

# Assisting Older Homeowners and Surviving Spouses Facing Foreclosure of Reverse Mortgages

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# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://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 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.

# Issues

- Property charge defaults
- Non-Occupancy
- Non-Borrowing Spouses
- Standing: non-negotiable instrument
- RMS Bankruptcy

# Glossary of Terms (1 of 3)

- **HECM:** Home Equity Conversion Mortgage – reverse mortgage insured by FHA. To be eligible, borrower must be at least age 62 and have significant equity in their home.
- **Mortgagee:** lender or assignee of a mortgage loan
- **NSC:** HUD’s National Servicing Center
- **T&I default:** default of a reverse mortgage loan due to borrower’s failure to pay property taxes and/or homeowner’s insurance
- **RPP:** repayment plan

# Glossary of Terms (2 of 3)

- **RESPA:** Real Estate Settlement Procedures Act, 12 U.S.C. 2601 et seq.
- **NOE:** Notice of Error as set forth under RESPA, 12 U.S.C. § 2605(e) and implementing regulation 12 C.F.R. § 1024.35
- **RFI:** Request for Information as set forth under RESPA, 12 U.S.C. § 2605(e) and implementing regulation 12 C.F.R. § 1024.36
- **UDAP:** Unfair and Deceptive Acts and Practices – describes a category of state statutes that regulate unfair business practices, the provisions of which vary state by state.
- **ECOA:** Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq.

# Glossary of Terms (3 of 3)

- **NBS:** non-borrowing spouse of a reverse mortgage
- **MOE:** Mortgagee Optional Election, as set forth in Mortgagee Letter 2015-15, which allows a servicer to assign a reverse mortgage loan to HUD where there is an eligible non-borrowing spouse and all other requirements are met
- **MOE deferral period:** deferral of foreclosure for an eligible non-borrowing spouse under the provisions of the Mortgagee Optional Election

# HECM vs. Proprietary Reverse Mortgages

- Home Equity Conversion Mortgage: insured by FHA pursuant to HECM statute & HUD regulations
  - Currently the most common
  - Subject to HUD guidelines
- Emergence of private/proprietary reverse mortgage products
  - Property values rising/stabilizing may entice lenders
  - Not subject to HECM statutory or regulatory requirements/limits
  - Potentially could involve larger lending limits
  - Unclear what loss mitigation or protections might be afforded by private lender; housing counseling may be provided, but not guaranteed

# HECM Policies

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

# PROPERTY CHARGE DEFAULTS

# Unpaid Property Charges (1 of 2)

- HECM borrower must pay property charges, including: Property Taxes, Homeowners insurance, and HOA dues, “on time” and “in a timely manner.”
  - See 24 C.F.R. § 206.205(e)(1) and § 206.27(b)(6), mortgage, and loan agreement.
- If borrower fails to make payments “in a timely manner,” servicer can advance funds to pay charges and declare borrower in default if borrower fails to repay advances.
  - See 24 C.F.R. § 206.205(e)(2).

## Unpaid Property Charges (2 of 2)

- Lender may also pay property charges if “necessary to protect the value of the Property and Lender’s rights in the Property” if borrower has not timely paid, loan is in default, or there is a legal proceeding that may significantly affect Lender’s rights.
  - See mortgage and loan agreement

# What is a “timely” payment?

- Look at state/local law defining **delinquency**.
- HUD says property taxes are considered “current” until determined to be delinquent by the local taxing authority. Mortgagee Letter 2018-08.

# If Taxes Aren't Timely Paid... (1 of 2)

- And the lender advances funds, then:
- Lender sends the “Property Charge Delinquency Letter” within 30 days of receiving notification of a missed payment.
  - Must give 30 days to respond
  - Must include “notice of any available loss mitigation options the mortgagee may offer” (not consistently happening)
  - If unable or unwilling to repay the property charges, lender shall submit a due and payable request to HUD
  - See 24 C.F.R. §206.205(e)(2)(ii), ML 2014-21, and ML 2015-11

## If Taxes Aren't Timely Paid... (2 of 2)

- Lender submits due and payable request to HUD
- Within 30 days of HUD's approval of due and payable status, lender sends "Due and Payable Notice"
  - Must give 30 days to respond before initiating foreclosure
  - "Must reference available loss mitigation" (not consistently happening), option to sell or execute deed-in-lieu, and refer to HUD-approved housing counselors. See ML 2015-11.
  - See also 24 C.F.R. §206.125(a)(2) (describing contents of notice).

