

§ 36.4325

38 CFR Ch. I (7-1-03 Edition)

in any case, irrespective of the identity or the survival of the original or of any subsequent debtor, if holder shall have given such notice as required by §36.4317 of this part and if, after receiving such notice, the Secretary shall have failed to notify the holder within 15 days to proceed in such manner as to effectively preserve the personal liability of the parties liable, or such of them as the Secretary indicates in such notice to the holder; or (3) the release of an obligor, or obligors, from liability on an obligation secured by a lien on property, which release is an incident of and contemporaneous with the sale of such property to an eligible veteran who assumed such obligation, which assumed obligation is guaranteed on the assuming veteran's account pursuant to 38 U.S.C. chapter 37; or (4) the release of an obligor or obligors as provided in §36.4314(d) of this part; or, the release of an obligor, or obligors, incident to the sale of property securing the loan which the holder is authorized to approve under the provisions of 38 U.S.C. 3714.

(Authority: 38 U.S.C. 3714)

[13 FR 7278, Nov. 27, 1948, as amended at 24 FR 6315, Aug. 6, 1959; 35 FR 7728, May 20, 1970; 46 FR 43673, Aug. 31, 1981; 52 FR 26342, July 14, 1987; 55 FR 37477, Sept. 12, 1990]

§36.4325 Partial or total loss of guaranty or insurance.

(a) Subject to the incontestable provisions of 38 U.S.C. 3721 as to loans guaranteed or insured on or subsequent to July 1, 1948, there shall be no liability on account of a guaranty or insurance, or any certificate or other evidence thereof, with respect to a transaction in which a signature to the note, the mortgage, or any other loan papers, or the application for guaranty or insurance is a forgery; or in which the certificate of discharge or the certificate of eligibility is counterfeited, or falsified, or is not issued by the Government.

(1) Except as to a holder who acquired the loan instrument before maturity, for value, and without notice, and who has not directly or by agent participated in the fraud, or in the misrepresentation hereinafter specified, any wilful and material misrepresentation or fraud by the lender, or by a

holder, or the agent of either, in procuring the guaranty or the insurance credit, shall relieve the Secretary of liability, or, as to loans guaranteed or insured on, or subsequent to July 1, 1948, shall constitute a defense against liability on account of the guaranty or insurance of the loan in respect to which the wilful misrepresentation, or the fraud, is practiced: *Provided*, That if a misrepresentation, although material, is not made wilfully, or with fraudulent intent, it shall have only the consequences prescribed in paragraphs (b) and (c) of this section.

(2) [Reserved]

(b) In taking security required by 38 U.S.C. chapter 37 and the regulations concerning guaranty or insurance of loans to veterans, a holder shall obtain the required lien on property the title to which is such as to be acceptable to prudent lending institutions, informed buyers, title companies, and attorneys, generally, in the community in which the property is situated: *Provided*, That a title will not be unacceptable by reason of any of the limitations on the quantum or quality of the property or title stated in §36.4350(b) and if such holder fails in this respect or fails to comply with 38 U.S.C. chapter 37 and the regulations concerning guaranty or insurance of loans to veterans with respect to:

(1) Obtaining and retaining a lien of the dignity prescribed on all property upon which a lien is required by 38 U.S.C. chapter 37 or the regulations concerning guaranty or insurance of loans to veterans,

(2) Inclusion of power to substitute trustees (§36.4327),

(3) The procurement and maintenance of insurance coverage (§36.4326),

(4) Advice to Secretary as to default (§36.4315),

(5) Notice of intention to begin action (§36.4317),

(6) Notice to the Secretary in any suit or action, or notice of sale (§36.4319),

(7) The release, conveyance, substitution, or exchange of security (§36.4324),

(8) Lack of legal capacity of a party to the transaction incident to which the guaranty or the insurance is granted (§36.4328),

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(9) Failure of the lender to see that any escrowed or earmarked account is expended in accordance with the agreement,

(10) The taking into consideration of limitations upon the quantum or quality of the estate or property (§ 36.4350(b)),

(11) Any other requirement of 38 U.S.C. chapter 37 or the regulations concerning guaranty or insurance of loans to veterans which does not by the terms of said chapter or the regulations concerning guaranty or insurance of loans to veterans result in relieving the Secretary of all liability with respect to the loan,

no claim on the guaranty or insurance shall be paid on account of the loan with respect to which such failure occurred, or in respect to which an unwillful misrepresentation occurred, until the amount by which the ultimate liability of the Secretary would thereby be increased has been ascertained. The burden of proof shall be upon the holder to establish that no increase of ultimate liability is attributable to such failure or misrepresentation. The amount of increased liability of the Secretary shall be offset by deduction from the amount of the guaranty or insurance otherwise payable, or if consequent upon loss of security shall be offset by crediting to the indebtedness the amount of the impairment as proceeds of the sale of security in the final accounting to the Secretary. To the extent the loss resultant from the failure or misrepresentation prejudices the Secretary's right of subrogation acceptance by the holder of the guaranty or insurance payment shall subordinate the holder's right to those of the Secretary.

(c) If after the payment of a guaranty or an insurance loss, or after a loan is transferred pursuant to § 36.4318 (a), the fraud, misrepresentation or failure to comply with the regulations in this subpart as provided in this section is discovered and the Secretary determines that an increased loss to the government resulted therefrom the transferor or person to whom such payment was made shall be liable to the Secretary for the amount of the loss

caused by such misrepresentation or failure.

[13 FR 7741, Dec. 15, 1948, as amended at 24 FR 2654, Apr. 7, 1959]

§ 36.4326 Hazard insurance.

The holder shall require insurance policies to be procured and maintained in an amount sufficient to protect the security against the risks or hazards to which it may be subjected to the extent customary in the locality. All moneys received under such policies covering payment of insured losses shall be applied to restoration of the security or to the loan balance. Flood insurance will be required on any building or personal property securing a loan at any time during the term of the loan that such security is located in an area identified by the Federal Emergency Management Agency as having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act, as amended. The amount of flood insurance must be at least equal to the lesser of the outstanding principal balance of the loan or the maximum limit of coverage available for the particular type of property under the National Flood Insurance Act, as amended. The Secretary cannot guarantee a loan for the acquisition or construction of property located in an area identified by the Federal Emergency Management Agency as having special flood hazards unless the community in which such area is situated is then participating in the National Flood Insurance Program.

(Authority: 42 U.S.C. 4012a, 4106(a))

[62 FR 5531, Feb. 6, 1997]

§ 36.4327 Substitution of trustees.

In jurisdictions in which valid, any deed of trust or mortgage securing a guaranteed or insured loan, if it names trustees, or confers a power of sale otherwise, shall contain a provision empowering any holder of the indebtedness to appoint substitute trustees, or other person with such power to sell, who shall succeed to all the rights, powers and duties of the trustees, or other person, originally designated.

[13 FR 7279, Nov. 27, 1948]