

Reverse Mortgage Update: Borrowers and Surviving Non-Borrowing Spouses Facing Foreclosure

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- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems with getting on to the webinar? Send an e-mail to NCLER@acl.hhs.gov.
- Written materials and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

About Justice in Aging

Justice in Aging is a national non-profit legal advocacy organization that fights senior poverty through law. Formerly the National Senior Citizens Law Center, since 1972 we've worked for access to affordable health care and economic security for older adults with limited resources, focusing especially on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency. Through targeted advocacy, litigation, and the trainings and resources we provide to local advocates, we ensure access to the social safety net programs that poor seniors depend on, including Medicare, Medicaid, Social Security, and Supplemental Security Income (SSI).

About NCLC

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S.

NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness.

Key Lessons

1. Grace period for non-borrowing spouses to obtain the Mortgagee Optional Election (MOE) until March 21, 2020, even if the borrower died months or years ago
2. Eligibility criteria and process for getting the MOE
3. Loss mitigation options for property charge defaults

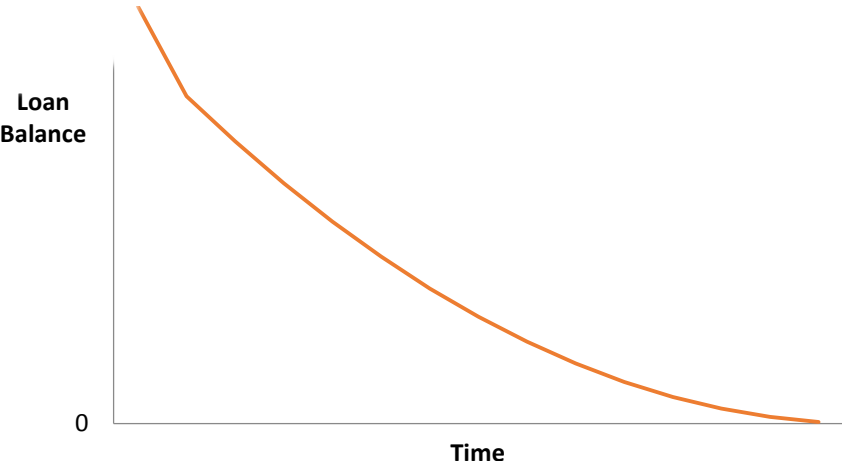
REVERSE MORTGAGE BASICS

Reverse Mortgage Basics (Slide 1 of 3)

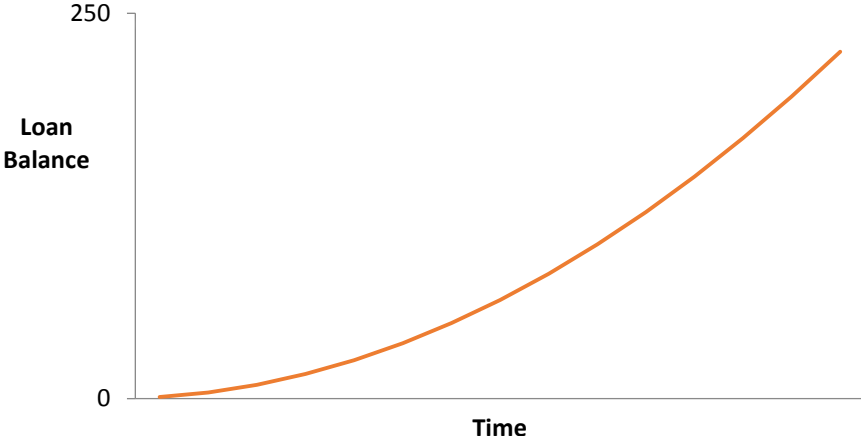
- FHA-Insured Reverse Mortgages: the Home Equity Conversion Mortgage (HECM); borrower must be at least 62 years old.
- Proceeds may be taken as a lump sum, line of credit, or an annuity.
- No monthly payments of principal or interest; interest and servicing fee is added to the loan balance each month.
- Loan comes due upon a triggering event – death or non-occupancy.

