Assisting Older Homeowners and Surviving Spouses Facing Foreclosure of Reverse Mortgages

NATIONAL CENTER ON LAW & ELDER RIGHTS

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National Consumer Law Center

The National Consumer Law Center uses 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 and people of color. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

Key Lessons

1. There are two types of reverse mortgages: Home Equity Conversion Mortgages (HECM), which are overseen by the Department of Housing and Urban Development (HUD); and proprietary reverse mortgages, which are developed and backed solely by private financial institutions.
2. HECM guidelines require lenders to complete several steps, like notice and opportunity to cure, before foreclosing on the property.
3. Borrowers and non-borrowing spouses may have options to avoid foreclosure under HUD program guidelines.
4. These options include loss mitigation for property charge default, deferral of foreclosure for non-borrowing spouses, and proving occupancy of the home.

Introduction

Older homeowners needing resources to “age in place” or meet other essential living expenses may obtain a reverse mortgage to supplement income. Reverse mortgages allow older homeowners to convert home equity into cash and receive the loan proceeds as a lump sum, stream of payment, or through a line of credit. No payment is due on the loan until the borrower dies, sells, permanently moves out of the home, or is unable to meet other loan obligations. Unlike a traditional mortgage, the amount owed on a reverse mortgage will go up, not down, over time as the borrower receives additional payments and interest and fees are added to the loan.

There are two types of reverse mortgages: **Home Equity Conversion Mortgages** (HECMs) and **proprietary reverse mortgages**. Most reverse mortgages are federally-insured HECM loans. The Department of Housing and Urban Development (HUD) manages the HECM program and provides guidance through Mortgagee Letters, FAQs, handbooks and regulations.[1] Proprietary reverse mortgages are equity conversion products that are developed and backed solely by private financial institutions.

1 See 12 U.S.C. § 1715z-20. The HECM regulations are in 24 C.F.R. Part 206. See also 82 Fed. Reg. 7094 (Jan. 19, 2017) (effective Sept. 19, 2017). Mortgagee Letters provide guidance to approved lenders regarding HUD’s mortgage-related policies. Under the Reverse Mortgage Stabilization Act of 2013, 12 U.S.C. § 1715z-20(h), HUD was given substantial authority to amend the rules of the HECM program through the issuance of Mortgagee Letters. The HECM Handbook 4235.1 provides details on the program but is not as up to date as the Mortgagee Letters or regulations.

Generally, the amount of money that the borrower can receive under the reverse mortgage is based on age, interest rate, and housing value (or HUD established limits, whichever is less). Loans originated after April 27, 2015 are subject to a financial assessment, which includes a review of the borrower's credit history and cash flow.[2] The borrower must have a satisfactory credit history that demonstrates their ability to pay ongoing expenses, including property taxes and insurance and to meet other financial obligations. Borrowers who do not meet the financial assessment criteria must, as a condition of the loan's approval, use a portion of the HECM proceeds to pay future property taxes and insurance.

EXAMPLE

Mr. James was facing foreclosure on his home due to property charge default. He struggled to handle his finances after the death of his wife, and did not realize that his reverse mortgage servicer had advanced funds to pay his property tax in certain years. Even though Mr. James had his own insurance coverage in place, the servicer also purchased additional homeowner's insurance for certain periods of time. This practice is often called **force-placed insurance**. Although he was entitled to a refund of the force-placed insurance premiums, Mr. James still needed to cure a default for certain premium payments and the property taxes the servicer paid. Advocates contacted the servicer on Mr. James' behalf and requested a repayment plan. The servicer responded that Mr. James could not obtain a repayment plan because his loan had reached the program's threshold. With no other option to save his home, Mr. James filed Chapter 13 bankruptcy. He has now been on a bankruptcy plan for more than a year, successfully paying nearly all of his surplus income towards curing the property charge default.

HECM Reverse Mortgage Foreclosures

HECM loans are due and payable when the last borrower dies, sells, or permanently relocates from the home. The due and payable status of the loan may be deferred if there is a non-borrower surviving spouse in the home.[3] In addition, the loan may be called due and payable if the borrower fails to meet certain conditions of the loan. These conditions include staying current on property taxes, insurance, and other property-related charges, and maintaining the home.

