2018 Midwestern Bankruptcy Institute

Consumer Track

Reverse Mortgages: HECM or HICUP?

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CONCURRENT SESSION

2018

Reverse Mortgage Servicing & Foreclosure: Emerging Issues

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Reverse Mortgage Basics

- FHA-Insured Reverse Mortgages: the Home Equity Conversion Mortgage (HECM); borrower must be 62 or older
- 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

- Loan balance may grow to exceed the value of the house
  - Nonrecourse loan
  - FHA insurance (assign to HUD when the loan balance reaches 98% of the Maximum Claim Amount)
- Initial principal amount loaned is based on:
  - Appraised value of the house
  - Prevailing interest rates
  - Age of the youngest borrower (older = higher loan proceeds)

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"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 Resources

- Statute -12 U.S.C. § 1715z-20
- Regulations - 24 C.F.R. part 206
  - Revised 82 Fed. Reg. 7094 (Jan. 19, 2017)
  - Effective Sept. 19, 2017
- Mortgagee Letters – www.hud.gov
- FAQ, HECM Handbook 4235.1
- HUD approved Counselors
- State laws

Emerging Issues & Concerns

- Property charge default – loss mitigation
- Occupancy issues
- Non-borrowing spouses

Property Charge Defaults & Loss Mitigation

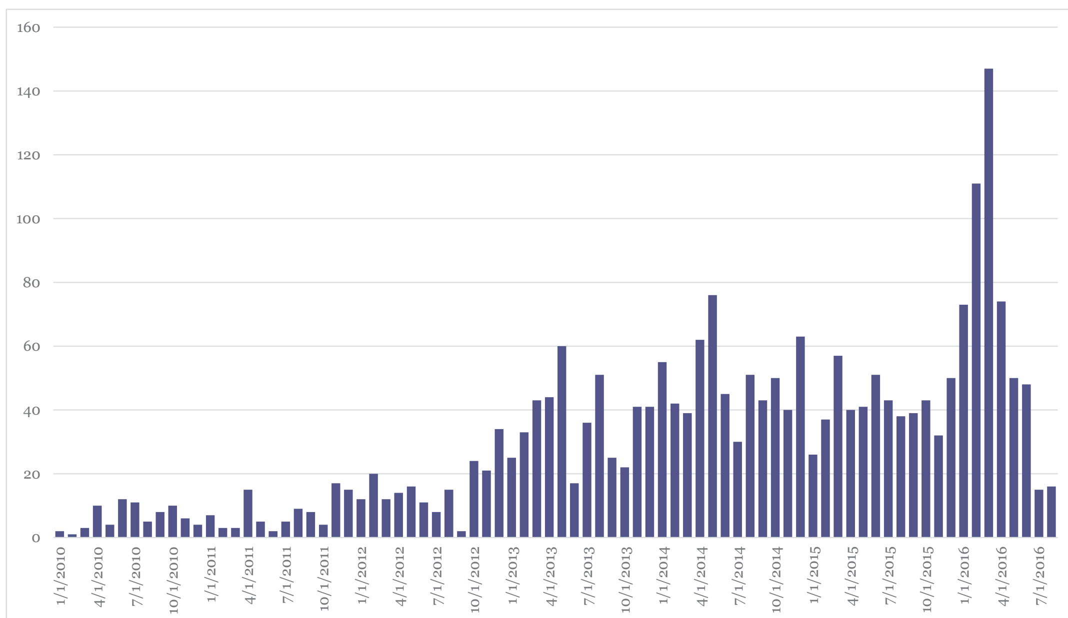
Property Charge Default

- Borrower is required to pay property charges.
- If unpaid, servicer will advance funds to pay the charges and declare default if borrower fails to repay the advances.
- "Property charges" include:
  - Property taxes (even if in a payment plan for arrears?)
  - Homeowner's insurance
  - HOA fees
  - Utilities?
    - Servicers pay utility liens (e.g. water) even though senior is on a direct payment plan with utility provider
    - HUD's Proposed Rule would include utilities as property charges that can result in default if not paid by the borrower.

What's changed? Why are there so many more RM foreclosures now?

- Mortgagee Letter 2015-11. (April 23, 2015)-- loss mitigation for unpaid property charges is now permissive, not mandatory.
- Requires servicer to call the loan due and foreclose if default is not cured.
  - Servicer must submit due & payable request to HUD
  - May request from HUD an extension of foreclosure deadlines if servicer determines a loss mitigation option is available
  - Must complete foreclosure within prescribed due diligence time periods

Reverse mortgage foreclosures filed in Philadelphia, PA



Verify Charges Claimed

- Ask for an itemized list of disbursements made for property charges
- In some cases, property charges are incorrect
  - E.g. lender took out forced-place insurance policy, even though the borrower had coverage; FPI charge can be reversed with borrower's proof of coverage
- Note: borrower cannot be required to repay other fees, such as property inspections, foreclosure costs, etc. Those charges can only be added to the loan balance, not assessed for reimbursement by the borrower

Cure Default in Full

- Borrower has the right to cure the default in full at any time prior to foreclosure.
- Cure amount is only for property charges advanced (not for foreclosure costs, etc.)
- Could be an option for low default balances, or seniors with savings or family able to contribute
- Explore local programs that might be able to assist; e.g. Hardest Hit funds

ML 2015-11: Repayment Plans

Servicer should:

- Determine the total amount due for unpaid property charges and property charges coming due in the next 90 days
  - Minus HOA fees, which cannot be included in the repayment plan
- Determine the borrower's ability to repay the charges through a repayment plan
  - No longer than 5 years
  - Payment no more than 25% of monthly surplus income
  - Or such shorter period so as to ensure repayment before the loan hits 98% of the Maximum Claim Amount

98% of Maximum Claim Amount

- "Maximum Claim Amount" = appraised value at the time of closing, up to $625,500
  - Amount on recorded security instrument is 150% of the MCA (i.e. secured amount÷1.5 = MCA).
  - Max HUD will pay on lender's FHA insurance claim
- Per ML 2016-07, may offer a repayment plan that will go beyond 98% of the MCA, but claim amount cannot exceed MCA
- Some servicers are exercising their "discretion" to deny payment plans where loan balance would exceed 98% MCA

Loss Mitigation After Foreclosure Initiated?

- ML 2015-11: Payment plan not available after foreclosure initiated
- ML 2016-07: for loans that were in foreclosure when ML 2015-11 was issued (April 23, 2015), a repayment plan is allowed
- NEW FAQ 5/26/16: "Mortgagees may evaluate a HECM borrower for permissive loss mitigation after first legal action has been taken [to initiate foreclosure]."
- Problem: servicers are still refusing loss mitigation once in foreclosure unless HUD grants an extension (b/c they can lose interest and fees on their insurance claim if they don't foreclose timely)

ML 2016-07: Additional Options

- Issued March 30, 2016
- New option: Servicer may delay foreclosure if the arrearage is less than $2,000 and the borrower has expressed willingness to pay and is attempting to pay, or lender has not yet been able to reach the borrower. But unevenly followed.
- New option: "Mortgagee Funded Cure"
  - Mortgagee may advance the funds to pay property charges
  - May not include the advanced funds in a claim to HUD
  - May not assign the loan for 3 years has passed where borrower has paid the T&I on time

TO: [redacted]

Philadelphia, PA 19140

NOTICE OF INTENTION TO FORECLOSE MORTGAGE
under Section 403 of Penna. Act No. 6 of 1974
(READ ALL PAGES OF THIS NOTICE CAREFULLY)

The MORTGAGE held by NATIONSTAR MORTGAGE LLC D/B/A CHAMPION MORTGAGE COMPANY and serviced by CHAMPION MORTGAGE (hereinafter referred to as we, us, or ours) on your property described above is in SERIOUS DEFAULT. The mortgage has come due under paragraph 9(b)(iii) which states that the lender may require immediate payment in full of an obligation of the borrower under the Mortgage is not performed, such as payment of taxes, hazard insurance premiums, ground rents and assessments in a timely fashion. The borrower has defaulted in payment of the Taxes & Insurance. Pursuant to the aforesaid provisions of the mortgage, if the borrower has not paid the taxes or insurance, the entire unpaid balance of the mortgage and note is immediately due and payable. THE TOTAL AMOUNT OF TAXES AND/OR INSURANCE TO BE PAID TO CURE THIS DEFAULT AS OF THE DATE OF THIS LETTER, IS NOTED BELOW.

(a) Taxes & Insurance: $267.37
(b) TOTAL AMOUNT REQUIRED AS OF THIS DATE: $267.37

You may cure this default within THIRTY (30) DAYS of this letter by paying to us the amount above, plus any additional charges WHICH MAY FALL DUE DURING THIS PERIOD. Such payment must be made either by CASH, CASHIER'S

“At Risk” F/C Extension (ML 5-11)

Mortgagee may request foreclosure extension if:

- Youngest living mortgagor is at least 80 years old, and
- Critical circumstances such as terminal illness or long-term physical disability of borrower or family member living in the home
- Submit written request with supporting medical records or doctor’s letter
- Must resubmit supporting documentation on an annual basis for ongoing extension each year
- NEW FAQ says the “at risk” extension is not available if loan is already in foreclosure; seek a waiver from HUD?
  - Trigger?: first legal action vs. F/C referral

Can Chapter 13 bankruptcy help?

- Servicer refuses to offer repayment plan or offers a shorter repayment plan than what the borrower can afford
- Cure the taxes and insurance through chapter 13 plan
  - Unlike a typical mortgage creditor, no P&I will be included in Proof of Claim
  - Attorney's fees and foreclosure fees should not be included in Proof of Claim (just property charges)

Occupancy Issues

Servicers Claim Non-Occupancy

- Servicers send annual occupancy recertification, borrower is supposed to return it under HUD regs
- Sometimes servicers claim the home is not occupied and seek to foreclose, even though borrower is still living there
  - Did borrower return occupancy verification? Did servicer take any additional steps to verify occupancy (e.g. calls, inspection)?
- Security deed says failing to occupy as principal resident is a due and payable event, not failing to return the occupancy verification
- Proof of occupancy should "cure" any default under the mortgage (utility bills, ID listing property address, etc).

After the Borrower's Death: Options to Prevent Foreclosure

- **Sale**
- **Refinance**
- **Surviving Spouse – Special Provisions**

Guidelines: after Death of Borrowers

- Loan balance comes due and payable (exception: optional deferral for surviving spouse)
- Estate or personal representative can:
  - Allow lender to foreclose
  - Sell the home
  - Short sale/purchase for 95% of appraised value
- Timeline
  - Estate has an initial 6-month period to try to purchase, sell, or refinance
  - Can request up to two 90-day extensions if additional time needed (but need to show progress, such as probate, sale listing, etc).

Option to Sell or Refinance at 95% of FMV if Home Underwater

Estate can sell the property to an heir/family member (to pay off HECM) for the lesser of:

- the current loan balance or
- 95% of the Fair Market Value,

whichever is less.

•FMV determined by servicer's FHA appraisal.

Practical considerations:

▪Can heir qualify for a loan (credit, income)?;

▪$$ for down-payment (look at assistance programs if insufficient savings)

Non-Borrowing Spouse Problem

- Until Aug. 2014, reverse mortgages only protected the borrower from foreclosure, even if there were a non-borrowing spouse.
- 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;**
- HUD regs/loan docs did not protect non-borrowing spouse, contrary to language in HECM statute that expressly protects the homeowner *and* "the spouse of a homeowner" (not only HUD–defined "borrowers")

ML 2015-15: "Mortgagee Optional Election" (MOE) 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 (cont.)

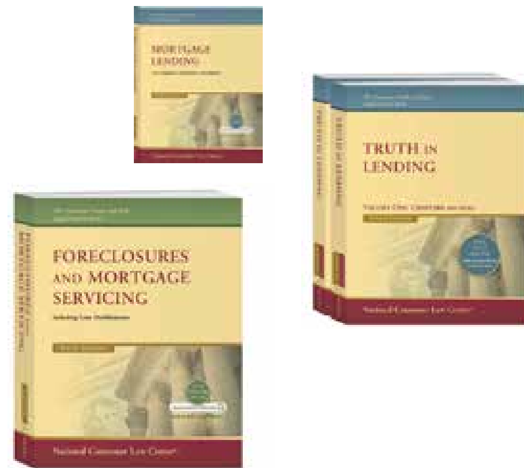
- (4) Spouse must have, or be able to obtain within 90 days of the death of the borrower, "good, marketable title to the property" or a legal right to stay in the home until his/her death.
  - Timing: within 90 days of the death (but what about deaths that occurred years ago and you are now trying to meet conditions for the MOE? Argue that so long as spouse can arrange it now, in time to meet MOE deadlines, should be OK)
  - What is "good, marketable title"?
  - Legal right to stay until death
    - Long-term lease
    - Court order
    - Partial ownership interest? (one of several heirs)
  - Silent requirement: homeowner's insurance in spouse's name

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:
  - Transfer on death deed (statute?)
  - Joint tenancy/quitclaim 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 (because spouse will have to bring current quickly after borrower's death)

Resources for Advocates

- National Consumer Law Center
- HUD
- Consumer Financial Protection Bureau (CFPB)



The nonprofit National Consumer Law Center® (NCLC®) helps build family wealth for low-income and other disadvantaged people in the U.S. by offering advocacy expertise through publications, policy analysis, research, litigation services, and training. www.nclc.org

Presented By:
Ron Farmer
Vice President, CHES, Inc.
HUD/FHA Certified HECM Counselor

REVERSE MORTGAGES

What Are Your Options?

About CHES, Inc.

- HUD/FHA Approved, Nonprofit Housing Counseling Organization.
- Provides required counseling services needed to apply for a Reverse Mortgage.
- Unbiased, third party information provider.
- Provides counseling services in person, or via phone.

Is a Reverse Mortgage Right for You?

Borrower Requirements:

- Be 62 years of age or older.
- Own the property outright or have considerable equity in the home.
- Occupy the property as your principal residence.
- Receive counseling from a HUD-approved reverse mortgage counselor.

...continued

Property Requirements:

- The following eligible property types must also meet all FHA property standards:
- Single family home or 2-4 unit home with one unit occupied by the borrower
- HUD-approved condominium project
- Manufactured home that meets FHA requirements

Features & Benefits

Amount of money received is based on:

- Age of youngest borrower or NBS (non borrowing spouse).
- Appraised value of home.
- Sales price (if a purchase).
- Lending limit.

Features & Benefits cont.

- Borrower remains in home, even if loan balance becomes more than value of property. Still responsible for taxes, ins., maint. & HOA.
- Non Recourse Loan, heirs and estate are not responsible for shortfall of loan balance.
- Sale of property (and MIP if shortfall) satisfies reverse mortgage balance.
- MIP (mortgage insurance premium) protects bank, borrower and heirs in case of shortfall.

Features & Benefits cont.

Options to receive your funds:

- **Fixed, one time transaction.**

- **Line of Credit, open ended transaction.**

Features & Benefits cont.

- **Proceeds from a Reverse Mortgage are <u>NOT</u> considered taxable income!**

Interest earned on investments you make with proceeds from a reverse mortgage may be considered taxable income. Seek the advice of a tax professional for more information.

Borrower Responsibilities

- Property maintenance.

- Keep property taxes, insurance & HOA dues current.

- Keep as your primary residence.

When is loan due?

- Upon death of last remaining borrower, or NBS.
- Upon sale of property.
- If both or last remaining borrower are in a hospital or care facility longer than 12 months.
- Not using home as your primary residence. *(longer than 6 months out of a year)*.
- Or anytime prior to the above, at <u>YOUR</u> choosing.