# Is the Alleged Property Charge Default Accurate?

- Property charges may not have been untimely
- Property charges may be incorrect
  - E.g., lender charging FPI even though borrower had coverage or including advances for attorney's fees, utilities, etc.
- Verify charges claimed
  - Ask for itemized list of disbursements made for property charges
    - Send RFI to request transaction history & copies of checks
    - Send NOE to fix any errors (and set up a RESPA claim)
  - Ask client for any proof of payments
  - Excessive, unnecessary, or unreasonable property inspections
    - Drive-by inspections
    - Multiple daily or multiple weekly inspections
    - Floyd v. Nationstar, Case:1:16-cv-00835-CRC, District of Columbia – class action filed 5/3/16 by NCLC, AARP, and Tycko & Zavareei LLP

# Were the Conditions Precedent to Foreclosure Met?

- Mortgage and regs require HUD approval for due and payable for property charges. See 24 C.F.R. § 206.27(c)(2) and § 206.125(a).
  - Did lender send an adequate property charge delinquency letter?
  - Did HUD actually approve?
  - Did lender provide inaccurate information to HUD?
- Was the due and payable notice adequate?
  - Did it actually reference “all available loss mitigation?”
    - Repayment plans and At-Risk Extensions are frequently omitted because lenders are using the generic language of 24 C.F.R. §206.125(a)(2)
  - Did lender wait 30 days before foreclosure?

# Loss Mitigation Options for Unpaid Property Charges

# Loss Mitigation Options for Unpaid Property Charges

- Reinstatement
- HECM Refinance
- Repayment Plan
- At Risk Extension
- Additional 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)
- Grants or Foundations
- Family members, religious institutions, etc.

# HECM Refinance

- Difficult without significant equity
- Refinance must meet all applicable HECM origination requirements
  - Life Expectancy Set Aside likely required if borrower has defaulting on property charges
  - Borrowing limits have decreased (PLF tables)
- Equity issues
- Origination costs

# Other Loss Mitigation is Discretionary

- ML 2015-11 made loss mitigation discretionary.
  - Hard to raise failure to offer loss mit. 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, at least 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 yrs (60 mos) or shorter period to ensure repayment before loan balance at 98% Maximum Claim Amount (MCA). [ML 2016-07: can offer a repayment plan where balance will reach 98%+ MCA, but the mortgagee's reimbursement claim can't exceed 100%]
  - Term based on payment of 25% surplus income; term of 5 years if 25% payment can't be reached.
  - **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 (1 of 5)

1. 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

# Repayment Plan Issues (2 of 5)

2. Servicer doesn't include property charges that are still owed or are due in the next 90 days. Servicer pays those charges, immediately cancels repayment plan.
  - “mortgagees must ... [include] unpaid property charges and any property charges due for the next 90 days” ML 2015-11.
  - Servicer may recalculate plan if borrowers fails to pay future property charges. ML 2015-11.
  - Strategy: send NOE alleging servicer failed to calculate RPP in accordance with ML 2015-11 and ask for a recalculated one.

# Repayment Plan Issues (3 of 5)

3. Borrower misses property tax payment or lapses on insurance. Servicer cancels plan.
  - Lender **may** recalculate the RPP, but term can't be extended beyond 60 months or 98% MCA. See ML 2015-11.
  - Strategy: request a recalculation and send NOE pointing to HUD guidelines

# Repayment Plan Issues (4 of 5)

4. Borrower can't afford monthly payments
  - Lender may recalculate RPP if decrease in surplus income due to a verified hardship. See ML 2015-11.
  - Strategy: **before borrower falls 60 days behind**, request a recalculation. Submit documentation of hardship.

# Repayment Plan Issues (5 of 5)

5. Borrower falls 60 days behind. Servicer cancels plan.
  - This is an “unsuccessful” repayment plan under ML 2015-11.
  - Is arrearage less than \$5,000?
    - Lender may recalculate RPP.
    - Must solicit financial information
    - Plan can’t extend beyond 60 months from beg. of original repayment plan or 98% MCA
  - If arrearage is more than \$5,000 or loan has reached/will reach 98% MCA before curing default, no further repayment plan.
    - But did borrower fall behind because of a disability (e.g. forgot to pay because of dementia)?
    - Request that HUD/lender recalculate repayment plan as a reasonable accommodation of borrower’s disability under the Fair Housing Act

# At-Risk Extension, ML 2015-11 (1 of 2)

- 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, ML 2015-11 (2 of 2)

- If granted, client remains in the property, with the servicer fronting the property charge costs
  - The borrower still owes that money and the balance will continue to grow during the foreclosure extension.
  - 1-year extension on foreclosure, and borrower needs to re-apply annually with updated doctor's letter.
  - Issues of timing (some servicers say application must be made within 30 days before expiration).
  - Some problems/delays with ongoing, multiple renewals.