When repayment is due, the home can be tendered to the lender and nothing further is owed.[4] Alternatively, the house may be sold and the proceeds used to pay off the loan. If the loan is paid off in full, any excess proceeds belongs to the borrower or the borrower's estate. The borrower is allowed to sell the property for the appraised value even if that value is less than the amount owed on the loan. If the mortgage is due and payable at the time a contract for sale is executed, the borrower may sell the property for ninety-five percent of the appraised value.

Prior to foreclosure the lender must:

- Notify HUD that the loan is due and receive approval, if necessary.[5]
- Notify the borrower that the loan is due, unless the loan is due by reason of the borrower's death. Also notify an eligible non-borrowing spouse, the estate, and heirs that the mortgage is due.
- Give the borrower thirty days to cure the condition which caused the loan to be called due. Even after foreclosure has been initiated, the servicer must permit the borrower to correct the condition which

2 The Revised HECM Financial Assessment and Property Charge Guide available as an attachment to Mortgagee Letter 2016-10 (July 13, 2016).

3 24 C.F.R. §§ 206.55; 206.3 (definition of qualified non-borrowing spouse). See also Dep't of Hous. & Urban Dev., Mortgagee Letters 2014-07 (April 25, 2014).

4 HECMs are "non-recourse" loans, which means that the borrower (or his or her estate) will not owe more than the loan balance or the value of the property, whichever is less.

5 24 C.F.R. § 206.125(a).

caused the mortgage to become due and reinstate the mortgage, subject to certain limitations.[6]

- Provide borrower, estate, or heirs time to pay the loan balance, sell the property (including for a short payoff), or provide a deed in lieu of foreclosure.
- For property charge defaults, the lender must provide notice of the property charge delinquency and determine whether a loss mitigation option, discussed below, is available.

Foreclosure-Avoidance Options for Borrowers and Non-Borrowing Spouses Facing Foreclosure

Borrowers and non-borrowing spouses may have limited options to avoid foreclosure under HUD program guidelines.

Loss Mitigation for Property Charge Default. Reverse mortgage borrowers must pay property-related charges including real estate taxes, hazard and flood insurance premiums, and if applicable, condominium association fees, ground rents, or other special assessments. HUD has directed lenders to use various loss mitigation strategies to address property charge defaults, including repayment plans; delay of the foreclosure process for certain "at-risk" borrowers 80 years or older suffering from a serious illness or disability; delay of due and payable status if the amount owed is less than $2,000; and cancellation of the foreclosure if the lender uses its own funds to cure the default and does not seek reimbursement from HUD.[7] Despite the menu of options, servicers can exercise their discretion and refuse to offer any loss mitigation option.

Repayment plans of sixty months or less are offered based on the borrower's surplus income. The calculation involves consideration of all available sources of income and the borrower's necessary living expenses and property charges due over the next year. The length of the plan is up to sixty months or a shorter time period, as necessary to ensure repayment before the mortgage reaches 98 percent of the Maximum Claim Amount.[8] A borrower who misses a payment and defaults on a repayment plan and owes more than $5,000 is not eligible for another plan.

Borrowers 80 years or older may qualify for an at-risk extension of the foreclosure timeframe. The borrower must suffer from certain critical circumstances such as a terminal illness, long-term physical disability or a unique occupancy need (i.e. terminal illness of family member receiving care at the home). HUD approves the at-risk extension. This certification must be renewed annually.

Aside from loss mitigation options, a HECM may be refinanced when the loans are older and property values are high or have increased. Direct aid from nonprofit organizations and state government may also help delinquent borrowers, where available. Michigan and Florida, for example, have mortgage assistance programs that are available to older homeowners with reverse mortgages.

