DATE: 06-26-91

CITATION: VAOPGCPREC 60-91
Vet. Aff. Op. Gen. Couns. Prec. 60-91

TEXT:

Public Law 101-625 RESPA Amendments

QUESTION PRESENTED:

Do the recent amendments to the Real Estate Settlement Procedures Act of 1974 made by the Cranston-Gonzalez National Affordable Housing Act, Public Law 101- 625, apply to VA portfolio loans?

DISCUSSION:

1. Sections 941 and 942 of the Cranston-Gonzalez National Affordable Housing Act, Public Law 101-625 (Cranston-Gonzalez), amend the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. §§ 2601-2617. Section 941 of Cranston-Gonzalez adds a new section 6 to RESPA (12 U.S.C. § 2605) pertaining to transfers of mortgage servicing of federally related mortgage loans. Section 942 of Cranston-Gonzalez amends section 10 of RESPA (12 U.S.C. § 2609) relating to escrow accounts for the payment of taxes and insurance in connection with federally related mortgage loans.

2. In summary, section 941 of Cranston-Gonzalez requires persons making federally related mortgage loans to provide certain disclosures with regard to selling or transferring servicing of such loans. Whenever such servicing is sold, assigned, or transferred, certain notices must be given to the obligors on such loans. For the first 60 days following the transfer of servicing, late fees may not be imposed. During that period, payments may not be considered late if they are made to the prior servicer of the loan. The amendments also impose certain duties on servicers regarding responding to inquiries from borrowers and protecting the borrowers' credit ratings. The amendments also impose liability for damages for failure to comply with the servicing transfer requirements.

3. Section 942 of Cranston-Gonzalez requires servicers of federally related mortgage loans which require escrows for taxes or insurance to notify borrowers at least annually of any shortages in the escrow accounts. This section also requires an initial escrow statement at loan closing and annual statements regarding the escrow account. In addition, the law provides for civil penalties for failure to provide the required escrow account statements.

4. RESPA defines the term "federally related mortgage loan" to include a loan "secured by a first lien on residential real property ... designed principally for the occupancy of from one to four families ... made in whole or in part, or insured,

guaranteed, supplemented, or assisted in any way, by the Secretary of Housing and Urban Development or any other officer or agency of the Federal Government or under or in connection with a housing ... program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency ...." 12 U.S.C. § 2602(1). This definition clearly includes VA portfolio loans (i.e., loans made by VA).

5. We, therefore, believe it is clear that the Congress intended Federal agencies making "federally related mortgage loans" to comply with RESPA. The new requirements imposed on all lenders by the Cranston-Gonzalez amendments to RESPA are similarly binding on Federal agencies. Accordingly, this office believes VA must fully comply with these new requirements.

6. It does not necessarily follow, however, that the Congress intended to waive sovereign immunity and subject Federal agencies to suits and penalties for alleged violations of RESPA.

7. Subsection (f) of section 6 of RESPA, added by section 941 of Cranston-Gonzalez, imposes liability for damages for failure to comply with the mortgage servicing transfer disclosure requirements imposed by that new section. The new subsection (d) to section 10 of RESPA, added by section 942 of Cranston-Gonzalez, authorizes the Secretary of HUD to impose penalties on lenders or servicers who fail to provide the escrow account statements required by the new subsection (c) to section 10 of RESPA. Neither section specifically waives sovereign immunity.

8. Waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." U.S. v. King, 395 U.S. 1, 4 (1969). U.S. v. Testan, 424 U.S. 392, 399 (1976). Since neither RESPA nor Cranston-Gonzalez contains an express waiver of sovereign immunity, we believe a strong case can be made that the Congress did not intend to make Federal agencies liable for damages or penalties for violation of RESPA, even though the Congress intended Federal agencies to comply with RESPA.

9. Nevertheless, we can expect a person suing VA for an alleged RESPA violation to argue that the "sue and be sued" clause of 38 U.S.C. § 1820 waives any immunity VA might otherwise have with respect to damages for RESPA violations. See: Crowel v. Administrator of Veterans Affairs, 699 F.2d 347, 351 n.1 (7th Cir. 1983). In Crowel, the court, in a footnote, noted a disagreement among the circuits as to the proper reading of a "sue and be sued" clause. That court concluded that 38 U.S.C. § 1820 authorized a suit for money damages against VA. Cf. Loefler v. Frank, 486 U.S. 549 (1988) (The United States Postal Service, which the Congress provided could "sue and be sued," may be liable for prejudgment interest notwithstanding the rule against Government liability for such interest announced in Library of Congress v. Shaw, 478 U.S. 310 (1986)).

Therefore, VA's liability for damages for alleged violations of the servicing transfer provisions of RESPA under 12 U.S.C. § 2605(f) is a close question. Although this office would likely argue that no waiver of sovereign immunity exists under RESPA, there is no way we can predict how a court would rule in a particular suit.

10. With respect to the penalty provisions in the new section 10(d) of RESPA, we believe VA clearly is not subject to these provisions. The Supreme Court has held the Government is not subject to penalties absent an express waiver of sovereign immunity. A "sue and be sued clause" does not waive Federal immunity to penalties. Missouri Pacific R.R. Co. v. Ault, 256 U.S. 554, 563-564 (1921). In re Sparkman, 703 F.2d 1097, 1100-1101 (9th Cir. 1983). Painter v. TVA, 476 F.2d 943 (5th Cir. 1973).

HELD:

Since VA portfolio loans are "federally related mortgage loans" within the meaning of the Real Estate Settlement Procedures Act of 1974 (RESPA), VA must comply with the amendments to RESPA made by the Cranston-Gonzalez National Affordable Housing Act, Public Law 101-625. This office cannot predict how a court would rule on the issue of sovereign immunity, which VA would likely claim, if VA were sued for an alleged violation of RESPA. VA would not be liable for penalties under RESPA because the Congress did not waive sovereign immunity with regard to such penalties.

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Vet. Aff. Op. Gen. Couns. Prec. 60-91