

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES AND JOYCE FERRELL, et al.,)
)
Plaintiffs,)
)
v.)
)
SAMUEL R. PIERCE, JR., in his)
official capacity as Secretary of)
the Department of Housing and)
Urban Development; THE UNITED)
STATES DEPARTMENT OF HOUSING AND)
URBAN DEVELOPMENT (HUD); PHILIP)
FOREST (Retired), individually;)
RICHARD BUCHHEIT, individually and)
in his official capacity as)
Director, Single Family Mortgage)
Division, Office of Single Family)
Housing, HUD; and SALLY C,)
McCORMACK, individually and in her)
official capacity as Chief,)
Insurance Servicing Branch, Single)
Family Mortgage Division, Office of)
Single Family Housing, HUD,)
)
Defendants.)

No. 73 C 334

FILED

MAR 20 1985

H. STUART CUNNINGHAM
CLERK, U. S. DISTRICT COURT

MEMORANDUM OPINION

I

Plaintiffs are now before us with a Petition for Contempt, Specific Enforcement, and Other Relief. The petition is brought on behalf of those plaintiff class members who applied and were rejected for an assignment of mortgage due to an improper calculation of the date of default between January 1, 1980 and July 11, 1983 by any HUD office except the Baltimore office, and on behalf of

plaintiff class members who applied and were rejected for an assignment of mortgage for any reason between January 1, 1980 and the present date by the Baltimore office of HUD. They request that we hold respondents in contempt of court for failure to comply with this Court's order of November 8, 1979 approving the Amended Stipulation as a Consent Decree. Alternately, petitioners seek an injunction requiring respondents to implement this Court's order of November 8, 1979 and the Amended Stipulation of the parties; retroactive application of this Court's orders of April 7, 1983, July 11, 1983, and April 15, 1984 relating to calculation of the date of default under the mortgage assignment program; and de novo reprocessing of all cases improperly processed from January 1, 1980 through July 11, 1983. Additionally petitioners seek relief for all members of the plaintiff class whose rights to be properly considered for an assignment of mortgage were violated by respondents' application of the "two month rule".

Plaintiffs also claim that HUD failed to oversee the actions of the Baltimore office which has allegedly improperly processed and denied hundreds of applications for an assignment of mortgage, and that defendants have failed to comply with the notice provisions of the Amended Stipulation by unilaterally altering the requirements of the assignment program without

notice to plaintiffs' counsel or the Court. The other issues relate to the proper remedy. At the request of the parties, this cause is decided without an evidentiary hearing, based upon the briefs, affidavits, depositions, and other documentation submitted by them.¹ For the reasons stated below, we grant plaintiffs' Petition for Contempt, Specific Enforcement and Other Relief in part and deny it in part.

II

BACKGROUND

The National Housing Policy

Congress long ago established a national housing goal of providing, as soon as possible, a decent home and a suitable living environment for every American family. National Housing Act, 12 U.S.C. § 1701t; 42 U.S.C. § 1441. In an effort to meet that goal, Congress established a Mortgage Insurance Program enabling lenders to offer essentially risk free mortgages to low income families at terms more favorable than they could get on the market. See, e.g., 12 U.S.C. § 1789(b)(5); Federal National Mortgage Association v. Rathgens, 595 F. Supp. 552, 553 (S.D. Ohio 1984). Congress also provided a Mortgage Foreclosure Avoidance Program (Mortgage Assignment Program) whereby HUD could help a mortgagor avoid foreclosure by acquiring the mortgage, suspending payments for up to 36 months, and refinancing the debt over an extended

period of up to 10 years. 12 U.S.C. § 1715u; 24 C.F.R. § 203.650; HUD Handbook 4030.2, ¶ 2-1.

HUD must accept an assignment of a mortgage when a mortgagor meets the criteria defined in the statute and regulations, one of which is the "circumstances criterion." Congress' intent in imposing the condition that the default be caused by circumstances beyond the mortgagor's control was to direct HUD's attention to 'deserving homeowners in hardship cases.'" Rathgens, 595 F. Supp at 555, citing S. Rep. No. 924, 86th Cong. & Ad. News 2844, 2853. Instead, HUD has often adopted a "prudent lender" standard for administering the mortgage foreclosure avoidance program. Rathgens, 595 F. Supp. at 555; Brown v. Lynn, 385 F. Supp. 986, 1000 (N.D. Ill. 1974). (the first reported opinion in the present case), reconsideration denied, 392 F. Supp. 559 (N.D. Ill. 1975). This standard is contrary to the plain intent of Congress, and subverts the purpose of the program. Rathgens, 595 F. Supp. at 555. "'Prudent Lenders' service credit-worthy mortgagors . . . HUD's role is to insure the risky mortgages of low income mortgagors that 'prudent investors' will not take, and to accept assignment of mortgages whose mortgagors are experiencing temporary problems." Id. at 556. The "statute is not precatory." HUD is obligated to "exercise its powers, functions and duties" consistent with the national housing

policy declared in the Act, and in such a manner as will facilitate sustained progress in attaining that goal. "Action taken without consideration of [those policies], or in conflict with them will not stand." Brown v. Lynn, 385 F. Supp. at 998-99, citing Commonwealth of Pennsylvania v. Lynn, 501 F.2d 848, 855 (D.C. Cir. 1974) (citations omitted). As we have previously stated: "under the Amended Stipulation, HUD has consistently, it appears, exercised its discretion . . . to limit access to the assignment program and to limit the level of assistance provided . . . HUD's consistent practice [is one] of resolving all doubts as to its obligations against the mortgagor." Ferrell v. Pierce, 560 F. Supp. 1344, 1364 (N.D. Ill. 1983), amended by unpublished order dated July 11, 1985, aff'd, 743 F.2d 454 (7th Cir. 1984).

Ferrell v. Pierce 2

This 1973 national class action suit was first settled in 1976 by this Court's unreported order approving a joint settlement agreement stipulation of the parties. Under the terms of the settlement, HUD agreed to require all HUD approved mortgagees to process, request, and execute assignments of mortgages to HUD in certain circumstances to avoid foreclosure of HUD insured single family home mortgages. HUD also agreed to abide by certain procedures for acting on requests for

assignment of mortgages which allowed a HUD insured mortgagor in default on his or her loan to apply to HUD for assignment of the mortgage. HUD was required to accept assignment when seven enumerated criteria were satisfied. If the application was granted, the term of the mortgage could be extended and the homeowner would make payments on the mortgage to HUD.

Substantial problems were encountered with HUD's administration of the mortgage assignment program between May of 1976 and January 31, 1979. After plaintiffs indicated their intention to seek specific performance of the stipulation, HUD reviewed the performance of a sample of its field offices and discovered a "significant incidence of error" in the processing of applications for assignment. An Amended Stipulation was executed on August 2, 1979, which was approved by the Court on November 8, 1979, and entered as a Consent Decree.

Amended Stipulation-Consent Decree

The Consent Decree imposed new obligations on HUD. HUD agreed, among other things, (1) to reprocess all applications for assignment rejected by HUD between May, 1976 and January 31, 1979 (over 27,000); (2) to administer the mortgage assignment program under new binding instructions consistent with the terms of HUD Handbook 4191.2 (now numbered 4330.2, hereinafter "Handbook") which was incorporated into the Amended

Stipulation and the Court's order of November 8, 1979; (3) not to make modifications which would curtail the basic rights of the mortgagors under the program then in existence; and (4) to give notice to plaintiffs' counsel prior to final action on any modification. Paragraph 14 of the Amended Stipulation requires HUD to provide foreclosure avoidance relief for mortgagors in temporary financial distress in the form of the present assignment program or an equivalent substitute both during and after the five year term of the Amended Stipulation. In addition, because of HUD's failure voluntarily to carry out its 1976 commitments, this Court specifically retained jurisdiction over the cause to insure that the terms of the Amended Stipulation were fully implemented by the defendants, and the plaintiffs' rights to enforce the Amended Stipulation and the Court order were specifically preserved.

In 1983, plaintiffs petitioned to hold HUD in contempt for violation of the Amended Stipulation and defendants moved to amend the stipulation. Though we did not hold HUD in contempt, we did deny its motion to amend, and found that HUD's proposed regulations, the Temporary Mortgage Assistance Program (TMAP) including the "60 day rule" for determining the date of default, were inconsistent with the requirements of the assignment program and would violate the Amended

Stipulation. We therefore enjoined HUD from implementing the proposed TMAP regulations. Ferrell v. Pierce, 560 F. Supp. 1344, 1372 (N.D. Ill. 1983) (the April 7, 1983 order), amended by unpublished order dated July 11, 1983, aff'd, 742 F.2d 454 (7th Cir. July 31, 1984).

In our order of July 11, 1983 we reiterated our holding regarding the proper method for calculating the date of default under the assignment program. In our order of April 5, 1984, we held that the July 11, 1983 order regarding the proper method of calculating the date of default should be applied retroactively. On July 31, 1984 the Seventh Circuit affirmed our order of April 7, 1983. 742 F.2d 454.

III

THE TWO MONTH RULE AND THE CIRCUMSTANCES CRITERION

The paramount issue in this case is whether HUD's nationwide use of the "two month rule" to determine the date of default under the mortgage assignment program violates the prior orders of this Court and the Amended Stipulation, thus constituting civil contempt. In order to avoid foreclosure, a mortgagor in default on a federally insured single family home mortgage loan may seek to have the mortgage assigned to HUD. To be eligible for the assignment program one of the criteria is that "the default must have been caused by

circumstances beyond the mortgagor's control which temporarily rendered the family financially unable to correct the delinquency within a reasonable time or make full mortgage payments." 24 C.F.R. § 203.650 (a) (5), Note; HUD Handbook 4330.2 (formerly 4191.2) ¶ 2-1(d).

In determining whether the default was due to circumstances beyond the mortgagor's control, only circumstances occurring prior to the date of default may be considered. Therefore, if the date of default is set at a time earlier than is proper, the time frame for evaluating the circumstances leading to the default is foreshortened. HUD may then improperly decline to accept an assignment of a mortgage which is in default due to circumstances beyond the mortgagor's control because those circumstances occurred after an improperly chosen date of default.

The Date of Default

Under the two month rule utilized by HUD, the date of default is 30 days after the date of the first missed payment, following two successive months of full payment (payment made within the month due which brought the account current).

Example 1.

Assume that a mortgagor made the January payment in January, the February payment in February, the March payment in April, the April payment in June, the May payment in July, and thereafter made no further payments.

In such circumstances the date of default under the two month rule is March 31 and any circumstances, such as illness, loss of employment, etc., beyond the mortgagor's control, which occurred after that date would not be considered.

However, it is well established that, pursuant to the orders of this Court, the federal regulations, and the Handbook, when determining whether the default is due to circumstances beyond the mortgagor's control, HUD is required to consider all payments which are made by the mortgagor, accepted by the mortgagee, and applied to the mortgagor's account. Thus, the date of default under the assignment program is 30 days after the mortgagor fails to make a monthly payment which subsequent payments were insufficient to cover, i.e., 30 days after the due date of the oldest unpaid installment. 24 C.F.R. § 203.330 construed in Ferrell v. Pierce, 560 F. Supp. at 1367-68, (the April 7, 1983 order), amended Mem. Op. July 11, 1983 at 2; cf. 24 C.F.R. 230.331. Once a late payment is accepted the date of default must be advanced accordingly.

In the scenario in example 1 above, under the proper method of calculation, the date of default is July 1 (30 days after the oldest unpaid installment which was due June 1). Under the two month rule the relevant time period for determining whether the default was due to circumstances

beyond the mortgagor's control is foreshortened to March 31. The effect of the two month rule is to tie the date of default to a requirement that the mortgage payment be made in the month for which it is due. If a mortgagor makes delinquent payments in months later than the month for which the payment is due, the time frame for circumstances leading to the default is foreshortened by the two month rule. An event coming after the default cannot logically be said to cause the default, and the clear effect of the two month rule is to shorten the time frame for considering circumstances of the mortgagor which may have caused the current default. 560 F. Supp. at 1367-68. The two month rule, like the proposed "60 day rule" previously ruled invalid in this case, excludes from assignment assistance many mortgagors who make regular payments but have fallen slightly behind in their mortgage payments and who thereafter become unable, due to circumstances beyond their control, to continue making any payments. The regulations permit such mortgagors to cure their defaults and still qualify for assistance when some later emergency causes them to cease making payments altogether. 560 F. Supp at 1366.

Use of the two month rule is unquestionably a violation of the statute and the prior orders of this Court. Defendants have already litigated this issue and are barred by the law

of the case and collaterally estopped from relitigating it now.

IV

THE PRIOR ORDERS OF THIS COURT

The November 8, 1979 Order

The November 8, 1979 order of this Court (Consent Decree) gave final approval to the Amended Stipulation of the parties which was executed on August 2, 1979. In it we ordered the defendants to abide by and to implement the procedures set forth in the Amended Stipulation which was incorporated into the order. The order specifically preserved plaintiffs' right to enforce the terms of the Amended Stipulation and the order, and the Court specifically retained jurisdiction of the cause to insure that the terms of the Amended Stipulation "are fully implemented by the defendants."

The Amended Stipulation

The Amended Stipulation incorporated HUD Handbook 4191.2 (now numbered 4030.2) as "binding instructions" for implementation of the Amended Stipulation. Under the terms of paragraph 3 of the Amended Stipulation³ the Department is required to administer the Amended Stipulation substantially in accordance with the terms of the Handbook, is prohibited from making any modifications during the term of the agreement which would curtail the basic rights of mortgagors under the program

then in existence, and is required to give notice to plaintiffs' counsel prior to final action on any modification. Paragraph 14 of the amended stipulation sets out the duration of the obligations:

Except as provided in this paragraph, the rights and obligations created by the Amended Stipulation shall terminate five years from date of execution [August 2, 1979 to August 2, 1984]. The termination of the Department's specific obligations under this Amended Stipulation shall not diminish or compromise the Department's obligation construed under the National Housing Act as amended, and Section 2 of the Housing Act of 1949 and Section 2 of the Housing and Urban Development Act of 1968 to provide foreclosure avoidance relief for mortgagors in temporary financial distress, and the Department shall provide assistance or relief in the form of the present assignment program or an equivalent substitute to permit mortgagors in default on their mortgages to avoid foreclosure and to retain their homes during periods of temporary financial distress.⁴

The Handbook

HUD Handbook 4191.2 was incorporated into the Amended Stipulation and into the November 8, 1979 court order. Paragraph 2-1 sets forth the eligibility criteria for determining whether to accept or reject a mortgagor's request for assignment of mortgage. Paragraph 2-1(d) requires that:

The default must have been caused by a circumstance or set of circumstances beyond the mortgagor's control which temporarily rendered the family financially unable to cure the delinquency within a reasonable time or make full mortgage payments.

The Handbook then sets forth examples of qualifying circumstances such as loss of employment, reduction or delay in receipt of government benefits, loss of income due to divorce or separation, and other circumstances where the mortgagor defaulted through no fault of his or her own. The section ends with the following note which HUD argues as the basis for its two month rule.

NOTE: [1] The current default is the only one to be considered in determining whether the mortgagor is in default due to circumstances beyond his or her control. [2] If the record indicates that the present default was caused by some circumstance beyond the mortgagor's control, regardless of past history, this criterion is satisfied. [3] If, however, the account was already delinquent when the qualifying circumstance first appeared, this criterion may or may not be satisfied. [4] The mortgagor's ability to avoid the default may have been affected by the amount of the delinquency which already existed at the time the qualifying circumstance occurred; judgment must be exercised. [5] Judgment is required also when an account, which has been chronically in default in the past, is current for one or two months and then a circumstance beyond the mortgagor's control arises and the account goes into default. [6] Generally, if the account was current for two or more months immediately preceding the present default, the default should be considered to be a new one. 5

The Federal Regulations

The "circumstances criterion" enunciated in the first (emphasized) sentence of paragraph 2-1(d) of the Handbook is reiterated in 24 C.F.R. § 203.650 (a) (5). Delinquency and

default under the assignment program are defined in 24 C.F.R.

§ 203.330 :

A mortgage account is delinquent any time a payment is due and not paid. If the mortgagor fails to make any payment, or to perform any other obligation under the mortgage, and such failure continues for a period of 30 days, the mortgage shall be considered in default for the purposes of this part.

