

HUD Face to Face: How do we refile and succeed?

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If a case is dismissed due to the HUD face to face meeting not taking place at all or taking place untimely; how can the issue be cured? From looking at the HUD regulations (24 CFR 203.604(b)), it may appear there is no resolution. The time period has passed to meet the regulations specific requirements and the “default date” is a specific date and cannot be changed. Here are some tips for ensuring success upon refileing the foreclosure.

First, it may be prudent to look closely and review the regulation including the exceptions to HUD face to face pursuant to 24 C.F.R 203.604(c). Many times, the exceptions may have been overlooked the first time.

1. Is this a HUD back mortgage? If not, or if it was and the investor has changed; no face to face meeting is required. *U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust v. Hassan*, [2017 WL 4411038](#) (Fla. Cir. Ct. Oct. 2, 2017) The cancellation of FHA insurance pre-foreclosure makes FHA defenses irrelevant.
2. Is the person bringing the defense a Mortgagor/Borrower? If not, have the face to face defense stricken. The regulations clearly indicate the HUD face to face interview is for the mortgagor.
3. Is the property Mortgagor/Borrower occupied? If not, the HUD face to face requirement does not apply. Review to see if the property is homestead in FL by reviewing the tax records and review the service returns from the prior action. The service returns usually provide some information as to whether the property is vacant or occupied. The service returns also note if the property is tenant occupied. It may be prudent to have a drive-by of the property to determine whether it is occupied or vacant and/or a skip trace to determine current occupancy.
4. Is there a servicer office and/or Bank location or branch office within 200 miles of the mortgaged property? If not, the face to face meeting is not required.
5. Was the face to face meeting conducted? Review all record to ensure there are notations that there was “at least one trip” to the mortgaged property.
6. Was a reasonable effort made to conduct the face to face meeting? Was the face to face letter sent by certified mail? The return receipt green card needs to be available as evidence for the court. If a mail vendor was used, is there a witness that can testify to the routine business practice of sending the letter by the third-party vendor or can the third-party vendor testify?
7. Has the Mortgagor/Borrower clearly indicated that he/she will not cooperate with the interview? In FL, review whether the mortgagor sent a cease and desist letter prior to the foreclosure. There is new appellate case law holding a cease and desist letter is clear evidence the Borrower would not be cooperative with the face to face meeting. *Bank of America, N.A. v. Jones*, LEXIS 3942 (Fla. 4th DCA 2020). In IL, an appellate court found the Borrower’s actions were inconsistent with an intent to cooperate with HUD face to face; when the Borrower filed a

federal lawsuit and a complaint with HUD against the lender after receiving information regarding setting the face to face interview.

