Role of State Deficiency Judgement Law in FHA Insured Mortgage Transactions

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Note: The Role of State Deficiency Judgment Law in FHA Insured Mortgage Transactions

I. INTRODUCTION

When the proceeds of a judicial foreclosure sale against a defaulting mortgagor are insufficient to satisfy the mortgage debt, state law typically provides that the mortgagor, following state procedures, may obtain a judgment in state court against the mortgagor for the deficiency. However, when the unsatisfied mortgagor is the federal government in the person of the Federal Housing Administration (FHA), the matter is tried in federal court. The federal court may apply the state rule, or it may, under its federal common law power, compel a uniform disposition of such cases beyond the dictates of state law. There is also a third possibility: adoption of a federal common law rule that incorporates as its content each state's rule. Two distinct sets of remedies, therefore, state and federal, seemingly dependent only upon the identity of the mortgagee, may be available against the mortgagor. Thus the federal courts face a difficult choice of laws problem, the solution of which is still at issue among the circuits. However, the majority rule is that state deficiency judgment laws should be completely disregarded in favor of a uniform federal rule in the FHA mortgage context. This note will critically examine that position and propose an alternative rule—select incorporation of state law as the federal common law rule.

1. See text accompanying note 16 infra.
4. Moreover, because an FHA mortgage gives the mortgagee the option of bringing foreclosure proceedings himself under state law or assigning the mortgage to the FHA, the mortgagor has control over neither venue nor remedies. 12 U.S.C. § 1713(g) (1969).
II. BACKGROUND

A. FHA INSURANCE OF MORTGAGES

The FHA, under its general power to insure private mortgage loans, is not a mortgagee, but rather is a third-party insurer of the private lending institution actually advancing the funds. The lending institution charges the mortgagor a small premium to cover the cost of the insurance. Application for FHA mortgage insurance must be filed on the forms approved for use in the particular jurisdiction in which the property is located. Full compliance with the terms of the mortgage insurance binds the FHA to indorse the mortgage for insurance. The only legal duty of the FHA is to protect the mortgagor from default by the mortgagor.

The FHA considers the mortgage to be in default when the mortgagor fails to make any payment due under the mortgage. When default continues for 30 days, the mortgagor is entitled to the benefits of the mortgage insurance upon "assignment, transfer and delivery" to the Secretary of Housing and Urban Development of all rights, claims, other insurance and any part of the loan not yet advanced to the mortgagor. The mortgagor also has the option after a 30 day default to bring foreclosure proceedings in its own name where a commercial mortgage is involved.

7. 24 C.F.R. § 207.3(a)(1) (1971). This requirement is often used as the basis of arguments that Congress intended FHA mortgage transactions to depend upon local property laws. See text accompanying notes 51-52 infra.
9. 12 U.S.C. § 1713(g) (1969). Although the statute merely states that default is the failure to make any payment due, the Commissioner is given further rulemaking power to grant the request of the mortgagor for extension. See, e.g., 12 U.S.C. § 1710(a)(proviso 7) (1969).
10. Although the FHA was originally an independent federal agency, 42 U.S.C. § 3534 (1970) transfers and vests all the "functions, powers and duties" of the FHA in the Secretary of HUD. It is provided in 42 U.S.C. § 3533 (1968) that one of the Assistant Secretaries of HUD shall head the FHA as the Federal Housing Commissioner and shall administer programs related to private mortgages. See also 24 C.F.R. § 200.40 (1971), which provides for the appointment of the Secretary of HUD by the President with the advice and consent of the Senate.
An articulated policy of the FHA is to bid the fair market value of the land at foreclosure sales. In fact, however, a federal statute expressly prohibits the FHA from bidding more than the unpaid balance on the mortgage debt at foreclosure, which is potentially considerably less than fair market value. As a result, despite articulated policy, the mortgagor is rarely compensated at fair market value.

B. STATE DEFICIENCY JUDGMENT PROVISIONS

At least 34 states and the District of Columbia provide statutorily for deficiency judgments in the mortgage context. Spe-

Statutes establishing deficiency judgment procedures currently in force are as follows: ALASKA STAT. § 34.20.100 (1962); ARIZ. REV. STAT. ANN. § 33-725 (B) (1956); ARK. STAT. ANN. § 81-1110 (1947); CAL. CODE CIV. PRO. § 580 (a) (West 1955); CONN. GEN. STAT. ANN. § 49-28 (1970); D.C. CODE ENCYCL. ANN. § 45-616 (1968); Fla. STAT. ANN. § 702.06 (1969); IDAHO CODE ANN. § 6-108 (1948); ILL. ANN. STAT. ch. 95, § 17 (Smith-Hurd 1935); IND. ANN. STAT. § 3-1815 (1968); IOWA CODE
pecific prerequisites to the mortgagee's obtaining such judgments vary. In many states some form of notice to the mortgagor and strict adherence to the statutory time limits are necessary. Penalties for failure to comply with these provisions are strict. In some states, if the mortgagee fails to move for a deficiency judgment within the requisite time, the proceeds of the sale are considered to be full satisfaction of the mortgage debt. Other statutes in this situation give the mortgagor the right to petition the court to mark the judgment satisfied six months after the foreclosure sale.

Another important aspect of the state provisions is the frequent limitation placed upon the amount of the recovery under

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17. See ME. REV. STAT. ANN. tit. 14, § 6203-E (Supp. 1970) (mortgagee must give mortgagor 21 days notice by registered mail of his intention to seek a deficiency judgment at the foreclosure sale); MASS. ANN. LAWS ch. 244, § 17B (1956) (same effect); PA. STAT. ANN. tit. 12, § 2621.3 (1967) (notice must be given to the mortgagor 10 days before the hearing).

18. Action for a deficiency judgment must usually be brought within a specified time after the foreclosure sale. See REV. STAT. ANN. § 40.455 (1969) (three months); N.J. STAT. ANN. § 2A:50-2 (1969) (three months); N.Y. REAL PROP. ACTIONS § 1371(2) (McKinney 1965) (90 days); N.D. CENT. CODE § 32-19-06 (1960) (90 days); PA. STAT. ANN. tit. 12, § 2621.7 (1967) (six months). In addition, there is generally a statutory time limit on the completion of execution under the deficiency judgment after the time of sale. See MD. ANN. CODE, (Rules of Civ. Pro.), Rule W75(b) (3) (1971) (three years); MASS. ANN. LAWS ch. 244, § 17A (1956) (two years); N.D. CENT. CODE § 32-19-06 (1960) (three years); OHIO REV. CODE ANN. § 2329.08 (Anderson 1954) (two years on land with dwelling for two families or less or used as a farm dwelling). Minnesota has no such specific time limit.


20. PA. STAT. ANN. tit. 12, § 2621.7 (1967) gives such a right to any party six months after the foreclosure sale as long as the plaintiff has 10 days notice.
the deficiency judgment. Generally such legislation credits the mortgagor with the fair value of the property at the time of the foreclosure sale, rather than the foreclosure price itself, but at present almost every state has a different formula for determining the amount of the deficiency due. Most often there is no presumption that the sale is for the fair market value of the land, and most states require some form of appraisal.