The date of default under the mortgage insurance program is defined in 24 C.F.R. § 203.331 as follows:

For the purposes of this subpart, the date of default shall be considered as 30 days after-

- (a) The first uncorrected failure to perform any obligation under the mortgage; or
- (b) The first failure to make a monthly payment which subsequent payments by the mortgagor are insufficient to cover when applied to the overdue monthly payments in the order in which they became due.

The April 7, 1983 Order 6

Our April 7, 1983 Memorandum Opinion cited several ways in which certain proposed Temporary Mortgage Assistance Payments (TMAP) regulations were inconsistent with the obligations imposed on HUD by the Amended Stipulation. We determined that, among others, the proposed regulation for determination of date of default, for purposes of applying the "circumstances beyond the mortgagor's control" eligibility criterion, contained an impermissible evisceration of "basic rights" accorded mortgagors under paragraph 3 of the Amended Stipulation.

Under the proposed TMAP regulation the date of default would have been set at "sixty days following the first day of the most recent month in which the mortgagor made a payment(s) within the month due which brought the account current. Payments made by the mortgagor after the date of default which are insufficient to bring the account current will not change the date of default." 560 F. Supp. at 1367, citing 24 C.F.R. § 203.640(a)(3) [proposed]. We held that such a method would adversely affect "the eligibility chances of mortgagors who have fallen a payment behind on their mortgages and who, despite making regular payments, have failed to become current." Id. at 1367.

The April 16, 1984 Preliminary Injunction Order

In our order of April 16, 1984, we reiterated that the "correct method of calculating a mortgagor's date of default under the current mortgage assignment program is thirty days after the due date of the oldest unpaid installment."

V

HUD'S USE OF THE TWO MONTH RULE VIOLATES PARAGRAPHS 3 AND 14 OF THE AMENDED STIPULATION AND THIS COURT'S ORDER OF NOVEMBER 8, 1979

Example 2

Assume that a home owner makes his December 1, payment on December 1; his January 1, payment on January 6; his February 1, payment on March 6; his March 1, payment on April 10; and his April 1, payment on May 5; and that he makes

no payments thereafter. Assume further that he lost his job on April 20th.

In the above situation, under the proposed sixty day rule in the TMAP regulation, the date of default is March 2 (March 2 is 60 days after January 1, the first day of the most recent month in which the mortgagor made a payment within the month due to bring the account current). The date of default under the two month rule is March 3 (March 3 being 30 days after the first missed payment [the February 1, payment] which was the first payment not made in the month due following two successive months of full payment [December and January]). However, the date of default under the regulations and the Amended Stipulation, as construed in our previous opinions, is May 31 (May 31 being 30 days after May 1, which was the date of the last due and unpaid installment). A mortgagor is allowed, in effect, "to cure a default by making payment of a delinquent amount after the month in which payment is due." 560 F. Supp at 1366. Thus, under the sixty day rule in the proposed TMAP regulations and under the two month rule at issue here, the April 20th job loss, while clearly a circumstance beyond the mortgagor's control, could not be considered. Under the proper method of calculating the date of default, the homeowner could use the April 20th job loss as a circumstance beyond his control. See 560 F. Supp at

1367, as amended by Mem. Op. July 11, 1983, aff'd, 743 F.2d at 462 n. 8.

The effect of both the sixty day rule and the two month rule is to tie the calculation of the date of default to a requirement that the mortgage payment be made in the month for which it is due. Therefore, whenever a mortgagor continues to make delinquent payments later than the month for which the payments are due, the time frame for determining circumstances leading to the default is improperly foreshortened by use of the two month rule to determine the date of default, just as it was by the sixty day rule in the proposed TMAP regulations. See 560 F. Supp. at 1367-68, as amended by Mem. Op. July 11, 1983. As we stated in the April 7, 1983 order, "the current regulation, as the parties agree, permits such mortgagors [e.g. mortgagors who have fallen a month behind in their payments] to cure their defaults and still qualify for assistance [assignment of mortgage] when some subsequent emergency causes them to cease making payments altogether. The current regulation plainly accords with the letter and spirit of the Amended Stipulation, as another court has already emphatically held. Etheridge v. Beasley, 532 F. Supp. 266, 270-71 (N.D. Ga. 1981)." Ferrell, 560 F. Supp. at 1368.

In Etheridge the defendants argued unsuccessfully that the last two sentences of the Handbook ¶ 2-1(d) ⁷ require them to utilize the two month rule to establish the date of default. Etheridge, 532 F. Supp. at 270-71. The court concluded that "while it may be a reasonable rule, it is simply not a reasonable construction of HUD regulations and guidelines . . . neither the federal regulations nor the HUD Handbook contain a two month rule. There is no hint of such a rule in the federal regulations," and "it would be unreasonable to conclude that the Note [to Handbook ¶ 2-1(d)] authorizes the application of a two month rule . . ." Id. at 269-70. The court concluded that "the regulations and guidelines do not mandate the application of a two month rule or a one month rule; they rather require HUD officials to exercise their independent judgment in determining whether, in light of all the surrounding circumstances, the mortgagor's default was beyond his or her control." Id. at 271.

In this case, HUD argues that the first and last sentences of that same Note require it to utilize the two month rule to determine the date of default. The first and last sentences of the Note do not require the use of the two month rule, nor do they or any other sentence or sentences in the Handbook or regulations authorize the use of the two month rule.

The Note to Handbook ¶ 2-1(d) is obviously intended to make clear that the mortgagor is to receive the benefit of any doubts. This is consistent with the Amended Stipulation as well as with the remedial spirit and with the letter of the statutory scheme embodied in the mortgage assignment program. The first two sentences of the Note simply prevent HUD from considering past defaults and "past history" when considering whether the current default is due to circumstances beyond the mortgagor's control. The third and fourth sentences deal with a situation in which the account was already delinquent. In such a case HUD is required to use judgment--not in determining the date of default, but in determining whether the current default was due to circumstances beyond the mortgagor's control.

The date of default is advanced, as we have previously held, when late payments are made and accepted by the mortgagee. 560 F. Supp. at 1366. The fifth sentence states that HUD should also use judgment in determining whether the default was due to circumstances beyond the mortgagor's control when an account has been chronically in default in the past and is current for one or two months prior to a circumstance beyond the mortgagor's control arising and the account again going into default. The last sentence says, if the account is current for two or more months immediately preceding the

present default, it should be considered a new default. This goes almost without saying, especially in light of the requirement in the second sentence of the note that past history should not be considered. It is not a statement of how the date of the default is to be calculated. On the contrary, the Note addresses the question of causation of the default, not the determination of the date of default as HUD contends. The date of default is specifically and clearly controlled by §§ 203.330 and 203.331 of the regulations which are inconsistent with either the 60 day or the two month rules.⁸

As we have explained at least three other times, the current regulation, 24 C.F.R. § 203.330, understandably and wisely permits a mortgagor to cure a default by making payments later than the month in which the payment is due and still qualify for assistance when some emergency causes him to cease making payments altogether. 560 F. Supp at 1366; Mem. Op. July 11, 1983 at 2; Mem. Op. April 5, 1984 at 3. We have also articulated the reasons why the date of default is advanced:

Where a mortgagor allows a month to pass without making the mortgage payment which was due in that month, thereby technically becoming in default, and then subsequently makes a payment, which is accepted by [the mortgagee] and applied to the mortgage, the effect of the subsequent payment must be to advance the date of default. There is no other equitable or logical construction of

[24 C.F.R.] § 203.330. For [the mortgagee] to accept the payment [and for HUD then to refuse] to consider the default date as having been advanced by virtue of payments being made obviously affronts common sense as well as common notions of fair play.

This result follows under § 203.330 independent[ly]. . . . It is thus not necessary that the subsequent payment, made after the technical default, be made in the month immediately succeeding the month in which the payment was due.

Mem. Op. April 5, 1984 at 2-3, accord 560 F. Supp at 1366.

HUD's use of the two month rule to determine the date of default is, and always has been a violation of this Court's order of November 8, 1979 because, contrary to paragraph 3 of the Amended Stipulation, it eviscerates and derogates the basic rights accorded HUD insured mortgagors under the assignment program then in existence. It also violates paragraph 14 of the Amended Stipulation because it constitutes a failure to provide assistance or relief in the form of the assignment program in effect at the time the Consent Decree was entered, or to provide an equivalent substitute.

VI

CONTEMPT

"A civil contempt action is remedial in nature in that it is brought to compel obedience to a court's order. . . . A civil contempt may be predicated only upon a finding of 'clear and convincing' evidence that there was a lawful order and a

violation of that order. Willfulness is not an essential element of civil contempt." United States v. Greyhound Corp., 363 F. Supp. 525, 570 (N.D. Ill. 1973) supplemented, 370 F. Supp 881 (N.D. Ill. 1974), aff'd, 508 F.2d 529 (7th Cir. 1974). "[T]he sanctions for civil contempt are 'employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, [or] to compensate the complainant for losses sustained.'" Shakman v. Democratic Organization of Cook County, 533 F.2d 344, 349 (7th Cir.) cert. denied, 429 U.S. 858 (1976), citing United States v. United Mine Workers, 330 U.S. 258, 302 (1947). Plaintiffs' seek remedial relief to assure future compliance and to compensate the plaintiffs for injuries caused by the defendant's violation of the court's orders.

As we previously stated, "[w]e may not hold HUD in contempt of our November 8, 1979 order absent proof by clear and convincing evidence that HUD violated a valid and unambiguous requirement of the Amended Stipulation or the Handbook." Ferrell, 560 F. Supp. at 1356 (citations omitted). The alleged contempt must be shown by clear and convincing evidence to have violated an operative command of an order. Shakman, 533 F.2d at 351; Panther Pump Equipment Co. v. Hydrocraft, Inc., 424 F. Supp. 815, 818 (N.D. Ill. 1976), vacated on other grounds, 566 F.2d 8 (1977), cert. denied sub nom Beck

v. Morrison Pump Co., 435 U.S. 1013 (1978); United States v. Greyhound, Corp., 363 F. Supp. 525, 570 (N.D. Ill. 1973), supplemented, 370 F. Supp. 881 (N.D. Ill. 1974), aff'd, 508 F.2d 529 (7th Cir. 1974).

"While a court order will not be expanded by implication or entendment beyond the meaning of its terms in order to find the respondents in contempt, Terminal Railroad Association of St. Louis v. United States, 266 U.S. 17, 29 (1924), it may be read in light of the purposes for which it was entered and it is subject to a reasonable interpretation." United States v. Greyhound, 363 F. Supp. at 544.

One hundred percent compliance with a court's order may not be expected because it is impossible; however, where the inadequate measures which are taken to achieve compliance make it almost inevitable that errors will occur, it follows that the errors are made deliberately and intentionally. Greyhound, 363 F. Supp. at 554. Even where the court does not command a certain method of compliance, nevertheless there is "an obligation to provide full and prompt compliance" by whatever means is felt appropriate. Id. at 557. "Having chosen a course of action, [the defendant] must bear the responsibility for the failure of that course to achieve the desired end." Id. at 559.

In the context of criminal contempt, requiring a showing of willfulness, such a showing "may be inferred from a reliance on a twisted or implausible interpretation of the order, especially where there was no attempt to seek a clarification of the order" from the court. Greyhound, 508 F.2d 529, 532 & n. 8 (7th Cir. 1974). The court stated that Greyhound should reasonably have known that its interpretation was erroneous and that its conduct violated both the letter and spirit of the order. Id. at 539, 541.

VII

VIOLATIONS OF THE ORDER OF NOVEMBER 8, 1979 AND THE AMENDED STIPULATION

HUD concedes that it used the two month rule to determine the date of default. However, it will be helpful to review how that rule was adopted and implemented. After we entered the order of November 8, 1979 approving the Amended Stipulation, HUD conducted training sessions in at least three cities (Chicago, Philadelphia, and Atlanta) regarding its ongoing administration of the mortgage assignment program. The Atlanta training session took place on August 25, 1980. At these sessions, respondents Forest, Buchheit, and McCormack instructed field office personnel to determine the date of default by use of the two month rule. Plaintiffs' Ex. A, see infra note 16.

This was the first time apparently that the two month rule was prescribed. HUD personnel in the Tampa, Florida service office described the two month rule in a November 24, 1980 memorandum as being "completely different from our usual practice" [of] "using the 'current' default date on all assignment requests [which has been done] since the inception of the program. This date is the day after the second full payment is past due; i.e., the second day of the second unpaid installment. This method was followed without exception." Plaintiff's Petition, Ex. A, see infra note 16. Though the Tampa office changed its method of determining the date of default on August 25, 1980 to use the two month rule, the change proved unworkable because "in some cases, you must go back months and even years (at times even to the inception of the loan) to locate two consecutively current payments." Id. Upon inquiry, personnel in the Tampa office were informed that, based on the last sentence to the Note to Handbook ¶ 2-1 (d), the central office wanted their "interpretation [the two month rule] to be followed one hundred percent nationwide." Id.

On December 18, 1980, (Plaintiffs' Ex. B, infra note 16) and again on March 19, 1981 (Plaintiffs' Ex. C, infra note 16) personnel in the Jacksonville, Florida office pointed out to the central office that "[t]here appears to be a

conflict with [the two month rule] and the definitions in Title 24, sub-paragraphs 203.330 (a) and (b)." They also noted that problems had surfaced in their relationship with Legal Services personnel because of the apparent difference in establishing the date of default. (Plaintiffs' Petition, Ex. B, infra note 18). Respondent Forest replied to the field office inquiries on April 13, 1981 and ordered that the two month rule be used to calculate the date of default and "never [to] review a later default in the case of a mortgagor who had not remained current for at least two months since the earlier default." (Plaintiffs' Petition, Ex. D, infra note 17). Respondents McCormack and Buchheit concurred. Id.

The Etheridge decision, handed down on September 24, 1981, held categorically that the use of the two month rule on the basis of the Note in ¶ 2-1 (d) of the Handbook was "simply not a reasonable construction of HUD regulations and guidelines." Etheridge v. Beasley, 532 F. Supp. at 269-70. Although Etheridge put HUD on notice that the two month rule was not justified under the Handbook or regulations, HUD neither appealed the Etheridge decision, nor did it seek guidance or clarification from this Court on the proper method of determining the date of default.

Rather, on October 1, 1981, notwithstanding the Etheridge decision which was not appealed, Forest advised the Georgia field office to continue to process assignments "as we have done in the past," i.e., to continue to use the two month rule to determine the date of default. Plaintiffs' Ex. E, infra note 18. Buchheit has stated that HUD abandoned use of the two month rule after the Etheridge decision by orally instructing field office personnel to that effect at a training session in Ft. Worth, Texas in December of 1981. (Buchheit Dep. at 53-54). According to Buchheit the proper method of calculating the date of default in December of 1981 was to look at "the most current default, the last payment applied." Id. at 75-76. However, Buchheit was not sure that this interpretation was ever conveyed to the field offices, Buchheit Dep. at 53-67, and McCormack was unaware of the proper interpretation at that time and thought that HUD was still using the two month rule for "chronic delinquents." McCormack Dep. at 12-13.

Buchheit, it should be noted, in an undated memorandum apparently issued in October 1981, also ordered his staff to prepare instructions to all field offices requiring use of the two month rule but directed that they not make it look like a change to the Handbook. (Plaintiffs' Petition, Ex. F, infra note 19). According to Buchheit, the reason

the field offices were not informed of the proper method of determining the date of default, after the Etheridge decision, was that HUD had decided to incorporate the sixty day rule (similar to the two month rule) into the proposed TMAP regulations. Buchheit Dep. at 60. We, as previously noted, found the TMAP sixty day rule also to be a violation of the Amended Stipulation. Ferrell, 560 F. Supp. at 1367-68.

In February of 1983, one of McCormack's central office staff instructed the Atlanta regional office that it was proper to use the two month rule to determine the date of default, but that the rule should not be mentioned in the preliminary rejection letter because HUD lost the Etheridge case for this language. (Plaintiffs' Petition, Ex. G).

