

1989

Keith C. Williams v. Commercial Security Bank aka Key Bank of Utah : Brief in Opposition to Certiorari

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

890361

IN THE SUPREME COURT OF THE STATE OF UTAH

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| KEITH C. WILLIAMS, |) | RESPONDENT'S BRIEF IN |
| |) | OPPOSITION TO PETITION |
| Plaintiff/Appellant |) | FOR WRIT OF CERTIORARI |
| and Petitioner, |) | |
| |) | |
| vs. |) | |
| |) | |
| COMMERCIAL SECURITY BANK, aka |) | No. 890361 |
| KEY BANK OF UTAH, a Utah |) | |
| corporation, |) | |
| |) | CATEGORY 13 |
| Defendant and |) | |
| Respondent. |) | |

PETITION FOR REVIEW BY WRIT OF CERTIORARI
OF ORDER OF AFFIRMANCE OF THE UTAH COURT
OF APPEALS (JUDGES JACKSON, ORME AND GARFF)

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in concluding that the defendant did not breach any duty it owed to the plaintiff, and, if so, does that error constitute "special and important reasons" for granting review by writ of certiorari?

OPINION OF THE COURT OF APPEALS

The Court of Appeals decided Williams' appeal as an expedited appeal under Rule 31 of the Rules of the Utah Court of Appeals. After oral argument, the Court of Appeals entered its unpublished order affirming the judgment of the district court. A copy of the Order is attached to Williams' Petition for Writ of Certiorari as Appendix "A". A copy of the district court's Ruling on Motion for Summary Judgment (with gratuitous underlining added

by plaintiff's counsel) is attached to Williams' petition as Appendix "B".

JURISDICTION

The decision sought to be reviewed was dated July 12, 1989, and was filed on July 13, 1989. The jurisdiction of this Court is based on sections 78-2-2(3)(a), 78-2-2(5) and 78-2a-4 of the Utah Code.

CONTROLLING RULES AND REGULATIONS

This case involves Utah Rule of Civil Procedure 56 and 24 C.F.R. § 203.32(c), the pertinent text of which is set forth in the Appendix.

STATEMENT OF THE CASE

A. Nature of the Case

The plaintiff, Keith C. Williams, brought this action against Commercial Security Bank ("CSB" or the "Bank"), seeking damages for CSB's rejection of his loan application.¹

¹ The plaintiff's legal theories have shifted during the course of this litigation. The complaint included two claims for relief. The first appeared to be for misrepresentation, and the second for negligence. The trial court treated the plaintiff's claims as such. Appellant's Petition for Writ of Cert. app. B at 4 (Record at 137). In the Court of Appeals, the plaintiff characterized his claims as claims for negligence and breach of contract. Appellant's Brief at 5. Apparently, the only claim that Williams makes before this Court is that the Bank breached "a duty to use skill, and diligence in following controlling HUD regulations." Petition for Writ of Cert. at iii.

B. Course of the Proceedings

After discovery, CSB moved for summary judgment on both of Williams' claims. The trial court granted CSB's motion, and Williams appealed. This Court poured the case over to the Court of Appeals for disposition. The Court of Appeals set the matter for an expedited hearing under Rule 31 of the Rules of the Utah Court of Appeals. Following the hearing, the Court entered its order affirming the judgment of the district court.

C. Statement of Relevant Facts

1. At all times relevant to this action, CSB was a banking corporation with its principal place of business in Salt Lake City, Utah, and with a fully operational branch office in Price, Carbon County, Utah. Record at 55 ¶ 1.²

2. The Federal Housing Administration ("FHA") is an organizational unit within the United States Department of Housing and Urban Development ("HUD") that insures certain home mortgages. See 24 C.F.R. §§ 200.2 & 200.3 (1988).