Possession of a deficiency judgment may also determine other legal relationships between the mortgagor and mortgagee such as the reopening of the redemption period or the legal basis for the appointment of a receiver in favor of the mortgagee. It may even provide a sufficient reason for giving the possession of the mortgaged property to the purchaser until the end of the redemption period.


26. Mass. Ann. Laws, ch. 244, § 35 (1956) limits this right to cases in which there is no power of sale in the mortgage.

27. See, e.g., First Nat'l Bank v. Illinois Steel Co., 174 Ill. 140, 51 N.E. 200 (1898); Russell v. Bruce, 159 Ind. 553, 64 N.E. 602, rehearing denied, 159 Ind. 553, 65 N.E. 585 (1902).

28. See Brabner-Smith, supra note 21, at 722.
sions not only seek to compensate the mortgagee for the unsatisfied amount of his mortgage debt, but also may determine the property rights of parties to a mortgage transaction.

C. Federal Common Law

Federal law is interstitial by nature, legislating ad hoc solutions with limited objectives against a background of existing state law. Congress, by its enactments, seldom occupies a field completely, but rather builds in various ways upon existing legal relationships established by the states. However, in some situations state law is simply incompatible with federal interests. In the absence of a specific Congressional enactment on the point at issue, federal courts may create a law of their own in these cases—federal common law.

Any modern analysis of federal common law must start with Mr. Justice Brandeis' statement in Erie Railroad v. Tompkins that "there is no federal general common law." However, by ending the reign of "general" federal common law, the Erie decision raised anew the problem of what law should apply where strong federal interests are involved in a non-diversity situation and no specific federal statute is applicable. Thus a post-Erie federal court in a non-diversity case may apply a "new" kind of federal common law—what Judge Friendly calls "specialized," as opposed to general, federal common law.

31. 304 U.S. 64 (1938).
32. Id. at 78. Cf. D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 469 (1942) (Mr. Justice Jackson's concurring opinion):

The federal courts have no general common law, as in a sense they have no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the federal government. But this is not to say that whenever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law.
33. Mishkin, supra note 30, at 798.
The landmark case in this area is *Clearfield Trust Co. v. United States.* The court there held that the rights and obligations of the United States on commercial paper of its own issue are governed by federal law, thus disallowing the claim of the Clearfield Trust Company that state law concerning unreasonable delay in notification of forged endorsements should govern to disallow recovery. The court held that “[i]n the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rules of law according to their own standards.” The court admitted that federal courts have the option to select state law as the applicable rule, but claimed that such a course would be singularly inappropriate under the circumstances of the case because it would subject the rights and duties of the United States on its commercial paper to “exceptional uncertainty.” Thus, the court in *Clearfield* recognized that the need for uniformity in large-scale transactions by the United States government requires the application of a single federal rule rather than the application of conflicting state laws. Although the amount of federal common law is much expanded from its beginnings, *Clearfield* remains the basic guideline of federal common law authority.

The courts tend to obscure their reasons for adopting or rejecting state law in the general area of federal common law under the *Clearfield* rule. In cases where federal statutory policy might govern or where the United States is itself a party to the action, the courts tend to devise rules which dictate results most favorable to the United States. In cases where state law is selected, most courts are unclear whether the state rule serves as the content of the federal common law or applies *ex proprio vigore* (of its own force) to the case. This lack of clarity can cause problems.

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35. 318 U.S. 363 (1943).
36. Id. at 367.
37. Id.
39. The precedent value of the case hinges largely upon this determination. For example, if the rule of decision is clearly based upon a broad reading of an articulated Congressional policy, an argument at a later time that common law defenses under state law are available is obviously of little value. Note, supra note 36, at 1452 n.162. Cf. Comment, *State Substantive Law Applies in Non-Diversity Actions When Local Interests Predominate—United States v. Yazell,* 65 MICH. L. REV. 359, 364 (1966).
40. In light of *Erie* there is no reason why federal common law should not be made binding on the states through the supremacy clause.
III. PREEMPTION OF STATE LAW BY THE FHA

A. View Crest Garden

Although theoretically coming into court on an equal footing with private litigants, the FHA traditionally receives special treatment in the federal courts, such as exemption from certain state statutes of limitations. Not until 1959, however, in United States v. View Crest Garden Apartments, Inc., did a federal court conclude that the source of law governing all relationships between the parties to an FHA mortgage transaction is federal. This decision marked the beginning of large-scale preemption of state law in the FHA mortgage context.

In View Crest the mortgagor defaulted once on his FHA-insured mortgage, negotiated directly with the FHA to reinstate his insurance coverage, and then defaulted again. The FHA then petitioned the federal district court for the appointment of a receiver to manage the property during the pendency of the foreclosure action and to receive the rents. The mortgagor objected to the appointment of the receiver, arguing that the National Housing Act refers to and adopts local law and that under state (Washington) law the FHA failed to present a sufficient showing to entitle it to a receiver. The Ninth Circuit, however, rejected the mortgagor's arguments.

C. Wright, Federal Courts § 60 at 250 n.21 (2d ed. 1970). Friendly, supra note 34, at 405. Cf. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (federal law applies in dealings between private parties where act of sovereign foreign state involved); Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962); Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962). The argument has even been made that the supremacy clause requires the application of federal common law in all cases where a governmental agency acts within the general authority delegated to it by Congress, even when such actions are in derogation of common law. Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harv. L. Rev. 1084, 1097 (1964). The problem of the courts unclearly labeling their reasons for selecting state law, however, is perhaps less serious in relation to the supremacy clause in the FHA mortgage area than in other areas because it is very unlikely that the FHA will be the plaintiff in a state court proceeding.


42. See United States v. Summerlin, 310 U.S. 414 (1940). This case allowed the FHA to make a claim against a decedent’s estate despite the running of the applicable state statute of limitations. It is still the leading case in the area of federal immunity to state statutes of limitations. See, e.g., Weissinger v. United States, 423 F.2d 762 (5th Cir. 1970); United States v. Taylor, 333 F.2d 633 (5th Cir. 1964).

43. 268 F.2d 380 (9th Cir.), cert. denied, 361 U.S. 884 (1959).

44. The mortgagor based his argument that Congress intended to adopt state law in the FHA mortgage transaction on the language in 12
First, the court held that the source of the relationship between the parties to an FHA mortgage is federal and thus federal law, not state law, governs. Federal policy demands protection of the federal treasury and the security of the federal investment. Protection of the treasury in turn promotes the prime purpose of the National Housing Act—facilitating the building of homes by the use of federal credit. Second, the court rejected the argument that the adoption of the state definition of "first mortgage" by the National Housing Act constitutes Congressional intent to adopt state law in all related matters. In support of its position the court noted two other provisions of the National Housing Act which provide rights and remedies that the FHA can pursue without any reference whatever to similar provisions under state law. Moreover, the court thought the mortgagor's state law argument particularly weak in light of the stipulation in the mortgage agreement enumerating the conditions under which the FHA would be entitled to a

U.S.C. § 1707(a) (1969) that specifically states that the definition of "first mortgage" in the National Housing Act will be the definition used in the state in which the real estate is located. There was no issue here of the FHA's failure to fulfill the requirements of state law. See also 12 U.S.C. § 1713(a) (1) (1969).