Things to Remember

- Balance of reverse mortgage increases over time.
- You are responsible for taxes, homeowner's insurance, maintenance and HOA (unless LESA).
- If you decide to sell your home or move, you will be required to pay either the loan balance or 95% of value, whichever is less.
- If you want to pass property to heirs, balance has to be paid in full within 6 months to 1 year.*

Resource Information

- National Council on Aging:

  www.ncoa.org

- American Association of Retired Persons:

  www.aarp.org

- CHES, Inc. (Credit & Homeownership Empowerment Services, Inc.)

  www.chesinc.org

- 8 Common Myths About Reverse Mortgages:

Questions & Closing

Thank you for attending today!

816-533-7417 *Financial Freedom…It's Your Move!* www.chesinc.org

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING-
FEDERAL HOUSING COMMISSIONER

April 23, 2015 **Mortgagee Letter 2015-11**

To	**All FHA Reverse Mortgage Loan Servicers**
Subject	**Loss Mitigation Guidance for Home Equity Conversion Mortgages (HECMs) in Default due to Unpaid Property Charges**
Purpose	The purpose of this Mortgagee Letter is to communicate permissible loss mitigation options mortgagees may provide when property charges are not paid in accordance with the terms of a HECM.
Affected Policy	This Mortgagee Letter supersedes and rescinds Mortgagee Letter 2011-01 in its entirety.
Effective Date	This Mortgagee Letter is effective immediately for all property charge defaults occurring on or after the publication date. For defaults occurring before the date of this Mortgagee Letter, mortgagees have 180 days from the date of publication to review their portfolio to bring HECM loans into compliance with the requirements herein. For HECM loans currently subject to a repayment plan, such plans may continue so long as they remain current. In the event that they cease to remain current, mortgagees must comply with the requirements of this Mortgagee Letter.
Loss Mitigation not Available during a Deferral Period	The loss mitigation options set out in this Mortgagee Letter are not available during a Deferral Period. In addition, HECM loans that are in default, and eligible to be called due and payable for reasons other than the death of the last surviving mortgagor, are not eligible for an assignment. Nothing in this Mortgagee Letter confers any right to a Mortgagor or a Non-Borrowing Spouse to any action on the part of HUD or the mortgagee.

HECM Loans in Default due to Unpaid Property Charges

Mortgagees are permitted to make property charge payments on behalf of mortgagors, who are borrowers on the HECM note, from the mortgagor's funds, available under the HECM. If the mortgagor has insufficient funds available under the HECM to satisfy these unpaid property charges, the mortgagor is in default, the mortgage is eligible to be called due and payable, and the mortgagee must submit a due and payable request.

During a Deferral Period, a mortgagee may not make property charge payments using HECM proceeds as no further disbursements are available under the HECM. If a property charge payment is missed during a Deferral Period, the mortgagee must notify any Eligible Non-Borrowing Spouse that an obligation of the mortgage was not satisfied and that the Deferral Period is ending unless the default is cured within 30 days.

If the default is cured within such time, the Deferral Period Reinstatement provisions of Mortgagee Letters 2015-02 and 2015-03 will apply.

If the default is not cured within such time, mortgagees must proceed in accordance with applicable regulations:

a) to initiate foreclosure; and
b) reasonable diligence in prosecuting foreclosure.

Should a default be cured after the mortgagee has initiated foreclosure, the Deferral Period Reinstatement provisions of Mortgagee Letters 2015-02 and 2015-03 will apply.

Mortgagees, regardless of the default, must take whatever steps are necessary to protect its and HUD's security interests.

HECM Mortgages with Set-Aside Accounts

For HECM loans with set-aside accounts for the purpose of paying property charges, the mortgage will be considered in default if:

- The set-aside account has been exhausted of available funds to make property charge payments; and
- The mortgagor, after being notified of their outstanding property charge obligation, fails to remit the property charge payment in full within 30 days as required; and
- The Principal Limit has been exhausted, requiring the mortgagee to make the property charge payment using corporate funds.

The guidance herein will apply to all mortgages with a set-aside account either required by the mortgagee at origination or elected by the mortgagor.

Requesting Due and Payable

Except during a Deferral Period, mortgagees must submit to HUD a Due and Payable Request, within 30 days, whenever a mortgage becomes eligible to be called due and payable because an obligation of the mortgage is not met. Mortgagees must submit Due and Payable Requests via the Home Equity Reverse Mortgage Integrated Technology (HERMIT) system.

Where a mortgagee has determined that a loss mitigation option is available under this Mortgagee Letter and is willing to offer a HECM borrower the available loss mitigation option, a mortgagee may request a Property Charge Loss Mitigation Extension in the HERMIT system to extend the aforementioned foreclosure timeframes, provided that all requirements established herein are met.

Any approved extension of the aforementioned timeframes ceases immediately if, at any point, the mortgagee determines:

(1) That no loss mitigation options are viable; or
(2) The mortgagor is unwilling to reimburse the property charge payments advanced on their behalf either by self-certification or non-communication with a mortgagee for 60 days; or
(3) The mortgagor is unable to cure the default; or
(4) The last surviving mortgagor dies.

Any request for an extension to a foreclosure timeframe due to the mortgagee's election to offer a permissible loss mitigation option under this Mortgagee Letter must include documentation of the mortgagee's loss mitigation efforts to prevent foreclosure.

Content of Due and Payable Notice

Mortgagees must inform mortgagors in writing that they have thirty (30) days to respond to a Due and Payable Notice[1]. All Due and Payable Notices sent to mortgagors must reference available loss mitigation options, if any, and inform the mortgagor of his/her ability to sell his/her property or execute a Deed-in-Lieu of foreclosure.

Mortgagees must refer mortgagors to a HUD-approved Housing Counseling Agency prior to initiating foreclosure.

Previous Due and Payable Requests

Due and Payable Requests that were approved prior to the publication of this Mortgagee Letter will not be rescinded. In addition, HECMs currently subject to foreclosure actions are not eligible for the permissive loss mitigation guidance herein.

[1] The specific mortgagee requirements for a Due and Payable Notice are outlined in HUD regulations and previously published guidance.

Curing the Default Post a Due and Payable Request

At any time prior to a foreclosure, a HECM loan will no longer be considered to be in default if a Mortgagor or an Eligible Non-Borrowing Spouse becomes current on all property charges, including having repaid all corporate advances made by the mortgagee (if any) and has fully cured any outstanding reasons for default. If the loan was called due and payable, and foreclosure proceedings were initiated, HUD's regulations regarding reinstatement found at 24 CFR § 206.125 apply. Where the last surviving mortgagor has died and there is an Eligible Non-Borrowing Spouse, the Deferral Period Reinstatement provisions of Mortgagee letter 2015-02 and 2015-03 will apply.

A reinstated mortgage may be eligible for assignment provided all other FHA requirements for assignment have been satisfied. Mortgagees shall follow existing procedures for submitting assignment requests. Submitted requests must include documentation validating that the mortgage is in compliance with all FHA requirements.

Loss Mitigation for HECM Mortgagors with Outstanding Property Charges

For HECM loans that are in default due to unpaid property charges, mortgagees shall provide a Property Charge Delinquency Letter to the mortgagor as soon as the mortgagee receives notice of a missed payment for property charges. Mortgagees may vary the actual structure of the letter, but must include the following substantive information:

(1) State that an obligation of the borrower to pay property charges has not been met;
(2) State that failure of the borrower to pay property charges will result in the loan becoming due and payable;
(3) Include, where a mortgagee has advanced corporate funds on behalf of the borrower, the amount advanced;
(4) Provide notice of availability of Housing Counseling; and
(5) Provide notice of any available loss mitigation options the mortgagee may offer.

Mortgagees may offer the following loss mitigation options for a mortgagor in default due to unpaid property charges:

(1) Refinancing the defaulted HECM into a new HECM if possible under all applicable HECM origination requirements; and
(2) Providing information, at no cost to the mortgagor, of local assistance programs (e.g., ELMORE) available for mortgagors.

If the aforementioned loss mitigation options are unavailable, have been declined by the mortgagor, or have been otherwise exhausted, mortgagees may offer the following:

Option (1): The option of a Repayment Plan to satisfy outstanding Corporate Advances made for Property Charge Defaults.

Option (2): The option for an extension of the foreclosure timeframes due to an "At Risk" HECM Mortgagor.

Mortgagees that elect to provide the aforementioned loss mitigation for HECM loans must update HUD about loans receiving such loss mitigation assistance. This includes maintaining loan level, loss mitigation data and updating the HERMIT system with the following information for loans associated with a Repayment Plan[2]:

- Total Outstanding Arrearage
- Monthly Surplus Income
- Term of Repayment Plan
- Amount of Monthly Repayment Plan Payment
- Due Date of Next Monthly Payment
- When a Mortgagor Experiences a Hardship
- Reason for Hardship

Option 1: HECM Loss Mitigation Repayment Plan

Before offering this loss mitigation option, the mortgagee must determine the mortgagor's eligibility and likelihood of success under a Repayment Plan. If the mortgagor will not be able to repay the corporate advance within the permissible time, this loss mitigation option is not available. Additionally, any permissible Repayment Plan must provide that in the event the last surviving mortgagor dies before the Repayment Plan is paid in full, any outstanding amounts owed become immediately due and must be satisfied within 30 days.

Mortgagees must follow certain steps when evaluating a mortgagor for a Repayment Plan. These steps are as follows:

A. How to Determine if a Mortgagor is Eligible for a Corporate Advance/Repayment Plan

When assessing a mortgagor for a Corporate Advance/Repayment Plan, mortgagees must:

(1) Determine the total amount, less any outstanding HOA fees[3], of the HECM mortgagor's net outstanding balance of unpaid property charges and any property charges due for the next 90 days; and

[2] The HERMIT modifications required to capture the Repayment Plan data are targeted for release in June, 2015.
[3] Any outstanding Home Owners Association (HOA) fees are not eligible to be included in a Repayment Plan.

(2) Evaluate the mortgagor's ability, using the financial information provided by the mortgagor as set forth in section B below, to repay the mortgagee's corporate advances through a Repayment Plan of a time period determined by the mortgagee except that in no event may a Repayment Plan exceed five years or such shorter time period as necessary to ensure repayment before the mortgage reaches 98 percent of the Maximum Claim Amount (MCA).

B. Repayment Plan Calculation

Mortgagees must calculate the terms of a Repayment Plan by:

Dividing the "Total Arrearage" in equal monthly installments, not to exceed 60 months or in such shorter time period as necessary to ensure repayment before the mortgage reaches 98 percent of the Maximum Claim Amount (MCA) and which do not exceed 25 percent of the mortgagor's monthly surplus income amount.

If only monthly installments exceeding 25 percent of the mortgagor's monthly surplus amount can be identified after performing the aforementioned calculation, mortgagees may extend the Repayment Plan to maximum remaining time available to achieve the lowest possible payment.

<u>Calculating "Monthly Surplus Income"</u>

For the purposes of this Mortgagee Letter, the mortgagor's "Monthly Surplus Income" is determined by subtracting the mortgagor's necessary living expenses – including healthcare, revolving and installment debt, any payment obligations, utility bills, and other household-related expenses - and a monthly amount needed for property charges due over the next twelve months from available sources of income as stated by the mortgagor.

<u>Calculating "Total Arrearage"</u>

For the purposes of this Mortgagee Letter, the "Total Arrearage" is determined by adding the outstanding corporate advances made for the account to any property charges, less any for HOA fees, due for the next 90 days. Anytime a property charge payment is missed, with the exception of a HOA fee, the "Total Arrearage" should be recalculated.

Please see Appendix A for sample calculations.

C. Options available where Additional Unpaid Property Charges are incurred or a Hardship is experienced after a Repayment Plan has been established.

Additional Unpaid Property Charges

If the HECM mortgagor is currently subject to a Repayment Plan and again fails to pay required property charges, the mortgagee, may reevaluate the mortgagor for an additional corporate advance. Mortgagees must solicit new financial information from the mortgagor to conduct this new Repayment Plan assessment.

The revised Repayment Plan must recalculate the "Total Arrearage", which should include all outstanding corporate advances made. If the mortgagee determines that a new Repayment Plan is not reasonable after performing this calculation, this loss mitigation option is not available. No mortgagor may be given more than 60 months (*or such shorter amount of time as necessary to ensure repayment before the mortgage reaches 98 percent of the MCA*) total to repay any and all advances.

Experienced Hardships

If the mortgagor experiences a decrease in their available amount of surplus income due to a verified hardship (e.g., illness, death of a household member who was identified as a contributor of income in a previous Repayment Plan calculation, emergency home repair, loss of employment income, etc.) and seeks to have a Repayment Plan adjustment, mortgagees must solicit new financial information from the mortgagor to conduct a new Repayment Plan assessment.

If the mortgagee determines that the recalculated Repayment Plan is reasonable, the mortgagor may be provided with a new monthly payment amount and term. The mortgagee may make further adjustments to the recalculated Repayment Plan in accordance with this section. However, no mortgagor may be given more than 60 months (*or such shorter amount of time as necessary to ensure repayment before the mortgage reaches 98 percent of the MCA*) total to repay any and all advances.

D. Unsuccessful Repayment Plan Performance

A mortgagor's Repayment Plan performance is unsuccessful when a full monthly payment is not made within 60 days of the monthly payment due date.

For a mortgagor failing to perform successfully under an existing Repayment Plan:

- If the outstanding arrearage is less than $5,000, the mortgagee may, after reevaluating the mortgagor, provide the mortgagor with a recalculated Repayment Plan if the mortgagee determines that it is reasonable; or
- If the outstanding arrearage is greater than $5,000 or the mortgagee determines that a recalculated repayment plan is not reasonable, the mortgagee may assess one of the subsequent loss mitigation options reflected below; or
- If the mortgage has reached or will reach – prior to curing the default – 98 percent of the Maximum Claim Amount (MCA), no further Repayment Plans should be entered into and any extensions provided to the aforementioned foreclosure timeframes cease immediately.

Option 2: "At Risk" HECM Mortgagors and Allowable Foreclosure Extensions

If a Repayment Plan is insufficient or unsuccessful, any extension to the aforementioned foreclosure timeframes cease immediately and the mortgagee must proceed in accordance with HUD's regulations. However, mortgagees may request an additional extension to the foreclosure timeframes, if the following criteria are met:

- Youngest living mortgagor is at least 80 years of age; **and**
- The mortgagee, after employing acceptable and prudent servicing practices, has determined that the mortgagor 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 the residence).

Mortgagees seeking a Property Charge Loss Mitigation Extension in HERMIT in accordance with this section must carefully denote their request as **"AT RISK"**. The mortgagee must also include supporting documentation validating that the conditions stated above are met. And, if the request is approved, provide (on no less than an annual basis) supporting documentation that the conditions continue to be met. Should one of the aforementioned criteria cease to be met, any approved extension ceases immediately. Notwithstanding any other provision of this Mortgagee Letter, HUD will determine in its sole and exclusive discretion whether an extension request will be granted and reserves the right to require the mortgagee to timely proceed to foreclosure.

If the last-surviving mortgagor dies, the extension to the foreclosure timeframe allowed by the "AT RISK" criteria ceases immediately.

Repayment Plans Satisfied Immediately Upon Death

Any approved Property Charge Loss Mitigation Extension immediately ceases when the last-surviving mortgagor dies. Any outstanding corporate advances owed become immediately due. If any amount owed is not satisfied within thirty (30) days, the mortgagee must proceed in accordance with applicable regulations.

If any outstanding amounts due are satisfied, the mortgagee must request that the due and payable status on the HECM loan related to the repayment of any approved property charges be rescinded.