3. Before December 1986, HUD appointed CSB a "direct endorsement lender" and qualified Harriet Wilkinson, one of CSB's officers, as a "direct endorsement underwriter." As such, CSB

² All material facts CSB set forth in its statement of facts in support of its motion for summary judgment that Williams did not specifically controvert in his memorandum in opposition to CSB's motion were deemed admitted. See Rule of Practice in the District Courts and Circuit Courts of the State of Utah 2.8(e) (superseded 1989).

and Ms. Wilkinson had authority to accept applications for FHA-insured mortgage loans, to evaluate them and to decide whether the loan application met the credit and underwriting standards of HUD. Record at 56 ¶ 2.

4. A direct endorsement underwriter has full, unconditional authority to determine whether a loan application complies with FHA rules and regulations. Deposition of Byron Vaun Bateman [hereinafter "Bateman Depo."] at 18. If she concludes that the application does, she submits the application to the HUD regional office, which then issues an FHA insurance endorsement. Id. Those FHA loan applications that CSB accepted as a direct endorsement underwriter were referred to the HUD Region VIII Field Office in Salt Lake City. Record at 56 ¶ 2.

5. FHA regulations in effect in mid-1985 precluded FHA approval of a loan application if there was recorded against the property a trust deed other than the trust deed securing the loan to be insured. Id. at 56 ¶ 3.

6. In October 1985, the HUD Region VIII Field Office circulated and CSB received a letter dated October 15, 1985, called "Circular Letter 14-85," stating that FHA would now insure first mortgages on properties for which a second mortgage existed if certain conditions were met. One of those conditions was that the repayment terms of the second mortgage could not "provide for a balloon payment before ten years or such other term as the

Commissioner may approve."³ Id. at 57 ¶ 3; Bateman Depo. Ex. 2 at 2-3.

7. On or about December 8, 1986, Mr. Williams submitted an FHA Residential Loan Application to CSB at its Price, Utah, branch. Mr. Williams was seeking an FHA-insured loan to refinance his home. Record at 58 ¶ 5.

8. The Application was submitted to Ms. Wilkinson, the direct endorsement underwriter, for her approval. Id. ¶ 4.

9. In processing Mr. Williams' loan application, CSB obtained a title report on Mr. Williams' property, which indicated that Mr. Williams had given his employer, Utah Power & Light Company ("UP&L"), a second deed of trust on his property in the amount of \$10,000. Id. at 58-59 ¶ 6.

10. After Ms. Wilkinson reviewed the UP&L note and trust deed, she determined, in the exercise of her authority and discretion as a direct endorsement underwriter, that the second mortgage on Mr. Williams' property did not comply with the FHA requirements for secondary financing set out in Circular Letter 14-85, codified at 24 C.F.R. § 203.32(c)(4), because the balance under the note could become payable before ten years if (1) Mr. Williams sold or transferred the property, (2) he no longer occupied it as a principal residence, (3) he was transferred by UP&L, or (4) his

³ The term "Commissioner" refers to the Federal Housing Commissioner acting on behalf of the Secretary of HUD. See 24 C.F.R. § 200.4(b).

employment with UP&L terminated. The UP&L trust deed was to remain as a second lien on the property if CSB granted the loan. Record at 59-60 ¶ 7.

11. Ms. Wilkinson then telephoned the Region VIII Field Office of HUD and was told that Williams' second mortgage did not comply with the balloon payment provisions of the FHA requirements. Id. at 35 ¶ 9; Deposition of Harriet Wilkinson [hereinafter Wilkinson Depo.] at 27; Bateman Depo. at 24 & Ex. 6.

12. CSB then notified Mr. Williams that his loan application could not be processed for FHA mortgage insurance because it did not comply with the FHA secondary financing requirements. Record at 60-61 ¶¶ 8 & 9.

13. In his deposition, Mr. Bateman, the supervisory realty specialist at the Region VIII Field Office of HUD, who is in charge of supervising the underwriting of loan applications, testified that a direct endorsement underwriter would be within her authority and discretion in declining an application for an FHA-insured loan if a second mortgage like the UP&L mortgage on Mr. Williams' property existed. He further testified that, in his opinion as an FHA administrator, Ms. Wilkinson's interpretation of Circular Letter 14-85 was a fair interpretation. Bateman Depo. at 27.