The court gleaned this conclusion from general case law in the federal common law area. See Bank of America v. Parnell, 352 U.S. 29 (1956); United States v. Allegheny County, 322 U.S. 174 (1944); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); McKnight v. United States, 259 F.2d 540 (9th Cir. 1958); United States v. Matthews, 244 F.2d 626 (9th Cir. 1957).

Four years later, the Sixth Circuit relied on this contention in holding that the Michigan law of coverture does not provide an adequate defense for nonpayment of a note signed on an FHA loan by a wife whose husband was discharged in bankruptcy. United States v. Helz, 314 F.2d 301 (6th Cir. 1963). Unfortunately, the Helz court directly cited only View Crest in reaching this result. Id. at 303.

Although an object of FHA-insured loans is to make credit available to individual borrowers, the primary purpose is to attract loans to help finance commercial developers and thus assure adequate financing for housing. United States v. Emory, 314 U.S. 423, 433 (1941); Deal v. FHA, 280 F.2d 793, 797 (8th Cir. 1958). United States v. View Crest Garden Apts., Inc., (268 F.2d at 383) cites the McKnight case (259 F.2d 540) for this proposition. See also 24 C.F.R. § 200.5 (1971).


The court evidently misunderstood the mortgagor's argument concerning the adoption of the state definition of first mortgage by the National Housing Act, taking it to mean that since Congress intended to adopt the state law in one area it meant to adopt state law in all areas. 268 F.2d at 382. More likely the mortgagor was seeking to show that state interests and definitions have been adopted without damaging the policies of the National Housing Act.
Finally, the court held that the FHA uses different forms in different states simply for commercial convenience in the planning and working stages of the mortgage agreement; after the default of the mortgagor, the policy factors favoring the federal government's financial interests come into play and dictate that federal policy must govern. Thus while the FHA is willing to use state law at the planning stages, it has federal remedies available when the transaction goes awry.

Although View Crest might be thought to hold only that the FHA need not show cause under state law for the appointment of a receiver where the mortgage itself spells out such rights, it has not been read so restrictively. Almost every major case involving FHA mortgages since View Crest has uncritically, and often summarily, cited View Crest for the proposition that federal law is the governing source of the relationships arising from an FHA mortgage and that any local rules which limit the effectiveness of the FHA's remedies cannot be adopted. Thus View Crest opened the way for a veritable onslaught in preemption of state law by the federal courts in the area of FHA mortgages.

50. 268 F.2d at 382 n.1.
51. See text accompanying note 7 supra.
52. 268 F.2d at 383.
53. See, e.g., United States v. Walker Park Realty, Inc., 383 F.2d 732, 733 (2d Cir. 1967); Madison Properties, Inc. v. United States, 375 F.2d 740, 741 (8th Cir. 1967); Clark Investment Co. v. United States, 364 F.2d 7, 9 (9th Cir. 1966); United States v. Chester Park Apts., Inc., 332 F.2d 1, 3 (8th Cir. 1964), cert. denied, 379 U.S. 901 (1964); United States v. Helz, 314 F.2d 301, 303 (6th Cir. 1963); United States v. Academy Apts., Inc., 230 F. Supp. 110, 113 (D. Minn. 1963). 54. E.g., in Thompson v. United States, 408 F.2d 1075 (8th Cir. 1969), the court held that under the reasoning in View Crest an Arkansas statute that required that judicial sale of land on credit did not apply to the FHA. See Clark Investment Co. v. United States, 364 F.2d 7 (9th Cir. 1966) (Idaho law permitting redemptioner to deduct rents received by the holder of the land during the redemption period from the amount due on the debt inapplicable where FHA is rent holder); United States v. Chester Park Apts., Inc., 332 F.2d 1 (8th Cir. 1964), cert. denied, 379 U.S. 901 (1964) (appointment of receiver for FHA permissible under express provision in mortgage even though such a clause is illegal under state law); United States v. Helz, 314 F.2d 301 (6th Cir. 1963) (Michigan law of coverture no defense to non-payment of note signed on FHA mortgage for wife whose husband was discharged in bankruptcy); United States v. Forest Glen Senior Residence, 278 F. Supp. 343 (D. Ore. 1967) (federal law governs where parties intend to use federal funds from the inception of the transactions); United States v. Academy Apts., Inc., 230 F. Supp. 110 (D. Minn. 1963) (FHA has enforceable contract right to a receiver and rents during the redemption period, even against a state tax lien).
B. Federal Deficiency Judgment Law

The post-View Crest tendency to apply federal law gives added strength to the already existing federal common law of deficiency judgments. It is clear that the federal courts have the power to grant deficiency judgments to the FHA,\(^5\) notwithstanding the fact that the FHA is limited by Congress to insuring mortgages. Congress merely intended by that limitation to exclude the FHA from the direct financing of new housing—not to authorize the assignment of claims without the corresponding rights of enforcement.\(^6\) Thus there is a body of purely federal law to which a court, encouraged by View Crest, may turn after rejecting state law.

The federal common law of deficiency judgments is substantially less complex and detailed than the state provisions, one reason being that there are no established guidelines except the non-application of state laws limiting federal remedies in a particular case. Normally, a problem arises when the federal government brings its action for deficiency after the expiration of the state deadline. The federal courts allow this action, however, reiterating the conclusion in United States v. Summerlin\(^5\) that the United States in the proper exercise of its governmental functions should not be restricted in its remedies by state statutes of limitations.\(^6\) Such a holding in effect totally exempts


\(^5\) 310 U.S. 414 (1940).

\(^6\) Other federal agencies are also exempt from state statutes of limitations. The case law regarding deficiency judgments in Veterans' Administration (VA) loans is particularly close to the developments in the FHA field. See, e.g., United States v. Shimer, 367 U.S. 374 (1961) (VA regulations override Pennsylvania statute requiring appraisal within six months after foreclosure sale); United States v. Wells, 403 F.2d 596 (5th Cir. 1968) (Florida statute leaving discretion to grant deficiency judgment in hands of the trial judge inapplicable); United States v. Rossi, 342 F.2d 505 (9th Cir. 1965) (obligation is personal to the debtor so that VA need not give notice to bring deficiency judgment action as required by state law); McKnight v. United States, 259 F.2d 540 (9th Cir. 1958) (federal regulations override state deficiency judgment provisions); United States v. Winter, 319 F. Supp. 520 (E.D. La. 1970);
the federal government from state statutory procedures. Thus courts have allowed deficiency judgments after foreclosure sales where the foreclosure judgements in the district courts provided only that the master determine the deficiency and not that the deficiency be assessed against the mortgagor, as required by state law.\textsuperscript{59}

Closely related to the disregard of state statutes of limitations for the FHA's benefit is the elimination of corresponding state statutory penalties for failure to bring the deficiency judgment action within the time allotted. In \textit{United States v. Merrick Sponsor Corp.},\textsuperscript{60} the court not only allowed the United States to bring an action for a deficiency judgment after the state statute had run, but also held the state rule for automatic satisfaction of the mortgage debt after 90 days inapplicable.\textsuperscript{61} In \textit{Herlong-Sierra Homes, Inc. v. United States},\textsuperscript{62} notwithstanding an explicit state provision barring a deficiency judgment in cases where the mortgage is secured by both real estate and chattels,\textsuperscript{63} the court allowed the FHA a deficiency judgment upon a showing that the high bid at the foreclosure sale was unreasonably low. As in most cases concerning deficiency judgments, the court did not cite \textit{View Crest}, but manifestly relied on it nonetheless. Neither of the courts seemed to require any showing of the adequacy or strength of the federal interest. Moreover, once the federal interest is presumed to operate, the courts seem to automatically give federal content to the rule of decision. Neither result is supported by reason.