Reverse Mortgage Basics (Slide 2 of 3)

Regular/Forward Mortgage



Reverse Mortgage



Reverse Mortgage Basics (Slide 3 of 3)

- Loan balance may grow to exceed the value of the house
 - FHA insurance
 - Nonrecourse loan
- Initial principal amount loaned is based on:
 - Appraised value of the house
 - Prevailing interest rates
 - Age of the youngest borrower (older = higher loan proceeds)

Maximum Claim Amount

The lesser of:

- Appraised value of the house

OR

- \$726,525

Property Charges

The reverse mortgage borrower must continue to cover “property charges,” including:

- Property taxes
- Homeowner’s insurance
- HOA fees

“Due and Payable” Events

- The last surviving borrower dies.
- The last surviving borrower sells the home or conveys title (however, borrowers can convey title after closing as long as they retain at least a life estate interest in the property).
- The borrower changes their principal residence:
 - A borrower may be away from the home for up to 12 months if the absence is due to medical reasons.
- Borrower fails to pay property charges or maintain the property in “saleable” condition.

HECM Policies

- Statute: 12 U.S.C. § 1715z-20
- HUD Regulations: 24 C.F.R. Part 206
- [HECM Final Rule: 82 Fed. Reg. 7094 \(effective September 19, 2017\) Redline Copy](#)
- [Mortgagee Letters](#)
- [HECM Handbook 4235.1](#)

NON-BORROWING SPOUSES

The Problem

- Until Aug. 2014, reverse mortgages only protected the borrower from foreclosure, even if there was a non-borrowing spouse (NBS).
- Lenders regularly removed a (younger) spouse from a deed when closing a HECM because:
 - The younger spouse is not yet 62;
 - Higher loan proceeds (and origination fees) if remove younger spouse.
- Although HECM brokers often told non-borrowing spouse they could be added back onto the deed later, loan docs called the loan due and payable upon the death of the **borrower.**

Addressing the Problem

- Litigation - *Bennett v. Donovan*, 703 F.3d 582 (D.C. Cir. 2013) and other cases.
- On June 12, 2015, HUD issued ML 2015-15, giving servicers the option to assign the loan to HUD.
- Problematic deadlines blocked access for many non-borrowing spouses.

Data from GAO Report—NBS

- HECM servicers submitted 1,455 requests for the MOE from June 2015 to 9/30/18.
- FHA approved 70% and denied 30% of these.
- 432 were rejected.
- 342 of these have not yet been terminated.
- HUD claims not to know how many NBS are out there; NRMLA estimated 8,600 at one point.

Mortgagee Letter 2019-15: MOE - NEW version (3.0)

- Effective 9/23/19
- Like prior MOE, gives servicers the option to assign the loan to HUD and allow eligible spouse to remain in the home.
- Prior version, ML 2015-15:
 - Had strict deadlines and requirements that made it difficult for many spouses and servicers to comply
 - Many problems, many denials, and a lot of advocacy led to new policy
- **IMPORTANT:** Spouses denied under the prior MOE have a new window for the loan to be assigned to HUD (within 6 months of ML 2019-15) if servicer hasn't already foreclosed.
 - This includes spouses who received "in house" MOE's from their servicer.

Mortgagee Letter 2019-15 (slide 1 of 3)

CRITERIA (these first three are the same as 2015-15):

1. Spouse must have been legally married to the borrower at time of the loan (with an exception for same-sex couples who could not legally marry) and must have been legally married at the time of borrower's death;
2. Home must be spouse's principal residence from the time of origination to the present;
3. Loan not due and payable for any other reason—If there has been a default on property taxes or homeowner's insurance, spouse must cure any such default before the loan can be eligible for assignment.
 - Once assigned, loans in the MOE “deferral period” still cannot get a repayment plan for T&I default; spouse must cure the default within 30 days.