Deferral of Foreclosure for Non-borrowing Spouses. A HECM reverse mortgage is due and payable upon the death of all surviving borrowers. In previous years, when applying for the reverse mortgage, many married couples were encouraged to take one spouse off the loan to qualify or to obtain a higher amount. The non-borrowing spouse was at risk of foreclosure and eviction if the spouse listed as the borrower on the loan died. Over the years HUD revised its policy regarding non-borrowing spouses.[9] Now, the due and payable status of

6 24 C.F.R. § 206.125(a)(3).

7 See Dep't of Hous. & Urban Dev., Mortgagee Letters 2015-11 (April 23, 2015); 2016-07 (March 30, 2016).

8 The Maximum Claim Amount (MCA) is the appraised value of the home at closing, or HUD established limits, whichever is less. Though services can offer repayment plans above 98 percent of MCA, they will not be reimbursed by HUD. In addition a HECM loan with an active repayment plan is not eligible for assignment to HUD. See Dep't of Hous. & Urban Dev., Mortgagee Letter 2016-07 (March 30, 2016).

9 See Dep't of Hous. & Urban Dev., Mortgagee Letters 2014-07 (April 25, 2014); 2015-12 (April 30, 2015); 2015-15 (June 12, 2015); 2016-05 (Feb. 12, 2016).

the loan is deferred until the death of the non-borrowing spouse, under certain conditions.[10]

For HECM loans made before August 4, 2014, the spouse must qualify for a Mortgagee Optional Election or MOE. With the MOE the servicer must elect the option and the surviving non-borrowing spouse must establish their eligibility under the program's guidelines in a very short period. Eligible non-borrowing spouses include those who were married to the borrower at the time of closing; have lived in the home as a principal residence; and have a loan that is not due and payable for other reasons. In addition the spouse must establish that they have marketable title to the property or a legal right to remain in the home within 90 days of the death of the borrower.[11] A legal right to remain may be established with a long-term lease, court order, or other means. Unfortunately the MOE is underutilized as servicers typically do not provide notice to surviving spouses of this option, and tight deadlines and documentation requirements may prove to be a barrier. While the borrower-spouse is alive the couple may take several steps, including clearing up property charge defaults and ensuring the spouse is added back on title (preferably with a deed conveying full title to the non-borrowing spouse upon death of the borrower), to ensure a smoother MOE application process.

Proving occupancy of the home. A reverse mortgage may be called due and payable if the home is not the principal residence of at least one borrower for longer than 12 consecutive months.[12] Servicers seek to establish occupancy, in part, by sending a certificate annually (or more frequently if they suspect the property is vacant) to be signed and returned. Unfortunately, many servicers fail to take additional steps or have inadequate measures to verify occupancy of the home, and improperly call the loan due and payable. Borrowers must provide proof of occupancy and defend against a loan called due prematurely. Proof of occupancy can include utility bills or other records which demonstrate the home was not vacant and inhabited by a borrower.

Conclusion

A foreclosure deprives older homeowners of their largest and most important financial asset. HECM defaults and foreclosures must be challenged to ensure that older adults enjoy the stability and comfort of a home in which to age in place.

Additional Resources

- U.S. Department of Housing and Urban Development (HUD)
  - HECM page for Lenders (includes link to Mortgagee Letters and Handbook)
  - Find a HUD-approved housing counseling agency
- Other Government Sites
  - Consumer Financial Protection Bureau
  - Federal Trade Commission (FTC)
- Housing Counseling & National Advocacy Organizations
  - Senior Homeownership Preservation Project (SHOPP): (773)262-7801. This project works with HECM borrowers who are facing default on their mortgages due to non-payment of property taxes or homeowners insurance.
  - National Consumer Law Center
- Legal Assistance
  - Legal services/ Legal aid

10 24 C.F.R. §§ 206.55; 206.3 (definition of qualified non-borrowing spouse).
11 See Dep't of Hous. & Urban Dev., Mortgagee Letters 2015-15 (June 12, 2015); 2016-05 (Feb. 12, 2016).
12 24 C.F.R. § 206.27(c).

  - Volunteer lawyers
  - National Association of Consumer Advocates
- Publications
  - National Consumer Law Center, Home Foreclosures (1st ed. 2019)
  - National Consumer Law Center, Mortgage Lending (2012)

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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