NAELA Journal, Volume 8, No. 1 Copyright © 2012 by the National Academy of Elder Law Attorneys, Inc.
Any use of the contents of this publication without the express written permission of the publisher is strictly prohibited.

Reverse Mortgages and the Current Financial Crisis

By Paul V. Black, Esq.

I. Introduction 87
II. The Economic and Demographic Context of Reverse Mortgages 87
III. How A Reverse Mortgage Transaction Works 92
IV. Possible Risks for Borrowers in Reverse Mortgage Transactions 97
V. State Approaches to Reverse Mortgage Regulation 104
VI. Federal Regulation of Reverse Mortgages 108
VII. Conclusion 111

I. Introduction

In the current financial crisis, many baby boomers find themselves facing their greatest challenge yet: how to fund their retirement, long-term care, and other needs with diminished investment income, endangered pensions, and often modest government benefits. Fortunately, reverse mortgages enable many aging homeowners to borrow against the equity in their home in exchange for offering the home as collateral. Yet the operation, risks, and regulation of such a loan transaction — which occur at a very vulnerable time in a borrower's life — remain a mystery to many lawyers who advise aging clients. This article seeks to educate the Elder Law community on the most relevant features of reverse mortgages.

Section II of this article introduces the economic and demographic context of reverse mortgages, and outlines key financial challenges faced by older consumers, many of whom were "aging into debt" long before the onset of the current financial crisis. Section III explains the basic mechanics of the reverse mortgage loan transaction, outlines borrower requirements, and describes the fees, interest costs, and insurance premiums that comprise the cost of the reverse mortgage loan to the borrower. Section IV unveils some potential risks of reverse mortgages for borrowers, including predatory lending tactics, possible loss of Medicaid eligibility, the now-prohibited "bundling" reverse mortgages with deferred annuities, and the possible consequences of misunderstanding some of the most basic features of a reverse mortgage loan. Section V highlights some of the most interesting state approaches to reverse mortgage regulation. Section VI surveys current federal regulation of reverse mortgages and explores how the nascent Consumer Financial Protection Bureau (CFPB) will likely play a significant but as yet unclear role in regulating reverse mortgages.

II. The Current Economic and Demographic Context of Reverse Mortgages

Traditionally, the "three-legged stool" of retirement income for many Americans has consisted of government benefits, a defined-benefit pension plan, and personal savings. Yet, as defined-benefit pension plans (in which employers pay retirees a fixed monthly

---

Paul V. Black, Esq., is a graduate of Georgia State University College of Law and the recipient of a 2010-2011 Borchard Foundation Center Law & Aging fellowship. He recently launched his own Georgia elder law, estate planning, and special needs planning practice. This article was originally published in the 2009 *NAELA Student Journal*. It has been updated for publication in *NAELA Journal*.

pension income) are being largely replaced by defined-contribution plans (in which workers contribute up to a certain maximum amount each month towards their retirement), many workers find themselves with lower pension income. When coupled with significant declines in stock prices, many retiring workers have found that one or more of these three "legs" is simply too short to provide stable income for long-term care and other needs late in life.[1]

Home values have also slipped significantly in the past five years, with a staggering loss of more than $9 trillion of home equity wealth in the United States since 2006.[2] Even so, home equity remains one of the largest and most widespread forms of wealth for aging Americans. As a joint project of the U.S. Census and the Department of Housing and Urban Development, the most recent American Housing Survey, compiled in 2009, noted that just over 12 million Americans aged 65 and older had no mortgage debt, and that the median value of their homes was roughly $150,000.[3] Further, it noted that 252,000 homeowners 62 years of age or older already had a reverse mortgage on their homes.[4] While the number of older Americans with mortgage debt has likely increased (and the value of their homes has most often decreased) since then, home equity remains one of the few sizeable assets that most aging homeowners possess.