ARGUMENT

I. WILLIAMS HAS NOT SHOWN "SPECIAL AND IMPORTANT REASONS" FOR GRANTING REVIEW OF THE COURT OF APPEALS' ORDER.

A party seeking review by writ of certiorari must show "special and important reasons" for granting review. R. Utah S. Ct. 43. The only reason for issuing a writ of certiorari that Williams offers is that the summary judgment entered by the trial court and affirmed by the Court of Appeals "is wrong." Appellant's Petition for Writ of Cert. at 16. Review by writ of certiorari is generally reserved for those cases that present important and unsettled legal issues. A petitioner cannot meet his burden of justifying discretionary review simply by claiming that the lower courts, which fully considered his arguments and rejected them, were "wrong." The fact that a lower court may have made a mistake, without more, is not a sufficiently "special" or "important" reason for invoking this Court's jurisdiction.

Even if a petitioner could obtain review by writ of certiorari simply by showing that the lower court was "wrong," review by certiorari is not justified in this case because the decisions of the lower courts were correct. Williams claims that the lower courts erred in three respects: (1) in finding that there was no genuine issue of material fact, (2) in concluding that the Bank was not negligent, and (3) in finding that the Bank had authority to reject Williams' application without referring it to HUD. Only

the last error is encompassed in Williams' statement of the questions presented for review, but since Williams devotes as much of his petition to the first two alleged errors as to the third, CSB will address each of these claims in turn.⁴

II. THE LOWER COURTS CORRECTLY CONCLUDED THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT.

Although not raised as an issue for this court's review, Williams disputes the trial court's conclusion (affirmed by the Court of Appeals) that summary judgment was appropriate because there was no genuine issue of material fact.

The trial court correctly concluded that the material facts of this case were undisputed. Williams tried to create a factual dispute in the lower courts by arguing that Ms. Wilkinson's affidavit was inconsistent with her deposition testimony.⁵ In her affidavit, Ms. Wilkinson stated, in pertinent part, that she telephoned the HUD regional office in Salt Lake City and that the "party who answered the telephone at the FHA Region [VIII] Office, verified that the secondary financing by Utah Power & Light on Mr.

⁴ Williams also devotes one point of his argument to his claim that the loss of future interest savings is compensable. The question of whether or not the plaintiff had suffered a compensable loss was never an issue in the courts below and was never ruled on.

⁵ CSB does not dispute point III of Williams' petition. It is simply irrelevant since, as shown below, Ms. Wilkinson's affidavit did not conflict with her deposition testimony in any material respect.

Williams['] property was not acceptable under FHA guidelines." Record at 35 ¶ 9. In her deposition, Ms. Wilkinson testified that she contacted HUD to be sure that there had been no change in its procedures and circulars since Circular Letter 14-85 was issued. See Wilkinson Depo. at 13 & 47.

Ms. Wilkinson's statements in her affidavit and deposition are not inconsistent. Although her purpose in calling HUD may have been merely to find out if there had been any change in the FHA requirements, she was nevertheless told that Mr. Williams' secondary financing did not meet the FHA conditions. Mr. Williams ignores Ms. Wilkinson's deposition testimony in which she stated, consistent with her affidavit, that she told HUD that Williams' other loan called for a balloon payment upon the termination of Mr. Williams' employment and was told that the secondary financing would not meet the FHA requirements. See Wilkinson Depo. at 7-8, 27 & 34. Moreover, Mr. Williams ignores Mr. Bateman's deposition testimony, in which he confirmed that someone at the HUD regional office told Ms. Wilkinson that Mr. Williams' secondary financing did not comply with the ten-year condition of the FHA regulations. Bateman Depo. at 24-25. Finally, Richard P. Bell, the manager of the Region VIII office, wrote Mr. Williams' attorney in 1988 and confirmed that "it was the opinion of our office" that Mr. Williams' secondary financing conflicted with FHA requirements and that "[w]e do have recollection of [so telling Ms. Wilkinson]." Bateman Depo.