8. Has a reasonable effort to arrange the face to face meeting been unsuccessful? Look to the comment log and make sure there are records to present in evidence at trial. If your HUD face to face meeting is done by an outside vendor, will they be approved to testify in court. If the HUD face to face was done by a different servicer, will the prior servicer provide a witness?
9. Is there substantial compliance? Some states have case law indicating strict compliance with the Federal Regulations is not required, substantial compliance will meet the standard for a condition precedent. Loss mitigation efforts over several years can constitute substantial compliance. *US Bank Natl Assn v. McMullin*, 2017 NY Slip Op 27050, 55 Misc. 3d 1053, 47 N.Y.S.3d 882 (Sup. Ct.) New York follows this reasoning as the Court held that loss mitigation efforts over several years constitutes substantial compliance with the HUD regulations so that lack of strict compliance, which would be impossible to achieve, is excused. In FL, the 5th DCA in *Palma v. JPMorgan Chase Bank, NA*, 208 So. 3d 771 (Fla. 5th DCA 2016) found “no meaningful reason to treat compliance with section 203.604 in a FHA mortgage differently than compliance with paragraph 22 in a standard mortgage...”
10. Was there any prejudice to the Mortgagor/Borrower? Absent some prejudice, the breach of a condition precedent does not constitute a defense to the enforcement of an otherwise valid contract. *Adiel Gorel and FLCA Tropical Holdings, LLC, v. Bank of New York Mellon*, 165 So 3d 44 (Fla. 5th DCA 2015) (citing *Allstate Floridian Ins. Co. v. Farmer*, 104 So. 3d 1242, 1248-49 (Fla. 5th DCA 2012) (holding breach of condition precedent must be material, meaning one causing prejudice, to constitute defense to enforcement of contract). Look at whether the face to face meeting would have changed the outcome for the Mortgagor/Borrower. Did the Borrower have any income that would have enabled he/she to make a payment? Review the case of *Njema v. Wells Fargo Bank, N.A.*, the United States District Court for the District of Minnesota. The Judge found for the Bank finding any loss mitigation would not have helped the borrower due to “his precarious financial situation.” Interestingly, the Bank did not make any effort to arrange a face to face meeting.
11. Has a repayment plan been entered? If a repayment plan was entered, a face to face may not be required, as a loss mitigation option is being used. Have the repayment plan available for trial
12. Has bankruptcy been filed by the Mortgagor/Borrower? Subsequent to a discharge in without reaffirmation, the Borrower is not entitled to protections of the mortgage contract which their actions have nullified and a face to face meeting is not required. This is an IL case, *PND v. Wilson*.
13. Was the time period for the face to face meeting during the COVID-19 moratorium? HUD suspended the face to face requirement for one year effective 3/13/2020 to 3/13/2021. However, contact must be established via alternative methods, such as phone



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interviews, email, or video conferencing technology such as skype. Review the records to ensure this activity is being documented for use in court.

14. Is there any way to settle the case before refiling? Review all settlement options. HUD does have restrictions on loan modifications that can make it more difficult to obtain a modification. Find out what the Borrower wants and see if it is reasonable.

If a face to face meeting is required and the Mortgagor does not fit any of the exceptions, make sure the case is being reviewed by competent counsel before refiling. In FL, consider advancing the default date to meet the time period within the Code of Federal Regulations. 24 C.F.R 203.604(b) provides a "mortgagee must have a face-to-face interview with the mortgagor or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid." Move the default date forward and make the reasonable effort to arrange the meeting prior to the time period expiring. Work closely with counsel to send the certified letter to arrange the face to face meeting required by 24 C.F.R 203.604(d) and keep the return receipt green card for evidentiary purposes. If the case was contested previously, expect the Borrower to litigate the new filing and ensure whoever conducts the face to face interview can testify in court, if needed.

Some states may not allow advancing the default date, in those states before refiling send the letter arranging the face to face meeting and conduct the face to face interview as required by the code. Substantial compliance with the HUD regulations will need to be argued in court.

Appellate Court opinions are few in many states, however, there are some defenses that can be argued successfully. Attorneys are using case law from other states to persuade Judges to apply the same successful arguments in their state.

In FL, there are specific defense attorneys who handle HUD face to face cases. Malcolm Harrison is the main opposing counsel filing motions for summary judgment based on the Plaintiff/Servicer not meeting the HUD face to face requirement. If he is opposing counsel in a HUD face to face case with your company, be sure to have a law firm successfully litigating against him handling your cases. When a case is dismissed, Malcolm Harrison will request an attorney fee multiplier based on his experience and education along with the difficulty of the case. There is good case law to counter his multiplier request and servicers need to be willing to litigate his attorney fees if an unreasonable amount is being requested.

HUD face to face requirements prior to filing a foreclosure continue to be a thorn in our sides; the solutions is to work closely with competent counsel to correct the issues before refiling the foreclosure. Don't make the same mistakes twice, work closely with your counsel to conduct a thorough review and get the foreclosure judgment entered upon refiling.

Please feel free to reach out to me with any cases needing an 'in depth' review of HUD face to face requirements at jane.bond@mccalla.com.



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