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DECISION

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

FILE: B-198161 DATE: November 25, 1980

MATTER OF: Farmers Home Administration [FHA] reservation of funds to indemnify Colorado public trustees against loss, resulting from release of trust deeds.

DIGEST:

Where beneficiary of trust deed cannot produce promissory note and State statute requires surety or indemnity agreement as condition to release of trust deed, GAO will not object if Farmers Home Administration executes indemnity agreement without concurrently reserving funds since no practical alternative exists and Government would be only party in a position to seek damages from public trustees.

The Farmers Home Administration (Administration) has asked us to reconsider a statement in our decision (B-114860, December 19, 1979). In holding that the Administration, under circumstances described in that decision, is authorized to enter into indemnity agreements with public trustees of the State of Colorado to secure the release of a deed of trust, we said that in order to avoid violation of the Anti-deficiency Act, 31 U.S.C. § 665 (1976), the Administration should reserve from available funds amounts sufficient to pay any indemnities arising from such agreements. Amounts payable under such indemnity agreements would presumably be charged against the Agricultural Credit Insurance Fund or the Rural Housing Insurance Fund (Funds). The Administration now questions whether, since both Funds are revolving accounts, the reservation requirement would apply.

Although the Anti-deficiency Act applies to revolving accounts as well as to accounts dependent solely upon periodic appropriations from Congress for maintenance and replenishment, we will not object if the Administration enters into indemnity agreements with Colorado public trustees without administratively reserving funds to cover the contingent liabilities arising from such agreements since no practical alternative exists and the Government would be the only party in a position to seek damages against the public trustees.

Our original decision in December responded to the Administrator's inquiry as to whether he has authority to purchase surety bonds in order to obtain release of deeds of trust for Colorado borrowers whose promissory notes have been lost while in the Administration's custody. The particular loans at issue were those made from the Agricultural Credit Insurance Fund and from the Rural Housing Insurance Fund. Although we found that both Funds could be used to purchase such surety

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bonds, we also approved the procedure under an alternative provision of Colorado law which permits a public trustee holding a deed of trust in such situations to release it if the agency of the Federal Government which originated the loan agrees to indemnify the trustee for damages arising as a result of the release. Use of an indemnity agreement to secure release of the trust deed, we said, would require the Administration to reserve from available funds amounts sufficient to pay any such indemnities. Administration officials have advised us that they now prefer to secure the release of the trust deeds with indemnity agreements rather than with surety bonds.

The requirement to reserve funds sufficient to liquidate liabilities which may arise under indemnity agreements is consistent with a long line of Comptroller General decisions holding that unless otherwise authorized by law, an indemnity agreement which subjects the United States to a contingent and undetermined amount of liability violates the Anti-deficiency Act and the Adequacy of Appropriations Act, 41 U.S.C. § 11 (1976). This is because sufficient funds can never be said to have been appropriated to cover such contingent liabilities. See 35 Comp. Gen. 85 (1955); 16 id., 803 (1937); 7 id. 507 (1928). This is true whether the amount available for expenditure from a fiscal year or multi-year account is determined by the size of a periodic appropriation or, in the case of revolving accounts, by the extent of the annual budget authority approved by Congress.

Claims based upon agreements to indemnify in amounts not exceeding the original principal amount of the trust deed, like the cost of surety bonds, are payable from the Funds. 7 U.S.C. § 1929(f)(6); 42 U.S.C. § 1487(j)(3); B-114860, December 19, 1979. Although the liability which arises from an indemnity agreement to secure the release of a trust deed may be contingent, the maximum cost of liquidating that liability would normally be a recordable expense limited by the Administration's annual budget authority.

The Colorado statute requires a surety bond or indemnity agreement as a condition to releasing trust deeds in instances where the beneficiary cannot produce the promissory note. Further, Administration officials have advised us that even if the statute were to be satisfied by purchasing surety bonds, the surety would require an indemnity agreement. Accordingly, there does not appear to be a practical alternative to the indemnification requirement.

In any event, we are unable to foresee circumstances under which the United States might have to indemnify the public trustee for liability incurred as a result of releasing the trust deeds. As we noted in our December decision, as the lender on the notes, the Administration would not be in a position to object to the release since it is the Administration which had custody of the notes when they were lost and is now requesting release of the trust deeds. Conceivably, a bona fide third-party purchaser or assignee might seek damages from a public trustee for unauthorized release of the trust deed. Administration officials, however, have advised us that it has not been the Administration's practice to sell such notes, and that even in the event it had transferred the notes and failed to document the transaction, the Administration would presumably have received some consideration in return. That consideration would, at least in theory, offset the indemnity payment to the public trustee. Inasmuch as it appears unlikely that the missing promissory notes were, or legitimately could have been, sold to a third party, the Government would apparently be the only party in a position to seek damages from the public trustee. The Administration, however, states that each of the loans has been completely repaid. Under such circumstances it is difficult to envision that any contingent liability which arises under the Colorado indemnity agreements would ever become fixed or certain.

Further, if a missing note had been stolen from the Administration and a third-party became a holder in due course without notice of the theft, the third-party would have the right to recover against any of the prior parties, and the damage must ultimately be borne by the party from whose possession the note was lost or stolen, that is the Administration. Thus, in such circumstances, the Government's right to the note proceeds and its ultimate liability to a holder in due course would not be increased by an indemnity agreement with the public trustee beyond what it would otherwise have been.

Accordingly, where it is necessary to obtain release of deeds of trust for Colorado borrowers whose promissory notes have been lost, we have no objection to an indemnity agreement with the public trustees in amounts not exceeding the original principal amount of the trust deed and will not insist upon a concurrent reservation of funds.

Milton J. Socolar

For the Comptroller General
of the United States