Petitioners claim that HUD used the two month rule to determine the date of default from January 1980 until July 11, 1983 to improperly deny applicants an assignment of mortgage. They cite cases in Miami, Florida (11/10/82); Chicago, Illinois (2/10/83); Mobile, Alabama (2/4/83); and that the Tampa and Indianapolis offices repeatedly denied applicants based on the two month rule.

It is clear that HUD not only used the two month rule, but that it did so knowing that it was a change in procedure which reduced mortgagors' rights and after it had been held invalid. This change curtailed basic rights of mortgagors

under the assignment program in violation of paragraphs 3 and 14 of the Amended Stipulation. Whatever HUD's intent, this clear violation of an unambiguous command of our order of November 8, 1979 constitutes contempt. Not only did HUD change the method of calculating the date of default, it did so without following the notice provisions of paragraph 3 of the Amended Stipulation. This action also constitutes contempt of our order.

VIII

HUD IS BARRED FROM RELITIGATING THE PROPER METHOD OF CALCULATING THE DATE OF DEFAULT

Law of the Case

Our conclusion in the April 7, 1983 order, 560 F. Supp. 1344, that the proposed 60 day rule in the TMAP regulations was an impermissible method of determining the date of default necessarily required us to find the proper method of ascertaining the date of default. Our holding was upheld on appeal and is the law of the case. 743 F.2d 454, 462 & n. 8 (7th Cir. 1984). The court of appeals said: "the district court made a finding, which is not challenged on appeal, that the new [TMAP] regulations will adversely affect the eligibility of a definable class of mortgagors who would be eligible for assistance under the current regulations. 560 F. Supp. at 1368." Id. Footnote 8 goes on to state that "the [TMAP]

regulation identifying the date of default made it less likely that mortgagors would be viewed as defaulting 'due to circumstances beyond their control' . . . HUD has not challenged these findings on appeal. Thus, these effects on eligibility would appear to establish beyond doubt that the new regulations violate the Amended Stipulation." 743 F.2d at 462 & n. 8.

It is obvious that any method of determining the date of default which has the same effect as the 60 day rule in the proposed TMAP regulations would also violate the Amended Stipulation, and would thus violate our order. HUD was well aware that the 60 day rule had the same effect as the two month rule because, as plaintiffs point out, HUD contended that the 60 day rule was valid because the two month rule, which had the same effect, was the proper method of determining the date of default under the Amended Stipulation. See Defendant's Response, Ex. G (Transcript of Forest Direct Examination at the TMAP hearing, p. 463-67). We necessarily and clearly rejected the argument that the two month rule was valid when we delineated the correct method of determining the date of default in our April 7, 1983 opinion. 560 F. Supp. 1342. Defendants are thus barred by the law of the case from contending that they were unaware of, and from relitigating the proper method of determining the date of default or the validity of the two month rule.

Though not an inflexible rule, generally when a court states a rule of law or reaches a holding which is to be applied in the case before it, the court establishes the "law of the case" that will normally be applied to the same issues in subsequent proceedings in that case. Rubin v. City of Berwyn, 553 F. Supp. 476, 478-79 (N.D. Ill.), aff'd, 698 F.2d 1227 (7th Cir. 1982), citing James Burrough Ltd. v. Sign of Beefeater, Inc., 572 F.2d 574, 577 (7th Cir. 1978). "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." United States v. U.S. Smelting, Refining & Mining Co., 339 U.S. 186, 198 (1950); accord James Burrough Ltd., 572 F.2d at 577. The rule "should not be applied where the law as announced is clearly erroneous, and establishes a practice which is contrary to the best interests of society, and works a manifest injustice in the particular case." Luminous Unit Coal Co. v. Freeman-Sweet Co., 3 F.2d 577, 580 (7th Cir. 1924); United States v. Habig, 474 F.2d 57, 60 (7th Cir.), cert. denied, 411 U.S. 972 (1973). "Only such issues [that] have actually been decided, either explicitly, or by necessary inference from the disposition, constitute the law of the case." 1B Moore's Federal Practice ¶ 0.404[1] at 120 n. 15 (2d ed. 1984).

Our ruling of April 7, 1983, 560 F. Supp. 1344, amended by Mem. Op. July 11, 1983, aff'd, 743 F.2d 454, is not clearly erroneous, contrary to the best interests of society, nor does it work a manifest injustice. On the contrary, it is plainly in accord with the letter and spirit of the Amended Stipulation, the federal regulations, and the national housing policy and has been affirmed on appeal.

Defendants argue that the two month rule was not at issue in the April 7, 1983 opinion. However, the proper method of determining the date of default was at issue. We stated what the correct method of determining the date of default was, and held that the 60 day rule under the proposed TMAP regulations was invalid because it curtailed basic rights of mortgagors under the Assignment Program in violation of paragraph 3 of the Amended Stipulation. The 60 day rule impermissibly foreshortened the relevant time period for evaluating the circumstances of the mortgagor which may have caused the current default because it tied the date of default to a requirement that the mortgage payment be made in the month for which it is due. The two month rule, though negligibly different than the 60 day rule, functions in the same impermissible manner. The only possible conclusion from our holding regarding the proper method of calculating the date of default is that neither the 60 day nor the two

month rule is valid. The doctrine of the law of the case would mean nothing if changing only the form, but not the substantive effect of a rule would enable a party to relitigate an issue already decided. In our 1983 opinion we carefully set forth our rationale for the invalidity of the 60 day rule; the two month rule, which is virtually identical, falls squarely within that rationale.

Defendants urge that we did not consider or rule upon the Handbook's two month rule. Yet, the Handbook is part of the Amended Stipulation and part of the November 8, 1979 order. If the Note to the Handbook ¶ 2-1 (d) which defendants allege both requires and permits use of the two month rule, were the proper method of determining the date of default, then, as defendants specifically argued in 1983, the 60 day rule would have been permissible as well. However, this argument was rejected in our April 7, 1983 opinion (560 F. Supp. at 1368) as well as by the court in 1981 in Etheridge. "[I]t would be unreasonable to conclude that the note authorized the application of a two month rule." Etheridge, 532 F. Supp. at 270.

Issue Preclusion

The defendants are also collaterally estopped from relitigating this issue. "When an issue of fact or law is actually litigated and determined by a valid final judgment,

and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement of Judgments § 27 (1982). One of the most difficult problems in the application of these rules of res judicata, issue preclusion or collateral estoppel "is to delineate the issue on which litigation is, or is not foreclosed by the prior judgment." Id. illus. 3 & c. at 252. "Preclusion ordinarily is proper if the question is one of the legal effect of a document identical in all relevant respects to another document whose effect was adjudicated in a prior action." Id. at 253. If an issue is one of fact, new evidentiary facts may not be brought forward to obtain a different determination, and "if the issue is one of law, new arguments may not be presented to obtain a different determination of the issue." Id. "The appropriate question, then, is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. If so, the determination is conclusive between the parties in a subsequent action, unless there is a basis for an exception" (e.g. "that the significance of the issue for purposes of the subsequent action was not sufficiently foreseeable at the time of the first action". Id. § 27j at 261.).

Where an issue, such as the proper method of determining the date of default under the mortgage assignment program, has actually been fully litigated and the determination was necessary to the judgment, preclusion will apply. Here the claims in the various actions are identical or very similar in that they involve asserted obligations arising out of the same subject matter. HUD had ample opportunity and motivation to fully litigate the issue of the two month as well as the 60 day rule and the proper method of determining the date of default in our 1983 hearing and in Etheridge. The determination of that issue was necessary to the judgment and is determinative of a material proposition in this suit. See 1B Moore's Federal Practice ¶ 0.442 [2]. HUD's contentions in this case are necessarily inconsistent with the prior adjudications in Etheridge and by us of the proper method of determining the date of default. It is therefore precluded from litigating that question yet again. The attempt to do so is another example of HUD's continuing efforts to prejudice the mortgagors they are supposed to be assisting.

Extrinsic Evidence Is Barred

HUD also contends at this late date, after all the intervening hearings and rulings, that, during the settlement negotiations leading to the 1979 consent decree (the Amended Stipulation) and the drafting of the Handbook, plaintiffs'

counsel agreed to the two month rule as embodied in the Note to ¶ 2-1 (d) of the Handbook. Plaintiffs deny that any such agreement was reached, (Plaintiffs' Memo. at 18-19), and argue that admission of evidence of the negotiations would violate and be inconsistent with the agreement of the parties. In an effort to support its allegation, HUD has noticed the depositions of two of plaintiffs' attorneys and submitted an affidavit from Philip Forest (Defendant's Response, Ex. A). At the pretrial conference on July 11, 1984 concerning this cause, we denied HUD's request to take discovery on the settlement negotiations and discussions relating to the formation of the 1979 consent decree. We now grant plaintiffs' motion to quash the subpoenas of plaintiffs' counsel and to strike the declaration of respondent Forest regarding the settlement negotiations.

The Amended Stipulation is unambiguous. Even if a two month rule was discussed, it was not incorporated into the Handbook. The Note to ¶ 2-1 (d) is not reasonably susceptible of more than one meaning, see United States v. Board of Education of the City of Chicago, 717 F.2d 378, 382 (7th Cir. 1983), and is certainly not susceptible of the meaning HUD would have us attach to it; namely, that the two month rule is mandatory. Etheridge, 532 F. Supp. at 270.

In addition, as previously pointed out, relitigation of the proper method of determining the date of default is barred by the Etheridge decision, the law of the case and the collateral estoppel effect of our April 7, 1983 judgment. 560 F. Supp. at 1344, aff'd, 743 F.2d 454. We there clearly and unequivocally rejected HUD's contention that the two month rule was proper under the assignment program. 560 F. Supp. at 1366-68; accord Mem. Op. July 11, 1983; Mem. Op. April 5, 1984. HUD did not challenge our findings on appeal of the April 7, 1983 order. 743 F.2d 454, 462 & n.8. HUD, therefore, may not now offer new arguments of law or extrinsic evidence absent a showing that our previous decision is "clearly erroneous and that it establishes a practice which is contrary to the best interests of society, and works a manifest injustice in the particular case." United States v. Habig, 474 F.2d at 60. It is clear that our prior opinion has none of these adverse consequences and HUD so conceded in not even challenging it on appeal. Therefore, HUD is barred from relitigating the issue.

IX

LACHES

HUD also argues that plaintiffs' petition is barred by the doctrine of laches. When a plaintiff inexcusably and unduly postpones bringing an action to enforce a claimed

right, and the defendant is materially prejudiced by the delay, laches may bar recovery. Advanced Hydraulics, Inc. v. Otis Elevator Co., 525 F.2d 477, 479 (7th Cir. 1975), cert. denied, 423 U.S. 869 (1975); accord Woodstock/Kenosha Health Center v. Schweiker, 713 F.2d 285, 291 (7th Cir. 1983). We have already rejected HUD's claim that plaintiffs became aware of the two month rule in the 1978-79 negotiations leading to the Amended Stipulation. Those negotiations are not relevant to the issue of the proper method of calculating the date of default because no two month rule was in effect in 1978-79 but, as the Tampa office documents reveal, was only adopted later in 1980. Nor was a two month rule incorporated into the Amended Stipulation or the Handbook. Moreover, knowledge of HUD's possible desire to use a two month rule is not notice of the fact that HUD actually adopted and implemented such a rule on a nationwide basis at a later date, especially where, as here, HUD did so without giving the required notification to plaintiffs' counsel or this Court.

Respondent Forest did contend that the two month rule was the proper method of calculating the date of default under the Assignment Program during the TMAP hearings before us in October of 1982. See Defendants' Ex. G. However, our decision rejecting that contention was issued on April 7,

1983. 560 F. Supp. 1344. In June of 1983, plaintiffs attempted to discover whether the two month rule was being used to reject applicants for assignment of mortgage on a nationwide basis (see Plaintiffs' Petition, Ex. J), and demanded that the Chicago Area Office cease using the two month rule. We granted plaintiffs' motion to compel discovery in October of 1983, and plaintiffs deposed Buchheit and McCormack in January of 1984. At these depositions, plaintiffs obtained the testimony and documentary evidence establishing HUD's continuing use of the two month rule on a nationwide basis. In March of 1984, plaintiffs demanded nationwide reprocessing of all improperly rejected cases (Plaintiffs' Petition, Ex. K). Negotiations began in April and continued unsuccessfully until plaintiffs filed this contempt petition on June 25, 1984. We cannot therefore say that plaintiffs delayed too long in bringing this action.

Nor has HUD demonstrated any harm due to the delay. Plaintiffs promptly sought information, made demands, and tried to negotiate a settlement prior to bringing this contempt petition. HUD was certainly on notice of plaintiffs' claims, and has not been unduly prejudiced by the passage of time. In fact, if HUD had been more forthright and notified plaintiffs' counsel or the Court of the intended change in the method of determining the date of default prior to adopting

and implementing the two month rule in 1980, plaintiffs could have brought this issue to our attention much sooner.

It is clear that HUD began to use the two month rule around or before August of 1980 when the three training sessions took place. And, though the two month rule was apparently in place in late 1980, albeit over the objections of a number of HUD's field offices, no notice of a modification of the Assignment Program was sent to plaintiffs' counsel or this Court despite the mandate in paragraph 3 of the Amended Stipulation to do so. In fact there is evidence that HUD attempted to cover up its use of the two month rule even after the Etheridge decision. Under these circumstances, there is no reason for plaintiffs to have found out about the use and the extent of use of the two month rule until late in 1982. Plaintiffs have thus pursued their claimed rights in a timely manner.

X

**THE COURT'S PRIOR ORDERS REGARDING THE PROPER METHOD
OF DETERMINING THE DATE OF DEFAULT
SHOULD BE APPLIED RETROACTIVELY**

Since it is clear both that HUD, in using the two month rule, deliberately and even secretly violated our order of November 8, 1979, and that HUD has no viable defense, we must hold HUD in contempt.

Retroactive application of a decision correcting invalid administrative determinations is the rule rather than the exception, and a limitation to prospective only relief should be applied only in unusual circumstances. See Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971); Ferrell v. Pierce, Mem. Op., April 5, 1984 at 4-5. See also EEOC v. Puget Sound Log Scaling & Grading Bureau, No. 84-3767, slip op. (9th Cir. January 29, 1985); EEOC v. Atlanta Gas & Light Co., No. 84-8051, slip op. (11th Cir. January 28, 1985). In determining whether a decision should be applied nonretroactively, the Supreme Court has set out three factors to be considered.

"First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity. '"

Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971). As we stated in our memorandum opinion of April 5, 1984:

Defendants have provided no tenable basis for prospective only application of the July [11], 1983 decision. That decision merely established what should have been obvious in any event: that by accepting a delinquent payment and applying that payment to a mortgage account, a mortgagee must be viewed as having tacitly acknowledged that the default date for the account is advanced in accordance with the payment received and accepted. This is hardly a decision that "was not clearly foreshadowed."

Mem. Op. April 5, 1984.

Our July 11, 1983 memorandum opinion did not order a substantial departure from an administrative practice in effect since before 1979 which had never previously been invalidated or ruled improper by any court, as HUD contends. Nor did we order a substantial departure from an administrative practice in effect since 1979. The two month rule was, apparently, not introduced until the three training sessions in late 1980, well after the 1979 consent decree. Prior to late 1980, HUD determined the date of default exactly as we found proper in our April 7, 1983 and July 11, 1983 opinions. See Tampa Memo., Plaintiffs' Ex. A, infra note 16. In 1980, in an obvious effort to limit the scope of the 1979 Consent Decree to which it was a party, HUD improperly departed from an administrative practice in effect since before the 1979 Amended Stipulation and the November 8, 1979 Consent Decree of this Court, without prior notification to plaintiffs'

counsel or this Court. Moreover, HUD's use of the two month rule had also been ruled invalid in Etheridge in September of 1981.

There is also no merit in HUD's other arguments. HUD claims that we overruled administrative precedent in holding that 24 C.F.R. § 203.330 specified which default HUD should consider for the purpose of applying the circumstances criterion, and in requiring HUD to advance the date of default to reflect partial payments (payments which do not bring the account fully current). HUD also claims that in ruling that § 203.330 permits mortgagors to cure their defaults we decided an issue of first impression whose resolution was not clearly foreshadowed.