While a handful of private institutions were issuing reverse mortgage loans as early as the mid-1970s, the federal government's introduction of the Home Equity Conversion Mortgage (HECM) in the late 1980s created the first nationwide reverse mortgage product.[5] Fannie Mae's decision to buy reverse mortgages from other (private) lenders created a large secondary market for these products, and shortly thereafter, private lenders such as Transamerica HomeFirst, Financial Freedom Senior Funding Corporation, and Household Senior Services introduced their own reverse mortgage products. Fannie Mae's own reverse mortgage product, HomeKeeper, emerged in 1996, but was discontinued in 2008.[6] While only 157 federally insured reverse mortgages were issued in 1997,[7] that number

1 *See e.g.*, Mike Dorning, *Early Claims Soar for Social Security Retirement Benefits*, Chicago Tribune (May 27, 2009), http://articles.chicagotribune.com/2009-05-27/news/0905270147_1_older-workers-early-retirement-center-for-retirement-research. This article notes that, while record numbers of workers (often recently laid-off) are seeking Social Security benefits, they might find that applying for the benefits early (at age 62 instead of age 66) reduces the amount of benefits by as much as 25 percent.

2 Blake Ellis, *Home Values Tumbled $1.7 Trillion in 2010.* CNNMoney (Dec. 9, 2010), http://money.cnn.com/2010/12/09/real_estate/home_value/index.htm.

3 U.S. Census Bureau, *American Housing Survey National Tables: 2009 Using Census 2000-based Weighting,* Table 3-15, http://www.census.gov/housing/ahs/data/ahs2009.html (accessed Nov.18, 2011). Appendix A-5 notes that "data for the elderly include information on all households with householders 65 years or older," but that the Housing and Urban Development definition is broader, as it includes all households with householders 62 years of age or older, or with a disability.

4 *Id.*

5 Ralph J. Rohmer & Fred H. Miller, *Truth in Lending,* 439 (Robert A. Cook, Alvin C. Harrell, & Elizabeth Huber eds., ABA, Mar. 2000, currently out of print).

6 John Edina, *Fannie Mae Discontinues Home Keeper Reverse Mortgage Product,* Reverse Mortgage Daily (Sept. 3, 2008), http://reversemortgagedaily.com/2008/09/03/fannie-mae-discontinues-home-keeper-reverse-mortgage-product/.

7 Margaret Price, *Reverse Mortgages Get A Boost from Uncle Sam,* Christian Science Monitor 14 (Oct. 27, 2008), http://www.csmonitor.com/Business/2008/1027/p14s03-wmgn.html.

grew to 114,692 by federal fiscal year 2009, but then declined to 79,106 for federal fiscal year 2010.[8] In 2011, several major reverse mortgage lenders — including Seattle Bank, Bank of America, Financial Freedom, and Wells Fargo — left the reverse mortgage business. Why? Declining home values are only one reason.

Recent news articles and studies of the reverse mortgage market paint a picture of a market that is increasingly populated by troubled consumers, and will likely continue to remain so, or even worsen, over the next several years. In October 2008, a report from Golden Gateway Financial summarized reverse mortgage data in dire terms: "Nationally, individuals exploring a reverse mortgage are increasingly older, with lower home values, and a greater percentage of them are saddled with an existing mortgage on their homes."[9] The current financial crisis has well-documented roots in the complexity of the modern mortgage securitization process, most notably in the eagerness of Wall Street to securitize bank-offered subprime loans.[10] But even before the subprime mortgage meltdown, American consumers were all too often "aging into debt."[11]

Aging Americans today have a longer life expectancy than their age peers of 20 to 30 years ago, but largely rely on fixed incomes that are often insufficient to pay for out-

---

8 National Reverse Mortgage Lenders Association, *Annual HECM Production Chart,* http://www.nrmlaonline.org/RMS/STATISTICS/DEFAULT.ASPX?article_id=601 (accessed May 30, 2011).

9 Michael Azzano, *New Reverse Mortgage Data Shows Senior Citizens Face Declining Home Values and Increasing Forward Mortgages; Seniors in California Carry 50 Percent More Forward Mortgage Debt Than National Average,* Marketwise (Oct. 29, 2008), http://www.marketwire.com/press-release/new-reverse-mortgage-data-shows-senior-citizens-face-declining-home-values-increasing-914669.htm. In June 2008, the Center for Economic and Policy Research (CEPR) published a similarly sobering study exploring the impact of three possible scenarios (housing prices remaining equal to their March 2008 levels or falling 10 percent or 20 percent respectively) upon household wealth by wealth quintile. *See* Dean Baker & David Rosnick, *The Housing Crash and the Retirement Prospects of Late Baby Boomers,* Center for Economic and Policy Research (June 2008), http://www.cepr.net/index.php/publications/reports/the-housing-crash-and-the-retirement-prospects-of-late-baby-boomers/ (June 2008).

