provides that no mortgagor or mortgagee insured under section 203 of the Act:

^{2/} 24 C.F.R. § 203.421 provides:

"For any semiannual period in which Mutual Mortgage Insurance operations shall result in a net income, or loss, the Commissioner [Assistant Secretary for Housing-Federal Housing Commissioner] shall allocate such net income or such loss to the General Surplus Account and/or to the Participating Reserve Account as he may determine to be in accord with sound actuarial and accounting practice. In determining net income or loss the Commissioner shall take into consideration all income received from fees, premiums and earnings on investments of the fund, operating expenses and provision for losses of the fund."

"* * * shall have any vested right in a credit balance in any such account or be subject to any liability arising out of the mutuality of the Fund and the determination of the Secretary as to the amount to be paid by him to any mortgagor shall be final and conclusive." 12 U.S.C. § 1711(d).^{3/}

HUD explains the procedure followed to establish a "distributive share" as follows:

"Annually, near the end of the calendar year, HUD determines 'distributive shares' that would be payable to mortgagors whose mortgage insurance may be terminated during the following year. Using FHA insurance in force data of the previous March 31 as a basis, HUD actuarially computes a share factor per thousand dollars of the original mortgage amount for each group of mortgages, i.e., the same endorsement years and term. Subsequently, when the FHA insurance is terminated on an individual mortgage, the applicable share factor, if any, is multiplied by the mortgage amount to calculate the amount of share payable. If, there is no applicable share factor at time of termination, no share is payable."^{4/}

Under HUD's regulations, the mortgagors are eligible for a "distributive share" if the contract for insurance is terminated by:

^{3/} 24 C.F.R. § 203.422 provides"

"No mortgagor or mortgagee shall have any vested right in a credit balance in either the General Surplus Account or the Participating Reserve Account. No mortgagor or mortgagee shall be subject to any liability arising under the mutuality of the Mutual Mortgage Insurance Fund."

^{4/} Mortgagee Letter 84-9, April 2, 1984, to all approved mortgagees, from the Assistant Secretary for Housing-Federal Housing Commissioner, HUD. See also 24 C.F.R. § 203.423(b), which provides:

"The Commissioner shall determine the amount of the distributive share by multiplying the amount of the premium or premiums paid by the applicable distributive share percentage for mortgages insured in the year the mortgage was endorsed for insurance. The Commissioner shall determine the applicable distributive share percentage in an equitable manner and in accordance with sound financial and actuarial practice, taking into account the cumulative actual financial and actuarial experiences through the end of the most recent calendar year."

- conveyance to other than the Secretary of HUD;
- prepayment of the mortgage; or
- voluntary agreement with the approval of the Federal Housing Commissioner.^{5/}

Thus, in any given year for which an insured mortgage terminates in the manner specified above, determination of the distributive share is a mere mathematical calculation based upon factors already determined for that year.

In keeping with these procedures, HUD calculates the amount of a particular distributive share, issues a notice of share payable to the mortgagor to obtain signature verification of the proper name and address, and releases the payment data to the Department of the Treasury for payment. Problems arise if the mortgagee fails to notify HUD officials of the proper name and address, or if the mortgagor cannot be located or does not respond to the notice requesting name and address verification. In these situations the distributive share cannot be paid.

It appears that the Binders' mortgage was paid in full in 1975, at which time insurance coverage terminated.^{6/} However,

^{5/} See 24 C.F.R. § 203.423(a), which provides:

"The Commissioner may provide for the distribution to the mortgagor of a share of the participating reserve account if the contract of insurance is terminated by conveyance to other than the Commissioner (§ 203.315), by prepayment of the mortgage (§ 203.316), or by voluntary agreement with approval of the Commissioner (§ 203.317)."

^{6/} We note that it was not until 1981 that HUD began to require mortgagees to inform mortgagors whose mortgages were paid in full or voluntarily terminated that they were eligible for a possible refund under the program. See HUD Mortgagee Letter 81-5, February 19, 1981, to all approved mortgagees. In addition HUD Handbook 4110.2, The Mortgagees' Guide Home Mortgage Insurance Fiscal Instructions (July 1972), was revised to provide that mortgagees must notify mortgagors of their possible entitlement to a distributive share at the time of both loan origination and loan termination. A sample fact sheet was prepared and included in the handbook for use by the mortgagees. Mortgagees were also required to obtain and provide the mortgagor's current address and provide this on Form HUD-2344. However, these procedures were too late to be of assistance in the case of the Binders.

a request for payment of their distributive share was not submitted until July 1984, at which time it was denied by HUD because the request was filed more than 6 years following termination of the insurance coverage (citing 31 U.S.C. § 3702(b) as authority). Later HUD also cited 28 U.S.C. § 2401 as authority for denying the request for payment of the distributive share.