Those arguments are wholly without merit. HUD's practice at the time the Amended Stipulation was signed, as to how the date of default should be determined when applying the circumstances criterion, is clear from the Tampa Memorandum which states that the date of default is the day after the second full payment is past due. (Plaintiffs' Petition, Ex. A, infra note 16). That is the same interpretation we gave in our April 7, 1983 Mem. Op., 560 F. Supp. at 1366-68. Implicit in the Tampa HUD office memo and clearly reflected in our April 7, 1983 opinion is that the date of default should be advanced to reflect partial payments. Our

July 11, 1983 opinion was necessary only to correct both HUD's apparently deliberate misreading of our earlier opinion and its ignoring of Etheridge, and was clearly foreshadowed. It was HUD's past practice, and it is clear from the regulations (24 C.F.R. §§ 203.330 & 203.331), and from the Handbook that partial payments were to be taken into account by HUD in administering the mortgage assignment program. See, e.g., Handbook ¶ 2-1 (b). In order to be eligible for an assignment of mortgage the Handbook requires that "at least three full monthly payments due on the mortgage are unpaid after allowance for any partial payments which may have been accepted [by the mortgagee] and not yet credited to the account." Id. (emphasis added). As we have said before, the only equitable and possible construction of the regulations and the Handbook is that the date of default is advanced when a mortgagor makes late payments which are accepted by the mortgagee.

Our decisions regarding the proper method of calculating the date of default did not establish a new principle of law. They overruled no past precedent. In fact, we merely agreed with HUD's historic practice and the clear holding in Etheridge. We did not decide an issue of first impression whose resolution was not clearly foreshadowed. The proper method of calculating the date of default was clearly foreshadowed in the purposes of the National Housing Act, in the

language of the regulations, in the long-time practice of HUD prior to the 1980 adoption of the two month rule and was reiterated in the 1981 Etheridge decision. The purpose and effect of setting the date of default under the mortgage assignment program so that mortgagors can cure their defaults is clearly in line with the national housing policy embodied in the statutory and regulatory scheme for assignment of mortgages. "As we have repeatedly emphasized, implementing the national housing policy is of crucial import. We have no doubt that that policy and the effect of our decision would both be advanced by retroactive application of the July 11, 1983 ruling." Mem. Op. April 5, 1984. Retroactive application of our prior orders regarding the proper method of calculating the date of default will clearly further, not retard, the national housing policy.

HUD attempts to misread the Etheridge decision. That decision does not say, as HUD contends, that judgment is to be used in determining the date of default; it says that judgment is to be used in determining whether the default is due to circumstances beyond the mortgagor's control. It says categorically that it "would be unreasonable to conclude that the note authorized the . . . two month rule." 532 F. Supp. at 270. Our decisions, past and present, are completely consistent with Etheridge.

Any hardship on HUD, in terms of effort and cost to correct its improper application of its own regulations is far outweighed by the hardship on homeowners who were meant to benefit from the mortgage assignment program, but who did not because HUD used the two month rule to determine the date of default and thereby excluded them from consideration under the Assignment Program. HUD can and does spread the cost of correcting its wrongs in a way individual homeowners cannot.

Summary

We reiterate: HUD's use of the two month rule (over objections from its field offices and even after the Etheridge decision), as well as HUD's efforts to justify that rule on the flimsiest of bases (the Note to ¶ 2-1 (d) of the Handbook), was and is a bad faith effort to deprive HUD insured homeowners of the benefits which Congress intended these low income families to have. The two month rule cannot be justified on the basis of the statutes, the Handbook or the regulations. In fact, it has no rational basis, and is not equitable or fair to HUD insured homeowners. The two month rule violates the orders of this Court and is not to be used in the future. Prior decisions rejecting requests for assignment of mortgages, which were affected in any way by HUD's use of the rule are to be reprocessed de novo by HUD, applying the proper standards. Those plaintiffs found to have been harmed by the use of the two month rule are to be made whole, insofar as that is possible.

XI

REMEDIES

What remains for decision is the proper remedy for HUD to purge itself of contempt and to implement the prior orders of the courts specifying the proper method of calculating the date of default under the mortgage assignment program.

We order HUD to implement this Court's order of November 8, 1979; and to retroactively comply with this Court's orders of April 7, 1983 (560 F. Supp. 1342); July 11, 1983; and April 5, 1984 relating to the calculation of the date of default. HUD must reprocess, de novo, all applications for assignment of mortgage which were rejected in whole or in part due to HUD's improper use of the two month rule in determining the date of default from January 1, 1980 to date. Mortgagor's who would have been eligible for an assignment of mortgage if proper procedures and standards had been followed initially are entitled to relief.

HUD must first identify those people who were potentially affected adversely by its use of the two month rule, and then utilize an independent professional locator service and advertising to assist in locating and notifying those potentially harmed. HUD must then, upon request, reprocess their applications for assignment of mortgage, de novo. The reprocessing is not to be done by an independent auditor as plaintiffs have requested. That would be neither time nor cost effective, nor in accordance with the national housing policy. It is HUD's obligation to implement the national housing policy, and the National Housing Act including the mortgage assignment program. Though HUD has been deliberately and grossly recalcitrant in carrying out its mission in the

past, we believe that it should nevertheless be given the opportunity to do so subject to close scrutiny by plaintiffs' counsel and the Court.

Mortgagors who would have been eligible for an assignment of mortgage absent HUD's use of the two month rule, and mortgagors who can show that they should have been found to have met all of the other criteria (whether HUD rejected them for multiple reasons initially or not) are entitled to relief. The mortgagors entitled to relief must be conveyed their former property, if available, under terms and conditions not less favorable than existed under the former mortgage, plus whatever additional relief it would have been appropriate to provide under a timely assignment of mortgage. Alternatively, they must be conveyed a comparable property at fair market value, either under terms and conditions not less favorable than those of the former mortgage, plus whatever additional relief would have been appropriate to provide under a timely assignment of mortgage, or at the prevailing FHA mortgage rate, whichever is lower.

Plaintiffs have requested two additional forms of relief which require some discussion. First, plaintiffs request injunctive relief in the form of a freeze on the sale of all HUD owned homes until reprocessing is complete, in order to insure the maximum availability of comparable homes. Second,

plaintiffs request that they have the option of receiving monetary damages in lieu of the former where it is not possible to convey a comparable home within a reasonable time or, we assume, where due to changed circumstances the former mortgagor no longer needs or desires such a home. Finally, plaintiffs have requested consequential and punitive damages, attorney fees and costs, and that the individual respondents be held personally liable for the damage awards.

We note first that plaintiffs have not made a sufficient showing of necessity, or even the possibility, of having an independent auditor perform the reprocessing. However, we believe that they have shown that HUD should be closely monitored and be required to advertise and hire a professional locator service to notify all former mortgagors who are eligible for reprocessing.

Use of a Locator Service but No Independent Auditor

Even though HUD has been found in contempt, HUD is entitled to the opportunity to remedy its contempt through

compliance with this Court's orders. See, e.g., United States v. City of Providence, 492 F. Supp. 602, 610 (D. R.I. 1980) (a distinctive characteristic of civil contempt is that the contemnor is to be given an opportunity to purge the contempt by attempting to right the wrong). As defendants point out, the sanctions imposed upon a finding of civil contempt are customarily conditional and contingent, able to be purged by compliance with the court's orders. See, e.g., United States v. Roux Laboratories Inc.; 456 F. Supp 973, 978 (M.D. Fla. 1978); cf. Shillitani v. United States, 384 U.S. 364, 370-71 (1966).

Moreover, plaintiffs have not demonstrated that a firm exists which could do this reprocessing. They argue that twice before HUD has agreed to outside firms' performing similar tasks. However, in those cases the independent firms had specific relevant expertise. In one case, an accounting firm oversaw the disbursement of a settlement fund to eligible tenants, and in the other case the American Institute of Architects reviewed construction defect claims. Neither case primarily involved the application of HUD's own regulations, guidelines, and procedures. Even if a firm did exist

which could perform the reprocessing, HUD and the plaintiffs' counsel would have to train the firm's staff as to the requirements and procedures of the mortgage assignment program. Such a process, in our view would be unduly costly and cause undue delay.

HUD estimates, based upon the results of the 1979 reprocessing and its experience in the use of a professional locator service that approximately 55% of those former mortgagors potentially eligible for reprocessing could be located through a professional locator service. Absent the use of such a service, HUD estimates, based upon the 1979 reprocessing, that only 24% of those potentially eligible for reprocessing could be located. Plaintiffs estimate that a professional locator could locate 75% of those potentially eligible, and that only 11.3% could be located absent the services of a professional locator service. Even if we accept HUD's figures, we believe justice demands that HUD use a professional locator service. It is a reasonable and available means to more than double, at the least, the number of people notified of their reprocessing rights. We believe that this minimal step should be taken by HUD in order to purge the contempt and attempt to comply with our past orders. Every mortgagor injured by HUD's use of improper standards deserves

notice of a right to reprocessing. Though that may be impossible, all reasonable steps should be taken to accomplish it so far as possible, including advertisements, if necessary.

Injunctive Relief

Freeze on the Sale of HUD Homes

Plaintiffs seek an injunction requiring HUD to withdraw all HUD-owned single family properties from sale to the general public, and to preserve those homes for the benefit of mortgagors eligible for reprocessing in order to insure the maximum availability of comparable homes for those mortgagors improperly denied an assignment of mortgage due to HUD's use of the two month rule.

The Agreed Portion of the Freeze

Where the property of a mortgagor who may have been affected by HUD's use of the two month rule is still in HUD's unsold inventory, HUD has agreed to freeze the sale of such property and to reconvey it to the insured mortgagor if desired and if found eligible in the reprocessing. (Defendant's Reply at 19, n. 14; Defendant's Supplemental Reply at 6, n. 6). And in the relatively few cases where mortgagors whose assignment requests were improperly rejected as specified herein still reside in their HUD-insured homes and foreclosure has not occurred, HUD will request the mortgagee to halt foreclosure

proceedings pending HUD's expedited determination in a de novo reprocessing of the request for an assignment of mortgage. (Id. at 22 n. 16).

The Injunction

The parties characterize the requested moratorium or freeze on the sale of the remaining single-family homes in HUD's inventory to the general public as a preliminary injunction. We believe the relief sought is better characterized as a permanent injunction. Generally, a preliminary injunction is issued before there has been a determination of the rights of the parties, and ordinarily preserves the status quo pending such a determination. Here, we have determined the rights of the parties after hearing the merits of the case and the requested freeze is not sought in order to preserve the status quo, rather plaintiffs claim that it is necessary to insure the availability of a sufficient pool of comparable homes to effectuate complete and quick relief.

However, whether denominated a preliminary or a permanent injunction, the requested injunction, in its present form, will not be granted at this time. Though there are differences in the standards for granting permanent and preliminary injunctions, in either case plaintiffs must show that they have no adequate remedy at law and that they will be irreparably harmed if the injunction does not issue; that the balance of

relative harm weighs in their favor; and that the public interest will not be disserved. Though plaintiffs have no adequate remedy at law, they have not, at this time, shown that they will be irreparably harmed if the injunction does not issue, nor that the balance of relative harms weighs in their favor, nor that the public interest will not be disserved by such a broad injunction.

The Seventh Circuit has recently reviewed the standard for granting and denying preliminary injunctions. Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380 (N.D. Ill. 1984); cf. Palmer v. City of Chicago, Nos. 83-1980 & 83-1981, slip op. (7th Cir. February 15, 1985); Roland v. Airline Employees Association, International and Republic Airlines Inc., No. 84-2333, slip op. (7th Cir. January 29, 1985); accord Singer Co. v. P.R. Malloy & Co., 671 F.2d 232 (7th Cir. 1982).

Preconditions

To secure a preliminary or a permanent injunction, the plaintiffs must show that they have no adequate remedy at law (that is, an award of damages is seriously deficient as a remedy for the harm), and that they will be irreparably harmed if the injunction does not issue. See, e.g., Roland Machinery, 749 F.2d at 386. For a preliminary injunction, the plaintiffs must also show some likelihood of success on

the merits. To secure a permanent injunction they must have succeeded on the merits. Ced's Inc. v. United States EPA, 745 F.2d 1092, 1100 (7th Cir. 1984). If plaintiffs can meet these prerequisites, we must balance the relative harms.

Balance of Relative Harms

We must "consider any irreparable harm that the defendant might suffer from the injunction." See, e.g., Roland Machinery, 749 F.2d at 387. Then, we must weigh the plaintiffs' irreparable harm if the injunction is denied against any irreparable harm that the defendants can show they will suffer if the injunction is granted. "The threatened injury to plaintiffs [must] outweigh the threatened harm the preliminary injunction may inflict upon the defendants." See, Palmer, slip op. at 30; Roland v. Airline Employees, slip op. at 14.

This balancing of relative harms is affected by an additional factor. Since the grant or denial of the injunction sought here will have consequences beyond the immediate parties, the public interest must be reckoned into the weighing process. Roland Machinery, 749 F.2d at 388. Finally, we are reminded that "the granting of an injunction is an exercise of very far reaching power, never to be indulged except in a case clearly demanding it." Id. at 389 (citations omitted).

For a number of reasons, we must deny plaintiffs' requested injunction ordering HUD to withdraw all HUD-owned single

family properties from sale to the general public until reprocessing is completed. Plaintiffs seek this injunction to insure the availability of a sufficient number of comparable homes for those mortgagors who were improperly denied an assignment of mortgage, and who are ultimately determined to be eligible for relief.

No Adequate Remedy at Law and Irreparable Injury

Even though plaintiffs seek damages as an alternate, and, in some cases, the preferred remedy, we believe that plaintiffs have no adequate remedy at law, and that an award of damages after reprocessing may be seriously deficient, even if proper. A mortgagor who lost his home after HUD improperly denied his request for an assignment of his mortgage has no adequate remedy at law. Real property, especially a home, is unique, not fungible. Johnson v. United States Department of Agriculture, 734 F.2d 774, 788-89 (11th Cir. 1984). Reconveyance of the former property, if available and in a comparable condition, or conveyance of a comparable property is the only remedy which might be considered adequate. Since the former property, it is stipulated, will not be available in the vast majority of situations, the next best remedy, in light of HUD's mandate under the National Housing Act, would be to convey to the injured plaintiffs a comparable property.

Monetary damages are also inadequate here because the nature of plaintiffs' losses make damages very difficult to calculate. See, e.g., Roland Machinery, 749 F.2d at 386. It is difficult to distinguish the effect of a wrongful denial of an assignment of mortgage from the effect of other things happening at the same time. See id. The mortgagee's actual foreclosure of the mortgage was not wrongful, as the mortgagor was in default in all cases at issue here. It will obviously be difficult to differentiate between the portion of plaintiffs' harm which flowed from their own wrongful defaults, and that portion which flowed from HUD's wrongful refusal to accept assignment of the mortgages.

However, an injunction should issue only if plaintiffs will suffer irreparable injury if the injunction does not issue. See Roland Machinery, 749 F.2d at 386. Irreparable injury is suffered when one is wrongfully ejected from his home and when he must live in inadequate or health endangering housing for any period of time as a consequence of the wrongful ejection. Johnson, 734 F.2d at 789. Plaintiffs will be irreparably harmed if they are not reinstated to their former or comparable homes. However, an injunction may not be necessary to insure the availability of former or comparable homes. HUD has agreed to freeze the sale of the former homes of mortgagors potentially eligible for relief, where those homes

are still in HUD's inventory, if any, and in the relatively few cases where foreclosure has not been completed, HUD has agreed to seek a stay of foreclosure proceedings.

In order to show that plaintiffs will be irreparably harmed by denial of the remaining portion of the injunction freezing the sale of all other single family homes in HUD's inventory, the plaintiffs must show that the freeze is necessary to avoid irreparable injury. The injury plaintiffs seek to avoid with the requested injunction is a lack of available and comparable homes for conveyance to mortgagors who are determined in the reprocessing to have been improperly denied an assignment of mortgage. Whether HUD should now be enjoined from selling to the general public in order to insure that a sufficient pool of comparable homes is available to compensate plaintiffs found eligible for relief depends upon a comparison of the projected number of mortgagors who will be entitled to relief with the number of properties available to choose from in HUD's inventory.