If the loan has been approved for reinstatement and, if all other requirements for a Deferral Period are met, the Deferral Period for an Eligible Non-Borrowing Spouse begins. Mortgagees are required to adhere to all issued guidance related to a HECM Non-Borrowing Spouse.

Information Collection Requirements

The information collection requirements contained in this document have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and assigned OMB Control Number 2502-0429. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

Questions

Any questions regarding this Mortgagee Letter may be directed to the HUD's National Servicing Center at (877) 622-8525. Persons with hearing or speech impairments may reach this number by calling the Federal Information Relay Service at (800) 877-8339. For additional information on this Mortgagee Letter, please visit www.hud.gov/answers.

Signature

Edward L. Golding
Principal Deputy Assistant Secretary for Housing

Attachment

APPENDIX A – Calculating a Repayment Plan

Initial Calculation

The following chart depicts an example of how mortgagees may perform and apply the Repayment Plan calculation for determining the mortgagor's potential Repayment Plan parameters:

Total Arrearage		Annual Surplus Income						
5000		15000	13000	11000	9000	7000	5000	3000
Repayment Terms	Monthly Repayment	Monthly Surplus Income						
		1250	1083	917	750	583	417	250
12	417	33%	38%	45%	56%	71%	100%	167%
24	208	17%	19%	23%	28%	36%	50%	83%
36	139	11%	13%	15%	19%	24%	33%	56%
48	104	8%	10%	11%	14%	18%	25%	42%
60	83	7%	8%	9%	11%	14%	20%	33%

A mortgagor with a "Total Arrearage" equal to $5,000 and that is determined to have a surplus income of $1,250 per month, must be placed into a 24 month Repayment Plan agreement with monthly payments totaling $208. Note that the monthly repayment amounts for the 36, 48, and 60 month Repayment Plan intervals are also below 25% of the mortgagor's monthly surplus income, yet the 24 month agreement is correct as it is the shortest Repayment Plan time frame that the monthly repayment amount was less than 25% of the monthly surplus income.

If the mortgagor had a "Total Arrearage" of $5,000 and is determined to have a surplus income of $250 per month, the mortgagee must extend the Repayment Plan agreement out to five years with equal monthly payments totaling $83 since there is no repayment option less than 25% of the monthly surplus income.

Recalculation Due to Reduction in Surplus Income or Missed Property Charge Payment

A Mortgagor has the following Repayment Plan identifiers:

Surplus Income	$1,250
Outstanding "Total Arrearage"	$2,912
Initial Repayment Plan Length	24 Months
Months Remaining on Repayment Plan	14 Months
Monthly Repayment Plan Payment	$208

If the mortgagor experiences a financial hardship…

The mortgagee may recalculate the Repayment Plan using the following steps:

1. Determine the new Surplus Income of the Mortgagor

2. Determine the new Repayment Plan Length and Payment

   - Calculate the potential Repayment Plan amount by dividing the outstanding "Total Arrearage" by 12, 24, 36, 48, 50 month intervals **(NOTE: Assessing the mortgagor for a 60 month Repayment Plan is no longer an option due to 10 months of previous repayment plan participation. Mortgagees must also adjust remaining availability if the Mortgage is projected to reach 98% of the Maximum Claim Amount within a time frame sooner than the amount of months available.)**

   - Choose the Repayment Plan length and payment at the first annual time interval in which the repayment amount is less than 25% of the surplus income. If, as a result of this Repayment Plan calculation, there is no repayment option available for the borrower that is less than 25% of their monthly surplus income, the servicer may extend the Repayment Plan out to the maximum time remaining for mortgagor participation. Thus, in this example, the servicer may extend the Repayment Plan out to 50 months, if none of the recalculated repayment options were less than 25% of the borrower's monthly surplus income.

Example:

Outstanding Total Arrearage		Annual Surplus Income
2912		7500
Repayment Terms	**Monthly Repayment**	**Monthly Surplus Income 625**
12	243	39%
24	121	19%
36	81	13%
48	61	10%
50	58	9%

A mortgagor's new Repayment Plan identifiers:

New Surplus Income	$625
Outstanding "Total Arrearage"	$2,912
New Repayment Plan Length	24 Months
New Time Remaining on Repayment Plan	24 Months
New Monthly Repayment Plan Payment	$121

If the mortgagor misses another property charge payment…

The mortgagee may recalculate the Repayment Plan using the following steps:

1. Ascertain the new "Total Arrearage" by adding the new corporate advances for the recently missed property charges (Mortgagees may include an estimated amount for upcoming property charges in the next six months).

2. Determine the new Repayment Plan Length and Payment

   - Calculate the potential Repayment Plan amount by dividing the outstanding "Total Arrearage" by the amount of time remaining on the initial Repayment Plan agreement.

   - If the new monthly repayment amount is still less than 25% of the mortgagor's monthly surplus income, then the time interval of the Repayment Plan does not extend. However, if the monthly payment plan amount surpasses 25% of the monthly surplus income, then the mortgagee must choose the Repayment Plan length and payment at the first annual time interval in which the repayment amount is less than 25% of the surplus income. If, as a result of this Repayment Plan calculation, there is no repayment option available for the borrower that is less than 25% of their monthly surplus income, the servicer may extend the Repayment Plan out to the maximum time remaining for mortgagor participation.

Example:

Total Arrearage	Annual Surplus Income
3600	15000

Repayment Terms	Monthly Repayment	Monthly Surplus Income 1250
14	257	21%
24	150	12%
36	100	8%
48	75	6%
50	72	6%

A mortgagor's new Repayment Plan identifiers:

Surplus Income	$1250
New Outstanding "Total Arrearage"	$3,600
Time Remaining on Initial Repayment Plan	14 Months
New Repayment Plan Length (No change)	14 Months

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Crossing Paths: The Intersection of Reverse Mortgages and Bankruptcy

by

*Tara Twomey**

INTRODUCTION

The senior population of the United States is expected to grow rapidly over the next twenty years. Rather than enjoying their golden years, older Americans are increasingly struggling with less income, greater debt, and insufficient retirement savings. The average amount of debt owed by seniors has soared over the last decade. Many now rely on credit cards to cover their basic living expenses. Rising mortgage debt has compromised the use of home equity as a retirement nest egg.

There are few easy solutions. For some, higher debt loads mean working longer or getting a second job. Tapping life insurance policies or savings accounts, for those lucky enough to have them, can also be a source of needed cash.

Two other tools available to seniors to combat financial distress are reverse mortgages and bankruptcy. Reverse mortgages allow seniors to reach their home equity to pay off outstanding debts or supplement monthly income. Bankruptcy provides an opportunity to obtain a fresh start by discharging certain debts or adjusting one's financial affairs.

The two options—reverse mortgages and bankruptcy—are not mutually exclusive. The intersection of these two tools, however, is unexplored in legal literature and reverse mortgage counseling information. As a result, misconceptions abound. Few bankruptcy practitioners know enough about reverse mortgages to adequately advise their senior clients, and few reverse mortgage housing counselors understand enough about bankruptcy to refer clients to a bankruptcy attorney when appropriate. As seniors face greater debt burdens, a better understanding of the relationship between reverse mortgages and bankruptcy is needed.

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*Tara Twomey is currently Of Counsel to the National Consumer Law Center and Project Director for the National Consumer Bankruptcy Rights Center. This work was made possible by an academic research grant from the Borchard Foundation Center on Law and Aging and grows out of a presentation with Nancy MacLeod from Atlanta Legal Aid Society on reverse mortgages and bankruptcy.

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This Article seeks to fill that gap by exploring the intersection between reverse mortgages and bankruptcy. Part I surveys the financial challenges faced by today's growing senior population. Part II reviews the mechanics of reverse mortgages, in particular, Home Equity Conversion Mortgages insured by the Federal Housing Administration. Part III provides an introduction to bankruptcy and key concepts that are helpful to understanding the intersection between bankruptcy and reverse mortgages. Part IV examines bankruptcy as a solution for borrowers facing foreclosure on a reverse mortgage. Part V considers challenges that reverse mortgage borrowers may face in bankruptcy, and Part VI describes how reverse mortgages and bankruptcy may be used together to put a senior on more solid financial footing.

I. LESS INCOME, LESS SAVINGS, AND MORE DEBT FOR A GROWING SENIOR POPULATION

The senior population of the United States, those sixty-five years and older, is expected to grow rapidly, from forty million in 2010 to sixty-five million by 2025.[1] Seniors are also expected to account for a growing share of the population—almost 19% in 2025, up from 13% in 2010.[2] Unfortunately for many in this growing population, financial insecurity looms on the horizon as a result of less income, less savings, and more debt.

Many Americans still feel the economic effects of the longest and deepest recession since the 1930s. Because of the lack of real wage growth (that is, wages are not growing faster than inflation), more people face greater challenges in just making ends meet. Median annual income[3] for all U.S. households in 2012 fell to the lowest level in more than a decade.[4] For that year, the median income was $51,017.[5] That figure is 9% below the peak level reached in 1999 ($56,080) and comparable to the median income in 1995 ($50,978).[6]

Those nearing retirement face the same challenge: the end of the Great Recession in 2009 has ushered in further income decline rather than recovery.[7] Since 2009, those nearing retirement—ages 55 to 64—have seen their

[1] U.S. Census Bureau, National Population Projections tables 2, 3 (2012), *available at* http://www.census.gov/population/projections/data/national/2012/summarytables.html, and U.S. Census Bureau, Age and Sex Composition: 2010 table 1 (2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf.

[2] *Id.*; U.S. Census Bureau, Age Distribution: 1940 and 2010 (2011), *available at* http://www.census.gov/newsroom/cspan/1940census/CSPAN_194012.pdf.

[3] All median annual income figures are inflation-adjusted.

[4] U.S. Census Bureau, Historical Income Tables: Households table H-10AR (2014), *available at* http://www.census.gov/hhes/www/income/data/historical/household/.

[5] *Id.*

[6] *Id.*

[7] The second quarter of 2009 marks the end of the Great Recession. U.S. Bureau of Labor Statis-

median annual income drop nearly 4%.[8] During this same period, those sixty-five years and older appear to have fared better and even show a slight gain ($284) in median annual income. This increase may, however, simply reflect greater labor force participation for those over sixty-five.[9] That is, more Americans are delaying retirement and working into their golden years. Even so, those over sixty-five could hardly be considered rich because their median annual income for 2012 was just $33,848, or about $2820 per month.[10] And many seniors live almost entirely on social security benefits of about $1294 per month, or $15,528 per year.[11]

The lack of real wage growth has also curtailed workers' ability to save for retirement at a time when employers are cutting back on retirement benefits. Employer-sponsored retirement plans have changed dramatically over the last thirty years. Defined benefit plans[12] that were once common have nearly disappeared for workers in the private job market.[13] These plans have been replaced by defined contribution plans[14] for some workers, while other employees have been left to save for retirement on their own. In the public sector, many governmental entities have large unfunded pension liabilities that make the promised benefits less certain.[15]

A recent study of 2.2 million employees at large companies estimates that workers need eleven times their annual income at age sixty-five to retire com-

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TICS, BLS SPOTLIGHT ON STATISTICS: THE RECESSION OF 2007-2009 (2012), *available at* http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf.

[8] U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES: HOUSEHOLDS: TABLE H-10AR, *supra* note 5.

[9] *See* Michael V. Leonesio, et al, *The Increasing Labor Force Participation of Older Workers and its Effects on the Aged*, 72 SOC. SECURITY BULL., no. 1, 59 (2012) (noting that labor force participation rates of men and women aged 62-79 have increased significantly since the mid-1990s).

[10] U.S CENSUS BUREAU, CURRENT POPULATION SURVEY table HINC-02 (2012), *available at* http://www.census.gov/hhes/www/cpstables/032013/hhinc/hinc02_000.htm. By contrast, the median income for all households with householders under 65 was $57,353.

[11] According to the Social Security Administration, the average monthly benefit for retired workers in 2013 was $1294. 22% of married couples and 47% of single people live almost entirely on social security benefits. U.S. SOC. SECURITY ADMIN., SOCIAL SECURITY BASIC FACTS (April 2, 2014), *available at* http://www.ssa.gov/pressoffice/basicfact.htm.

[12] Under a defined benefit plan, employers or sponsors promise a specified monthly benefit upon retirement.

[13] *See generally* CTR. FOR RET. RESEARCH AT BOSTON COLL., FREQUENTLY REQUESTED DATA: WORKERS WITH PENSION COVERAGE BY TYPE OF PLAN, 1983, 1992, 2001, AND 2013 (Sept. 2014), *available at* crr.bc.edu/wp-content/uploads-1012-01-figure-15.pdf; *James* Porterba, et al., *Defined Contribution Plans, Defined Benefit Plans, and the Accumulation of Retirement Wealth* (Nat'l Bureau of Econ. Research Working Paper No. 12597, 2006).

[14] Under a defined contribution plan, the employer (and possibly the employee) make contributions, usually to a tax-qualified retirement account. The employer makes no promises about the future benefits that may be realized (or not) on the account.

[15] *See* Alicia H. Munnell, Jena-Pierre Aubry, & Mark Cafarelli, *The Funding of State and Local Pensions: 2012-2016* 2, http://crr.bc.edu/wp-content/uploads/2014/06/slp_39.pdf (estimating unfunded pension liabilities for state and local governments for 2012 to be $1.2 trillion); Steven Yaccino & Michael Cooper, "Cries of Betrayal as Detroit Plans to Cut Pensions," N. Y. TIMES, July 21, 2013, at A1.

fortably.[16] The average employee, however, was expected to have saved only 4.7 times their pay by the time they reached age sixty-five—a shortfall of 6.3 times their pay.[17] In all, only about 15% of the 2.2 million employees surveyed were positioned to have sufficient resources if they retired at sixty-five.[18] As the study notes, results for the general U.S. population would be even worse because large employers tend to provide larger benefits and better communications regarding retirement savings.[19] Indeed, another study by the Employment Benefit Research Institute shows 66% of workers surveyed had less than $50,000 saved for retirement, excluding equity in primary residences and defined benefit plans.[20] Further, more than a quarter of workers had less than $1000 in total savings.[21] The bottom line is that, for a large portion of the American population, retirement savings are woefully inadequate.

Increased expenses complete the picture for a generation of seniors facing financial distress. Higher costs for housing, medical care, and food significantly limit seniors' ability to meet everyday expense obligations. Data from the most recent American Housing Survey reveals that over twenty million senior households (sixty-five and over) own their homes.[22] But in 2011 paying off a mortgage before retirement had become an elusive goal for more than a third (35%) of them, as compared with a quarter of senior homeowners in 1997.[23] More importantly, however, the amount of mortgage debt carried by seniors has risen dramatically. In 1997, the median outstanding principal amount on mortgage held by senior households was $19,146.[24] By 2011, that figure had climbed more than 400% to $79,000.[25] Today, on average, senior households carrying mortgage debt pay 20 to 24% of their current income toward their monthly mortgage payment.[26] At the same time housing costs were increasing for seniors, medical expenses were climbing as well. Between

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[16]Aon Hewitt, The Real Deal: 2012 Retirement Income Adequacy at Large Companies 7 (2012), *available at* http://www.aon.com/attachments/human-capital-consulting/The_2012_Real_Deal_Report.pdf.

[17]*Id.* at 36.

[18]*Id.* at 6.

[19]*Id.*

[20]Emp't Benefit Research Inst., The 2013 Retirement Confidence Survey: Perceived Savings Needs Outpace Reality for Many 18 (March 2013), *available at http://www.ebri.org/pdf/briefspdf/EBRI_IB_03-13.No384.RCS2.pdf* .

[21]*Id.*

[22]U.S. Census Bureau, American Hous. Survey table C-14a-OO (2011), *available at* http://www.census.gov/programs-surveys/ahs/data/2011/h150-11.html.