Ex. 6. None of this testimony was disputed, nor did the plaintiff point to anything in the record to show that HUD did not tell Ms. Wilkinson that Mr. Williams' secondary financing was unacceptable, as he was required to do under Rule 56(e). The only basis for Williams' claim of error is his inference that, because Ms. Wilkinson's purpose in calling HUD was to determine whether there had been any change in the applicable regulations, the subject of Mr. Williams' second mortgage must not have been discussed. However, that inference is refuted by the undisputed facts in the record that show that HUD did tell Ms. Wilkinson that it thought Mr. Williams' secondary financing was unacceptable. The plaintiff's bare assertion to the contrary simply does not raise a genuine issue of fact.

III. THE LOWER COURTS CORRECTLY CONCLUDED THAT CSB WAS NOT NEGLIGENT.

Williams claims that the lower courts erred in concluding that CSB was not negligent. The lower courts correctly concluded that, as a matter of law, Williams had no claim against CSB for negligence.

It is axiomatic that, to succeed on a negligence claim, the plaintiff must establish that the defendant owed him a duty of care and that the defendant breached that duty.⁶ Smalley v.

⁶ CSB does not dispute Williams' second point V in his petition, namely, that a bank's duties are questions of law. CSB simply claims that there was no evidence that it breached its duty

Rio Grande W. Ry. Co., 34 Utah 423, 450, 98 P. 311 (1908). A bank owes its customers a duty to exercise ordinary care. Arrow Indus., Inc. v. Zions First Nat'l Bank, 767 P.2d 935, 940 (Utah 1988).

Assuming arguendo that a loan applicant such as Mr. Williams is a "customer" of the bank, there is simply no evidence that CSB failed to exercise ordinary care in handling Mr. Williams' loan application. As a direct endorsement underwriter, CSB had full and unconditional authority to act as HUD's agent to approve or decline FHA applications without any prior approval from HUD. See Bateman Depo. at 14, 17-18; id. Ex. 6. Mr. Bateman, the HUD Region VIII Field Office employee who supervised the underwriting of loan applications, testified that a direct endorsement underwriter would be within her authority and discretion in declining an FHA application where a second note and trust deed like Mr. Williams' were presented and that it would be a fair interpretation of the 1985 circular that Mr. Williams' application would not qualify for FHA insurance. Id. at 27. Nevertheless, Ms. Wilkinson did contact HUD and was told that Mr. Williams' secondary financing was unacceptable. None of this testimony was refuted.

of care. Although claims of negligence ordinarily raise questions to be resolved by the trier of fact, where, as here, the relevant facts are undisputed and only one reasonable conclusion can be drawn from them, such questions become questions of law that the court can resolve on summary judgment. See, e.g., Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983).

To establish a claim for negligence, the plaintiff must show unreasonable conduct on the part of the Bank. Noonan v. First Bank of Butte, 740 P.2d 631, 636 (Mont. 1987). And the undisputed testimony shows that CSB acted reasonably in handling and turning down Mr. Williams' application. Williams' negligence claim therefore failed as a matter of law.

IV. THE LOWER COURTS CORRECTLY CONCLUDED THAT CSB DID NOT BREACH ANY DUTY IT OWED WILLIAMS BY NOT SUBMITTING HIS LOAN APPLICATION TO HUD.

Unable to show that CSB acted unreasonably, Williams argues that CSB had a duty to submit his application to HUD for regular processing.⁷ He argues that the 1985 HUD regulations deprived the direct endorsement underwriter of her authority to approve applications where there was a balloon second mortgage.

