

CITATION: VAOPGCPREC 12-90
Vet. Aff. Op. Gen. Couns. Prec. 12-90

DATE: 05-18-90

TEXT:

SUBJ: Waiver of Loan Guaranty Indebtedness Following a Deed in Lieu of Foreclosure

QUESTIONS PRESENTED:

- a. Does a veteran have the right to request waiver of a debt evidenced by a promissory note given in connection with a voluntary deed in lieu of foreclosure of a VA guaranteed loan?
- b. If question a. is yes, and the regional office Committee on Waivers and Compromises denies the waiver, is that decision appealable to the Board of Veterans Appeals?

COMMENTS:

1. The Secretary is empowered to waive collection of debts to the VA "with respect to any loan guaranteed, insured or made under chapter 37 of ... title 38, United States Code ... when recovery would be against equity and good conscience." 38 U.S.C. § 3102(b). The authority to consider waiver requests from veterans has been delegated to the regional office Committee on Waivers and Compromises (COWC). 38 C.F.R. § 1.955.
2. A home loan debt of a veteran or spouse may be considered for waiver "following default where there was a loss of the property which constituted security for the loan..." 38 C.F.R. § 1.964(a)(1). There is no time limit for requesting waiver of a loan guaranty debt.
3. The Chairman of your regional office's COWC requested advice on whether or not the COWC should consider waiver requests from veterans following a voluntary deed in lieu of foreclosure. In these cases, a veteran in default agrees to convey the security property to the loan holder rather than permit the loan to go into foreclosure. Ordinarily, the consideration for a voluntary deed is the forgiveness of the entire outstanding indebtedness. In such a case, the veteran would be totally released and there would be no debt to VA.
4. There are cases, however, in which the value of the security is less than the outstanding debt. In such cases, VA is reluctant to automatically preclude any

post-foreclosure liability to the Government on the part of the veteran. Accordingly, VA requires the veteran to sign an agreement to be liable to the Government for the difference between the debt and the property's value.

5. In one recent case, the veteran sought waiver of this debt. For reasons not material to this opinion, the COWC denied this request and the veteran appealed to the Board of Veterans Appeals (BVA). BVA ruled that it did not have jurisdiction. Since the veteran signed a promissory note, BVA concluded this case involved a contract rather than a question regarding veterans' benefits.

6. Since we do not have the file, we cannot comment on that specific case. As a general matter, however, we do not agree with the distinction BVA drew between the veteran's debt involving a contract rather than being a question regarding veterans' benefits. We believe these debts involve elements of both contract and benefits law.

7. A veteran obtaining a VA guaranteed home loan has been deemed to have agreed to indemnify the Government for any amounts paid the loan holder under the guaranty of the veteran's loan. 38 C.F.R. § 36.4323(e). United States v. Shimer, 367 U.S. 374 (1961). Jones v. Turnage, 699 F. Supp. 795, 797 (N.D.Cal.1988). appeal docketed No. 89-15053 (9th Cir.). (The post-foreclosure liability of a veteran with respect to loans closed after December 31, 1989, has been limited by Public Law No. 101-237, § 304. This statutory change does not affect this opinion.)

8. In one sense, all housing loan indemnity debts are contractual. As a condition for obtaining the Government's guaranty, the veteran must agree to indemnify the Government for any loss. The indemnity contract is mentioned on the loan application forms, and the regulation providing for indemnity is deemed incorporated into the loan agreement. 38 C.F.R. § 36.4334. Jones, 699 F. Supp. at 797. Therefore, any home loan debt is based on at least an implied contract.

9. In the deed in lieu situation, the veteran is required to acknowledge that there is a deficiency which he or she will be required to repay the Government. The contract creating the debt, however, arose when the loan was guaranteed. The note signed in connection with the deed in lieu reaffirms this obligation rather than creates it.

10. As we noted in the first paragraph, the Secretary's waiver authority under 38 U.S.C. § 3102 has been delegated to COWC. 38 C.F.R. § 1.955. Under the current regulations, the determination of whether collection of a debt would be against equity and good conscience, as required to be made under the law, must be made by COWC rather than the home loan division at the time of the deed in lieu is approved.

11. In this context, it is important to note that the Congress recently amended 38

U.S.C. § 3102(b) by striking out the word "may" in the phrase "the Secretary may waive payment" of a loan indebtedness and substituted "shall, except as provided in subsection (c) of this section." Public Law No. 101-237, § 311. (Subsection (c) bars waiver in case of fraud, misrepresentation, or bad faith, and is not material to this opinion.) Thus, not only does the veteran have the right to seek waiver, but VA has no authority to collect a debt if collection violates the equity and good conscience test contained in the law.

12. In addition, the test for seeking waiver contained in the regulation is met. Under 38 C.F.R. § 1.964(a)(1) the debt must arise following a default and a loss of the property which secured a guaranteed loan. The regulation does not specify the loss must have been through involuntary foreclosure.

13. The veteran's right to seek waiver of a debt is an important protection given by the Congress. A surrendering of this statutory right should not be implied. Therefore, unless the document signed in connection with the deed in lieu clearly contains an express and knowing agreement by the veteran that he or she will not seek waiver of the debt, the veteran retains this right.

14. Therefore, we believe an application for waiver of a home loan debt involves a question of veterans' benefits rather than merely a question of contract. The fact that the veteran has signed an affirmation of such debt, including a note, in connection with a deed in lieu of foreclosure does not change this conclusion.

15. Regarding an appeal of an unfavorable decision by COWC, it is the policy of this Office to defer to BVA on questions of their own jurisdiction. Accordingly, we express no opinion on whether BVA may or should consider such an appeal. In view of our conclusion regarding the nature of the waiver consideration, however, BVA may wish to revisit this issue in an appropriate context.

HELD:

Veterans who give a voluntary deed in lieu of foreclosure in connection with a defaulted VA guaranteed loan and who also sign a note to VA for the difference between the outstanding debt and the value of the security at the time of this deed do not by virtue of signing such note give up the right to seek waiver of the debt to VA. The regional office Committee on Waivers and Compromises should consider the case in the same manner as any other request for waiver of a loan guaranty debt. This Office expresses no opinion on whether or not the Board of Veterans Appeals should consider an appeal of an unfavorable decision by the regional office Committee.

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