[23]*Id.*

[24]U.S. Census Bureau, American Hous. Survey table 3-15 (1997), *available at* http://www.census.gov/prod/99pubs/h150-97.pdf.

[25]U.S. Census Bureau, American Hous. Survey table C-14a-OO (2011), *available at* http://www.census.gov/programs-surveys/ahs/data/2011/h150-11.html.

[26]*Id.*

1996 and 2009, the average out-of-pocket expense for health care for those age sixty-five and older increased 46%.[27] Not surprisingly, the increase in medical care costs has significantly outpaced overall inflation since 2006.[28] The cost of food, too, has grown more rapidly than the consumer price index for all items.[29] The consequence of higher expenses combined with less income and less savings is more debt.

The most recent look at older Americans and credit card debt shows that, of those who carry credit card debt, people age fifty and older now carry more such debt ($8278), on average, than their younger counterparts ($6258).[30] Half of the fifty and older age group carry medical expenses on their credit cards and 34% use credit cards to pay for basic living expenses such as housing, groceries, utilities or insurance because they have insufficient funds to cover these expenses.[31] Others "use credit cards as a high-interest 'plastic safety net' to cope with contingencies such as emergency car and home repairs or unexpected medical bills . . . ."[32] More broadly, the average debt owed by seniors increased 122.6% between 1992 and 2010 to just over $75,000 (inflation-adjusted).[33]

Given the precarious financial footing of many seniors, it is not surprising that they represent the fastest growing group of bankruptcy debtors. Between 1991 and 2007, the proportion of bankruptcy filers age sixty-five and older more than tripled.[34] For the same period, for those aged seventy-five to eighty-four, the rate of bankruptcy filing has soared 433%.[35] Scholars have suggested that the reasons older Americans file for bankruptcy include overwhelming credit card debt, medical issues, aggressive debt collection, reduced

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[27] HENRY J. KAISER FAMILY FOUND., HEALTH CARE COSTS: A PRIMER fig. 18 (2012), *available at* http://kff.org/health-costs/issue-brief/health-care-costs-a-primer/.

[28] U.S. BUREAU OF LABOR & STATISTICS, CPI DETAILED REPORT: DATA FOR JANUARY 2013 table 29 at 117 (2013), *available at* http://www.bls.gov/cpi/cpid1301.pdf.

[29] Richard Volpe, "Price Inflation for Food Outpacing Many Other Spending Categories," AMBER WAVES, U.S. Dept. of Agriculture (Aug. 5, 2013), available at http://www.ers.usda.gov/amber-waves/2013-august/price-inflation-for-food-outpacing-many-other-spending-categories.

[30] AMY TRAUB, IN THE RED: OLDER AMERICANS AND CREDIT CARD DEBT 5 (2013), *available at* http://www.aarp.org/content/dam/aarp/research/public_policy_institute/security/2013/older-americans-and-credit-card-debt-AARP-ppi-sec.pdf.

[31] *Id.* at 6-9.

[32] *Id.* at 6.

[33] Craig Copeland, *Debt of the Elderly and Near Elderly, 1992-2010*, 34 EMP. BENEFIT RES. INST. NOTES no. 2, at 2, 3 (2013). The median debt level increased 232% over the same period of time from $16,683 to $55,400. *Id.*

[34] John Pottow, *The Rise in Elder Bankruptcy Filings and the Failure of U.S. Bankruptcy Law*, 19 ELDER L.J. 119, 121 (2011). *See also* John Golmant & James Woods, *Aging and Bankruptcy Revisited*, 29 AM. BANKR. INST. J. 34 (2010) (suggesting that the general aging of the U.S. population does not account for increase in filings by those over sixty-five).

[35] Deborah Thorne, et al., GENERATIONS OF STRUGGLE 5 (AARP Pub. Pol'y Inst. 2008).

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income, and housing problems.[36]

In addition to bankruptcy, reverse mortgages are also a tool for combatting financial distress among senior homeowners. While bankruptcy provides an opportunity for a fresh start by discharging or adjusting debts, reverse mortgages allow seniors to tap their home equity to pay outstanding debt or to increase funds available for everyday living expenses. The following two sections briefly describe reverse mortgages and bankruptcy basics.

II. REVERSE MORTGAGES: REDUCING ECONOMIC HARDSHIP FOR SENIOR HOMEOWNERS

For many seniors, their home is their most valuable asset.[37] Equity built up over a lifetime can represent a significant amount of wealth.[38] Reverse mortgages provide a mechanism for liquidating that wealth while at the same time allowing borrowers to remain in their homes. When income and retirement savings are insufficient to meet monthly expenses, proceeds from a reverse mortgage can bridge the gap. Reverse mortgages can also be used to pay off existing mortgages, make home repairs or improvements, or fund long-term, in-home care.

Unlike traditional forward mortgages, reverse mortgage borrowers do not make monthly payments on the loan. Instead, over time, the reverse mortgage consumes equity and the balance rises as a result of additional advances, accruing interest, and fees. While most reverse mortgages keep homeowners in their existing homes, reverse mortgages can also finance the purchase of a home.[39]

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[36] *See* Pottow, *supra* n. 31; Deborah Thorne, "The (Interconnected) Reasons Elder Americans File Consumer Bankruptcy, 22 J. AGING & SOC. POL'Y 188, 194 (2010).

[37] "[R]esidential real estate has grown to become the largest single asset class held by households with heads aged 65 or older." WILLIAM C. APGAR & ZHU XIAO DI, HOUSING WEALTH AND RETIREMENT SAVINGS: ENHANCING FINANCIAL SECURITY FOR OLDER AMERICANS 1 (Working Paper No. W05-8, Joint Ctr. for Hous. Studies, Harvard Univ. 2005), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w05-8.pdf.

[38] In 2007, more than seven million seniors with annual incomes below $30,000 owned their homes outright with no mortgage. *See* U.S. CENSUS BUREAU, AMERICAN HOUS. SURVEY table 7- 19 (2008), *available at* http://www.census.gov/prod/2008pubs/h150-07.pdf.

[39] The HECM for Purchase program, which allows older consumers to purchase a principal residence with HECM loan proceeds, was authorized by the Housing and Economic Recovery Act of 2008. *See* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2122(a)(9), 122 Stat. 2654 (2008), *codified at* 12 U.S.C. § 1715z-20(m) (2013). The number of HECM for Purchase loans is growing, but remains relatively small. *See* INTEGRATED FINANCIAL ENGINEERING, INC., ACTUARIAL REVIEW OF THE FEDERAL HOUSING ADMINISTRATION MUTUAL MORTGAGE INSURANCE FUND HECM LOANS FOR FISCAL YEAR 2013 29 (2013), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=IFEFY2013MMIActRev_HECM.pdf (HECM for Purchase made up less than .5% and 4% of all reverse mortgages originated in FY 2009 and FY 2013, respectively).

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A. Home Equity Conversion Mortgage Basics

In 1988, Congress created a program to provide federal insurance for reverse mortgages in order "to meet the special needs of elderly homeowners by reducing the effect of economic hardship caused by the increasing costs of health, housing, and subsistence needs at a time of reduced income. . . ."[40] Federally insured reverse mortgages, known as Home Equity Conversion Mortgages (HECMs), have dominated the reverse mortgage market since their inception.[41] Originally limited to 2500 mortgages, the total number of insured mortgages under the HECM program now exceeds 600,000.[42] The annual volume of HECM loans climbed rapidly from 2001 to 2009, but subsequent housing price depreciation and programmatic changes have slowed HECM originations over the past couple of years.[43] While the HECM program has recently gone through significant changes, its foundation remains the same.[44]

Under the program, borrowers must be at least sixty-two years of age and must generally own their homes[45] free and clear or with a minimal

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[40] 12 U.S.C. § 1715z-20(a) (2013).

[41] It is estimated that non-HECM reverse mortgages, or proprietary reverse mortgages, make up a small portion of the reverse mortgage market. *See* Reverse Mortgage: Report to Congress 153 (Consumer Financial Protection Bureau June 28, 2012), *available at* http://files.consumerfinance.gov/a/assets/documents/201206_cfpb_Reverse_Mortgage_Report.pdf (estimating proprietary reverse mortgages may have reached a market share of 10%, but virtually disappeared following the Great Recession). These proprietary equity conversion products are developed and backed solely by private financial institutions and are largely unregulated at the federal level. Often these products are made to property owners whose property values exceed the HECM loan limits. Proprietary reverse mortgage borrowers have none of the basic consumer protections that are guaranteed to HECM borrowers.

[42] As of June 30, 2013, there were 624,318 active HECM loans. *See* Integrated Financial Engineering, Inc., *supra* note 35, at D-6.

[43] HECM volume reached a record high of 11,660 loans endorsed in April 2009. U.S. Dep't of Hous. & Urban Dev., HECM Endorsement Summary Report Apr. 1, 2009 to April 30, 2009 (2009), *available at* http://www.hud.gov/pub/chums/f17fvc/F17FVCQ-20090501.txt. HECM endorsements for FYE September 2013 totaled 60,091, U.S. Dep't of Hous. & Urban Dev., HECM Endorsement Summary Report Sep. 1, 2013 to Sep. 30, 2013 (2013), *available at* http://www.hud.gov/pub/chums/f17fvc/F17FVCQ-20131001.txt, compared to 114,692 for FYE September 2009. U.S. Dep't of Hous. & Urban Dev., HECM Endorsement Summary Report Sep. 1, 2009 to Sep. 30, 2009 (2009), *available at* http://www.hud.gov/pub/chums/f17fvc/F17FVCQ-20091001.txt. Note that the federal fiscal year begins October 1 and ends September 30 of the following calendar year.

[44] HUD announced significant changes to the HECM program in September 2013. *See* U.S. Dep't of Hous. & Urban Dev., Mortgagee Letter 2013-27 (2013). The changes (discussed below) include new initial disbursement limits, changes to the required upfront mortgage premium, and new principal limit factors. Most of the new requirements became effective September 30, 2013. Prior to this change, HUD insured two types of reverse mortgages: HECM Standard and HECM Saver. U.S. Dep't of Hous. & Urban Dev., Mortgagee Letter 2010-34 (2010), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=10-34ml.pdf. The HECM Saver offered a much lower initial mortgage insurance premium, which reduced the upfront fees. However, the amount of money available to the borrower under the HECM Saver program was significantly lower. The 2013 changes terminated the HECM Standard product.

[45] Eligible properties are limited to single-family homes, one-to-four unit homes in which the borrower

amount of outstanding liens. Reverse mortgage borrowers are generally required to pay taxes, insurance premiums, ground rents, and assessments, and keep the property in good repair.[46] To be eligible for a HECM loan, the borrower must obtain "adequate counseling" by an independent third party.[47] Generally, there are no credit or income eligibility requirements,[48] but a financial assessment protocol must be used to ensure that borrowers have the ability to pay taxes and insurance charges as they accrue.[49]

Reverse mortgage lenders advance funds to borrowers as a lump sum, in monthly payments, through a line of credit, or a combination of these options. The first option—a single lump-sum disbursement at origination[50]—is the most expensive as interest on the lump sum is charged from the first day and compounded every month. Alternatively, under tenure plans, borrowers can receive equal monthly disbursements from the lender for as long as they live and continue to occupy the property as a principal residence.[51] Term plans also provide for equal monthly disbursements, but only for a fixed number of months.[52] Term plans offer larger monthly advances than tenure plans. A line of credit plan permits the borrower to draw amounts as needed until the line of credit is exhausted.[53] Modified tenure and modified term plans allow borrowers to combine these various features.[54] For example, a homeowner might receive $30,000 in cash up front to pay off current bills and make home

occupies one unit, HUD-approved condominiums, property located in HUD-approved planned-unit developments, and manufactured homes that meet FHA requirements. 12 U.S.C. § 1715z-20(d)(3) (2013); 24 C.F.R. § 206.45; HUD HANDBOOK 4235.1 Rev-1, § 3-3.

[46] 24 C.F.R. § 206.27(b)(5), (6); 24 C.F.R. § 206.205(b).

[47] 12 U.S.C. § 1715z-20(d)(2)(B) (2013). Counseling may not be provided by any party that is directly or indirectly associated with (1) originating or servicing the mortgage, (2) funding the loan, or (3) the sale of annuities, investments, long-term care insurance, or any other type of financial or insurance product. *Id.*

[48] HECM borrowers must demonstrate a satisfactory general credit standing, 24 C.F.R. § 206.37 (2015), but a detailed credit history analysis is not required to satisfy this obligation. Instead, credit standing requirements are have been limited to (1) ensuring delinquent federal debts are brought current, satisfied, or a satisfactory repayment plan is established; (2) ensuring that the borrower is not suspended, debarred, or otherwise excluded from participation in HUD's programs,; and (3) ensuring that HUD has not paid a claim within the previous three years on a loan made or insured by HUD, on the borrower's behalf (with certain exceptions). HUD HANDBOOK 4235.1, *supra* note 46, at § 4-3.

[49] See Part IV.B, *infra*, for a discussion of the financial assessment tool.

[50] The single lump sum disbursement cannot exceed the greater of: (1) 60% of the principal limit or (2) mandatory obligations plus 10% of the principal limit. HUD MORTGAGEE LETTER 2013-27, *supra* note 39. Mandatory obligations include, among other things, the initial mortgage insurance premium, loan origination fee, HECM counseling, reasonable transaction costs, and amounts to discharge any existing liens on the property.

[51] 24 C.F.R. § 206.19(b).

[52] 24 C.F.R. § 206.19(a). Though HECM term plans provide monthly payments only for a fixed number of months, they do not mature until the borrower dies, relocates, or sells the home. *See* text accompanying note 68 *infra*.

[53] 24 C.F.R. § 206.19(c). The remaining amount available under a HECM credit line increases every month by the same annual rate charged on the loan balance.

[54] 24 C.F.R. §§ 206.17, 206.25(d).

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repairs, establish a $30,000 line of credit for future home repairs and other contingencies, and receive $400 a month for as long as the homeowner lives in the home.

Interest on a HECM reverse mortgage compounds monthly,[55] and therefore the interest rate is an important factor in calculating the funds available to older homeowners. HECM mortgage interest rates may be fixed or adjustable.[56]

B. HECM Proceeds

To determine the amount that can be borrowed with a reverse mortgage, also known as the principal limit, one begins with the "maximum claim amount." The maximum claim amount is the appraised value of the home up to a cap, which is the maximum amount that HUD will insure.[57] The initial principal limit is calculated by multiplying the maximum claim amount by the applicable principal limit factor, periodically announced by HUD.[58] The principal limit factor depends on the borrower's age at origination and the expected mortgage interest rate.[59] In general, the PLF increases with the borrower's age and decreases with higher expected interest rates. For example, a seventy-five year old borrower with a maximum claim amount of $250,000 and interest rate of 5.5% will have a higher initial principal limit that a sixty-five year old borrower with the same maximum claim amount

[55] 24 C.F.R. § 206.25(e).

[56] 24 C.F.R. §§ 206.17, 206.21. Like traditional adjustable rate mortgages, the interest rate on a variable rate reverse mortgage is based on an index value plus a margin. The index value may be tied to either the Constant Maturity Treasury rates (CMT) or the London Interbank Offered Rate (LIBOR). The initial rate on a monthly-adjustable loan may use the one-year CMT, one-month CMT, or one-month LIBOR as an index. *Id.* §§ 206.21(b)(2), 203.49.