Williams reads too much into the HUD regulations. They do not deprive the direct endorsement underwriter of her authority and discretion to approve or reject applications for FHA-insured

⁷ Williams claims in point V of his petition that CSB's breach of this alleged duty gives rise to claims for both negligence and breach of contract. See Appellant's Petition for Writ of Cert. at 15-16. Apart from the fact that Williams asserted his breach of contract theory for the first time on appeal, point V of his petition is irrelevant. Both of plaintiff's theories are premised on the breach of the same duty--CSB's alleged duty to submit Williams' application to HUD. Because no such duty existed and because Williams was not hurt by any breach of the alleged duty, see infra part V, it does not matter whether he sufficiently alleged a claim for breach of contract. Williams' contract claim must stand or fall with his negligence claim, and, for the reasons discussed in parts III through V, the lower courts correctly concluded that Williams had no claim against CSB for negligence.

mortgages. They simply require approval of the Commissioner if the lender wants to approve a mortgage where the second mortgage provides for a balloon payment before ten years. If the lender decides not to seek the Commissioner's approval, there is no duty to submit the application to HUD. The very letter that Williams relies on as a source of the alleged duty makes it clear that the direct endorsement underwriter had discretion to submit the claim to HUD or not. The letter states, "If a lender wishes to request a balloon term less than 10 years, the lender submits the case to the local FHA office just as with regular processing." Appellant's Petition for Writ of Certiorari, app. E at 2 (emphasis added). Moreover, Circular Letter 14-85 states, "In only those rare cases where [direct endorsement] underwriters really hesitate to commit, would we welcome the opportunity to accept the application under regular processing." Bateman Depo. ex. 2 at 2 ¶ 4. Under Williams' own theory of the case, Ms. Wilkinson did not hesitate in concluding that the UP&L loan did not meet FHA's secondary financing requirements; she only contacted the HUD regional office to see if the FHA requirements had changed.

In short, the lower courts correctly concluded that CSB did not owe Williams any duty to submit his application to HUD.

V. WILLIAMS WAS NOT INJURED BY CSB'S FAILURE TO SUBMIT HIS APPLICATION TO HUD.

Even if CSB owed Williams a duty to submit his application to HUD, Williams was not hurt by any breach of that duty. Under the applicable procedure, if CSB had wanted to seek the Commissioner's approval of Mr. Williams' secondary financing, it would have had to submit his application as with regular processing. Under regular processing, the loan application is submitted to the HUD field office having jurisdiction over the area where the property is located. In this case, that would be the Region VIII Field Office. The field office determines whether the application meets the eligibility requirements and either accepts or rejects the application. See 24 C.F.R. §§ 200.142 through 200.146. In this case, the field office determined that Mr. Williams' application would not qualify for FHA insurance given his second mortgage with its balloon payment provision and so informed Ms. Wilkinson. See, e.g., Bateman Depo. at 24 & ex. 6. Mr. Bateman testified that it was the consensus of the Region VIII Field Office at the time CSB was processing Mr. Williams' application that his secondary mortgage conflicted with the FHA requirements and that FHA "would not insure the loan if it were closed." Bateman Depo. at 35. Thus, even if CSB had submitted Mr. Williams' application for regular processing, at the time it would have been submitted the Region VIII Field Office would have rejected it.

Williams makes much of the fact that, in 1988, the HUD Region VIII Field Office indicated that the plaintiff's loan application would probably qualify for FHA insurance despite his secondary financing. See Record at 108-09; Bateman Depo. ex. 5. However, Williams overstates the region office's position. The region office merely concluded, after meeting with Williams' counsel, reviewing the UP&L loan documents and discussing the matter with its Washington underwriters, that "even though the issue raised" by the balloon payment "was still in question and not clearly resolved, and represented considerable risk to FHA and could jeopardise [sic] Mr. Williams' ability to perform on the FHA's portion, we decided to give benefit of the doubt to Mr. Williams." Bateman Depo. ex. 6 at 1 (emphasis added). Obviously, CSB, with its obligations as a direct endorsement underwriter to follow the applicable rules and regulations, owed Mr. Williams no duty to give him the benefit of any doubt and was not negligent for failing to do so.

CONCLUSION

Williams' claim that the lower courts erred is based on two premises: (1) that CSB had a duty to submit his application to HUD, and (2) that, if CSB had submitted the application to HUD, HUD would have accepted it. As shown above, neither premise is true. Because CSB's motion for summary judgment was fully supported by the record, the burden shifted to Williams to "set forth specific facts showing that there is a genuine issue for trial."