ML 2019-15: MOE Criteria (2 of 3)

BIG Change:

No More “**good and marketable title or legal right to remain**”:

- Prior version required spouse to obtain good and marketable title or other legal right to remain in the home within 90 days of borrower’s death.
- HUD recognized that this was not necessary to protect its security interest, this was a difficult requirement to satisfy, and involved a matter of state law that wasn’t dispositive of spouse’s ability to occupy the property.
- Spouse need only show continued occupancy.
- If Spouse is later removed from the home, deferral period will end and loan will come due and payable.

ML 2015-15: MOE Criteria (3 of 3)

BIG Change:

- Timing: No Hard Deadline
 - Removal of strict 120-day deadline to “elect” the MOE, 60 days to certify eligibility & 120 days to assign.
- New 180-day “due diligence” window to initiate assignment to HUD.
- Mortgagee may still assign the loan to HUD after the 180 day window, but may face interest curtailment
 - Similar to the financial penalty if servicer fails to timely foreclose.

180-Day “Due Diligence” Window

- From the later of:
 - Issuance of ML 2019-15 on 9/23/19 (runs to 3/21/20)
 - Death of the borrower
- Means that the old loans where borrower died a year or two or three years ago get another bite at the apple!
 - Even if previously denied under prior MOE
- Important to follow up with servicers on all clients who haven't already been assigned or foreclosed

“In-House” MOE

- When HUD assignment fails, some servicers (Champion in particular) have offered an “in-house” MOE to allow spouse to remain in the home.
- For clients in these programs (whether written or not), follow up with servicer about assigning the loan to HUD within the new window (180 days from ML 2019-15 – 3/21/20).
- Questions about enforceability of “in house” MOE programs, particularly if loan is transferred to new owner/servicer.
- Upshot: Get the loan assigned to HUD now

NEW: Outreach by Servicers (1 of 2)

- Servicer is now required to try to identify spouse prior to borrower's death.
- ML 2019-15 requires servicer to send out a form with the annual occupancy certification in order to identify potential non-borrowing spouses ahead of the borrower's death.
- This is a positive step, so that servicers will know of the existence of the spouse before the death and can communicate appropriately about the MOE option in order to assign within the applicable timeframe.

Outreach by Servicers (2 of 2)

- Potential problems with the way the form is worded:
 - May be difficult for lay-person/senior to read, understand and complete correctly;
 - Arguably asks for more information than is really required at the early stages (including NBS's SSN and "supporting documentation" which is undefined);
- If completed incorrectly, potential issue with servicer/HUD not tracking existence of the spouse or later holding NBS to the form in denying eligibility for MOE.

Other Open Questions

- Mortgage must remain in 1st position
 - Problem: Servicers may mistakenly require junior liens be canceled if they think lien status is in question.
- Homeowner's insurance in spouse's name?
 - This was a silent requirement in prior MOE assignments, unclear whether HUD will still want to see this or if insurance in borrower's name will be sufficient (since title requirement has been eliminated).

Planning Ahead for Non-Borrowing Spouse While Borrower Still Living

- Same-sex couples need to marry if they haven't already.
- Advise/assist in correctly completing NBS form with the annual occupancy certification.
- Keep taxes and insurance current.
 - If lender advances funds for these expenses, ideally couple should repay immediately as opposed to repayment plan or at-risk extension (because spouse will have to bring current quickly after borrower's death).
- Advise spouse to contact mortgage company ASAP if/when borrower dies to start the MOE process.
- Although not required anymore, still a good idea to help get spouse back on title with survivorship rights (e.g. transfer on death deed, joint tenancy deed, trust).