Though any method of calculation is highly speculative at this point, we believe that for purposes of analysis the following will suffice. HUD estimates that 26,000 mortgagors will be entitled to receive a notice of the right to reprocessing, while plaintiffs estimate the number at about 32,000 (32,098). The primary difference between HUD's estimate

and plaintiffs' estimate is that plaintiffs include in their estimate those mortgagors whose final rejection was based on the "circumstances beyond the mortgagor's control" criterion along with one or more other criteria. HUD's estimate excludes those additional mortgagors because it assumes that, even if the mortgagor were to satisfy the "circumstances beyond the mortgagor's control" criterion due to a change in the date of default, the mortgagor would still be ineligible for an assignment due to failure to meet the other assignment criteria. However, as we stated in our memorandum opinion of April 5, 1984:

it is realistic to assume that a mortgagor who may have had adequate grounds to appeal and win a decision as to [the other cited] criterion would not have attempted to do so if he believed that he could not meet the circumstances of default criterion. In this circumstance, the erroneously calculated date of default may have created a "chilling effect" which caused the mortgagor to forego an appeal.

Mem. Op. April 5, 1984 at 9. Therefore, all cases (including those where a mortgagor failed to appeal a preliminary rejection) which cited the "circumstances criterion," even if in conjunction with another criterion, as a basis of rejection must be reprocessed by HUD in accordance with the correct method of calculating the mortgagor's date of default.

Though plaintiffs' estimate is probably somewhat high-- because it assumes that 50% of the cases where a mortgagor

did not appeal preliminary rejection or did not apply at all and 50% of reopened cases which were rejected with no reason cited were probably rejected because of the two month rule and thus are eligible for reprocessing--we accept, for the purpose of this argument, their figure of 32,000 mortgagors eligible to receive notice of the right to reprocessing.

In the 1979 reprocessing there were 27,000 mortgagors potentially eligible to receive notice of reprocessing. Letters were sent and 24% (6,500) responded to the letters. (HUD suggests that for the purpose of this estimate we use a higher response rate of 30%.) Of those 6,500, approximately fifty percent were found ineligible upon a facial review of the file. Of the 3,320 cases which were fully reprocessed, relief was granted in 1,137 (34.2% of cases fully reprocessed). That is, 16.6% of those who responded were granted relief.

We can estimate the approximate number of people who would ultimately be entitled to relief in this case by applying the above analysis of the 1979 figures with certain modifications. If 30% of the approximately 32,000 people entitled to notice respond to a letter, there will initially be some 9,600 cases to be reviewed. HUD suggests that of the 22,400 who do not respond to an initial letter, approximately one third could be located by using a professional locator service. (This estimate is allegedly based on HUD's past experience.)

Since we have ordered HUD to use such a service, we can assume an additional 7,392 cases would be available for review. That total would be 16,992.

HUD has also characterized its estimate of those who could be notified by use of a locator service as 55% of eligible mortgagors. Plaintiffs estimate that 75% could be contacted if a locator service were used. However, since the vast majority of mortgagors eligible for reprocessing will no longer be in their former homes and will have little if any connection to those homes, HUD's estimate that only 55% will actually receive notice of a right to reprocessing, even if a locator service is used, is a reasonable estimate. (55% of 32,000 is 17,600.) We will use this figure. HUD alleges, and we have no reason to doubt it, that, even using the proper standards, about 50% of those 17,600 applications would be found to be ineligible for an assignment of mortgage upon a facial review of the file. The asserted reasons are, for example, that there is no change in the date of default upon recalculation, or, if there is a change in the date of default, that it makes no difference in the determination, or that the mortgage is current because foreclosure never occurred. We assume, then, that 8,800 cases would have to be fully reprocessed (50% of 17,600).

In 1979 relief was granted in about one third of those cases which were fully reprocessed. Applying that percentage here yields 2,930 mortgagors eligible to have their former or a comparable property conveyed to them or to receive damages due to the improper calculation of date of default and resultant improper denial of an assignment of mortgage. This is approximately 16.6% of those actually informed of their rights, which is consistent with the 1979 results.

On June 1, 1984 HUD had approximately 10,300 unsold single family homes in its nationwide inventory. Each month 2,900 homes are added to the inventory and 3,000 are sold. A total of 34,800 homes would be added to HUD's inventory in a 12 month period and 36,000 would be sold. Therefore, there are approximately 45,000 homes which will revolve through HUD's national inventory in a year period out of which comparable properties could be chosen. HUD would offer comparable properties to those estimated 2,930 mortgagors entitled to relief on a first refusal basis. There could theoretically therefore be over 15 houses from which each injured mortgagor could choose a comparable property during a year period.

Even if we have underestimated the number of persons who will ultimately be entitled to relief in the form of a comparable home by as much as 100%, or the geographic disparity in available homes is substantial, there should still be an

average of 7-1/2 properties for each mortgagor to choose from during a one year period.

The procedure we now order is that, once a mortgagor is determined to be eligible for relief, then all reasonably comparable properties within a reasonable geographic area, specified by the eligible mortgagor, should be offered to the mortgagor on a first refusal basis. During the 1979 reprocessing, plaintiffs and HUD agreed to freeze the sale of three comparable properties for each eligible mortgagor. Once the three-to-one ratio between eligible mortgagors and comparable properties was achieved for a given jurisdiction, the freeze on the sale of HUD properties to the general public within that jurisdiction was lifted. Often there were few, if any, comparable properties available which caused delay.

Plaintiffs admit that the number of properties to be frozen cannot be determined until after the number of mortgagors eligible for relief is determined. At that time, what constitutes a comparable property for each mortgagor entitled to relief can also be determined. HUD will then be in a position to identify which of the properties in its inventory and which of its new acquisitions fit a comparable property description for a given mortgagor in a given area. And, HUD will be able to offer that property to the proper mortgagor entitled to relief prior to signing a contract to sell it to

a member of the general public. Such a procedure is reasonably tailored to achieve the desired ends without being overbroad, unduly intrusive or costly.

Therefore, we find that a sufficient pool of homes will probably be available within a reasonable time to compensate plaintiffs on a first refusal basis. No injunction need be issued now to insure that plaintiffs will not be harmed in the interim. If it subsequently appears that a substantial number of plaintiffs will be irreparably harmed by the present denial of an injunction, plaintiffs may apply again.

Balance of Relative Harms

HUD claims that the cost of freezing the sale of all single family properties will cause it irreparable harm. HUD estimates that it would incur interest and holding costs of at least \$60 million dollars for a six month freeze. Even accepting plaintiffs' supposition that houses would sell at a much faster rate after the freeze was lifted, HUD estimates holding and interest costs would be \$44 Million dollars for a six month freeze. Thus the cost to HUD would be between \$14,000 and \$20,000 per mortgagor entitled to relief. This cost will do nothing to recompense the injured mortgagors as it is a mere prerequisite to providing a comparable home, and one we have already found is unnecessary on the facts before us. The requested injunction will not prevent their

injury but will only, possibly, speed up the time necessary to correct the injury. Time is of the essence, however plaintiffs will not be significantly harmed further if the injunction is denied at this time.

HUD also complains of the additional administrative cost and burden of a freeze and the retroactive application of our prior orders. This contention is without merit. Whatever burden is imposed on HUD in this respect is of its own making.

The Public Interest

A freeze at the present time on the sale of all HUD homes to the general public would disserve the public interest in a number of ways. First, HUD's primary mission is to provide homes to low income families. Part of that mission clearly is to provide homes to the injured families here who were improperly denied an assignment of mortgage. However, HUD should not be required to stop providing homes in its inventory to the many other families in need of homes in this country for an extended period of time. Those individuals are also entitled to HUD's services. In addition, since most HUD homes are vacant, a freeze will result in further deterioration which accompanies such vacancy. More importantly, the revenues from HUD's sales of homes are used to replenish the various mortgage insurance funds run by HUD for the benefit

of low income families. The lack of these revenues could adversely affect the public interest and will not serve HUD's primary mission.

These reasons, in addition to the tremendous holding and interest costs which would be incurred by a freeze, contrasted with what we see as, at best, a minimal benefit to the affected plaintiffs, leads us to the conclusion that the injunction must be denied at this time. "[W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold the relief until a final determination of the rights of the parties, though postponement may be burdensome to the plaintiff." Yakus v. United States, 321 U.S. 414, 440 (1944). The freeze suggested by plaintiffs seems to us to be overly broad, unnecessarily costly, and not narrowly tailored to achieve its intended purpose. Better, at least initially, is the methodology suggested above, which will require HUD to offer comparable properties on a first refusal basis to the injured plaintiffs from HUD's inventory as they are acquired by HUD, beginning at the time when what constitutes a comparable property is actually identified for each plaintiff entitled to relief.

Though plaintiffs have no adequate remedy at law, they have not at this juncture shown that they will be irreparably injured by a denial of the injunction. The balance of harms weighs against granting the injunction because of the relatively small benefit to plaintiffs in granting the injunction. On the other hand, there would be significant detriment to the public interest if all HUD owned housing were withdrawn from the market for an extended period of time. Therefore, we deny plaintiffs' motion for a injunction except to the extent agreed to by HUD. We will further order that HUD expedite the reprocessing, and offer those mortgagors entitled to relief their former homes, if available, or comparable homes on a first refusal basis prior to contracting to sell them to a member of the general public. A hearing will be set shortly to determine a timetable for the reprocessing.

Monetary Damages

For mortgagors who would have been eligible for an assignment of mortgage had HUD used the proper standards and procedures initially, plaintiffs request that they have the option of receiving compensatory money damages as an alternative to having their former or a comparable property conveyed to them.

Plaintiffs argue that HUD should be required to pay monetary damages to eligible mortgagors if HUD is unable to return the mortgagor to his former home, or to provide an acceptable comparable property within a reasonable time. This Court has the power to order payment of money damages pursuant to our finding that HUD is in civil contempt. McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949); Gompers v. Buck Stove & Range Co., 221 U.S. 418 (1911); Federal Facilities Realty Trust v. Darrow, 227 F.2d 657 (7th Cir. 1955). Such a sanction is appropriate in a civil contempt proceeding either to compel compliance or to compensate for losses sustained. United States v. United Mine Workers, 330 U.S. 258, 303-304 (1947); accord McComb, 336 U.S. at 193. The measure of the court's power is "determined by the requirements of full remedial relief." McComb, 336 U.S. at 193. ⁹

Sovereign Immunity

The United States may be sued only to the extent that it has waived its sovereign immunity. HUD claims that federal sovereign immunity prohibits any remedy which requires HUD to pay monetary damages. However, the "sue or be sued" clause in HUD's authorizing legislation creates a specific waiver of sovereign immunity. FHA v. Burr, 309 U.S. 242, 245 (1940); see also Kiefer & Kiefer v. Reconstruction Finance Corp., 306 U.S. 381 (1939). The Seventh Circuit has held that federal

agencies and their officers are liable for both monetary damages and equitable relief where the federal government has waived its sovereign immunity through such a "sue or be sued" clause. Baker v. F & F Investment Co., 489 F.2d 829, 833-34 (7th Cir. 1973); accord Estrada v. Hills, 401 F. Supp. 429, 433 (N.D. Ill. 1975); see also Keifer, 306 U.S. 381; Gulf Oil v. Panama Canal Corp., 407 F.2d 24 (5th Cir. 1969). But see Federal Deposit Insurance Corp. v. Citizens Bank & Trust Co., 592 F.2d 364, 370-71 & n. 9 (7th Cir.), cert. denied, 444 U.S. 829 (1979) (abrogating Baker on other grounds). Such "sue or be sued" clauses do not make distinctions between kinds of relief. Reconstruction Finance Corp. v. J. G. Menihan Corp., 312 U.S. 81, 83 (1941); FHA v. Burr, 309 U.S. at 245; Baker, 489 F.2d at 834.

The National Housing Act waives sovereign immunity by providing that "the Secretary [of HUD] shall, in carrying out the provisions of . . . subchapter II [which includes the mortgage insurance and assistance programs], be authorized, in his official capacity, to sue or be sued in any court of competent jurisdiction, state or federal." 12 U.S.C. § 1702. "Such waivers of governmental immunity should be liberally construed." FHA v. Burr, 309 U.S. at 245.

[W]hen Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and

permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue or be sued" clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue or be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be. . . .

That does not, of course, mean that any funds or property of the United States can be held responsible for this judgment. Claims against a corporation are normally collectible only from corporate assets. That is true here. Congress has specifically directed that all such claims against the Federal Housing Administration . . . "shall be paid out of funds made available by this Act." . . . The result is that only those funds which have been paid over to the Federal Housing Administration in accordance with § 1 and which are in its possession, severed from the Treasury funds and Treasury control, are subject to execution.

Id. at 245, 250. See also Dugan v. Rank, 372 U.S. 609, 620 (1963); Industrial Indemnity, Inc. v. Landrieu, 615 F.2d 644, 646 (5th Cir. 1980); Baker, 489 F.2d at 829; United States v. American National Bank, 443 F. Supp. 167, 170-71 (N.D. Ill. 1977); Battles Farm Co. v. Hills, 414 F. Supp. 521, 525 (D.D.C. 1976), aff'd in relevant part, 703 F.2d

1292 (D.C. Cir. 1983); Estrada v. Hills, 401 F. Supp. 429 (N.D. Ill. 1975); Brown v. Lynn, 385 F. Supp. 986 (N.D. Ill. 1976).

There is no doubt that the respondents were involved in carrying out the provisions of the National Housing Act when doing the acts alleged. The Secretary is given the power to delegate in 12 U.S.C. § 1702, and, under the same section, has funds available out of which a monetary judgment could be paid. ¹⁰ The Secretary is given the power to acquire single family home mortgages by assignment of mortgage for the purpose of avoiding foreclosure in section 1715u. ¹¹ The regulations provide that "the secretary will accept assignment of mortgages . . . in order to avoid foreclosure when, [among other conditions], . . . the mortgagor's default has been caused by circumstances beyond the mortgagor's control which render the mortgagor unable to correct the delinquency within a reasonable time or make full mortgage payments." 24 C.F.R. § 203.650 (a) (5); see also HUD Handbook ¶ 2-1(d). In addition, HUD Handbook 4191.2 provides that there are "no . . . quotas of any sort with respect to this program. . . . no minimum or maximum numbers of mortgages which Field Offices are expected to accept or reject. Each case must be considered individually and the decision to accept or reject an assignment request must be based solely upon the eligibility criteria discussed

in chapter two of this handbook." Handbook ¶ 1-2. It is clear that in using the two month rule the respondents were acting under the authority of the National Housing Act (Subchapter II). It is equally clear that the regulations and handbook contain no mandatory two month rule, and that defendants' use of the two month rule was improper under the regulations and the Handbook, was an improper attempt to narrow the relief mortgagors were entitled to under the 1979 consent decree, and that the impropriety was certainly clear after the Etheridge decision, if not before.

The defendants' next claim is that there is no fund within the Secretary's control from which plaintiffs may recover, and for that reason the suit is not within the waiver provision in 12 U.S.C. § 1702. Though recovery from the U.S. Treasury is prohibited, FHA v. Burr, 309 U.S. at 250, in Merrill Tenants Council v. U.S. Department of Housing & Urban Development, 638 F.2d 1086, 1091 (7th Cir. 1981), the court there identified several sources of funds from which the plaintiffs' claims could be satisfied. Depending upon the type of damages which may be allowed, we cannot, at this point, know exactly what funds, if any, would be available for payment in this case. It seems unlikely, however, given the substantial funds generated by the sale of properties

acquired by HUD that no sources of damage payments would be available.

The Seventh Circuit recently pointed out that "[i]nsofar as the suit is against the defendant officers [of HUD] in their official capacities . . . [the fact that] the secretary may sue and be sued in [his] official capacity by 12 U.S.C. § 1702 . . . means that the 'Mortgage Insurance Fund,' or possibly other government funds [within HUD's control], may be used to pay judgments and that issues of sovereign immunity and consent to be sued are eliminated." Burroughs v. Hill, 741 F.2d 1525, 1528 (7th Cir. 1984) citing Merrill, 638 F.2d at 1091. In Burroughs, the plaintiffs, residents living near a run down HUD-owned building, sued HUD for damages arising out of HUD officials' failure to comply with HUD regulations and state law requiring that HUD keep its properties in proper repair. The court found that § 1702 constituted the necessary waiver of sovereign immunity, but that it does not by itself create a private cause of action. Burroughs, 741 F.2d at 1528, citing Shivers v. Landrieu, 674 F.2d 906, 911 n. 21 (D.C. Cir. 1981).