10 In particular, the current financial crisis can be largely attributed to the gradual replacement of a relatively "horizontal" mortgage lending system (in which the lender qualified the borrower, ascertained the value of the property, issued a mortgage, and collected the monthly payments) with a much more "vertical" mortgage lending system, in which government-sponsored enterprises (such as Fannie Mae and Freddie Mac) led to a liberalization and geographic disconnectedness of lending practices. In this newer mortgage lending system, a host of privately held entities — from mortgage brokers to loan servicers to credit rating agencies — quickly found that they could make handsome profits by disconnecting and then specializing in small parts of the overall lending process. While certain players in this market, such as mortgage brokers, were paid when deals were closed, and thus rewarded chiefly upon the volume of transactions they processed, other players, such as investment bankers, were rewarded based upon the growing demand for their ability to create and issue mortgage-backed securities whose rates of return were often higher than those of other, more traditional investment vehicles, such as stocks and bonds. *See* Charles E. Daye, *Stripping Off Market Accountability: Housing Policy Perspectives on the Crises in the Financial System,* 12 N.C. Banking Inst. 105 (Mar. 2009); *see also* Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis,* 13 N.C. Banking Inst. 5 (Mar. 2009).

11 Deanne Loonin & Elizabeth Renuart, *The Life and Debt Cycle: The Growing Debt Burdens of Older Consumers and Related Policy Recommendations,* 44 Harv. J. on Legis. 167 (Winter 2007). For an earlier version of this paper, *see also* Deanne Loonin, Julia Devanthery & Steve Tripoli, *The Life and Death Cycle, Part One: The Implication of Rising Credit Card Debt Among Older Consumers,* National Consumer Law Center (June 2006), http://www.nclc.org/images/pdf/credit_cards/rising_debt.pdf.

of-pocket health care costs, energy bills, property taxes, essential maintenance, and other non-discretionary expenses. These consumers use credit cards as a "plastic safety net" to make such purchases.[12] Between 1992 and 2001, the average credit card debt of Americans ages 65–69 rose by more than 217 percent to nearly $6,000.[13] Even more than the many younger consumers who also face mounting credit card debt, however, seniors are not likely to pay it down because so many rely upon a fixed income.[14] Sadly, this mounting credit card debt has contributed to a skyrocketing rate of bankruptcy filings among elderly consumers. AARP's Consumer Bankruptcy Project found that from 1991–2007, while the number of bankruptcy filings by those under age 54 dropped significantly (by at least 20 percent for each age range bracket), the number of filers age 55–64 rose 40 percent, the number of those ages 65–74 rose 125 percent, and the number of filings by those 75–84 rose a staggering 433 percent.[15]

Unprecedented high levels of debt among aging consumers are also reflected in the increasing home equity debt of older Americans. Between 1989 and 2001, the percentage of total debt owed by homeowners 65 and older that could be attributed to mortgage debt increased from just over 50 percent to 70 percent, reflecting a trend in which more aging homeowners are still paying off their mortgage, often because they have borrowed heavily against their home equity.[16] A September 2008 study by the Center for Retirement Research at Boston College found that 30 percent of homeowners ages 50–62 have already borrowed against the equity in their homes, and that these same homeowners would likely continue to be burdened with mortgage debt and likely face a decrease in their net worth as they approach retirement.[17] In particular, the study noted that from 2001–2008, the decline in housing values and increased debt led the net worth of such homeowners to fall 14 percent.[18] In states with significantly above-average home prices, such as California, the outlook is even more troubling. Higher home prices (and the resulting non-traditional forward mortgage products offered) mean that the forward mortgage debt of senior citizens in California is 50 percent greater than the national average.[19]

Opinions on the use of reverse mortgages to prevent foreclosure have shifted over time from skepticism toward greater acceptance. A February 2006, article for the *Wall*

---

12 Loonin & Renuart, *supra* n. 11, at 168.

13 *Id.* at 168-173.

14 Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect- the Legal Framework*, 31 Conn. L. Rev. 77, 101 (1998).

15 Christine Degas, *Bankruptcy Rising Among Seniors,* USA Today (June 16, 2008), http://www.usatoday.com/money/perfi/retirement/2008-06-16-bankruptcy-seniors_N.htm.

