IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLIE PLUNKETT, *et al.*,

Plaintiffs,

v.

JULIÁN CASTRO,[1] in his capacity as SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant.

Civil Action No. 1:14-CV-00326 (ESH)

DEFENDANT'S REPLY IN FURTHER SUPPORT OF HIS MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

STUART F. DELERY
Assistant Attorney General
Civil Division

BRIAN G. KENNEDY
CAROL FEDERIGHI
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Phone: (202) 514-1903
Email: carol.federighi@usdoj.gov

Counsel for Defendant

OF COUNSEL:

WILLIAM C. LANE
BRUCE S. ALBRIGHT
AMBER J. RICHER
United States Department
of Housing and Urban Development
451 7th Street, S.W.
Washington, D.C. 20410

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[1] The new Secretary of Housing and Urban Development, Julián Castro, is hereby substituted for former Secretary Shaun Donovan pursuant to Federal Rule of Civil Procedure 25(d).

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INTRODUCTION

HUD has stated that plaintiffs' spouses' deaths no longer trigger the foreclosure deadlines and other requirements in 24 C.F.R. § 206.125, and, in parallel, offered an additional assignment option to mortgagees with qualified plaintiffs. Thus, HUD now permits the mortgagees to hold plaintiffs' spouses' mortgages unless and until some other event of default occurs, and makes assignment to HUD available in two situations – when the mortgage loan balance reaches 98% of the maximum claim amount, or earlier if the plaintiff can meet certain conditions. Notwithstanding these actions, plaintiffs continue to insist that the only thing that will end this litigation is immediate assignment of their mortgages to HUD – all of the mortgages, now – no matter the legal issues concerning the mortgage, the cost to HUD, or the impact on third parties. Plaintiffs overestimate both their legal rights and HUD's powers and duties.

First, the Court's ruling in *Bennett I*, which resulted in the invalidation of 24 C.F.R. § 206.27(c)(1) as to plaintiffs and their relief from regulatory foreclosure deadlines, does not also entitle them to a wholesale rewriting of their spouses' private mortgage contracts to remove the mortgagees and replace them by HUD (the effect of immediate assignment). Such relief amounts to retroactive relief, which has not been, and should not be, mandated by the Court's prior order because it interferes with existing contracts involving third parties not before the Court.[2]

Second, plaintiffs are not entitled to review of HUD's decision because there are no legal standards governing the sui generis remand process and remedy crafted by HUD here. The Mortgagee Optional Election was developed by HUD, not because it is required by any statute or

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[2] Because those contracts are between non-parties who are not before the Court, any issues concerning the validity of those contracts are also not before the Court.

regulation, but in the exercise of its administrative discretion to respond to the specific June 10 Order in *Plunkett*, as well as its similarly broad discretion to establish requirements "necessary to improve the fiscal safety and soundness" of the Home Equity Conversion Mortgage ("HECM") Program. 12 U.S.C. § 1715z-20(h)(3). There are no judicially manageable standards governing HUD's decision and, therefore, it is not subject to review. Third, the Court is, in any event, without subject-matter jurisdiction because, in view of HUD's statements and actions, plaintiffs no longer have a sufficient injury caused by HUD to give them constitutional standing.

Fourth, the relief HUD has crafted is not in any event arbitrary or capricious. The additional assignment option developed by HUD reasonably balances the interests of plaintiffs, those of third parties, and HUD's legal and financial constraints. Plaintiffs might desire a different solution and an easier path to assignment, but the existence of other possible solutions does not render HUD's solution impermissible. Accordingly, the Complaint should be dismissed or, in the alternative, summary judgment should be granted for defendant.