# At Risk Extension, ML 2015-11

What supporting documentation will HUD approve?

- **X** Client's attestation of illness/disability
- **X** Family member / POA attestation of illness/disability
- **X** Very convincing letter from client's excellent attorney
- **X** Medical records
- **?** Letter from APRN or PA
- **✓** Letter from doctor
- **✓ ✓ ✓** Letter from doctor with language that loss of home would negatively affect health
- **\*\*\***The final package *should* include a convincing cover letter, and supporting statements from client/family can be helpful – but a signed doctor letter on letterhead appears to be the key to success.

# At-Risk Extension Renewal

- 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, make constituent complaint to U.S. Senator/Representative.

# At Risk Extension & Active Foreclosure Case?

- Many servicers refuse to dismiss foreclosure suits after an At Risk Extension is granted.
- Some courts dismiss for failure to prosecute/dormancy or dismiss as settled. Others are holding the cases on the docket.
- There is some indication that servicers don't particularly mind dismissal over their objection but feel they risk HUD penalty if they consent.
- Advocates can assist by sharing dismissal orders from various jurisdictions. (NCLC listserv)

# 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 – does your state allow mediation for HECMs?

# Chapter 13 Bankruptcy to Stop Foreclosure

- Servicer refuses to offer RPP or offers a shorter RPP than borrower can afford, or refuses to provide other loss mit.
- Cure the taxes and insurance through plan of 3-5 years
  - No fees or interest should be included in the mortgagee's Proof of Claim, only the property charge advances.
- Potentially good option in non-judicial foreclosure states:
  - Defenses can be brought in objection to mortgagee's proof of claim;
  - Claims for affirmative recovery can be litigated in adversary proceeding.
- Homeowner must have sufficient income to meet monthly expenses and pay back the outstanding property charges
  - Other factors to consider: equity in home, other secured or priority debts, other assets.

# Discrimination and Loss Mitigation (1 of 2)

- Age is a protected class under ECOA.
- Disability is a protected class under the Fair Housing Act.
- Examples:
  - Requiring a borrower with capacity who has a cognitive disability to designate an attorney-in-fact to get a RPP.

# Discrimination and Loss Mitigation (2 of 2)

- Examples continued:
  - Telling a borrower with a durable POA she has to be conserved to get the At-Risk Extension.
  - Servicing reverse mortgages worse than traditional mortgages (for Champion and RMS):
    - As a policy or practice, ignoring NOEs from RM borrowers while answering those from traditional borrowers.
    - As a policy or practice, paying RM borrowers' taxes before they're delinquent while giving traditional non-escrowed borrowers until delinquent.

# Servicer Prepayment of Taxes

- Borrower defaults, perhaps for a different reason. Lender starts paying the taxes.
  - These taxes weren't "untimely," so lender shouldn't have made an advance. See 24 C.F.R. § 206.205(e)(2).
  - It's not "necessary" for lender to pay the taxes to protect its interest, especially if the default was for an unrelated reason or borrower has indicated they'll pay. See mortgage and loan agreement.
  - See *Shakespeare v. LiveWell*, case no. 2:18-cv-07299, District Court for E.D. New York (class action filed by AARP against Celinek).

# Servicer Prepayment of Taxes

- Borrower is on a repayment plan that requires them to pay property charges before they become delinquent. Servicer pays taxes early, cancels plan, and forecloses.
  - Send an NOE.
  - Defenses: no default, breach of contract, failure to meet condition precedent, unclean hands, breach of good faith/fair dealing, equitable estoppel, negligent misrep.
  - Claims: UDAP, breach of contract (reciprocal attorney's fees may be available), potentially RESPA, ECOA age discrimination based on disparate impact if servicer doesn't pay taxes early for non-escrowed traditional mortgages (RMS & Champion); ECOA adverse action notice

# Non-Occupancy Defaults

# Servicer Alleges Non-Occupancy

- Security instrument (mortgage) requires occupancy as principal residence.
- “Principal Residence” – majority of calendar year in residence.
  - Still considered principal residence if borrower is temporarily in a health care institution, so long as less than 12 months.
- Borrower can “cure” the default:
  - Providing verification that they are living there; or
  - verification that have moved back in (if they were actually out of the home).