NBS Deferral Period: Post-2014 Loans

- Loans made after 8/4/14 are required to include a deferral period for an eligible NBS (identified at the time of origination).
- Emerging servicer errors:
 - Ignoring deferral period altogether.
 - Initiating foreclosure if spouse doesn't respond within 30 days of the borrower's death.
 - Requiring proof of ownership be provided within 90 days of the death:
 - Unclear whether HUD will be amending this requirement in light of new MOE
 - We argue that spouse needs to have legal right to remain within 90 days, but no deadline to provide proof of rights
 - Be on the lookout for these issues, and contact NCLC about problems.

QUESTIONS?

PROPERTY CHARGE DEFAULTS

Loss Mitigation Options for Unpaid Property Charges

- Repayment Plan
- At-Risk Extension
- Other options

Reinstatement

- HUD allows borrower to reinstate at any time, subject to 3 exceptions:
 - If mortgagee accepted reinstatement within past two years;
 - Reinstatement will preclude later foreclosure;
 - Reinstatement will adversely affect lien priority.
 - See Mortgage, Par. 10 and 24 CFR § 206.125(a)(3)
- Family members, religious institutions, grant, etc.

HECM Refinance

- Difficult without significant equity
- Refinance must meet all applicable HECM origination requirements
 - Life Expectancy Set Aside likely required if borrower has defaulted on property charges
 - Borrowing limits have decreased
- Origination costs

Other Loss Mitigation is Discretionary

- ML 2015-11 made loss mitigation discretionary.
 - Hard to raise failure to offer loss mitigation as a defense, unless separate requirement under state law.
 - But see 12 U.S.C. § 1715u(a): “Mortgagees shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure.”
- If a servicer chooses to offer loss mitigation, does it need to follow HUD’s parameters for it?
 - ML 2015-11:
 - “Mortgagees **must** follow certain steps when evaluating a mortgagor for a Repayment Plan...”
 - “Mortgagees **must** calculate the terms of a Repayment Plan by...”
 - Potential argument, and basis for an NOE

Repayment Plan, ML 2015-11

****DISCRETIONARY****

- Step 1: Determine total amount due plus property charges due for the next 90 days. (Minus HOA fees, which are not included in repayment plans.)
- Step 2: Ability to Repay
 - Repayment period up to 5 years (60 months) or shorter period to ensure repayment before loan balance at 98% Maximum Claim Amount (MCA).
 - Term based on payment of 25% surplus income.
 - **NOTE:** Depending on servicer, financial verification may be done over the phone, by submitting a budget worksheet, and some may require supporting documentation.
 - Unsuccessful RPP = “a full monthly payment is not made within 60 days of the monthly payment due date.”

Repayment Plan Issues

- Supposed to include property charges coming due in the next 90 days.
- 25% of surplus income rule – should not be a barrier.
- Servicers refusing to offer repayment plans, or offering shorter term (1 year only).
- Servicers refusing to consider repayment plans after foreclosure initiated.
- Re-default and arrears greater than \$5,000.

25% of Surplus Income

Issue: Servicer says HUD doesn't allow payment above 25% of discretionary income or some other arbitrary cap.

- Borrower should be offered lowest possible payment, which can exceed 25% of discretionary income. See ML 2015-11.
- But “mortgagee must determine the mortgagor’s eligibility and likelihood of success under a Repayment Plan.” ML 2015-11. Potential servicer argument for denial.
- Strategy: send NOE and escalate to HUD’s NSC, especially if servicer is blaming HUD guidelines.

At-Risk Extension, ML 2015-11

Servicer may request foreclosure extension from HUD if:

- Youngest borrower at least 80; and
- Borrower has critical circumstances such as a supported terminal illness, substantiated long-term physical disability, or a “unique” occupancy need (e.g., terminal illness of family member receiving care at residence)
- Servicer must include supporting documentation validating conditions (e.g., doctor’s letter); borrower must furnish.
- If approved, servicer to provide supporting docs to HUD on no less than an annual basis.