ARGUMENT

I. PLAINTIFFS HAVE NO RIGHT TO ASSIGNMENT

In its Memorandum in Support of Defendant's Motion for Summary Judgment, HUD addressed the effect of the Court's holding in *Bennett I* that 24 C.F.R. § 206.27(c)(1) is invalid as to Mr. Bennett and Mrs. Joseph. HUD first explained that it viewed the decision in *Bennett I* as equally binding with regard to the *Plunkett* plaintiffs. Def's SJ Mem. 2, 23-24. First, the *Bennett I* holding as to 24 C.F.R. § 206.27(c)(1) is the law of the case with regard to those plaintiffs in *Bennett II*. *See McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1074 (D.C. Cir. 2012) ("'When there are multiple appeals taken in the course of a single piece of litigation, law-

of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court.'" (quoting *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 350 (D.C. Cir. 1995))), *cert. denied*, 133 S. Ct. 1582 (2013). Second, the Court has indicated that it views *Bennett I* as controlling as to the issue of the validity of 24 C.F.R. § 206.27(c) for the *Plunkett* plaintiffs as well. *See* Def's SJ Mem. 2 n.2. The Court has also consolidated *Plunkett* with *Bennett II*, further indicating that it considers the *Plunkett* plaintiffs on the same footing as the *Bennett* plaintiffs. Thus, HUD has assumed that the Court will hold 24 C.F.R. § 206.27(c)(1) invalid as to the *Plunkett* plaintiffs, although the Court has refrained from so holding as to the entire putative class and HUD makes no such assumption with regard to the class.

HUD then stated that, as 24 C.F.R. § 206.27(c)(1) is no longer valid as to the six plaintiffs in these consolidated cases, it could no longer act as a regulatory trigger for the time requirements in 24 C.F.R. § 206.125 as to these plaintiffs. *See* 24 C.F.R. § 206.125(a)(1); Def's SJ Mem. 2, 23-24. Accordingly, the regulatory foreclosure deadlines and other requirements in 24 C.F.R. § 206.125 do not apply to foreclosures initiated with regard to plaintiffs' spouses' mortgages solely as a result of the death of plaintiffs' spouses. HUD has now notified the mortgagees involved of this reading of its regulations.[3] *See* Declaration of Sally Bené, attached as Exhibit A.

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[3] Plaintiffs request that the Court certify a class and that HUD then be required to notify *all* mortgagees that 24 C.F.R. § 206.125 does not require them to foreclose when a married borrower dies and is survived by a non-borrowing spouse. Pls' Opp. 1, 5, 13-14. HUD will respond to these claims in its opposition to plaintiffs' supplement to motion for class certification, to be filed by August 11, 2014. *See* Minute Order (Aug. 1, 2014).

Thus, as far as HUD is concerned, the mortgagees may hold plaintiffs' spouses' mortgages unless and until some other event of default occurs. Contrary to plaintiffs' assertion that HUD has conceded the invalidity of 24 C.F.R. § 206.125 (Pls' Opp. 9, 14), HUD's statement does not mean that § 206.125 is invalid, either as to these mortgages or generally. It simply means that the death of a borrowing spouse is no longer a regulatory trigger for the requirement under § 206.125 that plaintiffs' spouses' mortgagees foreclose within a particular time from the borrower's death.

As plaintiffs correctly point out (Pls' Opp. 2), assignment of these loans to HUD when they reach 98% of the maximum claim amount may then also be available in the future because, as to these plaintiffs, § 206.27(c)(1) no longer bars assignment under § 206.107(a)(1)(iii). (The loans must still meet all the other normal prerequisites for assignment.) And, once these loans are assigned at 98%, HUD, as successor mortgagee bound by the Court's decision with regard to § 206.27(c)(1), would be obligated to hold them until the death of the non-borrowing spouse or until some other event of default occurs.

But the foregoing result is the sole necessary consequence of the Court's decision. Plaintiffs contend that the Court's ruling in *Bennett I* entitles them to assignment now. But this relief would essentially effectuate a wholesale rewriting of their spouses' private mortgage contracts to remove the mortgagees and replace them by HUD. Such relief amounts to retroactive relief, which has not been, and should not be, mandated by the Court's prior order. The Court did not indicate that its ruling with regard to § 206.27(c)(1) could be applied retroactively to require the rewriting of the original mortgage contracts. Although judicial decisions in general apply retroactively, they may be limited to prospective application where

there is "grave disruption or inequity involved in awarding retrospective relief."[4] *Ryder v. United States*, 515 U.S. 177, 185 (1995). Here, the existing, established contractual agreements between plaintiffs' spouses and their mortgagees militate against retroactive application that would impair those settled obligations. *See Hooks v. Forman, Holt, Eliades & Ravin, LLC*, 717 F.3d 282, 286 (2d Cir. 2013) (prospective-only application is appropriate where there has been "'justifiable reliance' on some settled understanding of prior law"); *see also Am. Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 185-86 (1990) ("The Court has also declined to provide retrospective remedies which would substantially disrupt governmental programs and functions."). Moreover, this consideration is especially strong here where the mortgagees are not parties to this case, may not be subject to the jurisdiction of this court, and have had no opportunity to represent their interests. *See* Fed. R. Civ. P. 19(a)(1)(B)(i). Accordingly, plaintiffs' request for immediate assignment to HUD should be rejected.