# Non-Occupancy: HUD v. Mortgage

- Annual certification: 24 CFR 206.211 requires mortgagee to verify borrower(s)' contact information and determine whether the property is the principal residence of at least one borrower. Mortgagee shall require each borrower to make an annual certification.
- Mortgage: requires occupancy as principal residence, not returning the occupancy certification.
- 2015 form HECM provides for default if borrower “failed to provide lender with material information” about occupancy *during loan application process*, but not ongoing during the term of the loan.

# Advocacy Strategies

- Escalate servicer errors to HUD National Servicing Center
  - Contact NCLC if you need help with this
- Request reasonable accommodation:
  - If client has disability that made it difficult to understand/respond timely.
- Notice of Error or Request for Information
  - This portion of RESPA applies to HECMs

# Potential Defenses (1 of 5)

- Not in default
  - Actually occupying the property
  - Was current on property charges, but servicer paid taxes early or took out FPI when there was already insurance
  - Was lender's advance "necessary"?
  - Substantial performance
  - Has a repayment plan (also breach of that contract)

# Potential Defenses (2 of 5)

- Failure to meet a condition precedent to foreclosure
  - Deficient property charge delinquency or due and payable notice (e.g. failure to provide cure amount and complete loss mitigation options).
  - Notice of forced-place insurance (RESPA FPI rules apply).
  - Acceleration notice.
  - State law notice requirements.

# Potential Defenses (3 of 5)

- Breach of Implied Covenant of Good Faith and Fair Dealing
  - Borrower reasonably expected under the contract to receive benefits (e.g. notice of all loss mitigation options prior to foreclosure, right to pay property charges up until the delinquency date).
  - Bad faith:
    - Similar stories from CFPB complaint database & listserv.
    - Knowledge your borrower is elderly and may be vulnerable (know low-income? Know has disabilities?).
    - Financial motivation to foreclose quickly to recoup expenses.

# Potential Defenses (4 of 5)

- Equitable defenses
  - Unclean hands (e.g. failure to communicate or provide correct info, improper charges, failure to correct errors).
  - Laches (e.g. long delay in servicer enforcement).
- Estoppel
  - Servicer mistake/misrepresentation on which borrower relied and caused borrower to be in worse position (e.g. lender acquiesced to late property charge payments or gave borrower misinformation).

# Potential Defenses (5 of 5)

- Due and payable status not approved by HUD:
  - Demand proof
  - Approval based on misinformation from servicer
    - Also basis for equitable defense
- Standing/non-negotiable instrument

# Potential Affirmative Claims (1 of 2)

- Breach of contract
  - Some states provide for reciprocal attorney's fees
- UDAP (incl. state claims re: elderly)
- RESPA (set up with NOEs and RFIs)

# Potential Affirmative Claims (2 of 2)

- ECOA
  - Discriminatory impact based on age
  - Failure to provide adverse action notice
    - Split as to whether loss mitigation adverse action notice required if loan is in default. NCLC Credit Discrimination Manual, § 10.5.2.
    - Argue that borrower brought loan out of delinquency with timely payments on RPP, and cancellation of RPP is adverse action.
- Negligence
  - Confirm whether law in your jurisdiction recognizes a duty of mortgage servicer, since HUD says loss mit is discretionary

QUESTIONS?

# 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 remove 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**.

# Statutory Protection for Spouses

In a section titled, “Safeguard to Prevent Displacement of Homeowner,” the **statute** provides:

The Secretary may not insure a home equity conversion mortgage under this section unless such mortgage provides that the homeowner's obligation to satisfy the loan obligation is deferred until the homeowner's death, the sale of the home, or the occurrence of other events specified in regulations of the Secretary. *For purposes of this subsection, the term "homeowner" includes the spouse of a homeowner.*

12 U.S.C. § 1715z-20(j).

# HUD's Original Regulation

- Only protected the borrower, not the spouse:  
“The mortgage shall state that the mortgage balance will be due and payable in full if a ***mortgagor*** dies and the property is not the principal residence of at least one ***surviving mortgagor*** . . .” 24 C.F.R. § 206.27(c)(1).
- Lenders forced to foreclose on non-borrowing spouse once the borrower passed away (financial penalty on HUD insurance claim if they don't foreclose within deadlines).