However, the federal courts may not be entirely free of restraints in this area. Federal Rule of Civil Procedure 69(a) provides that "proceedings supplementary to and in aid of a judgment . . . [and] execution" shall be "in accordance with the practice and procedure of the state in which the district court is held" except to the extent that any federal statute is applicable.\textsuperscript{64} Seizing upon this language, the Tenth Circuit, in Re-

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\textsuperscript{59} \textit{United States v. Walker Park Realty, Inc.}, 383 F.2d 732 (2d Cir. 1967).
\textsuperscript{60} 421 F.2d 1076 (2d Cir. 1970).
\textsuperscript{61} \textit{N.Y. REAL PROP. ACTIONS} § 1371(3) (McKinney 1965).
\textsuperscript{62} 358 F.2d 300 (9th Cir. 1966).
\textsuperscript{63} \textit{CAL. CODE CIV. PRO.} § 580(b) (West 1955).
\textsuperscript{64} \textit{FED. R. CIV. P.} 69(a) reads in relevant part:
construction Finance Corp. v. Breeding, held that a state statute providing for entry and enforcement of a deficiency judgment is applicable in the federal courts under Rule 69(a) since entry of the deficiency judgment in the manner specified is a post-judgment prerequisite to the issuance of a general execution under state law. It further held that the mortgage was not entitled to a deficiency judgment when it had not been timely filed under the state law. This case engendered a line of district and circuit court cases in the Tenth Circuit, which culminated in United States v. Inciardi. In that case the court applied Oklahoma's deficiency statute against the Small Business Administration (SBA) on the theory that the state statute did not exempt the United States from its purview.

Other circuits, however, do not accept the Tenth Circuit view. For example, the Second Circuit, in United States v. Merrick Sponsor Corp., held that state deficiency judgment statutes are merely statutes of limitations and not "processes to enforce judgment" under Rule 69(a). Under such a reading a court can draw directly on the Summerlin line of cases, which make state statutes of limitations ineffective to bar the remedies of the federal government. More simply, a court could conclude that Rule 69(a) was not applicable because the policy of the National Housing Act governs the area and thus federal law governs. Although most courts do not seem to consider the specific problem which Rule 69(a) presents, it is likely that concern with federal government interests would dictate the adoption of the Second Circuit's view in most courts.

The pervasiveness of the View Crest reasoning in the deficiency judgment area, despite differing factual situations and competing state laws, is evident. By starting (and finishing) the

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Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

65. 211 F.2d 383 (10th Cir. 1954).
67. 421 F.2d 1076 (2d Cir. 1970).
68. Id. at 1079.
69. See note 42 supra.
analysis with the federal interest, moreover, the courts have a convenient tool to assure the application of a rule favorable to the interests of the federal government.

C. STADIUM APARTMENTS

The most significant recent development in the View Crest line is the case of United States v. Stadium Apartments, Inc.\textsuperscript{70} Starting from the View Crest premise of the applicability of federal law to the FHA mortgage situation, the court in Stadium in effect permitted the complete negation of state redemption statutes with regard to FHA mortgages. In doing so, the court set the clearest ground rules yet for the preemption of state laws by federal interests in the field of FHA mortgages.

Stadium Apartments obtained an FHA insured mortgage loan from the mortgagee containing the following clause:\textsuperscript{71}

The Mortgagor, to the extent permitted by law, hereby waives the benefit of any and all homestead and exemption laws and of any right to a stay or redemption and the benefit of any moratorium law or laws.

Stadium Apartments later defaulted on the mortgage and the mortgagee assigned the mortgage to the Secretary of Housing and Urban Development.\textsuperscript{72} The FHA then brought suit for the foreclosure of the mortgage in federal district court. The court granted foreclosure in default, but included in the foreclosure decree a one year period of redemption as required by the state statute.\textsuperscript{73} On appeal the Ninth Circuit reversed.

The Ninth Circuit's reasoning began with the View Crest holding that local rules could not be allowed to limit the effectiveness of the remedies available to the FHA for the breach of a federal duty.\textsuperscript{74} The court rejected the lower court's reasoning that the FHA cannot have greater rights as an assignee than its assignor would have had under state law, noting that the FHA was in a preferred position because of the overriding necessity


\textsuperscript{71} 425 F.2d at 359.

\textsuperscript{72} Action was taken pursuant to 12 U.S.C. § 1743 (c) (1969).

\textsuperscript{73} \textsc{Idaho Code Ann.} § 11-402 (1948).

\textsuperscript{74} 425 F.2d at 367 (emphasizing View Crest, 268 F.2d at 383).
of protecting the security interests of the federal government.\textsuperscript{75} Congress, it held, had not adopted state law, but required only that the \textit{mortgagee} be given protection on default equal to his protection under state law.\textsuperscript{76} The court also rejected the argument that the numerous references to state law in the National Housing Act as the substantive content of the federal provisions showed an absolute intention to adopt state law where federal statutory law did not cover the precise point at issue.\textsuperscript{77}

The court admitted that the qualifying phrase—"to the extent permitted by law"—in the mortgagor's waiver clause\textsuperscript{78} might be read as referring to state law.\textsuperscript{79} However, the court felt that such language probably referred to the law applicable to the FHA mortgage. That law, the court concluded, is federal\textsuperscript{80} and allows waiver of the benefits of state law. There is no federal law which prohibits the FHA from conditioning its acceptance of mortgage insurance on the waiver of state redemption rights by the mortgagor. Moreover, the court agreed with the FHA contention that the state statute does not force the purchaser at the foreclosure sale to bid the full market value of the property. Thus, since the mortgagor need pay only the sale price on redemption, the court thought that state law would compel the federal government to absorb any loss of land value during the course of the redemption period.\textsuperscript{81} The court determined that the FHA should not be compelled to absorb or mitigate such losses, because the government is not in the real estate business.\textsuperscript{82}

The dissent in the \textit{Stadium} case, although conceding the presence of a federal interest, could not find "an overpowering motive of federal self-defense" which would necessitate the overturning of state redemption statutes wherever FHA mortgages are involved.\textsuperscript{83} It determined that \textit{View Crest} prescribed