II. HUD'S DECISION IS NOT SUBJECT TO REVIEW

Notwithstanding the difficulty in providing any form of relief in the face of existing contractual agreements involving third parties, HUD has nevertheless endeavored to fashion such relief by creating the Mortgagee Optional Election. However, the unprecedented nature of this type of relief dictates that it be unreviewable. There simply is "no law to apply" to judge HUD's decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)); *see Falkowski v. EEOC*, 783 F.2d 252, 253 (D.C. Cir. 1986) (Department of Justice's decision not to provide appellant with counsel was

[4] As regards prospective relief, for HECM mortgages with case numbers assigned as of today, August 4, 2014, HUD's Mortgagee Letter 2014-07, providing for deferral periods for non-borrowing spouses, is in force.

unreviewable); *Morris v. Runyon*, 870 F. Supp. 362, 369 (D.D.C. 1994) ("[B]ecause the regulations at issue contain no standards by which to judge the Postal Service's exercise of discretion, such discretion, as exercised in this case, cannot be reviewed."). As discussed in defendant's previous memorandum, the statutory provisions governing assignment here, both 12 U.S.C. § 1715u and § 1715z-20(i), do not provide any judicially manageable standards by which HUD's actions can be judged. In addition, HUD's authority to adopt the decision at issue here also stems from 12 U.S.C. § 1715z-20(h)(3). This provision authorizes HUD, *i.e.*, the Secretary, to "establish, by notice or mortgagee letter, any additional or alternative requirements that the Secretary, *in the Secretary's discretion*, determines are necessary to improve the fiscal safety and soundness of the program authorized by this section." *Id.* (emphasis added). As with the provisions governing assignment and loss mitigation, this provision does not provide any workable standards by which the Court could review HUD's decisions in this regard and, indeed, explicitly commits such decisions to the agency's discretion. Moreover, as defendant pointed out in his prior memorandum, the National Housing Act also specifically commits assignment decisions to the agency's unreviewable discretion. *See* 12 U.S.C. § 1715u(d).

Plaintiffs' brief fails to identify any statutory, regulatory, or other objective standards by which to assess HUD's decision. Instead, plaintiffs suggest that the decision be judged by whether any of them can qualify under the criteria established by HUD. Pls' Opp. 2, 14 (complaining that HUD's remedy benefits no one). This extra-statutory standard (essentially, the number of individuals eligible under HUD's criteria) underlines the lack of statutory or other standards by which to evaluate HUD's decision. Nor does it provide a workable criterion itself, as plaintiffs do not indicate what an acceptable "grant rate" would be.

Although failing to identify judicially manageable standards, plaintiffs insist that the D.C. Circuit "expressly contemplated that this Court would review [HUD's] action on remand," quoting *Bennett v. Donovan*, 703 F.3d 582, 589 (D.C. Cir. 2013). Pls' Opp. 6-7 & n.5. However, the quoted statement by the D.C. Circuit, setting forth a general principle of law on an issue not briefed and not essential to the issues before that court at the time, is nonbinding dicta. *See Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 520 (2012) ("'[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'" (citation omitted)). The D.C. Circuit was not asked or required to rule on the reviewability of the specific decision at issue here and therefore its earlier musings on that topic are not controlling. In the absence of any identifiable, judicially manageable standards, therefore, this Court should find that HUD's decision is not subject to review, as was Congress's clear intent with regard to such decisions. *See* 12 U.S.C. §§ 1715u(d), 1715z-20(h)(3).