DISCUSSION

As noted, the Act establishes a system of mutual mortgage insurance. See 78 Cong. Rec. 11191 (June 12, 1934) (remarks of Mr. Stagall); 78 Cong. Rec. 12014 (June 16, 1934) remarks of Mr. Fletcher). A mutual insurance company has been defined as a cooperative enterprise "wherein the members constitute both insurer and insured, where the members all contribute, by a system of premiums or assessments, to the creation of a fund from which all losses and liabilities are paid, and wherein the profits are divided among themselves in proportion to their interests." 43 AM. Jur. 2d "Insurance" § 104 (1969).

Where the policy provides that the policyholder is entitled to participate in the distribution of the surplus account as may from time to time be determined by the company's officers, the policyholder has no title to any part of the surplus that would support an action at law until a distribution is made. Greff v. Equitable Life Assurance Soc., 160 N.Y. 19, 54 N.E. 712, 46 L.R.A. 288 (1899). This is very similar to the general principle of corporate law that a stockholder has no individual property interest in the profits of the corporation until such time as the dividends are declared. 19 AM. Jur. 2d "Corporations" § 855 (1965). However, once a distribution of a portion of the surplus is declared, it is the property of the policyholders, payable to each on demand. Zinn et al. v. Germantown Farmers' Mutual Ins. Co., 132 Wis. 86, 111 N.W. 1107 (1907); cf. Bisner v. Macomber, 252 U.S. 189, 208-209 (1919).

In our opinion, the direction in 12 U.S.C. § 1711(d) (1982) quoted above that no mortgagor shall have a "vested right in a credit balance" apparently refers to the mortgagor's interest prior to the termination of his mortgage obligation. After a determination of the amount to be paid a mortgagor by the Secretary, by analogy to the above, a property right may be said to arise in favor of the mortgagor, which is held in trust by the Government until it pays it over to the mortgagor. That the Government is a trustee is clear since it is in possession of funds belonging to another which would have been paid had

HUD been able to locate the persons entitled to a distributive share. Funds in the hands of Government officials which belong to another historically have been treated as trust funds. 8 Comp. Gen. 280 (1928) and 7 Comp. Gen. 355 (1927). See also 12 Comp. Gen. 365 (1932) and 7 Comp. Gen. 478 (1928). Furthermore, the Congress has by legislation made such funds trust funds.

Pursuant to 31 U.S.C. § 1322, money properly belonging to private persons who cannot be located which is held by Government agencies is required to be placed in a trust receipt account in the Treasury entitled "Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown." A permanent, indefinite appropriation for payment of funds to entitled individuals is established by 31 U.S.C. § 1322(b). Regulations governing the proper accounting by agencies for the proceeds owed individuals whose whereabouts are unknown and the payment of the proceeds to parties entitled thereto are set forth in the Treasury Department Fiscal Requirements Manual for Guidance of Federal Agencies, Vol. I, Part 6, Chapter 3000.

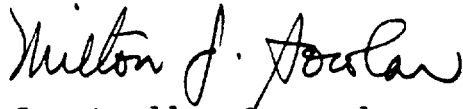
As a general rule, statutes of limitations have been held not to run against beneficiaries of trusts (including trusts administered by the Government) unless there is a breach of some duty owed by the trustee to a beneficiary or a repudiation. See United States v. Taylor, 104 U.S. 216 (1881); United States v. Wardell, 172 U.S. 48 (1898); Nelson v. United States, 35 Ct. Cl. 427 (1900); Wayne Adm'r v. United States, 26 Ct. Cl. 274 (1891); A-51705, November 12, 1942; and Bogert, Trusts and Trustees, § 951 (2d Ed. Rev. 1983). In keeping with the general rule, this Office has deemed the 6-year limitation for presenting claims to this Office to be inapplicable to claims payable from the trust fund account "Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown." B-103575, August 27, 1951.

The only thing that arguably could amount to a repudiation of the trust relationship on the part of the Government (through HUD) is HUD's denial of the Binder's request for a distributive share. This would be the first act by which HUD communicated to the trust beneficiary (or by which the beneficiary reasonably could have known) that HUD was no longer holding the distributive share in trust for payment to the persons entitled thereto. Prior to this point HUD was not asserting any right inconsistent with the right of the beneficiaries (that is, the Binders).

While it is clear that HUD has not been complying with the requirements set forth in I TFRM 6-3000 since it has not been clearing amounts owed mortgagees as distributive shares from the Fund and transferring them to the appropriate Treasury account in accordance with I TFRM 6-3040.10, this does not

preclude payment of the amount owed to the Binders. Trust moneys maintained in a non-trust account do not lose their trust fund status for the purposes of 31 U.S.C. § 3702(b), because the manner in which the funds are accounted for does not change their trust nature. Thus, failure to transfer from the Fund to the trust account as required by 31 U.S.C. § 1322 does not render them subject to the 6-year limitation imposed by 31 U.S.C. § 3702(b).

Accordingly, the voucher may be certified for payment.

for 
Comptroller General
of the United States