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DECISION

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

[Bank Claim for Loss on Loan Made Under National Housing Act] 9318

FILE: B-191660 DATE: MAR 5 1979

MATTER OF: Twin City Federal Savings and Loan Association - National Housing Act Claim

DIGEST: Original note submitted by lender for insurance pursuant to Title I of National Housing Act had projected maturity date 2 days in excess of 12 year, 32 day maximum term provided by statute at time loan was made. All available evidence, including borrower's payment record and other information in record supports lender's claim that due to inadvertence note as written did not reflect intention of parties at time loan was made. Claim can therefore be paid since term of note would not have exceeded statutory maximum had inadvertent mistake not been made.

An authorized certifying officer, Department of Housing and Urban Development (HUD), asks whether he may certify for payment a voucher in the amount of $5,609.16, payable to the Twin City Federal Savings and Loan Association of St. Louis, Missouri (Bank). The voucher covers a claim by the Bank for its loss on a property improvement loan to Frank J. and Betty J. Thera. We conclude that the voucher may be certified for payment.

The note was submitted to HUD for insurance, pursuant to Title I of the National Housing Act, as amended, 12 U.S.C. § 1701 et seq. The Bank's claim was initially denied by HUD because the term of the note was in excess of the maximum statutory term for such loans in effect when the loan was made.

The note as originally written was dated October 17, 1974, and provided for payment in 144 installments of $35.37. The note, as written and as executed on October 17, 1974, further provided that "the first installment [was] to be paid on the 20th day of December 1974, and subsequent installments on the same day of each and every month thereafter until paid in full." Under this repayment schedule, the maturity date of the note would be November 20, 1986, making the term of the note 12 years and 34 days.

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At the time the note was executed, section 2(b) of the National Housing Act, as amended, 12 U.S.C. § 1703(b), read as follows:

> "No insurance shall be granted under this section to any such financial institution with respect to any obligation representing any such loan * * * (2) if such obligation has a maturity in excess of twelve years and thirty-two days * * *."

Since the term of the note was 2 days in excess of the maximum maturity prescribed by statute at the time the loan was made, HUD denied the Bank's claim.

The lender resubmitted the claim for reconsideration, by letter dated February 10, 1978, after "correcting" the note by changing the date the first installment was due from December 20, 1974, to December 5, 1974. In doing so, the Bank alleged that

> "All of this should have been completed in 1974. However the note was inadvertently typed as an original and the correction was not made."

A letter from the Bank's attorney further explained the Bank's position as follows:

> "We have been informed that the note given by Frank J. Thera and Betty J. Thera to Twin City Federal Savings and Loan Association recited through inadvertence that the first date of payment was the 20th day of December, 1974, whereas it should have been the 5th day of December, 1974; and that subsequent to the discovery of the erroneous date, the date was corrected and the correction was consented to and initialed by Frank J. Thera and Betty J. Thera.
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> "It is our opinion that the note as correct is a valid note and that the parties are legally bound by the terms of the note as corrected, except for the discharge of the obligation by the makers by reason of the subsequent bankruptcy proceedings."

There is only one question at issue in this case. If, in fact, the parties did intend December 20, 1974, to be the date on which the first installment was to be due, with subsequent payments coming due on the 20th of every month, the maturity date would have exceeded the statutory maximum by two days, making the loans uninsurable from its inception. For example, see B-182482, August 4, 1975; and B-172121, April 12, 1971. However, if it can be determined that at the time the loan was made and the note was executed, the parties intended that

the first payment and all subsequent payments were to become due on the 5th day of the month, the loan would not have exceeded the maximum statutory term and would have been insurable.

The significant factor is, of course, what the parties intended at the time the note was executed. The mere fact that the bank and borrower agreed to change the due date of the first payment from December 20th to December 5th after the default had occurred and the loan was rejected by HUD as uninsurable, is legally irrelevant. Similar arguments have been rejected in the past. See B-188240, August 10, 1977. The submission from the Bank and its attorney to HUD does not establish the intent of the parties at the time the loan was made. However, it is our opinion, after reviewing the entire record, that at the time the loan was executed, the parties did intend that, and acted as if, payments were due on the fifth day of every month.

First, based on the information provided to us by HUD, it appears that when the loan was first submitted for insurance, it was rejected by HUD, (see January 1, 1975, Exceptions Statement), because the "date of note or date of first payment [was] incorrect." We were advised by HUD that the Bank's report to it concerning this loan was apparently later corrected because the loan was accepted for insurance on the March 1, 1975, monthly statement after the Bank resubmitted it. (HUD was unable to provide us with any additional specific information on this point.)

We recognize that the fact the loan was originally rejected as uninsurable, for the same basic reason it has now been determined to be uninsurable, and was then accepted for insurance after apparently being corrected and resubmitted by the Bank, is not determinative in and of itself. However, the resubmission tends to support the Bank's position that, at the time the loan was so resubmitted and accepted by HUD, the parties intended that the first payment had become due on December 5, which would, of course, have had the effect of bringing the term of the note within the permissible maximum period.

Second, when the Bank submitted its "Claim for Loss" to HUD, using the standard HUD form provided for such claims, the Bank indicated May 5, 1977, as the date of default. On the form, "default" was defined as the "date of earliest installment for which full payment has not yet been received." Obviously, a default, thus defined, could not have occurred on May 5, 1977, unless the date of the first payment as well as all subsequent payments was the fifth day of the month. This form was dated July 27, 1977, and was submitted to HUD before the Bank was advised that the loan was not eligible for insurance because of a maturity in excess of the statutory maximum.

Third, and of greatest significance, is the payment record of this loan that HUD obtained from the borrower and then furnished to us at our request. Although the dates on which the borrower made payments on this loan varied too widely for us to determine the precise due date on that basis alone, the information contained in the payment record was helpful in allowing us to determine the due date in a different way. The original note provided for payment of a late charge whenever an installment was "more than 10 day past due". Our examination of the borrower's payment record reveals that many payments were made "late" and numerous late charges were assessed against the borrower. For example, whenever the borrower's payment was received between the twentieth and thirtieth day of the month, which occurred on numerous occasions, a late charge was always assessed. This, of course, would not have been correct, considering the term of the note as written, since these payments would have been made within the 10-day grace period if the payments were due on the twentieth day of the month. Moreover, no late fee was ever charged for payments received prior to the fifteenth day of the month in which they were due.

Thus, the payment record and pattern of late charges assessed against the borrower support the Bank's position that the date on which the payments were due was the fifth rather than the twentieth of the month. Also, since the Bank consistently assessed late charges against the borrower on this basis, without apparent objection by the borrower, it would appear that, since the inception of the loan, both the Bank and borrower had operated under the assumption that payments were due on the fifth day of the month.

Considering the foregoing it could reasonably be assumed that due to inadvertence December 20--instead of December 5--was inserted as the due date of the first payment. Cf. B-164118, December 30, 1969. Accordingly, the voucher in question may be certified for payment if otherwise correct. The voucher together with the case file is being returned to the certifying officer who submitted it.

R.F.KELLER

Deputy Comptroller General
of the United States