[57] Until 2008, the maximum amount HUD would insure varied from county to county. The Housing and Economic Recovery Act of 2008 created a national limit for HECM loans set at $417,000. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2122(a)(5), 122 Stat. 2654 (2008), *amending* 12 U.S.C. § 1715z- 20(g). HECM maximum loan limits are tied to the loan limitations established under the Federal Home Loan Mortgage Corporation Act. *See* 12 U.S.C. § 1454(a)(2) (2008). The limit has been increased to $625,500, at least through December 31, 2014. U.S. Dep't of Hous. & Urban Dev., Mortgagee Letter 2013-43 (2013), *available at http://portal.hud.gov/hudportal/documents/huddoc?id=13-43ml.pdf*.

[58] The complete principal limit factor table is available at http://portal.hud.gov/hudportal/documents/huddoc?id♂cm_plf_2013.xls. For HECM Payment Calculation Formulas, *see* U.S. Dep't of Hous. & Urban Dev., Handbook 4235.1 REV-1, Home Equity Conversion Mortgages appendix 22 (1994), *available at* http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4235.1/42351trnHSGH.pdf. *See* U.S. Dep't of Hous. & Urban Dev., Mortgagee Letter 2014-12 (2014), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=14-12ml.pdf.

[59] The expected average mortgage interest rate is determined at origination and is used to determine the amount that the homeowner can borrow. The expected interest rate for adjustable rate loans equals the ten-year Constant Maturity Treasury (CMT) or the ten-year LIBOR swap rate plus the lender's margin. It differs from the note rate (or accrual rate), which is used to calculate the interest added to the loan each month. Any given loan must use either CMTs or LIBOR for both the accrual rate and as an index. 24 C.F.R. § 206.3 (2015).

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and interest rate. The table below provides examples of the initial principal limit for borrowers of different ages and at two different interest rates, assuming a home value of $250,000.

Borrower's Age at Origination	Expected Mortgage Interest Rate	Principal Limit Factor (as of Aug. 4, 2014)	Initial Principal Limit Based on a MCA of $250,000
65	5.5%	0.478	$119,500
65	7.0%	0.294	$ 73,500
75	5.5%	0.553	$138,250
75	7.0%	0.373	$ 93,500
85	5.5%	0.644	$161,000
85	7.0%	0.479	$119,750

The principal limit is the maximum gross amount of money that the borrower can receive under the reverse mortgage. Historically, the initial principal limit for most reverse mortgage borrowers ranged from sixty to seventy perfect of the appraised home value.[60] But HUD has adjusted the principal limit factors and reduced the funds available through the HECM program.[61]

Loan costs and existing liens may be paid from the principal limit. In addition, other amounts may be subtracted from the principal limit (*e.g.*, set asides for taxes and insurance or servicing fees) to arrive at a net principal limit. The net principal limit is the amount the borrower can actually convert to cash.

C. Fees and Costs

The borrower under a HECM loan must bear certain costs and fees. As is typical in real estate loan transactions, borrowers may be charged for document preparation, appraisals, title and tax searches, flood zone searches, inspection fees, tax reporting services, attorney's fees and origination fees. Origination fees are limited to $6000[62] to a minimum of $2500 based on a formula established by HUD.[63] In addition, HECM borrowers must pay mortgage insurance premiums (MIP) and a monthly servicing fee. The upfront MIP for an HECM loan, which is due at origination, equals either .5% or 2.5% of the maximum claim amount depending on the initial disbursement

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[60] *See* Hui Shan, *Reversing the Trend: The Recent Expansion of Reverse Mortgage Market, 2009-42* 15 (Finance and Economics Discussion Series 2009-42, Federal Reserve Board) (2009), *available at* http://www.federalreserve.gov/pubs/feds/2009/200942/200942pap.pdf.

[61] *See* HUD Mortgagee Letter 2014-12, *supra* note 54; HUD Mortgagee Letter 2013-27, *supra* note 39.

[62] 12 U.S.C. § 1715z-20(r)(6) (2013). The $6,000 limit is adjusted in accordance with the Consumer Price Index in $500 increments. *Id.*

[63] 12 U.S.C. § 1715z-20(r)(1) (2013); U.S. Dep't of Hous. & Urban Dev., Mortgagee Letter 2008-34 (2008), *available at* http://portal.hud.gov/huddoc/08-34ml.doc. The HUD Secretary has authority to adjust these limits. 12 U.S.C. § 1715z-20(r)(1) (2013).

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amount.[64] The upfront MIP and other costs commonly are financed with the proceeds of the loan itself. After the closing, a monthly MIP accrues daily on the mortgage balance at a rate of 1.25% a year and is paid by the lender to HUD. Borrowers also are typically charged a fixed monthly servicing fee, ranging from $25 to $35. MIP amounts and servicing fees are added monthly to the borrower's mortgage balance.

D. Repayment

All HECM loans may be prepaid in whole or in part without penalty.[65] Additionally, HECMs are "nonrecourse" 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.[66] The entire balance for a HECM loan is due at maturity, which occurs when the borrower dies, sells the home, or fails to occupy the home for at least a year.[67]

When repayment is due, the home can be tendered to the lender and nothing further is owed. Alternatively, the house may be sold and the proceeds used to pay off the loan. If the loan is paid in full through a sale, any excess proceeds belong to the borrower or the borrower's estate. HECM regulations permit the borrower to sell the property for the appraised value even if that value is less than what is owed on the loan.[68] If the mortgage is due and payable at the time a contract for sale is executed, the borrower may sell the property for 95% of the appraised value.[69]

E. In Practice

Reverse mortgage can help reduce economic hardship for seniors by allowing them to tap equity in their home. For example, seniors can use reverse mortgage proceeds to pay off an existing traditional mortgage, thereby freeing the homeowner from monthly mortgage payments. Seniors can also use the proceeds to eliminate other debt, such as credit card or medical debt, or to pay everyday expenses. Below are two examples showing how senior homeowners can use reverse mortgages in practice to address their financial difficulties.

The Maberrys. Milton and Martha Maberry, ages seventy and sixty-five,

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[64] If the initial disbursement at closing (and during the first twelve month disbursement period) is less than 60% of the principal limit, then the initial MIP is .5% of the maximum claim amount. For disbursements greater than 60% at closing (and during the first twelve-month disbursement period), the initial MIP is 2.5% of the maximum claim amount. *See* HUD Mortgagee Letter 2013-27, *supra* note 39, at 20.

[65] 12 U.S.C. § 1715z-20(d)(4) (2013); 24 C.F.R. § 206.209(a).

[66] 12 U.S.C. § 1715z-20(d)(7) (2013).

[67] 12 U.S.C. § 1715z-20(j) (2013); HUD Handbook 4330.1 Rev-5 § 13-22

[68] 24 C.F.R. § 206.125(c).

[69] *Id.*

respectively, are looking to refinance their existing traditional mortgage with a reverse mortgage. Their current monthly mortgage payment for principal and interest is $1200. The Maberrys no longer work and are living on a combination of social security benefits and Mr. Maberry's pension. It is a struggle to make the mortgage payments and meet their other expenses on their limited income. Their goal is to eliminate their mortgage payment.

The Maberrys	
Youngest Borrower	65
Expected Interest Rate	5.5%
Appraised Home Value	$250,000
Maximum Claim Amount	$250,000
Principal Limit (PLF = 0.478)	$119,500
Less Fees and Costs	
Upfront MIP (2.5%)	$ 6,250
Loan Origination Fee	$ 4,500
Other Closing Costs	$ 2,500
Net Principal Limit	$106,250
Less Mortgage Payoff	$100,000
Remaining available funds to be taken as a part of a single lump sum disbursement or line of credit	$ 6,250

[70]

With a home valued at $250,000, the Maberrys have a net principal limit of $106,250. After paying off their traditional mortgage ($100,000), they have $6250 remaining that they may take as part of a single, lump-sum disbursement or as a line of credit.

Mrs. Boxley. Dorothy Boxley, age seventy-five, owns her home free and clear. Her only source of income is her social security benefits of $1270 per month. For more than a year, Mrs. Boxley has been making ends meet by charging groceries and other necessities to her credit cards. Her outstanding credit card balance is currently $13,700. Mrs. Boxley would like to use a

[70] In this case, the upfront mortgage insurance premium is 2.5% of the maximum claim amount because the initial disbursement needed by the Maberrys to pay off their existing mortgage and loan fees and costs exceeds 60% of the maximum claim amount. *See* HUD MORTGAGEE LETTER 2013-27, *supra* note 39, at 20.

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reverse mortgage to pay off her credit card debt, supplement her monthly income, and provide her with a line of credit for unexpected future expenses.

Mrs. Boxley	
Youngest Borrower	75
Expected Interest Rate	5.5%
Appraised Home Value	$180,000
Maximum Claim Amount	$180,000
Principal Limit (PLF = 0.553)	$ 99,540
Less Fees and Costs	
Upfront MIP (0.5%)	$ 900
Loan Origination Fee	$ 3,600
Other Closing Costs	$ 1,721
Net Principal Limit	$ 93,319
Less Credit Card Payoff	$ 13,700
Less Line of Credit	$ 20,000
Amount Remaining for Monthly Payments	$ 59,619
Monthly Tenure Payments	$ 409

[71]

Mrs. Boxley's home is valued at $180,000. A reverse mortgage with an expected interest rate of 5.5% will provide her with a net principal limit of $93,319, after costs and fees. After paying her credit card debt of $13,700, Mrs. Boxley can set aside $20,000 in a line of credit and receive monthly disbursements of $409 for the remainder of her life. If Mrs. Boxley decided to forgo the line of credit, her monthly disbursements would increase to $547.

III. BANKRUPTCY BASICS

Bankruptcy is a process under federal law in which individuals can eliminate or repay some or all of their debts. In general, bankruptcy is designed to give debtors a fresh financial start. In the words of the Supreme Court, bankruptcy law "gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."[72]

A. Key Concepts

An understanding of some key bankruptcy concepts is important to the later discussion about the intersection between reverse mortgages and bank-

[71] In this case, the upfront mortgage insurance premium is 0.5% of the maximum claim amount because the initial disbursement at closing (and during the first twelve month disbursement period) is less than 60% of the principal limit. *See* HUD Mortgagee Letter 2013-27, *supra* note 39, at 20.

[72] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

ruptcy. These concepts are the bankruptcy estate, exempt property, the automatic stay, the discharge, and chapter choice.

The Bankruptcy Estate: Upon the filing of a bankruptcy petition, the Bankruptcy Code creates a bankruptcy estate.[73] Section 541(a) contains an expansive definition of the estate that includes all legal or equitable interests in property whether tangible or intangible, real or personal.[74] Some property, such as certain retirement accounts, is specifically excluded from the estate.[75] Other property initially included in the bankruptcy estate may be removed from the estate through the exemption process.[76]

The Bankruptcy Code provides various powers to collect assets of the estate. For example, the trustee may undo preferential transfers of property made before the filing of the bankruptcy,[77] fraudulent transfers,[78] and transfers of property made after the commencement of the case.[79] The trustee may also obtain control of estate property through an order requiring a third party to give up possession of the property to the trustee.[80]

Exempt Property: In the bankruptcy context, exemptions serve the overriding purpose of helping the debtor to obtain a fresh start by maintaining essential property necessary to build a new life.[81] Accordingly, the Bankruptcy Code permits debtors to exempt certain property from the bankruptcy estate pursuant to the federal exemptions, listed in 11 U.S.C. § 522(d), or the applicable state exemptions along with exemptions provided by federal nonbankruptcy law.[82] In thirty-three states, however, the debtor may only use the state exemptions combined with federal nonbankruptcy exemptions.[83] In the remaining states, the debtor may choose between the

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[73] 11 U.S.C. § 541 (2006).

[74] 5 COLLIER ON BANKRUPTCY ¶ 541.01 (A. Resnick and H. Sommer eds., 15th ed. rev. 2007).

[75] Certain property may also be added to the bankruptcy estate after the commencement of the case. 11 U.S.C. §§ 541(a)(5) (property acquired by inheritance within 180 days of the filing of the petition), 541(a)(4) (2006) (applicable to certain property recovered by the trustee).

[76] 11 U.S.C. § 522(b), (l) (2006).

[77] 11 U.S.C. § 547 (2006).

[78] 11 U.S.C. § 548 (2006).

[79] 11 U.S.C. § 549 (2006).

[80] 11 U.S.C. § 542 (2006).

[81] *See* H.R. REP. NO. 95-595, at 118 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078 (purpose of this scheme is to provide "adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start."); Rousey v. Jacoway, 544 U.S. 320, 322, 325 (2005) (exemptions "help the debtor obtain a fresh start . . . .").

[82] 11 U.S.C. § 522(b)(2), (3) (2006).

[83] The Bankruptcy Code allows states to "opt out" of the federal exemption scheme. 11 U.S.C. § 522(b)(2) (2006). The following states have opted out: Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. *See* National Consumer Law Center, CONSUMER BANKRUPTCY LAW AND PRACTICE § 10.2.1.1 (10th ed. 2012 and Supp.).

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federal or state exemption schemes. Exempt property is removed from the bankruptcy estate and shielded from administration by the trustee.

The Automatic Stay: The automatic stay is a fundamental cornerstone of the bankruptcy system. It is triggered instantly upon the filing of a bankruptcy petition.[84] With few exceptions, the automatic stay stops creditors from taking collection action, pursuing or continuing a court case against the debtor, or seizing any property of the debtor based on debts that arose before the bankruptcy petition was filed. Creditors can seek relief from the stay.[85] Courts frequently grant foreclosing mortgagees relief from the stay when, for example, the debtor is not making current payments to the mortgagee or there is no equity in the mortgaged property.

Discharge: The primary goal for most bankruptcy debtors is to obtain a discharge of their debts. The discharge operates as an injunction prohibiting creditors from taking or continuing any action to collect any discharged debt as a personal liability of the debtor.[86] While most debts are discharged, there are a few exceptions, such as most taxes and student loans, alimony and child support, and debts incurred after the bankruptcy case was filed.[87] Because the discharge eliminates only the debtor's personal liability, bankruptcy generally does not affect *in rem* rights, such as liens.

Chapter Choice. Individuals seeking bankruptcy relief generally seek relief under chapter 7 or chapter 13 of the Bankruptcy Code.[88]

A case filed under chapter 7 is often called a "liquidation." Under chapter 7, a trustee is appointed to examine the debtor's assets and determine whether any of them are not exempt and may be sold or recovered for the benefit of creditors.[89] The primary duty of the chapter 7 trustee is to collect and reduce to money property of the estate and expeditiously close the estate.[90] In most consumer cases, all of the debtor's assets are exempt. Unless a timely objection is filed and sustained, the debtor will receive a discharge.[91] The typical consumer chapter 7 bankruptcy debtor receives his or her discharge in three to four months after filing for relief.

A chapter 13 bankruptcy provides for the adjustment of an individual's debts without liquidating assets. It is available to individuals with regular income whose debts do not exceed certain limits.[92] Unlike chapter 7, where

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[84] 11 U.S.C. § 362(a) (2006).

[85] 11 U.S.C. § 362(d) (2006).

[86] 11 U.S.C. §§ 727, 1328 (2006).

[87] 11 U.S.C. §§ 523, 1328(a) (2006).

[88] Chapter 11 is also available to individual consumer debtors, but chapter 11 cases are significantly more expensive.

[89] 11 U.S.C. § 704(a)(1) (2006).

[90] 11 U.S.C. § 704(a)(1) (2006).

[91] 11 U.S.C. § 727 (2006).