Utah R. Civ. P. 56(e). Williams failed to meet this burden, and the lower courts correctly concluded that CSB was entitled to a judgment as a matter of law. But even if the lower courts were "wrong," as Williams claims, their alleged error does not present "special and important reasons" for this court to grant review of the Court of Appeals' decision. Williams' Petition for Writ of Certiorari should therefore be denied.

DATED this 13th day of September, 1989.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the attached Respondent's Brief in Opposition to Petition for Writ of Certiorari to be mailed this 13th day of September, 1989, postage prepaid, to:

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Eric P. Hartman, Esq.
Attorneys for Plaintiff/Appellant
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Paul M. Simmons

APPENDIX

UTAH RULES OF CIVIL PROCEDURE

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

§ 203.32 Mortgage lien.

(a) Except as otherwise provided in this section, a mortgagor must establish that, after the mortgage offered for insurance has been recorded, the mortgaged property will be free and clear of all liens other than such mortgage, and that there will not be outstanding any other unpaid obligations contracted in connection with the mortgage transaction or the purchase of the mortgaged property, except obligations that are secured by property or collateral owned by the mortgagor independently of the mortgaged property.

(b) With prior approval of the Commissioner, the mortgaged property may be subject to a secondary mortgage or loan made or insured, or other secondary lien, held by a Federal, State, or local government agency or instrumentality provided that the required monthly payments under the insured mortgage and the secondary mortgage or lien shall not exceed the mortgagor's reasonable ability to pay as determined by the Commissioner.

(c) With the prior approval of the Commissioner, the mortgaged property may be subject to a second mortgage held by a mortgagee that is not a Federal, State or local governmental agency or instrumentality. Unless the mortgage is for the purpose described in paragraph (d) of this section, it shall meet the following requirements:

(i) The required monthly payments under the insured mortgage and the second mortgage shall not exceed the mortgagor's reasonable ability to pay, as determined by the Commissioner;

(ii) Periodic payments, if any, shall be collected monthly and be substantially the same;

(iii) The sum of the principal amount of the insured mortgage and the second mortgage shall not exceed the loan-to-value limitation applicable to the insured mortgage, and shall not exceed the maximum mortgage limit for the area;

(iv) The repayment terms shall not provide for a balloon payment before ten years, or for such other term as the Commissioner may approve, except that the mortgage may become due and payable on sale or refinancing of the secured property covered by the insured mortgage; and

(5) The mortgage shall contain a provision permitting the mortgagor to prepay the mortgage in whole or in part at any time, and shall not provide for the payment of any charge on account of such prepayment.

(d)(1) With the prior approval of the Commissioner, the mortgaged property may be subject to a junior (second or third) mortgage securing the repayment of funds advanced to reduce the mortgagor's monthly payments on the insured mortgage following the date it is insured, if the junior mortgage meets the following requirements:

(i) The junior mortgage shall not provide for any payment of principal or interest until the property securing the junior mortgage is sold or the insured mortgage is refinanced, at which time the junior mortgage shall become due and payable;

(ii) The total amount of repayments under the junior mortgage shall not exceed the least of:

(A) One-half of the mortgagor's equity interest in the property at the time of sale or refinancing;

(B) Three times the amount of funds advanced to effect the interest rate buy-down; or

(C) The sum of the original loan amount plus the total accrued interest on the junior mortgage at the time of repayment; and

(iii) The junior mortgage shall contain a provision permitting the mortgagor to prepay the mortgage in whole or in part at any time, and shall not provide for the payment of any charge on account of such prepayment. Any full or partial prepayment will not be recoverable by the mortgagor if, by application of paragraph (d)(1)(ii) on sale or refinancing of the property, a lesser amount than the amount prepaid would have been due.

(2) The sum of the principal amount of the insured mortgage, any second mortgage made under paragraph (b) or (c) of this section, and the mortgage securing the repayment of funds advanced to reduce the borrower's monthly payments (whether a second or third mortgage) may exceed the loan-to-value limitation applicable to the insured mortgage, but such sum may not exceed the maximum mortgage limit for the area.

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