16 Loonin & Renuart, *supra* n. 11, at 171-172.

17 Editorial, *Skeptical Eyes on Reverse Mortgages,* Star Trib. (Minneapolis, Minn.) (July 19, 2008), http://www.startribune.com/opinion/editorials/25633024.html (accessed Nov. 15, 2011). *See also* Alicia Munnell & Mauricio Soto, *The Housing Bubble and Retirement Security*, Center for Retirement Research at Boston College, Working Paper 2008-13, http://crr.bc.edu/images/stories/Working_Papers/wp-2008-13.pdf (accessed Nov. 15, 2011).

18 Munnell & Soto, *supra* n. 17, at 20.

19 For an overview of California's Mortgage Debt Relief Law (and comparisons with the related federal mortgage debt relief law), *see* State of California Franchise Tax Board, *Mortgage Forgiveness Debt Relief Extended,* http://www.ftb.ca.gov/aboutftb/newsroom/mortgage_debt_relief_law.shtml (updated Apr. 13, 2010).

Street Journal warned that reverse mortgages "aren't a way to keep you out of foreclosure," and instead recommended more traditional possible solutions such as forbearance or loan modification.[20] Yet a December 2007, *Wall Street Journal* article on the same topic noted that using reverse mortgages to prevent foreclosure, is "relatively novel but gaining popularity among Legal Aid attorneys and housing advocates around the country." The latter article cites the work of Atlanta Legal Aid Society attorney William Brennan Jr., who pioneered a process for using reverse mortgages to pay subprime lenders, which encourages lenders to take the cash proceeds from a reverse mortgage instead of foreclosing on older homeowners.[21] The National Reverse Mortgage Lenders Association provides its members with detailed talking points on the use of reverse mortgages to prevent foreclosure.[22] Similarly, the National Consumer Law Center encourages troubled homeowners to explore reverse mortgages as one of many possible ways of preventing foreclosure, but encourages consumers to be vigilant for possible fraud and to closely scrutinize the terms and fees of any particular loan offer.[23] Yet many seniors who might be most in need of a reverse mortgage in these circumstances cannot qualify for such a loan, often because of insufficient equity in the home or existing loans against equity.[24] As detailed by Robert Cannon in his article, "Keeping Grandma Off the Street" in this issue of *NAELA Journal,* recent Federal Housing Authority statutory, regulatory and policy requirements prohibiting subordination of existing mortgage liens in conjunction with federally insured reverse mortgages have kept many seniors from using a reverse mortgage loan to avoid foreclosure.

Interestingly, survey data from HUD and AARP indicated that in 2007 (when the housing bubble remained mostly intact), the top reason cited by homeowners interested in reverse mortgages was "to respond to emergencies," a factor cited by 78 percent of respondents.[25] Fifty percent cited the need for additional money to pay everyday expenses; 40 percent of respondents cited a desire to pay off their existing (forward) mortgage, and 29 percent expressed interest in using reverse mortgage proceeds to pay for property tax and insurance expenses.[26] In light of the myriad reasons why a senior might inquire about a reverse mortgage, it is critical that Elder Law attorneys understand the mechanics of a reverse mortgage transaction.

---

20 Lew Sichelman, *Why A Reverse Mortgage May Not Stall Foreclosure,* Wall St. J. (Feb. 3, 2006).

21 Kelly Greene, *A Way For Older Homeowners to Back Out of a Bind,* Wall St. J. (Dec. 26, 2007).

22 Pamela Kirkpatrick, *Home Savers: How to Help Seniors Sidestep Foreclosure with a Reverse Mortgage,* National Reverse Mortgage Lenders Association, http://www.nrmlaonline.org/rms/marketing.aspx?article_id=732 (accessed Nov. 15, 2011).

23 *Consumer Concerns: Information for Advocates Representing Older Americans.* National Consumer Law Center, http://www.nclc.org/images/pdf/older_consumers/consumer_concerns/cc_prevent_foreclosure.pdf (accessed Nov. 15, 2011).

24 Allison Schaefer's, *Seniors Turn to Reverse Mortgages,* Honolulu Star-Bulletin (Dec. 13, 2008), http://archives.starbulletin.com/content/20081213_Seniors_turn_to_reverse_mortgages.

25 Margaret Price, *Reverse Mortgages Get a New Boost From Uncle Sam,* Christian Science Monitor (Oct. 27, 2008), http://www.csmonitor.com/Business/2008/1027/p14s03-wmgn.html.