[92] 11 U.S.C. § 109(e) (2006).

the debtor must turn over to the trustee all property of the estate, the chapter 13 debtor is permitted to retain possession of all property of the estate except as provided in a confirmed plan or order confirming a plan.[93] In chapter 13, the debtor submits a plan to repay creditors all or part of the money owed them over a three to five year period, usually funded by future income.[94] If the plan meets the requirements set forth in the Code, the bankruptcy court will confirm it.[95] There are generally four tests that the plan must satisfy in order to be confirmed: the best interest of the creditors test, the feasibility test, the disposable income test, and the good faith test. The best interest of the creditors test ensures that general unsecured creditors receive as much in a chapter 13 as they would have in chapter 7.[96] Under the feasibility test, the debtor must have sufficient income or other financial resources to make the payments proposed in the plan.[97] The disposable income test requires (in certain circumstances) that the debtor pay all of his or her projected disposable income (as defined by the Code) to unsecured creditors.[98] Lastly, the good faith test provides a check on actions that abuse the bankruptcy system.[99]

Chapter 13 details the treatment for secured creditors, such as those holding automobile loans or home mortgages. Typically, a secured creditors claim is split into secured and unsecured portions based on the value of the collateral.[100] For example, a creditor owed a debt of $5,000 secured by an automobile of $1,000 will have an allowed secured claim of $1,000, and an allowed unsecured claim of $4,000. The creditor's allowed unsecured claim, in this example $4,000, is treated as any other unsecured claim. Section 1325(a)(5) sets forth the criteria for the treatment of the allowed secured claim. The plan is entitled to confirmation if, with respect to each allowed secured claim provided for in the plan, 1) the creditor accepts the plan; 2) the debtor surrenders the collateral; or 3) the debtor treats the claim as provided for in § 1325(a)(5)(B). Put another way, the holder of an allowed secured claim has a right only to demand that the plan, in providing for the allowed secured claim, satisfy one of the alternatives in § 1325(a)(5).

Additionally, chapter 13 debtors are permitted to modify the rights of holders of secured and unsecured claims with one limited exception. The only exception applies to holders of secured claims where the claim is secured

[93] 11 U.S.C. § 1306(b) (2006).
[94] 11 U.S.C. §§ 1321, 1322, 1325 (2006).
[95] 11 U.S.C. §§ 1322, 1325 (2006).
[96] 11 U.S.C. § 1325(a)(4) (2006).
[97] 11 U.S.C. § 1325(a)(6) (2006).
[98] 11 U.S.C. § 1325(b) (2006).
[99] 11 U.S.C. § 1325(a)(3), (7) (2006).
[100] 11 U.S.C. § 506(a).

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only by the debtor's principal residence.[101] Notwithstanding this limitation, debtors may cure defaults on most home mortgages by paying the arrearage through the plan within a reasonable period of time.[102] Debtors are also permitted to modify home mortgages that mature during the life of the plan.[103]

Debtors make payments under confirmed plans, and the chapter 13 trustee distributes those payments to the debtor's secured and unsecured creditors. Upon completion of payments under the plan, debtors receive a discharge.[104]

To be eligible to file under any chapter, the debtor must obtain credit counseling within 180 days prior to filing the case.[105]

IV. REVERSE MORTGAGE FORECLOSURES: BANKRUPTCY SOLUTIONS

Failure to make monthly payment obligations is the most common cause of mortgage foreclosure. Unlike traditional forward mortgages, however, reverse mortgages do not require monthly loan payments. Nevertheless, there are a few circumstances under which foreclosure can be triggered. The failure timely to pay property charges, such as real estate taxes and hazard insurance, can result in foreclosure. Reverse mortgage foreclosure can also be triggered after a maturity event that makes the loan due and payable in full. In either situation, bankruptcy may provide a solution that allows the borrower to cure a property charge default or permits the borrower's spouse or other family members to pay off the balance over three to five years. Additionally, filing for bankruptcy will provide at least temporary relief: the automatic stay provided by the Bankruptcy Code will halt the foreclosure process in almost all cases.[106]

A. Property Charge Defaults

Although reverse mortgages do not require monthly payments of principal and interest, that does not mean that reverse mortgages are "payment-free."[107] Rather, the loan documents require reverse mortgage borrowers,

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[101] 11 U.S.C. § 1322(b)(2).

[102] 11 U.S.C. § 1322(b)(5).

[103] 11 U.S.C. § 1322(c).

[104] 11 U.S.C. § 1328(a) (2006).

[105] 11 U.S.C. § 109(h) (2006).

[106] 11 U.S.C. § 362(a) (2006). There are limited exceptions to the automatic stay for repeat filers. *See* 11 U.S.C. § 362(c)(3), (c)(4) (2006).

[107] The Federal Trade Commission (FTC) prohibits material misrepresentations in any commercial communication regarding any term of any mortgage credit product. 16 C.F.R. § 321.3. The rule, known as Mortgage Act and Practices Advertising Final Rule, applies to mortgage lenders, brokers, and others who engage in mortgage advertising, but not banks, federal credit unions or other entities excluded from the FTC's jurisdiction. In November 2012, the FTC and the Consumer Financial Protection Bureau (CFPB) issued warning letters to companies regarding potentially misleading mortgage advertisements.

like traditional mortgage borrowers, to pay "property charges." These charges include real estate taxes and hazard insurance premiums, and, if applicable, condominium association fees, ground rents, and other assessments. HECM borrowers may elect to set aside funds for property charges by withholding that amount from monthly payments, charging amounts to a credit line, or holding back a portion of a lump sum distribution.[108] If funds are not set aside, however, then the borrower must make these payments directly.[109]

When the borrower is responsible for, but fails to pay, the property charges, lenders usually elect to pay the outstanding property charges by withholding amounts from monthly payments or by charging amounts to a line of credit.[110] In this situation, the payment is treated as a distribution of available loan proceeds and the borrower is not considered delinquent.[111] This solution works so long as loan funds remain available to draw. When the available credit on the reverse mortgage is insufficient to cover the outstanding property charges (*i.e.,* the principal limit has already been reached), HUD generally requires lenders to advance their own funds, known as "loan advances" or "corporate advances," to pay the property charges. At this point, the loan is considered to be in "default."[112] After giving the borrower notice and an opportunity to cure the default and after obtaining approval from HUD,[113] the lender may accelerate the debt, making all sums due under the loan immediately payable.[114] Because the vast majority of reverse mort-

See Press Release, Federal Trade Commission, FTC Warns Mortgage Advertisers that Their Ads May Violate Federal Law (Nov. 19, 2012), *available at* http://ftc.gov/opa/2012/11/mortgageadvertise.shtm; Press Release, Consumer Financial Protection Bureau, Consumer Financial Protection Bureau Warns Companies Against Misleading Consumers with False Mortgage Advertisements (Nov. 19, 2012), *available at* http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-warns-companies-against-misleading-consumers-with-false-mortgage-advertisements/. One misrepresentation singled out by the agencies was the claim that "consumers who enter into a reverse mortgage will have 'no payments,' notwithstanding that such consumers may continue to be responsible for tax and insurance payments." Generic Warning Letter, Consumer Financial Protection Bureau (Nov. 19, 2012), *available at* http://files.consumerfinance.gov/f/201211_cfpb_generic_warning_letter_older_Americans.pdf.

[108]24 C.F.R. § 206.205(b). To date, only a small number of reverse mortgage borrowers have opted to set aside funds for taxes and insurance.

[109]*See* 24 C.F.R. §§ 206.27(b)(2), (b)(6), 206.205(a); *see also* Model HECM Mortgage Form ¶ 2, HUD HANDBOOK 4235.1 REV-1, *supra* note 54, *at* appendix 1.).

[110]24 C.F.R. § 206.205(c).

[111]*See* HECM Servicing FAQs, ML2011-01 (rev. Mar. 30, 2011).

[112]Neither HUD Regulations nor the model HECM loan documents use the term "default." HUD has repeatedly used the term, however, when referring to the borrower's failure to make payments for taxes and insurance.

[113]Prior to April 2009, HUD had an informal policy of deferring foreclosures based on property charge defaults because it did not want to foreclose on senior borrowers. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOUS. & URBAN DEV., AUDIT REPORT 2010-FW-0003, HUD WAS NOT TRACKING ALMOST 13,000 DEFAULTED HECM LOANS WITH MAXIMUM CLAIM AMOUNTS OF POTENTIALLY MORE THAN $2.5 BILLION (2010), *available at* http://www.hudoig.gov/reports-publications/audit-reports/hud-was-not-tracking-almost-13000-defaulted-hecm-loans-maximum.

[114]*See* Model HECM Mortgage Form, *supra* note 114, ¶ 9(b)(iii), (d).

gage borrowers do not have the financial resources to pay off the loan in full, property charge defaults can trigger foreclosure.

As of June 2012, approximately 57,600, or 9.8%, of the active reverse mortgages were in default as a result of the borrower's failure to pay property charges.[115] About 60%, or 35,110, of these borrowers owed more than $2000 in corporate advances, and a smaller, but still significant number of borrowers—14%—owed more than $10,000.[116] HUD's analysis of these defaulted loans shows, not surprisingly, that borrowers with high initial draws (> 85%)[117] or lower property values (*i.e.*, less equity to tap into) have a higher likelihood of defaulting.[118]

HUD has directed lenders to use various loss mitigation strategies to address outstanding property charge defaults.[119] The loss mitigation alternatives include: (1) establishing a realistic repayment plan for delinquent property charges; (2) referring borrowers to housing counselors or other local resources to resolve the delinquency or to identify and obtain funds to pay delinquent property charges; or (3) refinance the HECM with a new HECM if there is sufficient equity to satisfy the existing mortgage and delinquent property charges.[120] HECM refinances may be a solution where the loans are older and property values are higher. In 2009, HUD raised the maximum claim amount from $417,000 to $625,000.[121] As a result, borrowers with properties valued above $417,000 and loans originated before the increase may be able to tap additional equity to refinance their existing HECM and cure a property charge delinquency.[122] Direct aid from nonprofit organizations and government may help delinquent borrowers, but such financial re-

[115]Federal Housing Administration's Home Equity Conversion Update (Oct. 16, 2012). For comparison, in the second quarter of 2014, approximately 4.8% of all forward mortgages were seriously delinquent, defined as in foreclosure or 90 days or more overdue. Thus, defaults on reverse mortgages due to failure to pay property charges were was twice as likely as defaults on forward mortgages.

[116]The total amount of outstanding corporate advances for property charge default cases as of June 2012 was approximately $298 million. *Id.*

[117]For example, in 2013, 72% of HECM borrowers took out fixed-rate reverse mortgages, which required them to withdraw the maximum available as a lump sum at closing. *See* INTEGRATED FINANCIAL ENGINEERING, INC., *supra* note 35, at 28.

[118]HUD's 2012 Annual Report to Congress stated that HECM loans with high up-front draws are twice as likely to have a property charge default as are loans with initial draws of 60%, and four times as high as those with initial draws of 40% of the maximum allowed. U.S DEPT. HOUS. & URBAN DEV., ANN. REP. TO CONG. FISCAL YEAR 2012 FIN. STATUS FHA MUTUAL MORTGAGE INS. FUND 29 (2012).

[119]*See* U.S DEP'T HOUS. & URBAN DEV., MORTGAGEE LETTER 2011-01 (2011), *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/hecm/hecmml.

[120]*Id.*

[121]*See* U.S DEP'T HOUS. & URBAN DEV., MORTGAGEE LETTER 2009-07 (2009), *available at* http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/2009ml.cfm.

[122]The benefits from the increased maximum claim amount will be offset by the reduction in available proceeds resulting from reduced principal limit factors effective September 31, 2013. *See* HUD MORTGAGEE LETTER 2013-27, *supra* note 39, at 26.

sources are often scarce, especially in tough economic times.[123] Repayment plans are another option for borrowers, but HUD has limited the amount of time available to pay back corporate advance amounts as indicated below.

Corporate Advance Amount	Repayment Schedule
$1 - $500	Up to 3 months
$501 - $1000	Up to 6 months
$1001 - $ 5000	Up to 12 months
$ 5001 or more	Up to 24 months

Under HUD's guidance, no repayment plan may extend past twenty-four months. Unfortunately, the time frames established by HUD to cure property charge delinquencies are probably unrealistic for many borrowers. For example, a borrower who is $2400 behind will need to make a payment of $100 per month in addition to paying newly accruing property charges. And a $6000 arrearage translates into an additional monthly payment of $250.

When the borrower has some ability to repay advances but cannot afford to do so over twenty four months, it may be possible to cure the default over a longer period of time through a chapter 13 bankruptcy. Section 1322(b)(5) permits a debtor's chapter 13 plan to "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due."[124] In simplified terms, this provision allows debtors to cure defaults on long-term debts within a reasonable time, which typically will be three to five years. For example, in *In re Bordreaux*,[125] the court held that the borrower could cure her reverse mortgage default by paying amounts due through a chapter 13 plan. The lender in that case declared the loan immediately payable in full because the borrower failed to maintain required hazard insurance on the property. The debtor's chapter 13 plan proposed to pay the past due insurance premiums, taxes, and attorney's fees to the lender. The lender sought relief from the automatic stay arguing that, because reverse mortgages do not have installment payments, the borrower could not "de-accelerate" the debt and cure the default through the plan. The court flatly rejected the lender's argument, concluding that curing the default under § 1322(b)(5) did not impermissibly violate § 1322(b)(2)'s prohibition against modification of the lender's rights. Though no other courts have addressed the curing of tax and

[123] *See, e.g.,* 2011 Oregon Laws Ch. 723 (H.B. 2543) (2011), codified at O.R.S. § 311.700(2) (eliminating tax deferrals for reverse mortgage borrowers); *but see* News Release, Florida Housing Finance Corporation (Nov. 11, 2013) (Florida Hardest-Hit Fund Elderly Mortgage Assistance Program which will provide up to $25,000 to past due and future property charges for reverse mortgage borrowers.)

[124] 11 U.S.C. § 1322(b)(5) (2006).

[125] No. 09-12724, 2010 WL 724355 (Bankr. E.D. La. Feb. 24, 2010).

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insurance defaults on reverse mortgages through a chapter 13 plan, it is clear that § 1322(b)(5)'s cure provision provides an option to reverse mortgage borrowers who are not able to cure their defaults in the shorter period provided by HUD.

B. Foreclosure after Reverse Mortgage Maturity

Reverse mortgages permit homeowners to remain in their homes until a maturity event occurs. The HECM enabling statute states 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 the regulations by the Secretary."[126] The most common reason for foreclosure of a reverse mortgage is the maturity of the loan due to the death of the homeowner.[127] Upon the death of the homeowner, the property encumbered by the reverse mortgage is passed to the borrower's heirs by will, intestacy, or other state law mechanism, and the reverse mortgage becomes payable in full. The heirs must then decide whether to keep the home, sell the home, or turn the home over to the lender in order to satisfy the outstanding obligation on the reverse mortgage.[128]

HUD regulations specify that lenders must commence foreclosure within six months of the mortgagor's death unless the amount due[129] is paid in full.

[126] 12 U.S.C. § 1715z-20(j) (2013).

[127] When spouses are joint mortgagors, the reverse mortgage will not be affected so long as one spouse continues to live in the home. That is, the reverse mortgage will not mature if only one spouse dies or moves to a nursing facility. When only one spouse is the borrower on the reverse mortgage, the rights of the surviving spouse are unclear. For purposes of determining the maturity date of a reverse mortgage, "the term 'homeowner' includes the spouse of the homeowner." 12 U.S.C. § 1715z-20(j) (2013). This language strongly suggests that non-borrowing spouses have the same rights as borrowers to remain in the home. However, a HUD rule requires the mortgage to state that it is due and payable upon the death of all surviving *mortgagors*. 24 C.F.R. § 206.27(c). One court has held that the regulation is invalid because it is inconsistent with the statute. Bennett v. Donovan, 4 F. Supp. 3d 5 (D.D.C. 2013). If the statute controls, then the surviving, non-borrowing spouse should be able to remain in the home until he or she experiences a maturity event. HUD has issued several mortgagee letters that address the non-borrowing spouse issue. U.S. Dep't of Hous. & Urban Dev., Mortgagee Letter 2015-15 (2015), *available at* http://http://portal.hud.gov/hudportal/documents/huddoc?id=15-15ml.pdf; U.S. Dep't of Hous. & Urban Dev., Mortgagee Letter 2015-02 (2015), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=15-02ml.pdf.