# Bennett & Plunkett Litigation

- *See Bennett v. Donovan*, 703 F.3d 582 (D.C. Cir. 2013) - Surviving spouses had standing to sue HUD;
- *Bennett v. Donovan*, 4 F.Supp.3d 5 (D.D.C. Sept. 30, 2013) – HUD regulation allowing for foreclosure while surviving spouse still lived in the home is invalid; remanded to HUD to fashion a remedy;
- *Plunkett v. Castro*, 67 F. Supp. 3d 1 (D.D.C. Aug. 28, 2014) - HUD's creation of the MOE for the 6 named plaintiffs was not arbitrary and capricious (no consideration of deadlines); HUD also said Trigger Inapplicability/Hold Election relief was “automatic” result of reg being held invalid for P's loans; Court remanded for HUD to consider this relief for the entire class.

# HUD's Amended Regulation

- HUD amended the regulation for new loans originated after August 4, 2014:
  - First through issuance of ML 2014-07, then Final Rule effective 9/19/17
- Eligible NBS must be identified at closing, and deferral period provided in loan docs:
  - 24 C.F.R. § 206.27(c)(3) Deferral of due and payable status. The mortgage documents shall contain a provision deferring due and payable status, called the Deferral Period, for an Eligible Non-Borrowing Spouse until the death of the last Eligible Non-Borrowing Spouse
- No protection for NBS of reverse mortgage issued prior to 8/4/14, who was not contemplated in loan docs.

# Mortgagee Letter 2015-15 (1 of 3)

**On June 12, 2015**, HUD issued ML 2015-15, giving servicers the option to assign the loan to HUD.

## CRITERIA:

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.
  - Loans in the MOE "deferral period" cannot get a repayment plan for T&I default; spouse must cure the default within 30 days

## ML 2015-15: MOE Criteria (2 of 3)

4. Spouse must have, or be able to obtain within 90 days of the death of the borrower, “good, marketable title to the property” or a legal right to stay in the home until his/her death.
  - Legal right to stay until death
    - Lifetime lease
    - Court order
    - Partial ownership interest? (one of several heirs)
    - Heirship affidavit
  - 82 Fed. Reg. 7094, at 7100 (Jan. 19, 2017) ("HUD would like to remind the public that a NBS does not have to obtain legal title in order to be eligible for a deferral period. A NBS must establish a legal right to remain in the property, which may be accomplished through means other than obtaining legal title to the property.").

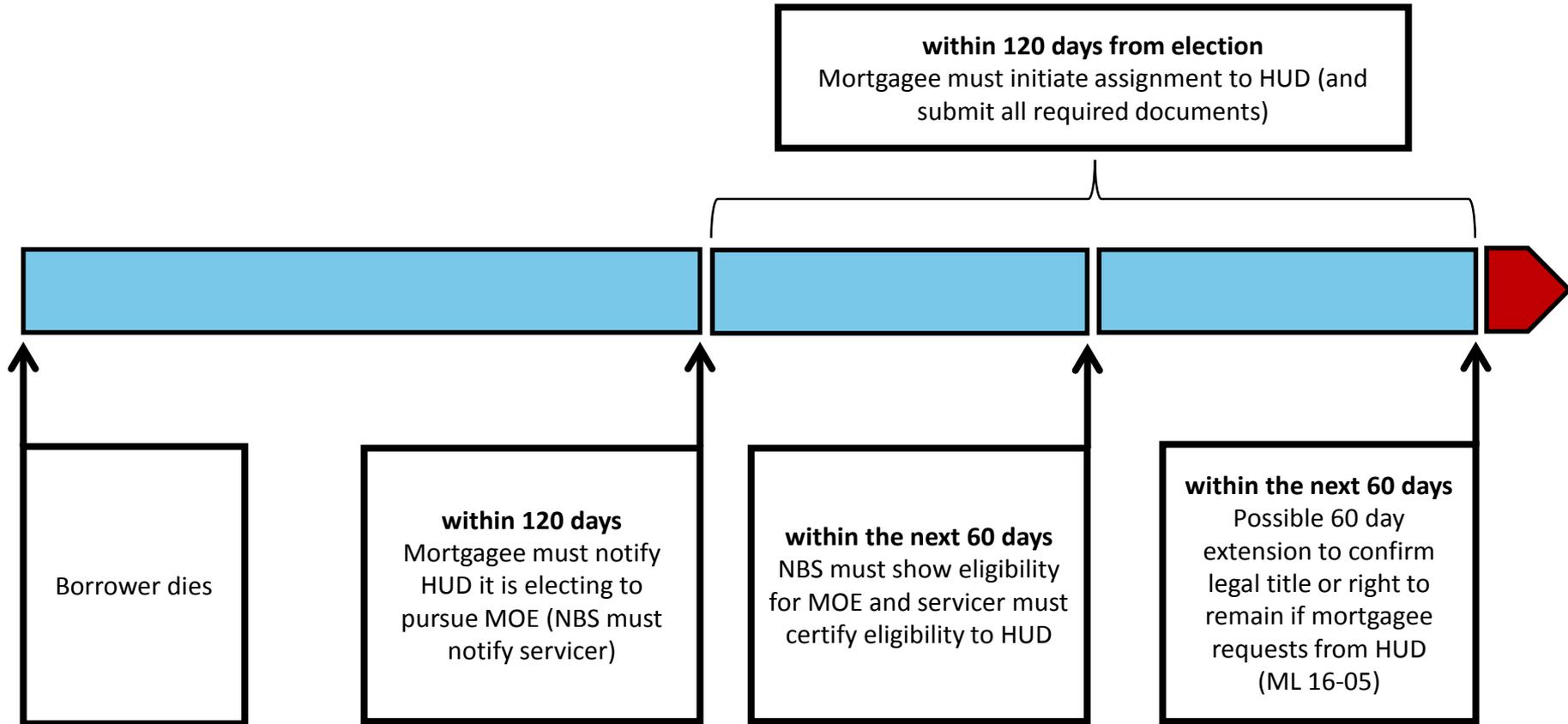
# ML 2015-15: MOE Criteria (3 of 3)