III. PLAINTIFFS LACK STANDING

In any event, plaintiffs have not established that they have standing to challenge either HUD's decision on remand or the validity of 24 C.F.R. § 206.125. The first prerequisite of standing to challenge a regulation is that a plaintiff must suffer some actual or imminent injury as the result of the regulation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs do not meet this prerequisite. As a matter of law, 24 C.F.R. § 206.125 no longer has any effect on their mortgagees' decisions whether to commence or proceed with foreclosure against their properties by reason of the deaths of their spouses. As explained above, the "trigger" that brings

the timeframes of § 206.125 into play for that purpose is not pulled because § 206.27(c)(1) is invalid as to these plaintiffs. *See* 24 C.F.R. § 206.125(a)(1) (requiring notification to the Secretary when a mortgagee is due and payable "under the conditions stated in § 206.27(c)(1)"). HUD has notified the mortgagees of this fact. *See* Declaration of Sally Bené, attached as Exhibit A. Thus, plaintiffs no longer face injury from HUD's actions.

Plaintiffs argue that HUD's position as to their standing is a strategy of "picking off" class representatives, citing *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980). That case is distinguishable on two grounds. First, the defendant in *Roper* offered the plaintiffs a monetary judgment for the full amount of their claim. Here, the inapplicability of the § 206.125 timeframes as to the plaintiffs is an *automatic* result of the Court's ruling in *Bennett I.* Thus, it is not correct to say that HUD is engaging in such activity here. Second, in *Roper*, the Supreme Court found standing despite the offer of judgment, finding that the plaintiffs retained a personal financial interest in their case because they sought to shift the cost of the litigation to the class. *Id*. at 336. Here the plaintiffs assert no such interest.

IV. HUD'S DECISION IS NOT ARBITRARY AND CAPRICIOUS

Even if the Court concludes that HUD's decision is subject to review and plaintiffs have standing, it should uphold that decision, as it is neither arbitrary nor capricious. HUD reasonably determined that it could not rewrite the existing mortgage contracts and could not control the decisions of third parties (the mortgagees) so as to require assignment. It also reasonably determined that requiring or accepting assignment in all cases was not possible or prudent, given the possibility of other defaults or counterclaims and given its duties to the insurance funds.

In attempting to show that HUD's decision is arbitrary and capricious, plaintiffs first complain that HUD has improperly delegated determinations of eligibility under its criteria to the mortgagees. Pls' Opp. 16. But plaintiffs ignore that it is the mortgagees, not HUD, that have been servicing the mortgages, that have the relevant information concerning the history of the mortgages, and that have the contractual right to payment under the mortgages. HUD's role is only that of an insurer. The mortgagees can, and must, take the lead in determining how they wish to move forward from this point.

In doing so, the mortgagees, in addition to choosing to enforce their contractual rights, have two other options available. First, so long as plaintiffs fulfill the obligations imposed by their spouses' mortgages, the mortgagees can simply do nothing and allow the plaintiffs to continue to reside in their homes. Then, at such time as the principal balance reaches 98% of the maximum claim amount, the mortgagees can assign these loans to HUD. Subject to continued compliance with the terms of the mortgage, HUD would then hold the assigned loan until the death of the non-borrowing spouse. Second, if the mortgagee does not wish to continue to hold the mortgage and, if the substantive requirements set forth in HUD's decision are met, the mortgagees can assign these loans to HUD now. In addition, the plaintiffs always have the option to purchase these properties from their spouses' estates for 95% of appraised value. 24 C.F.R. § 206.125(c). If a plaintiff qualifies, he or she may obtain a new HECM to finance this purchase. *See* Mortgagee Letter 2009-11 (copy attached as Exhibit B).

HUD will work with the mortgagees to ensure that they understand HUD's requirements and are applying them consistently, but HUD cannot make the necessary underlying factual or business determinations that each mortgagee must make with respect to its private mortgage

contract. In particular, HUD cannot require mortgagees to take actions inconsistent with the contract of mortgage insurance or to forego rights they have under their mortgage contracts. *See* 24 C.F.R. § 206.7. Therefore, the decision as to how to proceed lies with the mortgagees.