\textsuperscript{75} Id.
\textsuperscript{76} Id. at 361-62. See 24 C.F.R. § 580.18 (1947 Supp.).
\textsuperscript{77} Id. at 361. This is precisely the argument made in View Crest, 268 F.2d at 382-83.
\textsuperscript{78} See text accompanying note 74 \textit{supra}. As the dissent in \textit{Stadium} points out, waiver of the redemption right is specifically prohibited by law in some states. 425 F.2d at 370 n.3 (dissenting opinion). See, \textit{e.g.}, \textit{Cal. Const. Civ. Proc.} § 2889 (West 1955).
\textsuperscript{79} 425 F.2d at 362.
\textsuperscript{80} Id. This result is based upon an uncritical reading of \textit{View Crest}.
\textsuperscript{81} Id. at 365 n.7.
\textsuperscript{82} Id. at 366.
\textsuperscript{83} Id. at 367 (dissenting opinion).
a balancing test and concluded that the FHA would suffer only minor harm compared to the benefit to national housing policy in protecting mortgagors and junior lienors by use of state redemption statutes. There is no reason why the FHA should not be required to take the minimal risk of maintaining the property during the redemption period. This argument is especially weighty for states where redemption laws allow a fee for such services or allow the purchaser to collect rents during the period. In short, the dissent considers the state policy of redemption too strong to be abrogated by mere Congressional silence.

Both the majority and dissenting opinions agreed that View Crest necessitates consideration of the governing interest of federal law in this situation. However, despite the fact that View Crest was more thoroughly discussed in Stadium than in any other case since the original decision, the majority took View Crest almost entirely at face value. There is really no clear attempt to prove the adequacy of the federal interest at stake. Moreover, Congressional silence here might indicate that Congress has deemed the redemption right “neither so inimicable nor so beneficial to the operation of the government program as to require upsetting determinations of the individual states.”

The decision diminishes legal certainty by providing two redemption rules, one where the government is a party and one where it is not.

Even beyond the result in the Stadium case itself and its effect on state redemption laws, the decision is a staggering expansion of federal preemption of state law. The remainder of this note will return to state deficiency judgment statutes and

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84. Id. at 372.
85. See Clark Investment Co. v. United States, 364 F.2d 7 (9th Cir. 1966) which involves such a law of Idaho, the very state in which Stadium arose.
86. See United States v. West Willows Apartments, Inc., 245 F. Supp. 755 (E.D. Mich. 1965) where the court allowed the FHA to consent to the inclusion of a redemption period. The theory was that since the state statute provided that the mortgage holder could collect rents during the redemption period, the FHA as holder would suffer minimal financial harm.
87. The majority notes that 26 states have post-foreclosure redemption provisions. 425 F.2d at 364 n.4.
attempt to develop a reasonable alternative that would prevent their total extinction in the area of FHA mortgages.

IV. ANALYSIS: BALANCING STATE AND FEDERAL INTERESTS

A. UNIFORMITY: THE USE OF FEDERAL COMMON LAW

Underlying the choice of federal law over state deficiency judgment statutes for FHA benefit is the desire of the courts to protect the security interests of the federal government by providing a uniform body of administrative law. Abstractly, uniformity is desirable for several reasons: fairness demands that federal remedies should not vary from state to state; individuals prefer one set of rules to govern similar transactions; and uniformity lessens the administrative burden on the federal government. It might also be possible that the federal courts wish to create a rule favorable to the federal government.

The "uniform" rule established by the View Crest line of cases has taken shape solely from a rejection of state law where it restricts the federal government. Such a situation leads to only one certainty in the area—the preemption of state law. The uniform federal rule has taken its form on a case-by-case basis so that the federal government is not required even to plan its transactions with an eye to the limitations of state law. In order to determine whether this approach is legitimate, let alone the most desirable, it is necessary to look more closely at the federal common law power and the areas in which it is applicable.

Clearfield undoubtedly established federal court power to determine or create federal common law despite the existence of state laws covering the same subject matter. Such power is not total, however, but is restricted to non-diversity situations in which the strength of the federal interest justifies the application of a federal rule. The courts have developed five areas in which

90. Thus in Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816), any form of uniform review of state decisions by the Supreme Court could have been destroyed if the state court position had won out.


the federal interest is deemed sufficient to justify the application of federal common law.

The first area involves instances in which Congress has manifested some interest in the specific point at issue in a statute or federal program which has some bearing on that point, but where the federal law or program is not mandatory.94 Some courts hold that the mere existence of a federal statute or regulation in the same subject area as the state statute is conclusive.95 Such a view, however, is overly arbitrary since it fails to balance state interests against what might be a very minor federal interest.96 In this area of federal common law some evidence should be present in the legislative history or statutory scheme to indicate that Congress considered the specific issue.97

The second area, closely related to the first, involves situations where there is no statute sufficient in itself to engender a decisional rule inferentially, but where a court may nonetheless conclude that the entire field is so dominated by federal statutes and other indications of Congressional interest that all legal relationships in the area must be governed by federal law.98 This problem differs from the first in that the statute need not be relevant to the specific issue but merely to the general area in which the specific issue arises. In this instance federal common law effectuates the policy of federal acts and programs by extending the federal rule to issues not specifically covered by the language of the federal statutes.99

94. Compare concurring opinion of Harlan, J. in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). If federal law were mandatory, it would apply from the statute of its own force without need for the vehicle of federal common law. This first category seeks to include the situation where Erie does not require the application of state law in federal courts and federal statutory law does not cover the specific point at issue. Cf. Mishkin, The Variousness of "Federal Law": Competence & Discretion in the Choice of National and State Rules For Decisions, 105 U. PA. L.J. 797, 799 (1957).


99. Thus a court may use its common law powers to create entirely
FHA DEFICIENCY JUDGMENTS

Third, federal common law applies under a broad reading of the Clearfield case whenever the federal government performs a constitutionally permissible function that is not covered by a specific federal statute.100 This area is very broad and, in some instances, extends even to the functions of federal agencies.101 Some caution is necessary, however, as is indicated by famous dissenting opinion which would extend federal law to any transaction connected with federal currency simply because a federal function is involved.102

The fourth area uses federal common law to protect the fiscal assets and credit of the federal government.103 This area rarely takes on independent significance, but is usually tied to a consideration of the third area and used as a factor to reinforce the decision to apply federal common law in those circumstances.