- **Timing: 90 days of the death**
  - But HUD has recognized additional time may be needed to confirm legal title or right to remain. ML 2016-05
  - If spouse not already on title, argue they automatically had a legal right to remain as heir (if true per state law)
  - Document legal interest in the property ASAP
- **Silent requirement: homeowner's insurance in spouse's name**
- **Mortgage must remain in 1<sup>st</sup> position**
  - Problem: servicers requiring junior liens be canceled (under this provision or good, marketable title requirement)

# ML 2015-15: MOE Deadlines

- By **the later of** 120 days after the death of the borrower or 120 days after issuance of the Mortgagee Letter (June 12, 2015), Mortgagee must elect to take the MOE or exercise its contractual right to foreclose.
- Within 30 days after the election, Mortgagee must notify the spouse and the borrower's estate of what election it made.
- Within the 60 days after election of the MOE, Mortgagee must review all criteria to ensure that the loan is eligible - and if it isn't, the deferral period will end (and Mortgagee will foreclose).
  - + 60 day extension for spouse to confirm legal title or right to remain, per ML 2016-05
- Within 120 days after making the election, Mortgagee must initiate the assignment to HUD).

# MOE Deadlines



# How's the MOE working?

- According to FOIA response (Jan. 2018):
  - Total Number of requests for MOE = 591
  - Number of pending requests = 142
  - Number of requests granted = 317
  - Number of requests denied = 132
- Top 3 reasons for denial:
  1. MOE letter submitted more than 120 days from borrower's date of death;
  2. Loan Balance and Net Principal Limit did not meet FHA's tolerance level;
  3. Deficient Documentation.

# “In-House” MOE

- When HUD assignment fails, some servicers (Champion in particular) are offering an “in-house” MOE to allow spouse to remain in the home
- There may be a written agreement, maybe a letter from the servicer, or might just be verbal
- Enforceability?
- What happens if loan is assigned?

# Planning Ahead for Non-Borrowing Spouse While Borrower Still Living

- Make sure spouse will take title to the property immediately, or as quickly as possible, after borrower's death (e.g. transfer on death deed, joint tenancy deed, trust).
- Same-sex couples need to marry if they haven't already.
- 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.

# Advocating for your Client

- Escalate denials/servicer errors/problems to HUD National Servicing Center and HUD's Associate Regional Counsel for your region.
  - Contact NCLC if you need help with this
- Contact Congressional representatives' caseworker for client's location.
- RFI/NOE to servicer
  - NBS as successor to property, rep of probate estate, and/or person for whose benefit MOE process was undertaken
- Get as much info as possible from servicer & HUD about why MOE was denied:
  - RFI to servicer, Privacy Act request to HUD, and request through HUD NSC
- Litigation: complex area – consult with NCLC

# APA Claims vs. HUD

\*\*\*Talk to NCLC when considering this\*\*\*

- Potential avenue to get HUD to take assignment.
- Challenge regulation as still being invalid for pre-Aug 2014 loans.
- If regulation is invalid for pre-Aug. 2014 NBS, there is no due and payable event requiring foreclosure under HUD's regulations (servicer can continue holding the loan as in Bennett/Plunkett).
- Challenge MOE deadlines as arbitrary & capricious.
- Recent decision denying HUD's MTD: *Wilson v. HUD*, 1:18-cv-02149 (N.D.IL Feb. 5, 2019).