Plaintiffs next raise several complaints about the substantive requirements of HUD's decision on remand, none of which are well taken. First, they complain that the Principal Limit Test is "confusing [and] poorly worded" but, from their description (Pls' Opp. 15), they accurately understand it. To be sure, in some cases, calculating a plaintiff's hypothetical current principal limit (as increased from his or her principal limit on the date of endorsement to the date of election of assignment) may be mathematically complex. In the case of a variable interest rate mortgage endorsed after May 1, 1997, the interest rate applicable to the loan in each month needs to be determined. *See* 24 C.F.R. § 206.3 (definition of principal limit). In addition, the mortgagee needs to determine whether any insurance or condemnation proceeds have been applied to the loan's principal balance. *Id.* (citing 24 C.F.R. § 206.209(b)). It is precisely because of this complexity that HUD's decision urged the plaintiffs to contact their mortgagees, who are in the best position to make these individual calculations.

Plaintiffs argue that "the younger spouse [*i.e.*, plaintiffs] likely will have to pay a substantial sum to bring the mortgage balance under the Principal Limit threshold." Pls' Opp. 16. This may be true in some cases. However, nothing in HUD's decision requires plaintiffs to do that or to do it in a single, lump payment. As noted above, nothing in the decision precludes the mortgagees from simply holding these mortgages until the principal balance reaches 98% of the maximum claim amount and then assigning them to HUD, nor does anything in the decision preclude a mortgagee from entering into a payment plan under which the plaintiff reduces the

principal balance over time, then assigning to HUD when that has been accomplished. Finally, HUD's concern for "costs and fairness" has nothing to do with "turn[ing] back the clock." *Id.* It stems from the fact that HUD has obligations to persons and entities other than plaintiffs, most notably to the mortgage insurance funds on which both mortgagees and tens of millions of future mortgagors depend. *See* 12 U.S.C. § 1708(a)(3).

Next, plaintiffs criticize the requirement that a mortgage to be assigned not be in default for any reason other than the death of the borrower, in particular, for nonpayment of taxes or insurance. Pls' Opp. 17. Plaintiffs argue that HUD should not be able to refuse assignment on this basis until the mortgagee has given the plaintiff up to two years to repay any payments made by the mortgagee. *Id.* Again, nothing in HUD's decision precludes the mortgagee from instituting a payment plan after an initial determination that the plaintiff is currently not eligible for the assignment option. Nor does any decision by HUD not to accept assignment (*e.g.*, because of nonpayment of taxes) foreclose future requests by the mortgagee with regard to the same loan after repayment has been effectuated. HUD's regulations generally require that all payments owing to the mortgagee be current and that the mortgage not to be in a due and payable status as conditions on the assignment of any mortgage to HUD, including assignments made when the principal balance reaches 98% of the maximum claim amount. 24 C.F.R. § 206.107(a)(1)(i), (iii). This requirement ensures that a mortgage assignment does not put the mortgage insurance funds to the expense of a foreseeable foreclosure. Plaintiffs suggest no substantial reason that HUD should waive this requirement in the case of these assignments.

Plaintiffs allege that, under HUD's decision, fraud claims cannot be waived or settled. Pls' Opp. 18 n.14. This is incorrect – plaintiffs who have made fraud or misrepresentation

allegations will be eligible for relief under HUD's decision if they obtain a "judicial[] resol[ution]" of those claims. AR 2449. The term "judicial resolution" includes a court-issued consent decree. It does not require a full adjudication in the sense of a trial or other proceedings that would give that decree *res judicata* effect. Requiring a judicial resolution rather than a mere dismissal or out of court settlement by the parties should help guard against fraud claims being released as a result of any coercion, misleading statements, or other imposition.