Cause of Action for Monetary Damages

HUD argues that even if § 1702 constitutes the necessary waiver of sovereign immunity, the violation of a statute or regulation does not automatically give rise to a cause of

action for damages sustained. Neither the statute authorizing the mortgage assignment program, nor the regulations implementing it expressly authorize a private right of action for money damages. Defendants urge that, in order to recover monetary damages, plaintiffs must show that Congress intended to imply a private right of action for monetary damages under the standards set in Cort v. Ash, 422 U.S. 66 (1975) and its progeny.

Plaintiffs properly point out that this action is not an original action seeking monetary damages for HUD's violation of statute or regulation. Rather, it is one based on HUD's violation of the consent decree entered by this Court. Under the consent order of November 8, 1979, Amended Stipulation paragraph 3, ¹² HUD obligated itself "not to make any modifications which would curtail the basic rights of mortgagors under the program [then] in existence," and to give notice to plaintiffs' counsel prior to final action on any modification. In paragraph 14, ¹³ HUD agreed to continue to provide, even after the expiration of the Amended Stipulation's five year term, "assistance or relief in the form of the present assignment program or an equivalent substitute to permit mortgagors in default on their mortgages to avoid foreclosure and to retain their homes during periods of financial distress."

Amended Stipulation ¶ 14; Ferrell v. Pierce, 743 F.2d at 457-58.

HUD violated all three of these provisions. First, in instituting the two month rule in August of 1980 or before, HUD modified the method of calculating the date of default used in applying the "circumstances beyond the mortgagor's control" criterion under the mortgage assignment program. This modification curtailed basic rights of mortgagors under the then existing mortgage assignment program in violation of paragraph 3. Second, HUD made this modification without notifying plaintiffs' counsel or this Court prior to final action also in violation of paragraph 3. Third, HUD's implementation of the two month rule constituted a failure to provide assistance either in the form of the Assignment Program in effect at the time the Consent Decree was entered or an equivalent substitute in violation of paragraph 14. These acts and omissions constituted breaches of HUD's duty under the Consent Decree and contempt of this Court's order. HUD agreed to be bound by the consent order in paragraph 15 of the Amended Stipulation. And in paragraph 15¹⁴ the parties also agreed that plaintiffs had the right to enforce the Amended Stipulation, subject to the approval of the Court. Thus, plaintiffs have an express right of action to enforce the consent order of November 8, 1979.

We have, therefore, the equitable power to enforce our finding that HUD is in civil contempt with an order to pay compensatory damages.

**The Court's Power to Award Monetary Damages
as a Remedy for Civil Contempt**

The executive branch of the federal government is not above the law, nor beyond the power of the federal courts. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). "Civil . . . contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance." McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); See also United States v. United Mine Workers, 330 U.S. 258, 303-304 (1947). "The private or public rights that the decree sought to protect are an important measure of the remedy." McComb, 336 U.S. at 191. Decrees stated in general terms, enjoining practices which are violations of statutory provisions, as the one in McComb, or which, in this case, enjoin HUD from curtailing the basic rights of mortgagors under the mortgage assignment program, are often necessary to prevent further violations where, as here, HUD has shown a continuing proclivity for unlawful conduct. See McComb, 336 U.S. at 192.

This case is very much like McComb. A decree expressed in general terms was wholly warranted in light of HUD's past

practice of failing to live up to the letter and spirit of the National Housing Act and its own regulations. Though it chose not to, HUD could have petitioned for a modification of its obligations under the consent decree, or a clarification or construction of the order. See id. Instead, HUD, at its peril, made its own clearly erroneous determination of what the decree meant. See id. HUD cannot now claim to be immune from civil contempt because the consent decree did not specifically mention that use of the two month rule (of which the Court was unaware) was prohibited, or that the two month rule would curtail basic rights of mortgagors under the assignment program. See id. This case, like McComb, is also an excellent example of why a rule, which enforces only narrowly worded orders, invites disobedience of the law.

HUD, in fact, cooked up the 60 day rule for determining the date of default in the TMAP to replace the two month rule after the Etheridge decision made emphatically clear, what should have been obvious in any event, that the two month rule was improper. HUD took a calculated risk when, under the threat of a contempt citation, it modified its practice at the time of the consent decree and adopted the two month rule. HUD knew the risk of modifying the assignment program in a way which curtailed the basic rights of mortgagors without even giving the required notice to plaintiffs.

The Supreme Court in McComb had "no doubts concerning the power of the district court to order respondents, in order to purge themselves of contempt, to pay the damages caused by their violation of the decree." Id. at 193. The power of the court to grant the relief necessary to effect compliance with its decree in civil contempt proceedings is determined by the requirements of full remedial relief. Id. As Justice Douglas concluded in McComb, "It is the power of the court with which we are dealing--the power of the court to enforce compliance with the injunction which the Act authorizes, which the court has issued, and which respondents have long disobeyed." Id. at 194-95.

If this were an original action against HUD for damages arising out of HUD officials' failure to comply with HUD regulations, as was the case in Burroughs, 741 F.2d 1525 (7th Cir. 1984), we would be required to determine whether plaintiffs had an implied cause of action for monetary damages under the standards set in Cort v. Ash, 422 U.S. 66 (1975). However, because this case is not an original action (as was Burroughs), but rather a civil contempt proceeding, we need not, and do not decide that issue. HUD obviously cannot violate a consent decree to which it is a party and then contend that the Court is without power to grant the relief

necessary to remedy the damages caused by its contemptuous conduct.

If, upon reprocessing, HUD is unable to return mortgagors entitled to relief to their former homes, or to provide a comparable property, HUD will be required to pay each such mortgagor compensatory money damages. A hearing will be held shortly to determine what is a reasonable amount of time to complete the reprocessing and to determine the type of damages to be awarded and the measure of damages.

Though we have found no cases which are in a similar procedural posture and which address the issue of the propriety of an award of monetary damages to compensate plaintiffs for injuries sustained due to a federal agency's contempt of a court order, the Eleventh Amendment cases cited by plaintiffs offer a helpful analogy. "In exercising their prospective powers," as this Court did in entering the 1979 consent decree, "federal courts are not reduced to issuing injunctions against state officers and hoping for compliance." Neither are we reduced to entering a consent decree and hoping that federal (HUD) officers will comply. See Hutto v. Finney, 437 U.S. 678, 690 (1978). "Once issued, an injunction [or a consent decree] may be enforced." Id. "Many of the court's most effective enforcement weapons involve financial penalties . . . civil contempt may also be punished by a remedial fine,

which compensates the party who won the injunction for the effects of his opponents non-compliance." Id. at 690-91, citing United States v. United Mine Workers, 330 U.S. at 304-305; Gompers v. Buck Stove & Range Co., 221 U.S. 418.

In 1979, HUD was enjoined, prospectively, from eviscerating the basic rights of mortgagors under the mortgage assignment program. Adoption of the two month rule clearly curtailed such basic rights, in violation of the consent decree. Our order today, leaving open the possibility of an award of monetary damages is imposed to enforce that prospective injunction which HUD has violated. Just as the sovereign immunity of the State of Arkansas was held to be no bar to the monetary award in Hutto, so the possible monetary award here is not barred by any federal sovereign immunity.

In an Eleventh Amendment case analogous to this case, the First Circuit pointed out that

impossibility would be a defense to a motion for contempt . . . the fines are avoidable, so the commonwealth would not be faced with an inescapable order to pay money out of its treasury. Therefore, even if we assume that [sovereign] immunity would bar such an inescapable order in the contempt context, no eleventh amendment issue is present in this case, for it is clear that sovereign immunity does not bar remedial or coercive fines that are actually incurred, though theoretically avoidable. Hutto v. Finney, 437 U.S. 678, 690-91 (1978). The court's power to order prospective payments generally, see Milliken v. Bradley, 433 U.S. 267, 289-90 (1977); Edelman v. Jordan, 415

U.S. 651, 667-68 (1974), is ancillary to its power to order compliance with the law. Hutto v. Finney, 437 U.S. at 691. That power does not evaporate when the cost of compliance is high. Id. at 690 n. 15.

Fortin v. Commissioner of Massachusetts Department of Public Welfare, 692 F.2d 790 (1st Cir. 1982). In Fortin, the court found no Eleventh Amendment violation when the district court found the state department of welfare not in substantial compliance with a consent decree enjoining delays in welfare eligibility determinations and held the department in civil contempt, imposing fines for further noncompliance. We likewise see no barrier to ordering HUD to pay compensatory damages to plaintiffs if HUD is either unable or unwilling, within a reasonable time, to place them in substantially the same position they would have been absent HUD's contemptuous conduct.

XII

LIABILITY OF THE INDIVIDUAL RESPONDENTS IN THEIR INDIVIDUAL CAPACITIES

Insofar "as official funds are concerned, naming the Secretary as a defendant suffices and other officials need not have been joined." 15 See Burroughs v. Hills, 741 F.2d 1525, 1528-29 (7th Cir. 1984). The pleadings make it clear that plaintiffs seek to hold some of the individual respondents personally liable for damages in their individual capacities

as well. Plaintiffs have named as respondents in their individual capacities: Philip Forest (Retired from HUD), Richard Buchheit (Director, Single Family Mortgage Division, Office of Single Family Housing, HUD), and Sally McCormack (Chief, Insurance Servicing Branch, Single Family Mortgage Division, Office of Single Family Housing, HUD). Plaintiffs seek to hold these individuals liable for consequential and compensatory damage awards to eligible mortgagors. They contend that, should HUD be unable or unwilling to purge itself of contempt and comply with our prior orders by returning those mortgagors to their former homes, or providing them with a comparable home within a reasonable time, an award of damages is appropriate.

Judge Posner, in his concurring opinion in Burroughs said that "[t]he idea that . . . [the] Secretary of Housing and Urban Development might be personally liable for the untoward consequences of HUD's programs during her tenure--a liability that might run into the hundreds of millions of dollars--is almost too silly for words, especially when one considers that there is no indemnification of federal officers against whom a judgment is levied." Id. at 1539 (Posner, J., concurring). However, since the plaintiffs have raised the issue, we must address it. Plaintiffs argue that the above named defendants are liable in their individual capacities

because their actions in implementing the two month rule were in contempt of this Court's prior orders.

Defendants set up three defenses. First, is that the individual respondents are not parties to this litigation because they were not served or given notice of the specific allegations of unlawful conduct alleged against them. Second, is that venue over these non-resident defendants in their individual capacities does not lie in this judicial district, and finally, the shield of qualified immunity is raised as a defense.

The conduct of the individual respondents which is alleged to constitute contempt is as follows. Forest, Buchheit and McCormack instructed field office personnel to determine the date of default by use of the two month rule in a series of at least three training sessions, at least one of which took place in August of 1980. Plaintiffs' Ex. A. The validity of these instructions was challenged by HUD's own field office personnel. Plaintiffs' Exs. A, B, and C. 16 On April 13, 1981, in response to field office inquiries, Forest ordered that the two month rule be used to calculate the date of default in all field offices, and "never to review a later default in the case of a mortgagor who had not remained current for at least two months since the earlier default." Plaintiffs'

Ex. D. 17 Buchheit and McCormack concurred in these directives. Id.

Apparently in October of 1981, Forest advised the Georgia Field Office to continue to use the two month rule in spite of the Etheridge decision which was issued on September 23, 1981. Plaintiffs' Ex. E. 18 Buchheit admits that use of the two month rule was improper after the Etheridge decision, but is not sure if the proper interpretation was ever conveyed to the field offices. Buchheit Deposition at 75-76. McCormack was unaware of the "proper interpretation" and thought that HUD was still to use the two month rule to determine the date of default for chronic delinquents. McCormack Deposition at 13. Buchheit ordered Central Office staff to prepare instructions to all field offices requiring use of the two month rule apparently in October 1981, after the Etheridge decision was issued and further directed staff not to make it sound like a change to the Handbook. Plaintiffs' Ex. F. 19 As late as July 1983, McCormack indicated that the Georgia Field Office was still utilizing the two month rule "across the board." Plaintiffs' Ex. I. 20

The above allegations form a sufficient basis to issue a rule to show cause why each of the individual respondents should not be held in contempt of court for violating the consent decree ordered by this Court on November 8, 1979.

Each of them apparently took part in adopting and implementing the use of the two month rule which curtailed basic rights of mortgagors in violation of the consent decree, and did so without notifying plaintiffs' counsel or the Court of the modification.

We must, of course, initially address their defenses. First, the jurisdictional issue: the individual respondents assert that the Court has not acquired personal jurisdiction over them in their individual capacities because no new or third party complaint was initiated, and because they were not served in accordance with Federal Rule of Civil Procedure 4. Plaintiffs respond that they filed and served upon the individual respondents copies of the Petition for Contempt, Specific Enforcement, and Other Relief which notified respondents of the specific allegations of unlawful conduct alleged against them. ²¹ Plaintiffs assert, without citing authority for the proposition, that no further action is required to obtain personal jurisdiction over the respondents.

Jurisdiction over the person and of the subject matter is essential to sustain a judgment for contempt. Since this Court specifically retained jurisdiction over this action, this civil contempt proceeding is a continuation of the original suit, and the jurisdiction to make the Consent Decree effective is as broad as that which sustains the Consent Decree. Leman

v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 452-53 (1932); Folk v. Standard Business Forms, Inc., 270 F. Supp 147, 155 (W.D.N.C. 1967).

Though Leman is not exactly on point, and we have found no cases which are, it is clear that we have jurisdiction over the persons of the individual respondents. The 1979 Consent Decree bound HUD and its employees, which respondents were at the time of the alleged acts. Federal Rule of Civil Procedure 65(d) provides in relevant part that "every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Fed. R. Civ. P. 65(d). The respondents, as employees and officers of HUD were bound to obey the Consent Decree both in their official and individual capacities. This Court therefore has the power, if required, to enforce the Consent Decree against respondents in both their official and individual capacities.

Here the individual respondents as employees of HUD had notice of the terms of the 1979 Consent Decree, allegedly acted in contempt of that order, and were served with the Petition for Contempt, Specific Enforcement and Other Relief. Therefore they had actual notice of this proceeding and had

an opportunity to respond. Due process requires no more. See, e.g., Vuitton et Fils S. A. v. Carousel Handbags, 592 F.2d 126, 129 (2d Cir. 1979). Personal service of the petition upon the respondents as individuals is all that is required to give this Court in personam jurisdiction over them as individuals. See, e.g., Securities and Exchange Commission v. VTR Inc., 410 F. Supp. 1309, 1313-14 (D.D.C. 1975). If this were not the case, a court's power to punish contempt of its decrees by officers, agents or employees would be limited to those who could be found physically within its jurisdiction. Where, as here, a decree is nationwide in its scope, any person in contempt of the decree is subject to the issuing court's jurisdiction.

On this basis we could hold the individual respondents in contempt as we have done with HUD. See id. However, we believe the better practice is to issue a rule to show cause why each of the individual respondents should not be held in contempt, and to hold a hearing on the matter. Though HUD and the plaintiffs have stipulated to a decision as to HUD on this petition without a hearing, the individual respondents have not so stipulated in their individual capacities.

The 1979 Consent Decree is binding on the respondents not just in the Northern District of Illinois, but throughout the United States. See Leman, 284 U.S. at 451. Disobedience

constitutes contempt of the court which rendered the decree. The contempt lays in the fact, not in the place, of the disobedience whether within or without this district. Id. at 452.

As to the respondents second defense, that venue does not lie in this Court for the respondents as individuals, we must also disagree. Since it was this Court's order which was violated, venue is properly in this Court.