# Claims vs. Servicer: Litigators Beware

- Claiming spousal protection under the statute as against lender/servicer:
  - Courts almost universally holding that lender has right to foreclose under contract.
  - Statute only governs whether HUD can insure a loan (and insurance is still binding once issued).
  - *Estate of Jones v. Live Well Fin., Inc.*, 902 F.3d 1337 (11th Cir. 2018) - “1715z-20(j) addresses only HUD’s authority to insure loans and does not affect [the lender’s] contractual right to foreclose.” *See also Jeansonne v. Generation Mortgage Co.*, 644 Fed. Appx. 355, 357 (5th Cir. 2016).
  - Use as background for other claims, but not as independent claim.

# NBS as a “borrower” on the security instrument?

- Cases saying spouse who signed security instrument as “borrower” is protected from foreclosure: *Smith v. Reverse Mortgage Solutions*, 2015 WL 4257632 (Fla. 3 DCA 2015); *Edwards v. Reverse Mortgage Solutions*, 2016 WL 822084 (Fla. 3<sup>rd</sup> DCA 2016).
- Recent cases holding spouse not borrower given all loan docs (note, application, loan agreement, and NBS certification): *OneWest Bank, FSB v. Palmero*, 2018 WL 1832326 (Fla. Dist. Ct. App. Apr. 18, 2018); *Washington-Jarmon v. Onewest Bank, FSB*, 513 S.W.3d 103, 109 (Tex. App. 2016); *In re Clayton*, 802 S.E.2d 920, 926 (N.C. Ct. App. 2017).
- Maybe still possible on facts where spouse was 62+, didn’t come off title, didn’t sign NBS certification, etc: *Kostopolous v. OneWest*, 60 F.Supp. 3<sup>rd</sup> 804 (E.D. Mich. 2014).
- Arguments in favor: Security instrument is the document governing foreclosure; inconsistency in documents should be construed against drafter; interpretation consistent with HECM statute protection for spouse.

# Potential Claims/Defenses vs. Servicer for MOE Problems

- UDAP (depending on state law)
  - Servicer made program available, led NBS to believe she would be eligible, NBS did everything they asked, but servicer made a mistake (missed a deadline, changed doc requirements, gave inaccurate info).
- Estoppel based on servicer misrepresentations
  - Said loan was being assigned, but didn't assign; gave info about docs required, but then changed the requirement late in the game; gave wrong info about deadlines.
- Negligence-type claims
  - CAUTION: MOE is voluntary, discretionary program.
  - Research your state law as to whether servicer has any duty here.

# Enforcement of Forbearance Agreement

- Some servicers have NBS execute tolling, forbearance, release agreement for MOE, then fail to assign the loan to HUD.
- Agreement says eligible NBS has the right to remain in the home, but agreement is terminated if HUD doesn't accept assignment.
- If servicer never assigned (or didn't meet the deadline), argue it is estopped from asserting termination provision because NBS met all criteria, but servicer didn't do what was required for HUD to accept assignment.

# Equitable Arguments

Particularly in judicial foreclosure states, argue servicer's failure to appropriately handle the MOE:

- Lack of notice of MOE option (or buried on the 6<sup>th</sup> page of the letter about options available).
- Servicer's failure to comply with MOE procedures – NBS did everything right, submitted all documents, but servicer failed to make timely election or assignment.
- Equitable remedy may include reformation that would permit spouse to remain in the home.

# Fraud / Misrepresentation

- Claim against original lender for fraudulent statements made about the spouse's ability to remain in the home in order to induce the spouse to give up a title interest and/or the borrower to sign the loan.
- CAUTION: Disclosure documents that spouse may have signed acknowledging risk of foreclosure after borrower dies.
- Note: if HUD grants MOE relief, claims that invalidate the loan have to be resolved in favor of the lender or dismissed with prejudice.

# Reformation (1 of 2)

- Mistake of law (check your jurisdiction's rule on this):
  - Parties intended to enter into a HECM loan that would be eligible for HUD insurance and understood the legal effect of the docs would be a loan that complied with the HECM statute, but by mutual mistake, the loan did not comply with the legal requirements for HECM insurance due to the exclusion of the spousal protection provision.