26 *Id.*

III. How a Reverse Mortgage Transaction Works

A reverse mortgage transaction can be explained with varying degrees of complexity.[27] A simple explanation is that a reverse mortgage is a loan to a homeowner secured by a lien on the house, much like a home equity line of credit, with the difference being that reverse mortgage applicants need not satisfy a monthly income level because the borrower does not have to make monthly payments on the loan. A reverse mortgage is, by definition, a non-recourse loan; that is, homeowners have no personal liability for repaying the loan, even if the amount borrowed by the homeowner exceeds the equity in the home. Under the terms of the federal regulation governing reverse mortgages (discussed in detail in Section VI, *infra*) the loan is not payable until one of several "maturity events" occurs: The borrower dies; ceases to use the home as a principal residence (usually defined as a period of absence of 12 consecutive months); sells or otherwise transfers ownership interest in the home securing the loan; or violates the terms of the loan agreement by failing to maintain the home or pay property taxes.[28] As in the case of a traditional "forward" mortgage, the borrower retains title to the house and can thus bequeath it as desired.[29] However, the devisee would then be responsible for paying off any outstanding loan balance at the time of the homeowner's death.

Qualification criteria for reverse mortgages insured by the Federal Housing Authority and offered by the Department of Housing and Urban Development,[30] which currently make up 98 percent of the reverse mortgage marketplace, and are known as Home Equity Conversion Mortgages (HECMs), are relatively straightforward.[31] Potential borrowers need to be at least 62 years old and live in a single-family home that meets HUD's minimum property standards (for building design, materials, durability, and other factors).[32] Borrowers must also be homeowners rather than renters. But recent U.S. Census data indicates that nearly 80 percent of Americans aged 65 and older are currently homeowners.[33] Any remaining home purchase mortgage payments must therefore be repaid prior

---

27 Elder Law attorneys and clients alike would benefit from reviewing AARP's excellent webpage on reverse mortgages at http://aarp.org/revmort, and reviewing its brochure, *Reverse Mortgage Loans: Borrowing Against Your Home* (Oct. 2010), http://assets.aarp.org/www.aarp.org_/articles/money/financial_pdfs/hmm_hires_nocrops.pdf (accessed Nov. 15, 2011).

28 *See* Regulation Z's requirements for reverse mortgages at 12 USC § 226.33(a)(2), http://bit.ly/vcdWWb. This section of Regulation Z authorizes the first three "triggering events." Nearly all reverse mortgages include a survivorship provision whereby the death of one spouse or partner leaves the surviving spouse or partner as the reverse mortgage holder.

29 Federal Trade Commission, *Reverse Mortgages: Get the Facts Before Cashing In on Your Home's Equity,* http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea13.shtm (accessed Nov. 15, 2011).

30 HUD is currently authorized by statute to insure no more than 275,000 reverse mortgages. The cap on the number of HECMs that HUD can currently insure is contained as part of the enabling statute for the HECM program, Section 255 of The National Housing Act, 12 U.S.C. 1715z-20(g)), http://www.hecmcounselors.org/sites/default/files/uploads/pdfs/HECMStatute.pdf (accessed Nov. 18, 2011).

31 For a consumer-friendly overview of reverse mortgages, *see* U.S. Dept. of Housing and Urban Dev., *Top Ten Things to Know If You're Interested in a Reverse Mortgage,* http://www.hud.gov/offices/hsg/sfh/hecm/rmtopten.cfm (accessed Nov. 15, 2011).

32 U.S. Dept. of Housing and Urban Dev., *Minimum Property Standards for Housing,* 1994 Edition (4910.1), http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4910.1/index.cfm (accessed Nov. 15, 2011).

33 U.S. Census Bureau, American Housing Survey National Tables: 2009 Using Census 2000-based

to receiving any HECM proceeds, or be paid from the initial proceeds of the HECM. Before closing, potential borrowers are also required to attend loan counseling sessions that briefly explain the financial and legal responsibilities of entering into a reverse mortgage agreement, but usually do not discuss the suitability of the product for the borrower's needs or discuss other options that may be available.[34]

Borrowers can opt to receive the proceeds of their HECM in lump-sum form, as a line of credit (payable upon demand until exhausted), as monthly payments for the remainder of their natural life ("tenure"), or as a monthly payment for a term of years chosen by the borrower. In addition, a "modified tenure" option combines the monthly payments for life with the credit line option for as long as the borrower remains in the home, and a "modified term" option combines monthly payments for a term of years with the line of credit.[35]