Plaintiffs also fear that, despite HUD's assurance that the foreclosure deadlines in HUD's regulations no longer apply to them, a mortgagee will nevertheless want to foreclose now "if it does not want to wait to be paid." Pls' Opp. 2; *see also id.* at 9 (asserting that lenders may want to foreclose "to obtain funds to which [they are] entitled"). However, it is not self-evident that mortgagees will always have an incentive to foreclose now if assured of the availability of assignment on the normal terms upon reaching 98% of the maximum claim amount. As the Court of Appeals noted, any foreclosure brings with it costs and uncertainties. *Bennett*, 703 F.3d at 589. For example, HUD reimburses less than 100% of a mortgagee's out-of-pocket foreclosure costs. *See* 24 C.F.R. § 206.129(d)(2)(ii); Mortgagee Letter 2009-44, Attachment 1, page 9 (HUD reimburses up to two-thirds of approved foreclosure costs), attached as Exhibit C. Accordingly, it seems likely that a mortgagee would find it to be in its self-interest to simply hold an existing mortgage and to hope that the resident non-borrowing spouse survives until it has a right to assign the mortgage to HUD. Thus, while some mortgagees may decide to foreclose, others may have good reasons not to. In any event, to the extent that a mortgagee does decided to proceed with foreclosure, that would be an independent decision by the mortgagee over which HUD has no control.

Finally, plaintiffs assert that HUD's decision is flawed by misrepresentations of the record. Pls' Opp. 3-4. The issues they raise (whether plaintiffs voluntarily conveyed their interests in their homes to their spouses and whether they benefited from the HECMs) are not relevant to HUD's decision as finally modified by the *Plunkett* decision issued on June 24 and 26, 2014. That decision provides the Mortgagee Optional Election to anyone who can satisfy the criteria laid out in the decision, which are unrelated to the points plaintiffs focus on.

In any case, HUD made no mistakes in reading the record. Plaintiffs complain that they did not, as HUD found, "voluntarily" convey their interest in their homes to their spouses prior to the execution of the reverse mortgages because they were not "properly informed about what they were doing." Pls' Opp 3. However, under "federal law one who signs a contract has a duty to read it and is obligated according to its terms," absent special circumstances such as fraud or duress. *Shelton v. The Ritz Carlton Hotel Co., LLC*, 550 F. Supp. 2d 74, 80 (D.D.C. 2008). Although some plaintiffs have alleged fraud in their transactions, it is not clear how this fraud claim vitiates the consequences of their signing of the quitclaim deeds – each of them admittedly signed such deeds, and the deeds are easily understandable on their faces. *See, e.g.*, AR 1147 (unsigned transfer deed stating that "THE PURPOSE OF THIS DEED IS TO REMOVE THE GRANTEE'S HUSBAND, ROBERT J. BENNETT, JR., FROM TITLE."); *id.* at 21 (stating transfer deed was signed). In the face of this plain language, it is no excuse to say, as plaintiffs do with respect to Mr. Bennett (Pls' Opp. 3), that he "had no idea he was signing a quitclaim deed." *See Merit Music Service, Inc. v. Sonneborn,* 245 Md. 213, 221-22 (1967) ("[T]he law presumes that a person knows the contents of a document that he executes and understands at least the literal meaning of its terms."); *Owens v. Graetzel*, 149 Md. 689, 696 (1926) (parties to

mortgage are bound by its terms and "must be held to know its meaning as thereby expressed"). Accordingly, it is accurate to say those interests were voluntary transferred.

Plaintiffs misunderstand HUD's statement that plaintiffs derived a benefit from the HECMs executed by their spouses. Plaintiffs derived benefits from the HECM to the extent that, in each case, he or she was enabled to continue to reside in the marital home with his or her spouse and the couple was relieved of the obligation to make forward mortgage payments (and, in cases where the forward mortgage was a full-recourse obligation, relieved of that personal obligation as well). That is a very different question from the question plaintiffs address in their brief (p.4) – whether the HECM would have been the best financial decision for the couple had they known in advance when the borrowing spouse would die. Like other financial products that incorporate insurance or annuity features, the price and benefits of HECMs are decided ex ante based on the averages, and may result in "better" or "worse" outcomes ex post in any individual case.

CONCLUSION

For the reasons stated above and in the Memorandum in Support of Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, the Complaint should be dismissed or summary judgment granted for Defendant.

Dated: August 4, 2014

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General
Civil Division

/s/ Carol Federighi
BRIAN G. KENNEDY
CAROL FEDERIGHI
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Phone: (202) 514-1903
Email: carol.federighi@usdoj.gov

Counsel for Defendant

OF COUNSEL:

WILLIAM C. LANE
BRUCE S. ALBRIGHT
AMBER J. RICHER
United States Department
of Housing and Urban Development
451 7th Street, S.W.
Washington, D.C. 20410