Fifth, federal common law may apply largely because the United States is a party to the action.104 The theory apparently


102. This result would obviously be an absurd intrusion on many traditional areas of state law governing actions between private parties. See Stone & Webster Eng'r Corp. v. Hamilton Nat'l Bank, 199 F.2d 127, 133 (8th Cir. 1952) (dissenting opinion).


is that where the United States is a party, the question of remedies in particular takes on a peculiar federal character and thus federal law should govern. 105 Although there are still some vestiges of “sovereign prerogative” thinking, 106 the better reasoning is that it is the federal nature of the function involved—the source of the right sued upon—and not the grounds upon which federal jurisdiction is based which should determine the governing law. 107

Any argument that state law should apply of its own force in the area of deficiency judgments must deal with each of these well recognized areas in which the federal courts have created federal common law. Plausible arguments can be constructed for each of the five theories. A court could conceivably read the National Housing Act so that the first or second category applies. Congress certainly has considered issues relevant to state deficiency judgment statutes, but whether Congressional pronouncements should be read to cover the whole field in the absence of a specific statutory pronouncement on deficiency judgments is uncertain. Clearly the View Crest line would support the view that federal policy in the area is of overriding importance. The large-scale nature of FHA involvement in mortgage transactions clearly calls for consideration of the third category—federal performance of a constitutionally permissible function not specifically covered by federal statute. The potential damage to the federal security interest if the FHA is barred


107. Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956). See also United States v. Matthews, 244 F.2d 626 (9th Cir. 1957); Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 HARV. L. REV. 1084, 1094 (1964). Mishkin, supra note 94, at 801 n.19, contends that the Clearfield case itself disregarded the fact that the United States was a party to the action because the court did not mention the jurisdictional basis of the suit and because it is impossible to limit the Clearfield rule simply by the status of the parties to the suit. The test for the imposition of federal common law is the presence of a sufficient federal interest which includes the United States as a party but is not limited to such circumstances. See Comment, State Substantive Law Applies in Non-Diversity Actions When Local Interests Predominate, 65 Mich. L. Rev. 359, 360 n.12 (1966). Mr. Justice Douglas, author of the Clearfield opinion, is now on record to the contrary.
by state deficiency provisions brings the fourth category into play. Since the United States is a party to the action, representing the interests of the FHA, the fifth category is also relevant. Thus the power to create federal common law rules concerning deficiency judgment procedures in cases in which the FHA is the mortgagee might be readily justified on the basis of conformity to the entire range of established situations in which the power to create federal common law exists.

Most courts in the View Crest line of cases ceased analysis once it was concluded that a single category applied. After determining that damage would result to the federal interest in an area in which a federal agency was functioning, the courts concluded that federal law must apply. Furthermore, the courts determined that the federal law must be uniform to the extent that any state provisions which would bar federal government remedies must be denied effect. There is a noticeable lack of consideration of the other interests involved.

Federal courts clearly have the power to choose the applicable rule in cases in which the FHA is involved. Such power clearly includes the prerogative to formulate and apply a uniform national rule. However, there is no compulsion to formulate a uniform federal rule without any reference to state law simply because the area is federal. The formulation of a uniform rule—especially one based primarily upon avoiding the effects of established state law for the benefit of the federal government—is not a necessary corollary of the power to choose the rule of decision. In fact, a court has three choices: 1) the creation of a uniform federal rule solely on the basis of “federal law,” 2) the application of the state rule ex proprio vigore, or 3) the selective incorporation of the state law as the content of the federal common rule. A complete analysis requires review of affected interests other than federal interests in order to determine whether the strength of the federal interest is sufficient to justify the preemption of state law.

B. EXPECTATION: THE INTEREST OF STATE LAW

An FHA mortgage transaction functions at two levels. On the first level the FHA negotiates directly with the private lender-

108. See Mishkin, supra note 94, at 802.
110. Mishkin, supra note 94, at 802-03.
mortgagee to insure the loan which the mortgagee will make to the private mortgagor. At this point the federal government is very much involved in negotiations with the mortgagee. On the second level, however, the federal government is almost totally uninvolved except as its interests are represented by the mortgagee. Here, the bargaining is between two private parties, the mortgagor and the mortgagee. Each will be benefited and burdened by certain well defined contract rights and obligations under state law if the involvement of the federal government is ignored. The question which must be asked is whether the initial federal involvement should preclude the application of state law that normally would apply to transactions between private parties at this second level.

State law, of course, governs all aspects of a mortgage transaction between private parties from the construction of a deed as a mortgage to the determination of the redemption period. Nor can it be denied that the second level of the FHA mortgage transaction is similar in almost all respects to the negotiations for a non-FHA mortgage loan between private parties under state law. Although participation in the total transaction by the FHA changes the character of the dealings somewhat, the only effect induced by federal government involvement on the second level of the transaction is extra payment for insurance coverage. If the courts hold that the mere presence of federal funds changes the local negotiations so as to require the application of federal law, as some courts intimate, new problems arise. If the local bank does not explain the nature of the FHA mortgage insurance to the uneducated mortgagor, will the courts presume that the mortgagor had knowledge that federal funds were involved and thus that federal law applies? Even if the mortgagor is aware of the use of federal funds, does this knowledge give him adequate notice that his remedies under state law, e.g., redemption, might be unavailable? The proper concern in this area should be the strength of the state law interest as manifested by the expectations of the parties.

The strength of the state interest is evident from the difficulty courts have in justifying the blanket application of federal law in the area. There is often a very thin line between the

111. E.g., United States v. Forest Glen Senior Residence, 278 F. Supp. 343 (D. Ore. 1967). The court hinted that it might have read state redemption laws into the mortgage but for the fact that all the parties involved were aware of the presence of federal funds from the inception of the transaction.
creation of a security interest in the federal government under state law and the remedies available to the federal government under federal law. Even View Crest recognizes the primarily local context of the mortgage transaction and the desirability of deferring to state law as a matter of commercial convenience at the planning stages. The right to a deficiency judgment under state law (and the corresponding unavailability of a deficiency judgment if the proper procedures are not followed) are both parts of the state system of remedies open to the mortgagee. The original mortgagee would be restricted to remedies under the state procedures were he not given the option of assigning the defaulted mortgage to the FHA. From the standpoint of the mortgagor, the presence of the FHA does not change the character of his default on the mortgage. The mortgagee’s option to assign the mortgage to the FHA, however, can have a direct effect on the manner in which the mortgagor must satisfy the mortgage debt. Moreover, the availability of the option in only certain situations should not determine the general rule, because such a consideration focuses attention on only one of many interests involved.

The strength of the state interest rests in the certainty of result for all similar transactions within the borders of the state. If the mortgagee can overturn this certainty by assigning the defaulted mortgage to the mortgagee’s insurer (the FHA), the very purpose of the state statutes are defeated. The fact that this op-

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112. See, e.g., United States v. Thompson, 408 F.2d 1075 (8th Cir. 1969).
113. 268 F.2d at 383.
114. 12 U.S.C. § 1713(g) (1970). Where the mortgagee does not assign the defaulted mortgage to the FHA, the foreclosure action which he brings is merely an action between private parties under state law. The exact proportion of cases in which the mortgagee avails himself of this option is unknown. Generally, however, direct assignment to the FHA would seem the most convenient choice unless the mortgagee had some reason for wanting title himself. In any case the operation of the mortgagee’s option does little to mitigate the mortgagor’s expectation problems.
115. See 24 C.F.R. § 200.155 (1971). The regulation limits mortgagee’s option to situations where project (commercial) mortgages are involved. The effect of this distinction between home and commercial mortgage foreclosures can be argued to show the FHA’s deference to the dictates of state law. Alternatively, this provision might show an especially strong federal interest in commercial mortgages since the FHA is willing to take the risks of foreclosure itself in that area. The latter argument is not determinative in itself, however, because the relevant state and federal interests must still be weighed against one another. The real question is whether even such indications of significant federal interest are sufficient to overcome the state interests involved.
tion is not available to the mortgagee can be argued to show the FHA's realization of the strength of state interest in the area. This is not to say that the protection of the federal security never outweighs the governing interest of state law over what is primarily business conduct, but this state interest must not be ignored.