HECMS have several different itemized costs, including an origination fee, third-party closing costs, a mortgage insurance premium, a servicing fee, and interest, each of which merits brief explanation. Origination fees for HECMs are paid to lenders for educating the client, analyzing a prospective borrower's eligibility, and processing the loan application, and are currently capped at $2,500 or 2 percent of the maximum claim amount of the mortgage (MCA), whichever is greater, with an ultimate cap of $6,000.[36] Third-party closing costs, including a required appraisal of the home securitizing the reverse mortgage loan, a title search and title insurance, recording fees, credit checks, mortgage taxes, and possible surveys and inspections, will vary with the value of the home and the price of such services by area, but a total of $2,300–$3,500 is common.[37]

Mortgage insurance premiums (MIPs) are paid to the Federal Housing Authority (FHA), which then guarantees that a borrower will receive the promised loan amounts regardless of how long the resident remains in the home, what happens to the value of the home, or a lender's ability to make payments. Such a broad guarantee does not come cheaply to the borrower, who must pay the MIP in two parts: An "up-front" payment of 2 percent of the home's value, and an annual 1.25 percent MIP, which is factored into the monthly interest rate charged for the loan.[38] Both are payable out of the reverse mortgage loan proceeds, and are used not to make a profit for the HECM program, but rather to ensure that the borrowers who live the longest and whose home values grow the least (or

---

Weighting, Table 2-1, http://www.census.gov/housing/ahs/data/ahs2009.html (accessed Nov. 15, 2011).

34 Ltr. from Prescott Cole, Coalition to End Elder Financial Abuse (CEASE), to Sen. Claire McCaskill, Chair, Special Senate Committee on Aging, at 3 (Dec. 12, 2007), http://aging.senate.gov/events/hr185pc.pdf.

35 National Reverse Mortgage Lenders Association, *Reverse Mortgage Payment Options: Pros and Cons*, http://www.reversemortgage.org/Default.aspx?tabid=659 (accessed Nov. 15, 2011).

36 Ltr. from Brian D. Montgomery, Asst. Sec. for Housing-Fed. Housing Commnr., U.S. Dept. of Housing and Urban Dev., *HUD Mortgagee Letter 2008-34,* (Oct. 31, 2008), http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/08-34ml.doc.

37 Adjusted for inflation from AARP Reverse Mortgage Education Project's page, *Let Your Home Pay You With a Reverse Mortgage* (http://www.letyourhomepayyou.com/aarp-reverse-mortgage-education-project.htm) using the U.S. Bureau of Labor Statistics Inflation Calculator (http://data.bls.gov/cgi-bin/cpicalc.pl) (accessed Nov. 15, 2011).

38 J. Alton Alsip, *Texas' New and Improved Reverse Mortgage,* TX Bar J 1076 at 1077 (Dec. 2005), https://www.houseoflaw.biz/uploads/Texas_New_Reverse_Mortgage.pdf.

decline) can still receive their loan amounts. While the MIP thus represents a substantial cost to the reverse mortgage borrower, it provides a degree of protection unmatched by non-HECM, non-governmentally insured loans, and helps to explain why more than 90 percent of reverse mortgage loans to date have been federally insured HECMS.

For seniors interested in a reverse mortgage but not needing to borrow as much money, one of the most exciting and cost-effective options is the new HECM Saver program, which began in October 2010. The HECM Saver program essentially eliminates the mortgage insurance premium (MIP), charging only 0.01 percent of a home's value. Consider that the MIP on a $250,000 house under a traditional (HECM Standard) loan would be $5,000. Under the HECM Saver program, the homeowner would only pay $25 instead, a substantial savings.[39] Yet under the HECM Saver program, a senior can, depending on age, borrow between 10 percent and 18 percent less than the FHA's standard reverse mortgage.[40] The primary reason for the creation of the HECM Saver program was that the pre-October 2010 MIP of 0.5 percent was under-insuring the loss of home equity that was occurring in a time of falling home prices.[41] By raising the mortgage insurance premium on HECM Standard loans to 1.25 percent and then introducing the HECM Saver, the FHA was seeking to bolster its insurance funds "by increasing the costs of the standard product and by expanding the market with a lower risk alternative."[42] In short, those who need to borrow less will benefit from the HECM Saver program, but homeowners whose borrowing needs can only be met by an HECM Standard will now find themselves paying substantially more.[43]

