



MORTGAGE BANKERS ASSOCIATION

November 15, 2023

Elissa Saunders
Director, Office of Single-Family Asset Management
Federal Housing Administration
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington, D.C.

RE: *Show Me State Premium Homes v. McDonnell* (8th Cir. 2023)

Dear Ms. Saunders,

The U.S. Court of Appeals for the 8th Circuit recently held in *Show Me State Premium Homes v. McDonnell* that a subordinate lien (other than a federal tax lien) held by the United States must be foreclosed by judicial action.¹ Today, the Mortgage Bankers Association (MBA)² requests immediate guidance from the Federal Housing Administration (FHA) given the high volume of partial claims mortgage servicers completed throughout the COVID-19 pandemic.³

The consequences of *Show Me* will have detrimental effects on borrowers and communities with extended foreclosure timelines. Judicial foreclosure processes result in higher fees and costs for borrowers, which will particularly impact those borrowers seeking to payoff or cure. Additionally, prolonged judicial foreclosures can add to neighborhood blight when struggling homeowners who cannot afford their homes also cannot afford to maintain the upkeep on their homes either. Prolonged foreclosures also prevent properties from being available to new homeowners, further exacerbating the supply challenges constraining homeownership.

¹ *Show Me State Premium Homes, LLC v. McDonnell*, 74 F.4th 911 (8th Cir. 2023).

² The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 300,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

³ Approximately 800,000 Standalone Partial Claims have been completed since March 2020 according to FHA's Annual Report to Congress for Fiscal Year 2023 (available at hud.gov/sites/dfiles/PA/documents/2023FHAAAnnualReportMMIFund.pdf?utm_medium=email&utm_source=govdelivery)

FHA has historically recognized the benefit of non-judicial foreclosures, when available, over judicial foreclosures; indeed, Mortgagees are expected to utilize non-judicial foreclosures for HUD-insured loans. The court's decision without action by FHA unnecessarily increases the cost of servicing a nonperforming FHA loan, thereby damaging access to credit for the first-time homebuyers FHA's mission seeks to serve.

For these reasons, FHA should release a mortgagee letter to limit the adverse impact of *Show Me* for mortgage servicers. FHA should address the apparent conflicts and risks between FHA's existing policy in HUD's 4000.1 Single Family Housing Policy Handbook and *Show Me* by introducing guidance that:

1. Clarifies that a subordinate lien is divested from the mortgaged property and stipulates that HUD would release their partial claim following a non-judicial foreclosure;⁴ or
2. Expressly permits servicers to proceed to a judicial foreclosure in non-judicial states when there is a partial claim involved, thereby increasing the related attorney fee allowable and extending the FHA's Reasonable Diligence timeframe.⁵

Show Me has introduced widespread uncertainty within the industry, namely regarding the future insurability of title following a non-judicial foreclosure. FHA guidance is necessary because of the potentially persuasive authority of the 8th Circuit's decision. Thank you for considering these comments. Should you have any questions or wish to discuss further, please contact Brendan Kelleher at Bkelleher@mba.org.

Sincerely,

Justin Wiseman
VP, Residential Policy, Managing Regulatory Counsel
Mortgage Bankers Association

⁴ Please see United States Foreclosure Network, *USFN Letter to HUD re: Show Me State Premium Homes* (Nov. 10 2023), available at <https://www.usfn.org/blogpost/1296766/495479/USFN-Letter-to-HUD-re-Show-Me-State-Premium-Homes>. (summarizing the case, the impact to the mortgage industry, and highlighting the preferred approach to limit costs).

⁵ FHA would need to update Appendix 6.0 – First Legal Actions to Initiate Foreclosure and Reasonable Diligence Timeframes for non-judicial states when there is a partial claim involved. As a result of extending Reasonable Diligence timeframe, FHA will also need to work with the Federal Housing Finance Agency (FHFA) and Fannie Mae to also adjust the state allowable fees for a judicial foreclosure under these same circumstances, though the Government Sponsored Enterprises are not directly impacted by the decision. The Handbook expressly states that "Mortgagees may not request HUD approval to proceed with a method of foreclosure in states where an amount is not specified on the Fannie Mae Foreclosure Attorney Fees Exhibit . . . but reserves the right to revise amounts which it considers reasonable and customary at any time." (4000.1 SFHPB, III.A.2.t.ii(F)(2)(a)). Otherwise, mortgage servicers will have to curtail any claim for Insurance for being required to use the judicial foreclosure timeline but only being permitted to recover costs according to the non-judicial schedule and timeline.