Respondents are correct in their assertion that 28 U.S.C. § 1391 (e), which allows for nationwide venue when an action is essentially against the government, is applicable to them in their official capacities, but not their individual capacities. Stafford v. Briggs, 444 U.S. 527, 542 (1980). "A suit for monetary damages which must be paid out of the pocket of the private individual who happens to be--or formerly was--employed by the Federal Government [as are respondents here] plainly is not one 'essentially against the United States,' and thus is not encompassed by the venue provisions of 28 U.S.C. § 1391 (e)." Id. at 542. However, the cause of action for contempt arose in this district, where the order of the court contemned originated. See Leman, 284 U.S. at 452. Thus venue is proper in this Court, where the cause of action arose, under 28 U.S.C. § 1391 (b) which applies to the respondents as individuals.

The individual respondents' last line of defense is that qualified immunity protects them from personal liability for any monetary damages. The law of qualified immunity was redefined by the Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. . . .

[The] test . . . focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."

Harlow, 457 U.S. at 818-19 (citations omitted).

We have determined that use of the two month rule violated the currently applicable law. We believe that the law was, in fact, clearly established at the time the officials' conduct occurred. See id. at 818. Adoption and use of the two month rule was illegal from its inception for the reasons previously delineated. It is not in accord with the statute and

regulations implementing the National Housing Act as we have previously explained. It is in contravention of the substantive terms of the Amended Stipulation (Consent Decree). It was adopted and implemented without notice to plaintiffs' counsel, which also violated the Amended Stipulation. The Etheridge decision, 532 F. Supp. 266, issued September 23, 1981, merely confirmed the illegality of the two month rule. HUD's own field offices questioned the legality of the two month rule shortly after it was adopted in 1980. See Plaintiffs' Exs. A, B, and C. Clearly respondents knew or reasonably should have known that use of the two month rule was illegal.

The two month rule was adopted just after a series of negotiations regarding HUD's failure to carry out the purposes of the law. These negotiations resulted in the Amended Stipulation being entered as a Consent Decree in November of 1979. Given this history, these HUD officials should, in good faith, have consulted plaintiffs' counsel and the Court before they adopted and implemented a rule which they should have known would violate both statutory law and this Court's order. Certainly, these respondents knew, if they had any doubts before, that the two month rule was illegal after the Etheridge decision, yet they utilized it for almost two more years. Buchheit concedes that use of the two month rule was

improper after Etheridge. Buchheit Deposition at 75-76. Yet, there is no indication that any of these individuals or anyone else at HUD did anything significant to change the illegal practices. On the contrary, they apparently continued surreptitiously to order its use. Therefore, we will issue a rule to show cause why these respondents should not be held in contempt.

XIII

THE BALTIMORE REPROCESSING

Plaintiffs allege that between January 1, 1980 and April 30, 1984 the Baltimore Field Office processed 671 applications for assignment and accepted only 33 (4.9%), which is well below the nationwide acceptance rate for the same period (22.5%). Plaintiffs claim the reason is that improper standards were used in the administration of applications for assignments of mortgages in the Baltimore Field Office. ²² HUD concedes, that "the Baltimore Field Office in the majority of cases was incorrectly applying the Handbook 4330.2 criteria for accepting assignments." Declaration of Alan Kappeler, Defendant's Response, Ex. M. HUD has decided to proceed on its own to reprocess, with certain exceptions, most of the Baltimore assignment requests that were rejected for any reason. ²³ Plaintiffs attempted to enjoin this reprocessing pending our decision here, but we denied their motion. They

request that we decide a number of issues regarding the Baltimore reprocessing. 24

When we denied plaintiffs' motion for a preliminary injunction barring HUD from reprocessing applications for an assignment of mortgage which were rejected by the Baltimore Field Office, we said that we would not prospectively enjoin HUD from correcting its own errors in a manner which HUD contends is proper. HUD should correct its errors. However, we added the caveat: if HUD did an insufficient job, it would have to be redone. If there is evidence that HUD's reprocessing of the Baltimore rejections of assignments is not in compliance with this opinion and the nationwide reprocessing we order here regarding the two month rule, then HUD must correct or redo the Baltimore reprocessing. We stated that, if it appears that HUD's reprocessing was inadequate because HUD failed to utilize the services of a professional locator or to utilize advertisements to locate those who have been wrongfully denied an assignment, then the reprocessing would have to be redone. Preliminary Injunction Hearing November 20, 1984.

The purpose of our prior orders and of this order is to redress HUD's failure to live up to the 1979 decree. Our hope in denying the preliminary injunction of last November was that HUD would voluntarily do the job correctly. HUD proceeded at its own risk, if the reprocessing in Baltimore

or elsewhere turns out not to have met the standards and procedures set out in this opinion.

The Baltimore reprocessing is to be done, from now on, under the jurisdiction of this Court. HUD's efforts to locate class members who have been wrongfully denied an assignment, the procedures used in the reprocessing, and the relief to be granted should all conform with this order regarding the nationwide reprocessing of the two month rule claimants.

XIV

PRIOR NOTIFICATION TO PLAINTIFFS OF MODIFICATIONS

We order HUD to comply with its obligation to provide prior notification to plaintiffs' counsel of any and all modifications, clarifications, deletions, or any other such matters relating to HUD's operation of the mortgage assignment program and the servicing of mortgages accepted for assignment until such time as the reprocessing is complete and judicial oversight of the 1979 consent decree is no longer necessary. Plaintiffs seek to have HUD ordered to disclose essentially all documents relating to the mortgage assignment program. HUD, on the other hand, feels bound to notify plaintiffs' counsel only when it physically amends the language of the Handbook.

Paragraph 3 of the Amended Stipulation 25 provides that "the Department will give notice to plaintiffs' counsel prior

to final action on any modification [of the assignment program]" (emphasis added). It is clear that HUD can and has modified the assignment program without changing the language of the Handbook. In such cases HUD should have notified plaintiffs' counsel prior to final action. HUD asserts that unless the actual Handbook language is changed, its actions constitute clarification and not modification. This is a shameless attempt to get around the clear meaning and intent of paragraph 3 and to make material changes in the procedures without notice either to plaintiffs' counsel or the Court.

Paragraph 3 makes provisions for changing the actual provisions of the Handbook but the intent of the last sentence is to give plaintiffs' counsel notice of any change in the assignment program so that they can exercise their own judgment as to whether it constitutes a curtailment of the basic rights of mortgagors. That includes modifications in HUD's actual practices as well as those in the language of the Handbook. The assignment program obviously was "modified" when HUD adopted the two month rule. HUD apparently contends that the two month rule was "merely" a clarification or interpretation or reinterpretation and not a modification. Yet, it was in fact a substantial modification of what HUD had previously done and thus a modification of which plaintiffs' counsel should have been apprised prior to its being implemented.

Other examples raised by plaintiffs and disputed by HUD are similar.

HUD has attempted to avoid giving the required notice to plaintiffs' counsel, and has done so on more than one occasion. Plaintiffs seek no more than they need or are entitled to receive. In essence, if HUD is going to do something differently than it did in the past, then it should give the required notice. This will enable plaintiffs' counsel to determine for themselves and to raise the question with the Court whether such change adversely affects the rights of mortgagors under the assignment program. Otherwise, HUD is the sole judge of what constitutes a change (that which HUD decides to put into the Handbook), and whether a change curtails basic rights of mortgagors. Given HUD's past performance, it cannot be trusted to exercise such discretion honestly and fairly.

HUD should provide plaintiffs' counsel with prior notice of any modification in the assignment program whether it involves a written change to the Handbook or not, and whether it is denominated a modification, a clarification, deletion, or something else.

HUD's obligation to provide this advance notice is a continuing one since HUD has a continuing obligation, under paragraph 14 26 of the Amended Stipulation, to "provide

assistance or relief in the form of the present assignment program or an equivalent substitute."

XV

MONTHLY STATISTICAL REPORTS

On October 4, 1984, we granted plaintiffs' application for a preliminary and permanent injunction enjoining defendants from failing or refusing to provide statistical information concerning the mortgage assignment program as required by this Court's order of November 8, 1979. We now order HUD to provide similarly organized monthly reports, shortly after the close of each month, informing the Court and plaintiffs' counsel of the progress of the nationwide reprocessing of the two month rule cases, including those in Baltimore, and the reprocessing of all other Baltimore cases. These reports should continue until the reprocessing is complete.

XVI

COSTS AND FEES

Respondents are ordered to pay plaintiffs' costs and attorneys' fees incurred in bringing this action. Costs are allowed to the prevailing party under Federal Rule of Civil Procedure 54(d). See, e.g., Burroughs v. Hills, 741 F.2d 1525, 1532-33, 1537 (7th Cir. 1984). Attorneys' fees are awarded as part of the compensation necessary to make plaintiffs whole and for HUD to purge itself of contempt.

Conclusion

HUD's nationwide use of the two month rule to determine the date of default for the purpose of applying the "circumstances criterion" under the mortgage assignment program was a violation of the Amended Stipulation entered as a Consent Decree in this Court's order of November 8, 1979. HUD is barred from relitigating the issue of the proper method of calculating the date of default by both the law of the case and the doctrine of collateral estoppel or issue preclusion. HUD is barred from presenting extrinsic evidence on the meaning of the Consent Decree because that decree is unambiguous, and because such evidence is barred by the law of the case as well as the doctrine of collateral estoppel. Therefore, we grant plaintiffs' motion to quash the depositions of plaintiffs' counsel and strike the declaration of respondent Forest regarding the settlement negotiations. Plaintiffs' petition is not barred by the doctrine of laches. It being clear that HUD has violated our prior order, and there being no viable defenses, we find HUD in contempt of court.

This Court's orders regarding the proper method of calculating the date of default must be applied retroactively. We order HUD to purge itself of contempt, and to implement this Court's order of November 8, 1979, and to retroactively

comply with this Court's orders relating to the proper method of calculating the date of default.

HUD shall reprocess de novo all applications for assignment of mortgage which were rejected in whole or in part because of HUD's use of the two month rule. Once HUD identifies those potentially eligible for relief, in accordance with our decision, HUD shall use all reasonable means, including use of a professional locator service and advertisements, to notify rejected mortgagors of their right to reprocessing. Mortgagors found to be entitled to relief after reprocessing shall be conveyed their former homes, if available, on terms and conditions not less favorable than existed under the former mortgage plus whatever additional relief would have been appropriate under a timely assignment of the mortgage or at the prevailing FHA mortgage rate, whichever is lower. If not available, they shall be conveyed a comparable property out of HUD's inventory, including new acquisitions as they become available, on a first refusal basis, and at fair market value, either under the terms and conditions not less favorable than their former mortgage plus whatever additional relief would have been appropriate to provide under a timely assignment of mortgage, or at the prevailing FHA mortgage rate whichever is lower.

Plaintiffs' petition for an injunction freezing the sale of all HUD-owned homes is denied, except to the extent

agreed to by HUD as explained in this opinion, to which extent it is granted. HUD is to offer reasonably comparable homes in its inventory within a reasonable geographic area specified by the mortgagor, to each eligible mortgagor on a first refusal basis before contracting to sell any such homes to the general public. The parties will endeavor to agree on details and procedure. If they cannot, we will make the determination.

Compensatory money damages will be available as an alternative form of relief in the event that none of the above relief is possible. Sovereign immunity does not bar an award of monetary damages in this context, and plaintiffs have an explicit cause of action to enforce the 1979 consent decree. In addition, we have the power to award monetary damages as a remedy for civil contempt. There are funds within HUD's control to pay such awards.

A hearing will be set to determine what is a reasonable amount of time to accomplish the reprocessing and to determine the type and measure of any monetary damages to be paid.

We issue a rule to show cause why the individual respondents should not be held in contempt in their individual capacities. They are each properly before the Court, having been served with notice of the specific allegations of unlawful conduct alleged against them. Venue is proper in this Court.

The defense of qualified immunity apparently does not apply given the evidence before us at this time.

The reprocessing of the applications for assignment of mortgage rejected by the Baltimore Field Office for any reason is to be done under the auspices and jurisdiction of this Court. The cases rejected on the basis of the two month rule by the Baltimore office are part of the nationwide reprocessing, the other cases rejected in Baltimore are also to be reprocessed in accordance with this opinion, including provisions for notifying those potentially eligible for relief (use of an independent professional locator service and advertising), as well as the provisions concerning the available relief.

HUD is to comply with its obligations to give plaintiffs' counsel prior notice of any and all modifications of the mortgage assignment program as described in this opinion.

HUD is ordered expeditiously to compile monthly reports on the reprocessing in a manner to be determined. Plaintiffs are entitled to have their costs and attorney fees incurred in bringing this action paid by respondents. An appropriate order will enter.

One final word. We are well aware that this is an overlong and frequently repetitive or redundant opinion. We have deliberately spelled out our holdings and reasons therefor in detail and then reiterated them several times so that HUD will have no basis for ignoring, evading or misunderstanding them. We have endeavored since 1976 to cause HUD and its officials to discharge their statutory duty to assist mortgagors under HUD programs to retain their homes and to protect and maximize the rights of such mortgagors. HUD has entered into a Consent Decree and we have issued orders toward that end which HUD officials have promptly ignored, evaded or purported to misunderstand. We now make one last effort through civil contempt to induce HUD to protect rather than derogate the rights of these mortgagors and to carry out the national housing policy as spelled out in the applicable statutes adopted by the Congress and approved by the President. The only remaining sanction is criminal contempt.

ENTER:


United States District Judge

DATED: MAR 22 1985

Footnotes

1. Letter from Mellie H. Nelson to William P. Wilen, dated August 16, 1984.

2. The prior history of this litigation is summarized in the recent Court of Appeals opinion in this case, reported at 743 F.2d 454 (7th Cir. 1984) (affirming denial of HUD's motion to modify Amended Stipulation). The details of the allegations in the original complaint and the workings of the Mortgage Insurance Program and the Foreclosure Relief Program may be found in our prior opinions in this case, reported as Brown v. Lynn, 385 F. Supp. 986 (N.D. Ill. 1974) (denying motion to dismiss); 392 F. Supp. 559 (N.D. Ill. 1975) (denying reconsideration); and Ferrell v. Pierce, 560 F. Supp. 1344 (N.D. Ill. 1983) (denying motion to modify Amended Stipulation), amended by unpublished order dated July 11, 1983, aff'd, 743 F.2d 454 (7th Cir. 1984).

3. Paragraph 3 of the Amended Stipulation provides:

HUD Handbook 4191.2 [now numbered 4330.2], attached hereto as Appendix A, shall constitute binding instructions for implementation of the assignment program subsequent to the entry of this order. The Department shall administer the assignment program substantially in accordance with the terms of said Handbook. Said Handbook is incorporated hereto by reference and supersedes HM 76-43 and HM Mortgagee Letter 76-9, which documents were contained in this Court's order of July 29, 1976, as Exhibits A and B. The provisions of the Handbook may be modified in accordance with the Department's usual procedures. However, during the term of this Amended Stipulation the Department will not make any modifications which would curtail the basic rights of mortgagors under the program now in existence. The Department will give notice to plaintiffs' counsel prior to final action on any modification.

4. In addition, Paragraph 15 provides:

In consideration of the above agreements the plaintiffs and the plaintiff class members, by and through their attorneys and defendants,

by and through their attorneys, agree to the entry of an Amended Order incorporating the terms of the Amended Stipulation by reference, dismissing their complaint with prejudice, and preserving plaintiffs' right to enforce the Amended Order, subject to the approval of the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

5. We have numbered the sentences in the Note to Paragraph 2-1(d) of the Handbook for easier reference later.

6. Reported as Ferrell v. Pierce, 560 F. Supp. 1344 (N.D. Ill. 1983).

7. See supra text accompanying note 5.

8. Plaintiffs properly point out that 24 C.F.R. § 203.331 supports their position that the date of default is "30 days after . . . the first failure to make a monthly payment which subsequent payments . . . are insufficient to cover." 24 C.F.R. § 203.331. Defendants argue that this section by its very terms does not apply to the assignment program, only to the mortgage insurance program. We agree with plaintiffs that under the assignment program, HUD is required to ascertain the current default by reference to payments made by the mortgagor and accepted by the mortgagee. The making of these payments and their effect on the mortgagor's status vis-a-vis the mortgagee are governed by subpart B of §203, to which §203.331 does apply. In addition, the Handbook requires familiarity with the Mutual Mortgage Insurance Regulations contained in 24 C.F.R sections 257-203.662. Handbook forward. When §203.330 was amended in 1976, the purpose of the amendment was not, as HUD argues, to insure that §203.331 did not apply to the assignment program, nor was it intended to reduce HUD's pay out to mortgagees after a foreclosure, but rather to "reflect existing requirements developed over the course of years which" had previously been set forth in HUD notices. citing 41 F.R. 33604 (August 30, 1976).