In fact, both the federal courts and Congress recognize the residual validity of the state law in certain cases. The courts in fields other than FHA mortgages have drawn the line against preemption of state law, even in the presence of a very clear federal interest, where the state interest outweighed the hindrance to the federal program.\textsuperscript{116} Even in the area under discussion courts have disallowed deficiency judgments for the FHA on a simple federal theory of equity—that the price paid at the foreclosure sale was so grossly inadequate as to shock the conscience.\textsuperscript{117} Also, Congress frequently has relied upon state definitions to determine the scope of the National Housing Act.\textsuperscript{118}

\textsuperscript{116} Especially noteworthy in this regard is the case of United States v. Yazell, 382 U.S. 341 (1966). The Court held that the Texas law of coverture provided an adequate defense for the wife of a bankrupt husband on a note drawn by him to the Small Business Administration. Unfortunately, courts since Yazell have universally distinguished its result from the FHA mortgage situation on the theory that the SBA has direct contact with the borrower during the negotiations while the FHA does not. See United States v. Thompson, 438 F.2d 254, 257 (8th Cir. 1971); United States v. Stadium Apartments, Inc., 425 F.2d 358, 363 (9th Cir.), cert. denied sub nom. Lynch v. United States, 400 U.S. 926 (1970); United States v. Merrick Sponsor Corp., 421 F.2d 1076, 1078 (2d Cir. 1970); Clark Investment Co. v. United States, 364 F.2d 7, 9 (9th Cir. 1966). Moreover, the result in United States v. Helz, 314 F.2d 301 (6th Cir. 1963), which reaches the opposite conclusion from Yazell under similar facts in the FHA mortgage field is approved in the Yazell case itself. 383 U.S. at 348 n.15. But see Sitton v. United States, 413 F.2d 1386 (5th Cir. 1969), cert. denied, 397 U.S. 988 (1970). State law determined the amount of interest due on the deficiency judgment on a VA loan because state interest became stronger after foreclosure. Ironically, however, the effect of the decision was to require repayment to the VA at a 6% interest rate under state law rather than 4% under VA regulations.

\textsuperscript{117} See Magnolia Springs Apts., Inc. v. United States, 323 F.2d 726 (5th Cir. 1965). The dissent in Stadium argued application of this form of the "clean hands" doctrine because under that analysis of the facts the government acquired a deficiency judgment against the mortgagor for the difference between the value set by the court for the land and the amount of the unpaid debt. Mortgagor then bought at its own foreclosure sale for less than half that price. 425 F.2d at 370.

\textsuperscript{118} For example, the National Housing Act allows "first mortgage" to be defined on the basis of state definitions. 12 U.S.C. § 1713(a)(1) (1970). Furthermore, the regulations of the FHA provide that the validity of title to property purchased by the FHA must be determined
Perhaps these factors in themselves do not militate against the strict application of federal law against state deficiency judgments, but at least they indicate that state interests do exist and are recognized to some extent even in the field of FHA mortgages. The question of the extent of application of state law remains.

C. THE INTERESTS WEIGHED

Weighing the expectation interest of parties under state law against the interest of protecting federal security interests by a uniform federal rule for a national program requires careful scrutiny of the implications of each choice. The desirability of uniformity in the area of FHA mortgages is manifest: ease of governmental administration, protection of the federal treasury, enforcement of rights otherwise unavailable under state law. However, Congress, in the National Housing Act, does not require uniform application of a single rule concerning deficiency judgments. Nor, for that matter, does it require a preferred position for the federal government's security interests. If not required, the mere fact that uniformity is desirable for its own sake is only suggestive and surely does not compel a uniform national rule. Furthermore, the very purpose of the National Housing Act—"to facilitate the building of homes by the use of federal credit"—does not require any greater protection of federal credit than any other credit which is subject to state laws. Indeed, perhaps the federal government should even be willing to take the extra risks of state law to better accomplish its purpose of encouraging home building by holding land during state redemption periods or by subjecting itself to state deficiency judgment provisions. Even now the FHA can acquiesce to such conditions.

under state law on the basis of state records and evidence customarily used to prove title to property in the state. 24 C.F.R. §§ 207.35, 207.36 (a) (4) (1971). The regulations even make specific reference to the preservation of remedies under state law where the mortgagee elects to bring foreclosure himself. 24 C.F.R. § 207.58 (c) (2) (iii) (1971).

119. See Mishkin, supra note 94, at 813.


121. The View Crest result allows the FHA to acquiesce to practices not specifically allowed under federal law but nonetheless included in the general field covered by federal practice. Thus, in United States v. West Willows Apts., Inc., 245 F. Supp. 755 (E.D. Mich. 1965), the court allowed the FHA to consent to a redemption period despite the lack of specific authorization in the National Housing Act when state law required that a redemption period be included in any title insurance. Un-
On balance, the involvement of the FHA in the mortgage transaction does not seem to remove the essentially local character of the events. The mortgage transaction and the deficiency judgment procedure are regular events under state law between private parties. The FHA not only has no direct contact with the mortgagor, but is also replete with regional offices and well aware of the vagaries of local law, at least as applied to the early stages of the transaction. Although the View Crest doctrine rejects as insignificant the fact that the FHA itself provides different forms for different states,\textsuperscript{122} this fact again belies the claim that the FHA is not equipped to deal with local law. The further distinction which the View Crest court itself draws between local law at the planning stages and federal law at the remedy stages\textsuperscript{123} can only make sense where the federal security interest is strong enough to deserve protection from state law.

The strength of the federal interest must ultimately depend upon resulting damage if state law were to apply rather than federal law. As long as the local rule means only inconvenience in litigation for the federal government, and perhaps some small financial loss, there seems to be insufficient reason to give the FHA remedies which even the mortgagee cannot obtain on the same default. Furthermore, this result should follow whether the state deficiency statutes are read as substantive and jurisdictional or as merely procedural devices since the strength of the state interest \textit{vis-a-vis} the private parties is equal under either reading.

The final determination involves the question of what is the true scope of the government's potential losses. The answer to

\textsuperscript{122} 268 F.2d at 383.