At-Risk Extension Renewals

- Servicers are not consistently notifying borrowers of the renewal process, or telling them too late.
 - May need to remind borrowers to get and submit a new doctor's letter.
 - Many servicers claim borrowers can only request a renewal 30 days before extension lapses.
 - Even a timely request may not be approved by HUD in time, so the borrower may end up back in foreclosure.
- Late requests are generally still processed but sometimes treated as new applications
 - If borrower's disability prevented them from timely renewing, make a reasonable accommodation request to HUD or servicer.
- Strategies: Send NOE, escalate to HUD's NSC, contact NCLC

Additional Options

- ML 2016-07: Delay Due and Payable Notice
 - If arrears less than \$2,000; and
 - Borrower expressed willingness to pay and is attempting to pay or lender has not yet been able to reach the borrower.
 - Not available after loan already called due (per HUD NSC).
- ML 2016-07: Mortgagee-Funded Cure
 - Advanced amount is not added to HECM loan balance;
 - Advanced funds may not be included in a claim to HUD; and
 - Mortgagee agrees not to assign loan for three years after the cure.
- Mediation (if state has a program)
- Chapter 13 Bankruptcy

Data from GAO Report

GAO, Reverse Mortgages: [FHA Needs to Improve Monitoring and Oversight of Loan Outcomes and Servicing](#) (9/25/19): Peak of HECM terminations was 82,000 in FY2016.

- Over 2014-2018:
 - 34% of terminations were due to borrower's death
 - 15% due to default
 - 30% unable to determine the reason
- In 2018, 18% of terminations were due to default.

Data from GAO Report

- From April 2015 to end of 2018, 22% of HECM borrowers with property charge defaults got repayment plans.
- 2% got the At-Risk Extension.
- Servicers claim repayment plans are “rarely successful”.
- 8,800 HECMs that terminated in 2014-2018 had arrearage balances less than \$2,000.

QUESTIONS?

RMS BANKRUPTCY

Overview

- RMS (Ditech) filed Chapter 11 on 2/11/2019
 - Public website where pleadings are available:
<https://dm.epiq11.com/#/case/Ditech/dockets>.
- **Pre-petition proof of claims deadline: June 3, 2019**
 - Not clear who got notice of claims bar date
 - If your client never got notice, may file a late claim now and explain no notice; court may allow
- **Post-petition claims: Administrative Expense Claim, deadline Nov. 11, 2019**
 - These get paid 100%.

Limited Stay Relief

- Interim Order 2/13/19 authorizing ongoing reverse mortgage servicing, but vague and contradictory:
 - Borrower claims related to foreclosure and eviction proceedings that have the sole purpose of defending, unwinding, or enjoining foreclosure/eviction and do not adversely affect RMS assets.
 - In consumer bankruptcy case, borrower claim to reduce amount of arrearage on proof of claim that would not affect the total amount of the claim.
 - Defense in title dispute involving amount, validity, or priority of lien respecting property secured by mortgage, but no claims for relief that would affect amount validity or priority of lien.

Automatic Stay

- Monetary relief of any kind against RMS (Ditech entities), including:
 - Claims of recoupment or setoff
 - Attorneys fees
 - Relief that would affect amount, validity, or priority of the lien.
- NOT STAYED: loss mitigation, error resolution (NOE)
- Bankruptcy Court for S.D.NY has exclusive jurisdiction to resolve disputes about whether claim is stayed
 - Most prudent course is to seek relief from stay (if possible, by stipulation).

Consumer Relief in the Bankruptcy Plan

- \$10 million for consumer claims
- Also “account corrections” where possible
 - If your client filed a claim, RMS is trying to resolve as many of them as possible
 - This includes cases where RMS messed up the MOE assignment!
 - Contact Tara Twomey, ttwomey@me.com
 - Client’s name
 - Proof of Claim number if one was filed
 - Borrower’s name, address, loan number

QUESTIONS?

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