[128] 24 C.F.R. § 206.125(f) (instructing lenders to accept a deed in lieu of foreclosure, if the lender will receive clear title, in order to avoid delays and the additional expense of foreclosure).

[129] HUD regulations permit the sale of the property for 95% of the appraised value if the mortgage is due and payable at the time a contract for sale is executed. 24 C.F.R. § 206.125(c). However, in December 2008, HUD issued a mortgagee letter stating that lenders were only permitted to accept less than the full mortgage balance if the sale of the property was an arms-length transaction. U.S. Dep't Hous. & Urban Dev., Mortgagee Letter 2008-38 (2008), *available at* portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/letters/mortgagee/2008ml. This rule meant that the borrower, the borrower's family or heirs were required to pay the loan in full to retire the loan even though the appraised value was less than the loan balance. The practical effect was to penalize borrowers, borrowers' family members, and borrowers' heirs because they were frequently unable to obtain refinancing to pay off

HUD allows lenders to extend this six month period for an additional ninety days if the homeowner's estate is actively marketing the property or attempting to pay off the loan.[130] Heirs that want to keep the home often do not have sufficient cash on hand to pay the large lump sum due within nine months of the homeowner's death.[131] For homes with little to no equity remaining, refinancing, even at 95% of the appraised value,[132] in a tight credit market may be impossible. Similarly, in a soft real estate market, heirs may have difficulty selling the property within the nine month window.

Bankruptcy may provide a solution by giving the heirs up to five years to pay off the amount.[133] In a chapter 13 case, debtors may "modify the rights of holders of secured claims . . . or holders of unsecured claims . . . ."[134] Debtors may not, however, modify claims secured only by a security interest in real property that is the debtor's principal residence. Put another way, the general rule is that chapter 13 debtors may modify the rights of all creditors, but there is a limited exception for certain mortgagees when the property secured by the mortgage is the debtor's principal residence.

The rights protected by this "anti-modification" provision of § 1322(b)(2) include the

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HECM loans when the amount owed was greater (sometimes significantly greater) than the value of the home. Instead of keeping the home in the family, they were forced to sell properties to strangers, who could purchase the properties at 95% of value. In 2012, a federal district court enjoined foreclosure on a home where the heirs alleged that this policy violated HUD's regulations. Santos v. Reverse Mortgage Solutions, Inc., No. 12-3296-SC, 2012 WL 4891597 (N.D. Cal. Oct. 12, 2012) (finding that definition of "mortgagor" in HUD regulations [24 C.F.R. § 206.123(b)] to include the "mortgagor's estate or personal representative" determinative of the issue of whether the daughter of deceased mortgagor of reverse mortgage had right to purchase home for 95% of appraised value). HUD rescinded the 2008 mortgagee letter in 2011 and has not issued further guidance on the issue. U.S. DEP'T HOUS. & URBAN DEV., MORTGAGEE LETTER 2011-16 (2011), *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/letters/mortgagee/2011ml. *But see Chandler v. Wells Fargo Bank, N.A.*,No. 11-03831 SC, 2014 WL 31315 (N.D. Cal. Jan. 3, 2014) (holding that non-borrowing spouse did not have the right to purchase property at 95% of value upon death of borrower).

[130]HECM Servicing Frequently Asked Questions (Rev. Apr. 23, 2013).

[131]HECM regulations provide that the lender shall initiate foreclosure within six months of the date of the mortgagor's death, or within any additional time approved by the Secretary. 24 C.F.R. § 206.125(d).

[132]See note 116, *supra,* regarding the amount of the required payoff.

[133]Language added to the Code in 2005 requires that whenever a plan proposes periodic payments, they must be in equal monthly amounts. 11 U.S.C. § 1325(a)(5)(B)(iii)(I) (2006). Prior to the amendment, "balloon payment plans" had been an important home saving device. Under such plans, debtors typically made relatively small monthly payments followed by a large lump payment in the final month that paid off the remaining arrears. Debtors commonly funded the final payment through the sale of the home or refinancing. After 2005, courts have generally held that, upon objection by the trustee or creditor, balloon payment plans with small payments followed by one large payment violate the equal monthly payment rule of § 1325(a)(5)(B)(iii)(I). *See, e.g.,* In re Bollinger, No. 10-62344-fra13, 2011 WL 3882275 (Bankr. D. Or. Sept. 2, 2011); *In re* Lemieux, 347 B.R. 460 (Bankr. D. Mass. 2006).

[134]11 U.S.C. § 1322(b)(2) (2006).

> "right to repayment of the principal in monthly installments over a fixed term at specified adjustable rates of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan upon default and to proceed against [debtor's] residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure."[135]

Conversely, absent the "primary residence" protection, § 1322(b)(2) permits a debtor to modify any of the listed rights.

If the property secured by the reverse mortgage is not the primary residence of the heir of reverse mortgage borrower,[136] then the heir-debtor should be able to modify the rights of the reverse mortgage lender under § 1322(b)(2) by proposing a plan that pays the debt over a three to five year period. The fact that the debtor-heir has no personal liability on the reverse mortgage does not preclude the debtor from paying the debt through a chapter 13 plan.[137] For example, if the debt is $100,000, the heir-debtor could propose a chapter 13 plan in which she would pay $1667 per month toward the mortgage over sixty months. In addition, the heir-debtor would be responsible for paying the chapter 13 trustee's administrative fee and her own attorney's fees, and potentially must address any other outstanding debts through the chapter 13 plan.

Heir-debtors that use the property secured by a reverse mortgage as their primary residence will not be able to take advantage of the modification provision contained in § 1322(b)(2). But another Code provision, § 1322(c)(2), offers similar relief in the case of reverse mortgages. Section 1322(c)(2) provides that notwithstanding § 1322(b)(2), in a case in which the last payment on the original payment schedule for a claim secured only by a mortgage on the debtor's principal residence is due before the due date of the final plan payment, the chapter 13 plan may modify the creditor's rights pursuant to § 1325(a)(5).[138] Courts have repeatedly held that debtors who inherited property subject to a reverse mortgage that matured before the petition date

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[135]Nobelman v. American Sav. Bank, 508 U.S. 324, 329 (1993).

[136]The majority of courts have held that the debtor's use of the property at the time of the petition determines whether it is the debtor's principal residence. *See* One West Bank v. Benafel (*In re* Benafel), 461 B.R. 581, 589 (9th Cir. B.A.P. 2011).

[137]*See* Johnson v. Home State Bank, 501 U.S. 78 (1991) (property may be treated under a chapter 13 plan so long as mortgagee has an *in rem* claim against the property); *In re* Carter, No. 09-35587, 2009 WL 5215399 (Bankr. S.D. Tex. Dec. 28, 2009) (rejecting lender's argument that lack of privity with heir precluded the heirs use of chapter 13 to pay amount due).

[138]Section 1325(a)(5) provides three alternatives for the treatment of allowed secured claims in chapter 13. The secured creditor may accept the plan, the debtor may surrender the property, or the plan may be confirmed over the objection of the secured creditor under certain conditions.

can pay the amount due through a chapter 13 plan pursuant to § 1322(c).[139]

For example, in *In re Griffin*,[140] the debtor's mother had taken out a reverse mortgage four years before her death. The debtor resided in the property, was the personal representative of his mother's estate, and was 50% co-heir of the property.[141] After the reverse mortgage lender initiated foreclosure, the debtor filed for chapter 13 and proposed to pay the entire amount due through the plan over forty-seven months.[142] The reverse mortgage lender objected on the basis that the debt had been accelerated and that § 1322(b)(2) prevented modification of the mortgage because it was secured only by the debtor's principal residence.[143] The court rejected the lender's argument based on the anti-modification provision of § 1322(b)(2), finding that § 1322(c)(2) provided an express exception to § 1322(b)(2) when the final payment on the original payment terms is due prior to the final plan payment.[144] The court held that, because the final (and only) payment on the reverse mortgage was moved upon the death of the borrower to a date prior to the final plan payment, the rights of the lender could be modified under § 1322(c)(2).[145]

V. REVERSE MORTGAGE BORROWERS IN FINANCIAL DISTRESS: IS BANKRUPTCY A SOLUTION?

Sometimes life takes an unexpected turn for the worse, even for reverse mortgage borrowers. Unexpected medical expenses, a leaky roof, rising property taxes, or an unusually cold winter can cause financial distress among many senior homeowners. Seniors can tap home equity with a reverse mortgage to cope with unexpected financial distress. But what about seniors who have already used their home equity through a reverse mortgage to pay off traditional mortgages or credit cards, make home improvements, or supplement their cash flow? Some reverse mortgage borrowers, especially younger borrowers[146] and those borrowers that opted for "full draw" disburse-

[139]*See, e.g.,* Federal Nat'l Mortg. Ass'n v. Griffin (*In re* Griffin), 489 B.R. 638 (Bankr. D. Md. 2013); *In re* Domigue, No. 11-40437, 2012 WL 3961212 (Bankr. S.D. Tex. Sept. 10, 2012); *In re* Evans, No. 22-80123, 2011 WL 1420887 (Bankr. M.D.N.C. 2011); *In re* Brown, 428 B.R. 672 (Bankr. D.S.C. 2010); *In re* Carter, No. 09-35587, 2009 WL 5215399 (Bankr. S.D. Tex. Dec. 28, 2009); *In re* Jacano, No. 05-15384DWS, 2005 WL 2077045 (Bankr. E.D. Pa. 2005); *In re* Wilcox, 209 B.R. 181 (Bankr. E.D.N.Y. 1996).

[140]489 B.R. 638 (Bankr. D. Md. 2013).

[141]*Id.* at 640.

[142]*Id.*

[143]*Id.*

[144]*Id.* at 641.

[145]*Id.* at 642-43.

[146]The average age of reverse mortgage borrowers is declining. The average borrower age has dropped from 76.7 years in 1990 to 71.9 years by September 2012. HECM Cases Endorsed for Insurance by Fiscal Year, Also Selected Loan and Borrower Characteristics. September 30, 2012.

ments,[147] may have little or no equity remaining to draw upon to address future unexpected events. Is bankruptcy and its promise of a fresh start an option for reverse mortgage borrowers? The answer is that it depends.

To start, the filing of a bankruptcy is not an event of default under the terms of a HECM loan,[148] and it does not trigger acceleration. However, the HECM Loan Agreement specifically provides that the lender "shall have no obligation to make further Loan Advances on or following the date that a petition for bankruptcy of Borrower is filed."[149] This means that monthly disbursements under a tenure or term plan will stop and the homeowner will not be able to access her line of credit. This is so because upon filing the petition for bankruptcy, all of the debtor's property including her home equity becomes property of the estate.[150] The home equity belongs to the bankruptcy estate, not to the debtor, unless and until it is exempted. As a result, bankruptcy may not be a viable option for homeowners who rely on reverse mortgage disbursements to cover their daily living expenses.

For many reverse mortgage borrowers, one of their primary goals is to remain in their homes for as long as possible. Therefore, an important consideration before filing bankruptcy is whether, and to what extent, the borrower's home may be at risk.[151]

A. Is the home equity exempt?

The first step in determining whether the property may be at risk in chapter 7 (or how much needs to be paid in to a chapter 13 plan to keep the property) is to examine the home's current value and the balance on the reverse mortgage. If there is no equity in the home—that is, the mortgage balance is greater than the current property value—then the home will generally not be subject to liquidation by the chapter 7 trustee[152] and a chapter 13 debtor will not need to pay into the plan additional amounts on account of non-exempt home equity. If there is non-exempt equity, the property may be subject to liquidation by the chapter 7 trustee and, in chapter 13, where

[147] The fixed rate, full-draw reverse mortgage, which required borrowers to take out the maximum amount allowed, went from a small market share in FY 2009 (12%) to a large majority of the reverse mortgages originated in FY 2013 (72%). *See* Integrated Financial Engineering, Inc., *supra* note 35, at D-6 (2013). As of April 1, 2013, HUD discontinued the fixed rate HECM Standard reverse mortgage. *See* U.S. Dep't of Hous. & Urban Dev., Mortgagee Letter 2013-01 (2013), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=13-01ml.pdf.

[148] For non-HECM loans, the terms of the loan note and security agreement should be checked.

[149] HUD Handbook 4235.1 REV-1, *supra* note 54, at appendix 7, ¶ 4.4.

[150] 11 U.S.C. § 541(a) (2006).

[151] The same question arises if the debtor has other valuable assets that he wishes to keep in bankruptcy.

[152] Note, however, that a few chapter 7 trustees around the country have attempted to sell overencumbered property, particularly where the secured creditor agrees to pay the trustee's fees and expenses out of the proceeds of sale, even though there would be no return to unsecured creditors.

unsecured creditors must be paid as much through the plan as they would receive in a chapter 7, the debtor may need to pay into the plan an amount equal to the non-exempt equity.

The federal exemption scheme in bankruptcy and almost every state provides some protection for equity in the debtor's home. As noted above, § 522 of the Bankruptcy Code permits debtors to exempt certain property from the bankruptcy estate pursuant to the federal exemptions, listed in 11 U.S.C. § 522(d), or the applicable state exemptions along with exemptions provided by federal nonbankruptcy law. Most states have opted out of the federal exemption scheme; debtors in those states may only avail themselves of the state exemptions plus the federal nonbankruptcy exemptions. Under the federal exemption scheme, debtors may exempt up to $22,975[153] of equity in their homesteads.[154] The federal exemptions may be claimed by each debtor individually, so spouses filing jointly are each entitled to the exemption amount listed, effectively doubling those amounts for jointly held property.[155] In the case of the federal homestead exemption, the amount exemptible by spouses filing jointly would be $45,950. Homestead exemptions under state laws vary widely, with some states allowing debtors to exempt 100% of their homestead interest and others limiting the homestead to a minimal amount. For example, both Florida and Texas provide an unlimited dollar amount for homestead exemptions.[156] By contrast, Alabama's homestead exemption is limited to $5000.[157] Assuming that all the borrower's home equity, as well as any other assets, can be exempted under federal or state law, then borrowers should be able to eliminate any unsecured debt through bankruptcy without jeopardizing their home.

[153]This amount is effective for cases filed on or after April 1, 2013. This exemption amount is adjusted every three years. 11 U.S.C. § 104 (2006). The next adjustment will occur on April 1, 2016.

[154]11 U.S.C. § 522(d)(1) (2006). The federal "homestead" exemption applies to "real property or personal property that the debtor or a dependent of the debtor uses as a residences, in a cooperative that own property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor."

[155]11 U.S.C. § 522(m) (2006).

[156]FLA. CONST. art. X, § 4 (exempting without dollar limitation a homestead of 160 acres of contiguous land and improvement thereon outside of a municipality, or if the homestead is located within a municipality, one half acre of contiguous land); TEXAS CONST. art. 16, §§ 50, 51 (providing a homestead exemption, without dollar limitation, of ten acres in a town, village, or city or 200 acres elsewhere). These homestead exemptions are limited in bankruptcy under certain circumstances . *See* 11 U.S.C §§ 522(o) (2006) (conversion of property with fraudulent intent); 522(p) (2006) (property acquired within 1215 days of the petition); 522(q) (2006) (commission of certain bad acts by the debtor).