9. Plaintiffs argue that even absent a finding of contempt we have the equitable power to award monetary damages, if necessary to achieve fair remedial results. They cite Smith v. Miller, 665 F.2d 172, 174-75 (7th Cir. 1981);

Alexander v. Hill, 707 F.2d 780, 783 (4th Cir.), cert. denied, 104 S.Ct. 206 (1983) and other cases. Because we have found HUD to be in contempt, we do not address this issue.

10. The Secretary may delegate any of [his] functions and powers, . . . and may make such expenditures . . . as are necessary to any of the provisions of [among others] . . . subchapter II [which includes the Mortgage Insurance Program and the Mortgage Assignment Program] . . . without regard to any other provisions of law governing the expenditure of public funds. All such compensation, expenses, and allowances shall be paid out of funds made available by this chapter: Provided that . . . other necessary expenses not attributable to general overhead in accordance with generally accepted accounting principles shall be considered nonadministrative and payable from funds made available by this chapter, except that . . . expenditures made in any fiscal year pursuant to this proviso . . . shall not exceed 35 percentum of the income received by the department of Housing and Urban Development from premiums and fees during the preceding fiscal year.

12 U.S.C. § 1702.

11. Upon receiving notice of default of any mortgage covering a one-, two-, three-, or four-family residence . . . insured under this chapter, the Secretary, in his discretion and for the purpose of avoiding foreclosure of the mortgage, . . . may acquire the loan and security therefor. . . .

12 U.S.C. § 1715u.

12. See supra note 3.

13. See supra text accompanying note 4.

14. See supra note 4.

15. Throughout this opinion, thus far, we have spoken of the defendant or HUD, meaning the Secretary in his or her official capacity. As the other respondent officers of HUD in their official capacities are superfluous, we now address the question of their potential individual liability.

16. See generally supra section VII of this opinion. Plaintiffs' Exhibit A is a memorandum dated November 24, 1980 from Victor Hollis, Tampa Supervisor, on behalf of himself and Eva Davidson, Chief of Loan Management Division of the Tampa, Florida HUD Office to J. C. Coile, Deputy Director for Management of the Jacksonville, Florida HUD Office.

Plaintiffs' Exhibit B is a Memorandum dated December 18, 1980 from J. C. Coile to Julius Williams, Director, Single-Family Loan Servicing Division, Central Office, and includes a copy of Exhibit A. It questions the validity of the two month rule in light of the regulations.

Plaintiffs' Exhibit C is a Memorandum dated March 19, 1981 from J. C. Coile to Richard B. Buchheit, Director, Single Family Loan Servicing, Central Office. It includes copies of Exhibits A & B, and requests verification of the two month rule.

17. Plaintiffs' Exhibit D is a memorandum dated April 13, 1981 from Philip E. Forest, Office of the Deputy Assistant Secretary for Single Family Housing and Mortgage Activities, Central Office, to J. C. Coile. It was concurred in by Respondents McCormack and Buchheit and it confirms that the two month rule is "the correct procedure"

18. Plaintiffs' Exhibit E is a memorandum received October 13, 1981 from William A. Hartman, Area Manager of the Georgia Office to Philip E. Forest, Central Office, confirming an October 1, 1981 telephone conversation between Forest and Macie Helton in which Forest advised the Georgia Field Office to continue using the two month rule after the Etheridge decision.

19. Plaintiffs' Exhibit F is an undated longhand note to central office staff instructing them to prepare instructions to all the field offices requiring use of the two month rule. Buchheit specifically instructed the staff not to make it sound like a change to the Handbook. This memo was apparently

issued on October 8, 1981. However, even if it was issued prior to the Etheridge decision, it still indicates an intent to violate the notice provision in Paragraph 3 of the Amended Stipulation.

20. Plaintiffs' Exhibit I is a memorandum from Respondent Sally McCormack to Ann Sudduth apparently written in July of 1983. It confirms that at that time the Tampa Office was still using the two month rule "across the board."

21. We note that McCormack and Forest were served personally with the Petition for Contempt, Specific Enforcement and Other Relief in accordance with Federal Rule of Civil Procedure 4(c)(1) and 4(d)(1). However, Buchheit was served in his individual capacity only by leaving a copy with his secretary at his HUD office. While this is certainly sufficient service on him in his official capacity, it does not meet with the letter of the language of Federal Rule of Civil Procedure 4(d)(1) for abode service. Mr. Buchheit's secretary may have been authorized to accept service of process for Buchheit and in any event Buchheit has actual notice of this proceeding and is within the jurisdiction of this court.

22. Plaintiffs allege that:

From at least January 1, 1980 and continuing to the present, the Baltimore Field Office of HUD has engaged in a pattern and practice of violation of the November 8, 1979 Order and the Amended Stipulation. Said violations include but are not limited to, as follows:

(a) denying applications on the basis that the applicant is a "chronic delinquent" in violation of 24 C.F.R. § 203.650(a)(5) and Handbook ¶ 2-1d;

(b) denying applications on the basis that the applicant does not, at the time of application, have sufficient current (not prospective) income or have a job, in violation of 24 C.F.R. § 203.650(a)(6) and Handbook ¶ 2-1e;

(c) denying applications on the basis of the "two month" rule for determining the date

of default, in violation of 24 C.F.R. §§ 203.330, 203.331, 203.650(a)(5), and Handbook ¶ 2-1d;

(d) failing to ascertain whether cases referred to the mortgagee for further servicing are brought current through a forbearance agreement, failing to ascertain whether the mortgagor and mortgagee agree on a reasonable payment plan, failing to require that the Office's letter returning the case to the mortgagee specify the type of relief to be provided, the reasons the case is being returned, and the action the mortgagee should take if additional relief is not successful in reinstating the account, failing to ascertain whether the mortgagee complies with the assignment program requirements if the account again goes into default, and failing to reopen cases where additional relief does not bring about reinstatement, in violation of Handbook, ¶¶ 3-6.

Plaintiffs' Petition at 17-18.

23. The declaration of Alan Kappeler, HUD's Exhibit M, discusses the ongoing reprocessing effort that is being conducted in the HUD Baltimore Field Office. He states:

After it came to the attention of the HUD central office that the Baltimore field office might be incorrectly implementing HUD's assignment program, HUD conducted a sampling of case files and found that the Baltimore Field office in the majority of cases was incorrectly applying the Handbook 4330.2 criteria for accepting assignments. On this basis, HUD decided to voluntarily reprocess all Baltimore assignment requests rejected for any reason, to the extent that case files are available, with the following exceptions:

(a) cases returned to the mortgagee for further servicing unless later reopened on subsequently rejected;

(b) cases where the mortgage is current now either under the mortgage or a payment plan;

(c) cases where the mortgagor did not return form 92068F; or

(d) cases where the mortgagor sold the home prior to foreclosure.

(e) cases which the Baltimore office has already correctly reprocessed.

HUD will notify all mortgagors not in these excepted categories of the availability of reprocessing. Upon the mortgagor's request HUD will reopen the case.

In reprocessing these cases, HUD will use the assignment standards as specified in the Handbook. However, in compliance with this Court's April 16, 1984 Order, HUD will use the date of default as defined in this Court's opinions of April 4, and July 11, 1983 and will look at the former mortgagor's current reasonable prospects for repayment.

24. Plaintiffs request the Court to decide a number of issues regarding the Baltimore reprocessing. First, whether the de novo reprocessing of all cases rejected for an assignment of mortgage or returned to the mortgagee for further servicing should be done by HUD or a court-approved independent accounting company. HUD is to do the reprocessing. Second, what is the time frame of the cases to be reprocessed and the types of cases to be reprocessed. In accord with the general principles we have set forth, all cases improperly rejected should be reprocessed unless mooted. Third, whether all persons in cases rejected for an assignment or returned to the mortgagee for further servicing should be notified by registered letter and by first class mail and the amount of time mortgagors will have to respond to the letter informing them of their right to reprocessing, and whether HUD should use the services of a professional locator service, and whether HUD should use press releases and advertisements. All of these issues go to the effectiveness of the notice. We have already required HUD to use a professional locator service, that applies here as well. In addition it may be necessary to use advertisements, etc., as was done in the 1979 reprocess-

ing. Essentially HUD should use all reasonable means to contact those who were injured by its application of improper standards, and should allow a reasonable time to respond to the letter or other method of notice with enough flexibility to allow effective relief to those who are eligible.

The other issues raised by plaintiffs can be worked out with the above principles in mind. We note that it would be proper to include notice that the reprocessing is proceeding under the auspices of the court. We also note that the relief to be provided is to be in accordance with this order as to the relief to be granted to the two month rule claimants in the nationwide reprocessing.

25. See supra note 3, for full text of paragraph 3 of the Amended Stipulation.

26. See supra text accompanying note 4, for text of paragraph 14 of the Amended Stipulation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES & JOYCE FERRELL, et al.,)
)
Plaintiffs,)
)
v.) No. 73 C 334
) Hon. Hubert L. Will
SAMUEL R. PIERCE, Secretary,)
Department of Housing & Urban)
Development (HUD), et al.,)
)
Defendants.)

JUDGMENT ORDER

In accordance with the court's March 22, 1985 memorandum opinion and order, which shall constitute the findings of fact and conclusions of law required by Fed. R. Civ. P. ("Rule") 52(a) and 65(d), it is hereby ordered, adjudged and decreed that:

1. HUD's use of the two month rule to determine the date of default for the purpose of applying the "circumstances criterion" under the mortgage assignment program violated paragraphs 3 and 14 of the Amended Stipulation and this court's Order of November 8, 1979.
2. HUD is barred from relitigating the issue of the proper method of calculating the date of default under the assignment program by both the law of the case and the doctrine of collateral estoppel.
3. HUD is barred from presenting extrinsic evidence on the meaning of the Consent Decree as the decree is unambiguous; HUD is further barred from presenting extrinsic evidence on the

meaning of the Consent Decree by the law of the case and by the doctrine of collateral estoppel.

4. Plaintiffs' motion to quash the depositions of plaintiffs' counsel and to strike the declaration of Respondent Philip Forest regarding the settlement negotiations is hereby granted.

5. Plaintiffs' Petition for Contempt, Specific Enforcement and Other Relief is not barred by the doctrine of laches.

6. Respondent United States Department of Housing and Urban Development (HUD), and Respondent Samuel R. Pierce, Jr. in his official capacity as Secretary of HUD are hereby adjudged to be in contempt of court for violation of the court's November 8, 1979 Order.

7. HUD is further ordered to purge itself of contempt, to implement this court's order of November 8, 1979, and to retroactively comply with this court's orders of April 7, 1983; July 11, 1983 and April 5, 1984 relating to the proper method of calculating the date of default under the assignment program.

8. HUD is further ordered to reprocess de novo all applications for assignment of mortgage which were rejected in whole or in part because of HUD's use of the two month rule between January 1, 1980 and July 11, 1983.

(a) Once HUD identifies those persons potentially eligible for relief, HUD shall use all reasonable means, including use of a professional locator service and advertisements, to notify rejected mortgagors of their right to reprocessing.

(b) Mortgagors found to be entitled to relief after reprocessing shall be conveyed their former homes, if available, on terms and conditions not less favorable than existed under the former mortgage plus whatever additional relief would have been appropriate under a timely assignment of the mortgage or at the prevailing FHA mortgage rate, whichever is lower.

(c) If the mortgagors' former home is not available, HUD shall convey to mortgagors a comparable property out of HUD's inventory, including new acquisitions as they become available, on a first refusal basis, and at fair market value, either under the terms and conditions not less favorable than their former mortgage, plus whatever additional relief would have been appropriate to provide under a timely

assignment of mortgage, or at the prevailing FHA mortgage rate, whichever is lower.

9. Plaintiffs' petition for an injunction freezing the sale of all HUD-owned homes is denied except that where the property of a mortgagor who may have been affected by HUD's use of the two month rule is still in HUD's unsold inventory, HUD shall freeze the sale of such property and reconvey it to the insured mortgagor if desired and if found eligible in the reprocessing. This order is without prejudice to plaintiffs reapplying for injunctive relief if conditions warrant such application in the future. HUD shall also request the mortgagee to halt foreclosure proceedings pending HUD's expedited determination in a de novo reprocessing of the request for an assignment of mortgage in cases where mortgagors eligible for reprocessing still reside in their HUD-insured homes and foreclosure has not yet occurred.

10. HUD shall offer reasonably comparable homes in its inventory to mortgagors found eligible for assignment of mortgage during reprocessing. The homes shall be located within a reasonable geographic area specified by the mortgagor and shall be offered to each eligible mortgagor on a first refusal basis before HUD contracts to sell any such home to the general public.

11. The parties are directed to endeavor to agree on the details and procedures for reprocessing; in the event the parties are unable to agree, the court shall make the final determination.

12. In the event eligible mortgagors are not conveyed their former property or a comparable property within a reasonable time, HUD is ordered to pay to mortgagors compensatory money damages. Sovereign immunity does not bar an award of such damages in this context, and plaintiffs have an explicit cause of action to enforce the 1979 Consent Decree. In addition, compensatory monetary damages may be awarded by this court as a remedy for civil contempt. The court further finds that there are funds within HUD's control to pay such awards.

13. A hearing will be scheduled by the court to determine what is a reasonable amount of time to accomplish the reprocessing and to determine the type and measure of any compensatory monetary damages to be paid.

14. A rule to show cause why Respondents Philip Forest, Richard Buchheit and Sally C. McCormick should not be held in contempt of court in their individual capacities is hereby issued against said respondents. The court further finds that each respondent is properly before the court, having been served with notice of the specific allegations of unlawful conduct alleged against them. Venue is proper in this court. The defense of qualified immunity apparently does not apply given the evidence before the court at this time.

15. HUD is ordered to reprocess all applications for assignment of mortgage rejected by the Baltimore Field Office for any reason from January 1, 1980 to June 25, 1984; said reprocessing is to be done under the auspices and jurisdiction of this court. The cases rejected on the basis of the two month rule by the Baltimore Office are part of the nationwide reprocessing; the other cases rejected in Baltimore are also to be reprocessed in accordance with this order and the court's memorandum opinion of March 22, 1985, including provisions for notifying those potentially eligible for relief (use of an independent professional locator service and advertising) as well as the provisions concerning available relief.

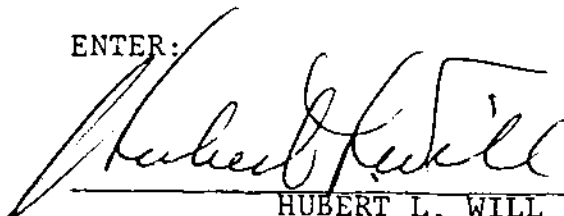
16. HUD is to provide prior notification to plaintiffs' counsel of any and all modifications, clarifications, deletions, or any such matters relating to HUD's operation of the mortgage assignment program and servicing of mortgages accepted for assignment until such time as reprocessing is complete and judicial oversight of the 1979 Consent Decree is no longer necessary. This requirement applies to any modification of the assignment program whether it involves a written change to the Handbook or not, and whether it is denominated a modification, a clarification, a deletion or something else.

17. HUD is ordered to expeditiously compile monthly reports and provide said reports to the court and to plaintiffs' counsel. The reports shall be similar to the monthly reports required by this court's order of November 8, 1979, shall include data on the nationwide reprocessing of the two month rule cases, including those in Baltimore, and the reprocessing of all other Baltimore cases. These reports shall continue until reprocessing is complete. A further order relating to the specific content of the monthly reports shall be issued at a later date.

18. Respondents are ordered to pay plaintiffs' costs and attorneys' fees incurred in bringing this action.

19. This court specifically retains jurisdiction of this cause to insure that the terms of this order and the March 22, 1985 Memorandum Opinion are fully implemented by defendants.

ENTER:



HUBERT L. WILL
UNITED STATES DISTRICT JUDGE

MAR 28 1985

DATED: _____