# Reformation (2 of 2)

- Mistake of fact:
  - Parties intended for the loan to continue uninterrupted until the death of the borrower AND the non-borrowing spouse, but by mutual mistake the loan did not express this intent.
- Pitfalls:
  - Standing (non-borrowing spouse may not be third party beneficiary).
  - Factual dispute as lender may have documents confirming that non-borrowing spouse not protected.

# NBS in Bankruptcy

- NBS has the right to include the loan in bankruptcy: a “claim” includes a debt secured by the debtor’s home, even if debtor has no personal liability on the note.
- Since entire balance is accelerated, NBS would need to pay in full through the plan, or
- “Cramdown” the balance owed to the fair market value of the home and reduce the interest rate to prime + a margin for risk (to be paid off during the plan term).
- Consider whether the NBS could propose a viable chapter 13 Plan:
  - Refinance; sell; or pay off during 3-5 year plan term.

# STANDING: ASSIGNMENTS & NON-NEGOTIABLE INSTRUMENT

# Enforcement of Assigned Notes

## UCC Article 3 Negotiable Instruments

- Negotiation (transfer) of instruments payable to order, to bearer, or indorsed in blank.
- Addresses who is a Person Entitled to Enforce regardless of ownership.
- Possession of note is key—but not only—requirement.

## UCC Article 9 Non-negotiable Instruments

- Enforcement of security instruments, promissory notes, etc.
- Addresses who is owner by proof of valid chain of title.
- Possession of note alone not sufficient to prove right to enforce if facts introduced in defense that call into question claims of ownership and right to enforce.

# HECM is Art. 9 Non-Negotiable Instrument

U.C.C. Sec. 3-104 governs enforcement rights in notes **ONLY** if they are *Negotiable Instruments*—Note must meet **all** the following conditions:

1. contains an unconditional promise to pay a fixed amount of money (**NO—balance increases over time**);
2. is payable to bearer or to order at the time it is issued or first comes into possession of a *holder* (**Maybe**);
3. is payable on demand or at a definite time (**NO—not due on demand; due on death = inherently indefinite**), and;
4. does not state any other undertaking or instruction by the promisor to do any action in addition to the payment of money (**NO—requires, e.g., occupancy, repairs, compliance with HUD regs**).

# Can “Holder” of HECM Note Foreclose?

- Generally, only owner of non-negotiable note can enforce (Art. 9). Holder status relates to transfer of negotiable inst., not enforcement (Art. 3)
- *Holder* = “the person in possession of a *negotiable instrument* that is payable either to bearer or to an identified person that is the person in possession.” U.C.C. § 1-201(b)(21)(A) (2001)
  - Payable to identifiable person: transfer of note requires delivery (voluntary transfer of possession) containing the indorsement of the current holder.
  - Payable to bearer: transfer by possession alone.
- Non-holder may enforce if in possession of note and has rights of holder (holder must be in the chain of title).

# Resources

- Elizabeth Renuart, *Uneasy Intersections: The Right to Foreclose and the U.C.C.*, 48 Wake Forest L. Rev. 1205 (2013).
- Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, And The Uncertainty Of Mortgage Title*, 63 Duke L.J. 637, December, 2013.

# RMS BANKRUPTCY

# Overview

- RMS (Ditech) filed Chapter 11 on 2/11/2019
  - 2<sup>nd</sup> bankruptcy filing (prior reorganization a year ago)
  - Likely to result in sale of business (or assets)
  - Public website where pleadings are available:  
<https://dm.epiq11.com/#/case/Ditech/dockets>.
- **Proof of claims due: April 1, 2019 (might be extended)**
  - No need to file Proof of Claim (POC) if claim listed in schedules and not disputed, BUT
  - Schedules won't be filed until March 27<sup>th</sup>
  - Any claim for monetary damages needs to be filed, even if asserted as offset or recoupment (if possible, file as offset - SECURED).
  - Unclear how much unsecured claims might receive, but important to file POC to preserve rights.
  - Not clear who is getting notice of claims bar date.

# Filing Proof of Claim

- [Proof of Claim form available here.](#)
- Monitor case for any extensions of claims bar date and make sure claim is filed timely
  - NOTE: Allow additional time if filing claim by mail – must be [received by deadline.](#)
- **If arguable** that there is a right to setoff against the mortgage, file as SECURED CLAIM.
  - 11 USC §§ 506(a), 553
  - If claim can be considered as secured (vs. unsecured), this will increase likelihood of payment.
  - If portion of claim can't be offset (e.g. attorneys fees), claim that portion as unsecured.
  - If liability & damages haven't been determined, file as contingent/unliquidated.

# 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).

# Questions?

# Contact Info

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