[157]The homestead is further limited to 160 acres, but the low dollar limit likely renders the area limit meaningless. ALA. CODE § 6-10-2 (1975).

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B. In practice.

The Maberrys—7 Years Later

Seven years have passed since Milton and Martha Maberry took out their reverse mortgage. They are now seventy-seven and seventy-two years old, respectively. Even though the Maberrys eliminated their mortgage payment by taking out the reverse mortgage, they continued to have trouble making ends meet. Mr. Maberry had some health issues, insurance did not cover the full cost of his care, and they are now paying about $3600 per year out-of-pocket for drug prescriptions. In addition, they had to replace their furnace and hot water heater in the last two years. They used their credit cards to pay many of these expenses, and the minimum payments, approximately $541, have become unmanageable for them. They stopped making payments, have been sued by debt collectors, and are considering filing for bankruptcy. The Maberrys want to know whether they will be able to stay in their home if they file bankruptcy to get rid of their overwhelming credit card debt. They have no other significant assets that would be subject to liquidation in a chapter 7 case.

The Maberrys	
Approximate Home Value	$280,000
Amount Owed on the Reverse Mortgage	$173,000
Amount of Equity	$107,000
Federal Homestead Exemption	$ 45,950
Non-Exempt Equity Under Federal Exemptions	$ 61,050
State Homestead Exemption	$150,000
Non-Exempt Equity Under State Exemptions	$ 0

The Maberrys home value has increased slightly over the years to $280,000. The balance on their reverse mortgage has climbed to $173,000 giving them $107,000 of equity in the property. Under the federal exemptions, the Maberrys would only be able to exempt a portion ($45,950)[158] of that equity, leaving a significant amount that could be realized by the chapter 7 trustee upon the sale of the property. State law, however, allows a homestead exemption of up to $150,000. By electing the state law exemption scheme, the Maberrys will be able to file chapter 7 to discharge their credit card debt and will be able to remain in their home.

Before filing for bankruptcy, the Maberrys should also consider whether

[158]Each joint debtor is entitled to take a homestead exemption of $22,975, meaning that jointly the Maberrys exemption will be $45,950.

debt collectors can force them to pay by garnishing their income or attaching their assets. That is, are the Maberrys judgment-proof? Debt collectors cannot force judgment-proof individuals to pay, and therefore bankruptcy will not significantly change the debtors' financial position. Bankruptcy may, however, provide them with peace of mind. Still, it may be better for them not to file, instead addressing any harassment or debt collection activity through a "cease communication" letter under the Fair Debt Collection Practices Act[159] and saving the bankruptcy option for later.

C. Myths of Reverse Mortgages In Bankruptcy

Myth #1: Borrowers Should Reaffirm Their Reverse Mortgages in Bankruptcy. The main goal of most consumer bankruptcies is the discharge, which effectively eliminates personal liability on almost all debt. Reaffirmation is a promise by a debtor to pay a debt despite its discharge.[160] In order to be enforceable, an agreement to reaffirm a debt must comply with a number of requirements set forth in the Bankruptcy Code.[161] Generally, it is inadvisable to reaffirm debts because it makes the debtor personally liable for the debt even after the bankruptcy.

Some commentators have suggested that reaffirmation of a reverse mortgage may be necessary in order to get the lender to resume making payments after a bankruptcy is filed or restore access to a line of credit. This is incorrect. In order to resume disbursements, the lender may need a court order to ensure it is not dissipating estate assets, but that is distinct from requiring the borrower to reaffirm personal liability on the loan. Because reverse mortgages are nonrecourse in the first instance, reverse mortgage lenders should not require reaffirmation agreements, reverse mortgage borrowers should not sign them, and courts should not approve them. As the court in *In re Rios*[162] explained:

> There is nothing here to reaffirm because there is nothing to discharge. Section 524(c) defines a reaffirmation agreement as one the consideration for which is based on a debt *that is dischargeable*. *See* 11 U.S.C. § 524(c). That section further elaborates that such an agreement is "enforceable only to any extent enforceable under applicable nonbankruptcy law. . ." *Id.* As this nonrecourse debt is enforceable only as an *in rem* claim in any event, reaffirmation is at best a useless act.

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[159] 15 U.S.C. § 1692c(c) (1977) (requiring collection agencies and attorneys to stop dunning consumers after receiving a written request asking the collector to cease collection contacts).

[160] 11 U.S.C. § 524(c) (2006).

[161] 11 U.S.C. §§ 524(c), (k), (m) (2006).

[162] No. 07-51623-C, 2007 WL 2409547 (Bankr. W.D. Tex. Aug. 20, 2007).

The *Rios* court was dealing with a home equity loan that was nonrecourse under state law, and thus the debtor had no personal liability for the loan. The court's reasoning is equally applicable to reverse mortgages. Because there is no personal liability on a reverse mortgage, reaffirmation accomplishes nothing.

The *Rios* court also expressed concern that voluntary reaffirmation of a nonrecourse debt could constitute a waiver of the protections provided to the debtor under state law.[163] Specifically, the court thought that lenders might sell defaulted debt and that the executed reaffirmation agreement would be a basis for the purchaser's "aggressive extra-judicial debt collection activity," notwithstanding the express state law prohibition of such collection.[164] While reverse mortgages are unlikely to be sold to debt collectors, it would still be imprudent for a reverse mortgage borrower to reaffirm the loan and risk waiving the protections of the federal HECM statute and regulations.

Myth #2: Reverse Mortgage Tenure or Term Payments Count As "Current Monthly Income." In 2005, Congress amended the Bankruptcy Code by adopting a "means test" formula to determine whether a debtor is presumed ineligible for a chapter 7 discharge.[165] The concept of "current monthly income" is central to the means test. Debtors with incomes below their state's median family income are not subject to the means test. If the debtor's current monthly income exceeds the applicable median and also exceeds a rather strict expense allowance, the debtor's chapter 7 case may be dismissed. Current monthly income is also the starting point for determining "disposable income," which is used to determine payments to unsecured creditors in chapter 13, and to determine the duration of a chapter 13 plan.[166]

"Current monthly income" is defined as the monthly average of all income (whether or not taxable) received by the debtor during the six month period ending on the last day of the calendar month preceding the bankruptcy filing.[167] In addition to the debtor's gross wages, salary and commissions, income includes amounts paid to the debtor on a "regular basis" for household expenses of the debtor or the debtor's dependents.[168]

Some have speculated that monthly payments made under a reverse mortgage tenure or term plan are "income" for purposes of the means test in chap-

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[163] *Id.*
[164] *Id.*
[165] 11 U.S.C. § 707(b) (2006).
[166] 11 U.S.C. § 1325(b)(2), (4) (2006).
[167] 11 U.S.C. § 101(10A) (2006).
[168] 11 U.S.C. § 101(10A)(B) (2006). The definition apparently excludes child support received on a sporadic basis.

ter 7 or the disposable income test in chapter 13. This is wrong. In general, the conversion of pre-petition assets (*i.e.*, assets held by the debtor prior to filing for bankruptcy) from one form to another, even to cash, does not produce income. For example, in *In re Breeding*,[169] the court held that the liquidation of two certificates of deposits did not produce income. Similarly, in *In re Zahn*,[170] the court held that voluntary withdrawals from the debtor's retirement account were not income because the funds in the account already belonged to the debtor. Reverse mortgage payments should be viewed in the same way. Monthly reverse mortgage payments simply convert one asset—home equity—to another form—cash; they do not create income.

VI. REVERSE MORTGAGE AND BANKRUPTCY WORKING TOGETHER?

For seniors with high credit card balances or other unsecured debt, the question may be whether a reverse mortgage or bankruptcy is the better option to obtain relief. In some cases, the answer may be both. A bankruptcy prior to a reverse mortgage can effectively eliminate most unsecured debt, thereby freeing up reverse mortgage proceeds to address secured debts, such as a traditional mortgage, or to increase the borrower's available line of credit or monthly payments. Whether a bankruptcy prior to a reverse mortgage is a viable option depends on whether the debtor's home equity and any other assets can be protected in a chapter 7 bankruptcy and the results of the financial assessment. As discussed above, the protection of the debtor's home equity depends on the extent of the homestead exemption available under federal or state law.[171] The application of the financial assessment tool is discussed below.

A. In practice

Mrs. Boxley Revisited

Consider again the case of Mrs. Boxley. Mrs. Boxley is seventy-five years old and owns her home worth $180,000 free and clear. She has been paying day-to-day expenses using credit cards and her current balance is $13,700. Under the original scenario, Mrs. Boxley used her reverse mortgage to pay off the credit card debt, establish a $20,000 credit line, and provide her with monthly tenure payments of $403. Assuming that Mrs. Boxley lives in a state in which her homestead exemption will be at least $180,000, such as Florida or Texas, and that she has no other nonexempt assets, she could sig-

[169] 366 B.R. 21, 25-26 (Bankr. E.D. Ark. 2007).
[170] Zahn v. Fink (*In re* Zahn), 391 B.R. 840, 844-46 (8th Cir. B.A.P. 2008).
[171] *See* discussion at notes 134-139, *supra.*

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nificantly increase her monthly reverse mortgage payments by filing bankruptcy prior to obtaining a reverse mortgage.

Mrs. Boxley	
Youngest Borrower	75
Expected Interest Rate	5.5%
Appraised Home Value	$180,000
Maximum Claim Amount	$180,000
Principal Limit (PLF = 0.553)	$ 99,540
Less Fees and Costs	
Upfront MIP (0.5%)	$ 900
Loan Origination Fee	$ 3,600
Other Closing Costs	$ 1,721
Net Principal Limit	$ 93,319
Less Credit Card Payoff	$ **0**
Less Line of Credit	$ 20,000
Amount Remaining for Monthly Payments	$ 71,159
Monthly Tenure Payments	$ 505

Under this revised scenario, Mrs. Boxley filed a chapter 7 and received a discharge of her $13,700 in credit card debt. Subsequently, she took out a reverse mortgage. Because she did not need to pay off the credit card debt, those funds instead were used to increase her monthly tenure payment. Here, Mrs. Boxley will receive $505 per month, instead of $409 per month, an increase of nearly $100. Similarly, without the credit line Mrs. Boxley's monthly payment will increase from $547 to $643 as a result of discharging the credit card debt in bankruptcy prior to the reverse mortgage.

B. Financial Assessment Caution

In November 2014, HUD announced financial assessment requirements for the HECM Program to ensure that borrowers have the ability to meet ongoing obligations for taxes, insurance, and other property charges—whether through income, assets, reverse mortgage proceeds, or a reverse mortgage set aside.[172] Importantly, the financial assessment does not determine eligibility for a reverse mortgage, but may significantly impact the amount of proceeds available to the borrower. Borrowers that are unable to demonstrate the willingness and capacity to meet property charge obligations must set aside a portion of the reverse mortgage proceeds for the payment of property charges.[173] In practice, such a set aside may limit the proceeds to the extent that the reverse mortgage becomes infeasible or does not serve its

[172] *Id.* at 28-31; U.S. Dep't of Hous. & Urban Dev., Mortgagee Letter 2014-22 (2014), , *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=14-22ml.pdf.

[173] U.S. Dep't of Hous. & Urban Dev., HECM Financial Assessment and Property Charge Guide (2014), at 75 *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=14-22ml-atch2.pdf.

purpose. For example, a borrower seeking to pay off a forward mortgage may not have sufficient proceeds to do so if a property charge set aside is required.

The financial assessment includes both a Cash Flow/Residual Income Analysis and a Credit History Analysis. A residual cash flow analysis is used to determine whether the borrower has the capacity to pay for their living expenses and meet their tax and insurance obligations under the reverse mortgage. This analysis specifically requires lenders to include chapter 13 plan payments as an expense when calculating residual income.[174] The credit history analysis requires an in-depth review of all components of the borrower's credit report to determine whether the borrower has "the willingness to timely meet his or her financial obligations."[175]

Under the credit history analysis, lenders are instructed to determine whether the borrower has any delinquent federal debt, any unpaid liens against the property, a satisfactory payment history on revolving credit, installment accounts, and mortgages, and a satisfactory history of timely payment of property charges.[176]

HUD has attempted to lessen the impact of the Credit History Analysis and Cash Flow/Residual Income Analysis by requiring that lenders to take into account extenuating circumstances and compensating factors. In particular, the guidance provides that where the credit history raises concerns about the mortgagor's capacity or willingness to meet their obligations, "mortgagees must consider extenuating circumstances that led to the credit/financial issues."[177] These issues may include the loss of income due to death of a spouse, unemployment, reduced work hours, and emergency medical treatment. Similarly, compensating factors for purposes of a shortfall in residual income include documented income from a non-borrowing spouse, certain overtime or part-time income, assets, and monthly reverse mortgage loan disbursements.[178]

Though the financial assessment contains no specific limitation on traditional HECM loan eligibility based on a prior bankruptcy, a bankruptcy will have a negative impact on the borrower's credit report, which in turn could adversely affect the credit history analysis. By contrast, the HECM for Purchase program has an explicit bankruptcy restriction under the proposed financial assessment.[179] Though a prior bankruptcy will not automatically

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[174]The guide does not address how lenders are to address the situation where a chapter 13 debtor's plan payment includes payments on a forward mortgage or the debtor seeks to pay amounts due under the plan with reverse mortgage proceeds.

[175]*Id.* at 16.

[176]HECM FINANCIAL ASSESSMENT AND PROPERTY CHARGE GUIDE, *supra* note 177, at 21-30.

[177]*Id.* at 71.

[178]*Id.* at 72-73.

[179]*Id.* at 27.

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disqualify a borrower from the HECM for Purchase program, at least two years must have elapsed since the date of the bankruptcy discharge in chapter 7. During those two years (or more), the borrower must have re-established good credit or chosen not to incur new credit obligations. The elapsed time requirement may be reduced to twelve months if the borrower demonstrates that the bankruptcy was caused by extenuating circumstances beyond his control and has since exhibited an ability to manage his financial affairs in a responsible manner. For borrowers that have previously filed a chapter 13 petition, the proposed financial assessment requires lenders to document that one year of the "pay-out" period[180] under the bankruptcy has elapsed, the borrower's payment performance has been satisfactory, and the lender has received permission from the bankruptcy court to enter into the transaction.[181]

The bottom line is that the financial assessment does not automatically disqualify bankruptcy debtors from obtaining a reverse mortgage. It will undoubtedly impact debtors' ability to participate in the HECM for Purchase program, and even in the traditional HECM program, it may curtail the benefits of filing a bankruptcy to discharge unsecured debts prior to obtaining a reverse mortgage. However, if the debtor has consistently paid property charges prior to bankruptcy, notwithstanding his or her financial distress, and has used bankruptcy to discharge unsecured debt and obtain a fresh start as intended, it is likely that the property charge set aside will not be required.

CONCLUSION

Both reverse mortgages and bankruptcy are important tools for senior homeowners in financial distress. In light of trends that show a growing senior population with less income, less savings, and more debt, a better understanding by housing counselors and bankruptcy attorneys of how these tools intersect with each other will improve outcomes for senior homeowners in the future. As this article demonstrates, reverse mortgages and bankruptcy can be used independently of one another or, under the right circumstances, in tandem with each other to put senior homeowners on a more sound financial footing. Bankruptcy can be a solution to reverse mortgage foreclosure, and it can also provide relief to reverse mortgage borrowers with unmanageable credit card or other unsecured debts. Bankruptcy's fresh start may be used to maximize the benefits of a reverse mortgage by discharging unsecured debts rather than paying them off with reverse mortgage proceeds.

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[180] It is not clear what the "pay-out period" means, but it is assumed that it refers to payments under a confirmed chapter 13 plan.

[181] *Id.*