\textsuperscript{123} Id. This is an ingenious distinction, but it contains the seeds of its own destruction. By deferring to local law in the planning stages, the FHA shows that it recognizes and understands the workings of state law. The only real issue left is measurement of the size of the burden involved in FHA deference to local law beyond the planning stage. In any case the FHA must show more than the fact that the mortgagor has defaulted to bring federal law into play. If the FHA is geared to operate under state law—or could be adapted to do so—the required showing of federal inconvenience must be substantially greater.
this question is not so obvious as some courts have thought. Surely if the federal government loses the right to a deficiency judgment, after already having paid off the mortgagee under its insurance obligation, the government is left only with the proceeds of the foreclosure sale or the ownership of the land itself. This would only occur if the government failed to follow state procedures of which it could have been well aware and was well equipped to follow. If the proceeds of the foreclosure sale are sufficient to satisfy the remainder of the mortgage debt, the FHA loses no money whether or not the mortgagee assigns the mortgage. Thus the loss the federal government might suffer is merely the prerogative to ignore state law and not the loss of a supplementary judgment remedy for the amounts left due and owing on the mortgage debt.

V. A PROPOSAL: INCORPORATION OF STATE LAW AS FEDERAL POLICY

The problem of the choice of law in FHA mortgage cases involving state deficiency judgment statutes poses a dilemma. If the federal interest is not strong enough to overcome entirely the state statutory scheme but is nevertheless strong enough to demand some protection for the federal interest, what rule of law should apply and what should be its effect? Where federal interest in the general area is firmly established and the parties are in a federal court because the United States is the plaintiff, a court will be loath to apply state law ex proprio vigore even if state interests outweigh federal interests on the specific point. One possible solution is to recognize the general coverage of federal common law where the FHA is involved, but to give it consideration by selectively incorporating the varying provisions of state law as the substantive content of federal common law. "The scope of a federal right is, of course, a federal question but that does not mean that its content is not to be determined by state rather than federal law." 125

124. This result is reached because the FHA either receives the proceeds itself if it has brought the foreclosure proceedings or is excused from the payment of the insurance money if the mortgagee has brought foreclosure himself and has not chosen to assign within a "prompt" time as prescribed by statute. See 12 U.S.C. § 1710(a) (1970).
125. DeSylva v. Ballentine, 351 U.S. 570, 580 (1956). Cf. Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204 (1946) (state law governs the definition of "property" under the federal act where the federal act so provides); Board of County Comm'rs v. United States, 308 U.S. 343 (1939) (although state law is not controlling, it may be adopted
This exercise, then, is similar to the actions of Congress in allowing state definitions to serve as the substantive content of certain provisions in the federal statutes.\textsuperscript{126}

Selective incorporation has two main virtues. First, it escapes the wooden analysis that either federal common law with a completely federal content applies to the case or that state law applies of its own force. Given that bare choice, it would be difficult indeed for most courts to conclude that federal interests did not predominate. The selective incorporation approach recognizes the presence of the federal government in the field of FHA mortgagees by acknowledging that federal common law will govern, but that the content of such federal common law will not be restricted. The uniform rule becomes the application of state law through the exclusive vehicle of federal law. Thus a court can fairly consider the weight of state law without fear that adoption ex proprio vigore will destroy the federal interests.

Second, selective incorporation allows much greater judicial flexibility. In a case where the state law would work a true hardship on the federal government, as in the case of an aberrant state law, the court can create an exception and apply a "federal" rule. Such exception differs from the strict application of a non-state rule initially in that the standard becomes much more restrictive.\textsuperscript{127} Under the selective incorporation analysis a court must first approach facts from the direction of state law and preempt state law only when it works an undeniable hardship on the federal interest. Furthermore, the courts could create exceptions to the use of state law under a general rulemaking power in discrete areas where federal regulations extend beyond the confines of state law.\textsuperscript{128} A second advantage of selective incorporation appears where the state law specifically provides that no deficiency judgment is available under state law in a certain class of cases, \textit{e.g.}, purchase money mort-
Rather than simply give the federal government a deficiency judgment in such a case, the court is forced to examine the strength of the state policy. The court can conclude that this rule is aberrant in the given case in that it grossly affects the security interest of the federal government, but it also might conclude that the general presumption in favor of applying the state rule under the federal common law still exists. This reasoning would apply even in a case where the state law might prohibit the granting of a deficiency judgment absolutely.

At this point there is a difficult theoretical hurdle. If the federal courts were to adopt state law as the substantive content of the federal common law rule, would there be a different federal policy for each state of the union? Does this not destroy the very concept of a uniform national rule which the federal common law seeks to establish? The answer to this argument is that uniformity need not mean the application of one sentence of black letter law in every situation similar on its facts. Nor does a uniform rule mean that a uniform result must occur. Under this proposal federal courts could apply state law as the content of federal common law, except in situations where such application would work an unendurable hardship on the federal interest, as a matter of uniform federal policy. Moreover, federal common law can only demand a uniform result when the federal interests warrant the upheaval of an established system of state remedies and rights. In the case of deficiency judgments, the strength of the federal interest, on balance, is not that strong. Furthermore, adoption of the state law as the federal standard would remove uncertainty for all three parties to the FHA transaction with only a minimal discomfort to the federal interest.

This approach is not without its problems, not the least of which is the determination of the applicable state law itself. There are also problems with the effect of state court holdings on federal court actions and the weight which must be attached to amendments to the state statute. Such difficulties are common whenever there is use of state law in federal courts and therefore do not strongly militate against selective incorporation as the best alternative.

129. E.g., ARIZ. REV. STAT. ANN. § 33-729(A) (1956); CAL. CODE CIV. PRO. § 580(b) (West 1955).
130. See Mishkin, supra note 94, at 808.
VI. CONCLUSION

The courts must find some way to give greater effect to state rules regarding deficiency judgments where the FHA is involved than is now the case. Although View Crest establishes a decided inclination toward the use of federal law in the general area of FHA mortgages, a careful analysis of the specific area of deficiency judgments reveals that federal interests in this particular aspect of FHA mortgages are not strong enough to overcome what amounts to a presumption of state law. The crucial failure of the line of cases from View Crest to Stadium is the summary treatment given state law simply on the basis of federal involvement in the transactions and the desire to protect the federal security interest without really considering the strength of that interest. No assuredly correct solution in this area can be determined without a close look at the strengths of the state interests involved. Preemption of substantial systems of state procedures must occur only when the federal interest itself is substantial and where giving effect to state law would significantly damage that interest. Where state law governs the whole transaction which gives rise to a deficiency judgment where the FHA is not involved and also governs if the mortgagee chooses not to assign to the FHA when it is involved, preemption of the state law on the basis of minimal inconvenience to the federal government is unjustified.

Where a significant local interest is involved in the absence of irreconcilable conflict with long-range objectives of federal policy, a federal policy of the incorporation of state law controlling deficiency judgments seems the most promising alternative. In this way all the parties to the mortgage and insurance transactions are subject to the same rules of law in seeking a deficiency judgment and a more predictable result is achieved. Of course, the incorporation of state laws requires the FHA to prosecute its actions under separate laws in different states, but the many locations of FHA offices and the present use of state law in the planning stages indicate that the FHA's adjustment would be a small burden. On balance the strength of state interests outweigh the minor litigational inconveniences the FHA would suffer.