Servicing fees payable to lenders for administrative tasks such as sending the payment check are paid using a "service fee set-aside" (SFSA) in which the FHA-capped monthly fee amount of $30 or $35 is multiplied by the number of months until the borrower would reach age 100. Obviously, few borrowers live to turn 100, so the total set-aside amount nearly always overstates the amount of service fees paid on a loan. Significantly, the set-aside amount is deducted from the amount of available loan proceeds available to the borrower, and borrowers cannot earn interest on this amount.[44]

The calculation of interest costs in a reverse mortgage loan is perhaps the most commonly misunderstood (and most important) cost component of a reverse mortgage. In a traditional "forward" mortgage to purchase a house, the outstanding principal balance owed by the borrower shrinks as the borrower makes payments over time. In turn, the

39 Ltr. from David H. Stevens, Asst. Sec. for Housing-Fed. Housing Commnr., U.S. Dept. of Housing and Urban Dev., *FHA Mortgagee Letter 2010-34,* http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/10-34ml.pdf (Sept. 21, 2010). *See also* Lamar Wooley, HUD Announces New Reverse Mortgage Option, HUD No.10-205, U.S. Dept. of Housing and Urban Dev., http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-205 (Sept. 22, 2010).

40 Donna Fuscaldo, *A Reverse Mortgage for Less,* AARP (Oct. 4, 2010), http://www.aarp.org/money/credit-loans-debt/info-10-2010/new-reverse-mortgage-for-less.html.

41 For HUD's detailed policy response to under-insured HECM losses, *see* Ltr. from David H. Stevens, Asst. Sec. for Housing-Fed. Housing Commnr., U.S. Dept. of Housing and Urban Dev., *FHA Mortgagee Letter 2011-01* (Jan. 3, 2011), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14694.pdf.

42 Fuscaldo, *supra* n. 40. The explanation quoted is that of Don Redroot, strategic policy advisor for AARP's Public Policy Institute.

43 *Id.*

44 National Reverse Mortgage Lenders Association (NRMLA), *About Reverse Mortgages,* http://www.reversemortgage.org/Default.aspx?tabid=230 (accessed Nov. 18, 2011).

percentage of each monthly payment that is applied towards interest will decrease over time as the borrower makes payments and diminishes the amount of principal upon which interest is paid. In a reverse mortgage transaction, however, the stream of payments is reversed; that is, the lender is paying the borrower. Thus, the outstanding total balance owed by the borrower will not shrink, but rather grow over time. This growth of the outstanding total balance owed will occur whether a reverse mortgage borrower elects to receive a lump-sum amount up front (in which the amount of principal does not change, but interest still accrues over time) or whether the borrower elects to receive payments over time, either as monthly payments or as a line of credit (in which cases both the amount of loan principal and the amount of interest payable would increase over time.) While nearly all HECM lenders charge adjustable interest rates, the rate is tied to the current one-year Treasury Security rate, and cannot be increased more than 2 percent per year or 5 percent over the life of the loan. Alternately, an HECM lender can charge a lower rate adjustable every month, similarly tied to the one-year Treasury rate, and limited to a 10 percent cap on the life of the loan. Yet regardless of the interest rate, reverse mortgages will always be "rising debt" loans.[45]

Historically, the up-front costs of acquiring an HECM Standard (the origination fee, third-party closing costs, initial MIP) and the ongoing costs (the monthly MIP premium, servicing fee, and interest) could add up to 6-10 percent of the value of the home securing the loan. Yet even before HECM introduced the HECM Saver, many HECM lenders have been willing to waive their loan origination fees and servicing fees, so that borrowers can tap into more equity and keep initial loan costs considerably lower.[46] In October 2010, journalist Tara Siegel Bernard of the *New York Times* provided a helpful side-by-side comparison of how a hypothetical borrower (65 years old, and seeking a lump sum rather than a line of credit or other option) would fare under the current HECM Standard versus HECM Saver programs:

> If a 65-year-old borrower with a home valued at $400,000 were to apply for a standard reverse mortgage with a fixed rate of 5.06 percent, he would be eligible for about $255,000. But he would also owe an upfront mortgage premium of $8,000, and roughly $3,600 in other closing costs, which means he would ultimately receive a lump sum of about $243,000, according to ReverseVision, a reverse mortgage software company.
>
> This assumes that the lender waived the origination fee and a servicing fee (lenders can charge an origination fee of 2 percent of the first $200,000 of your home's value, plus an additional 1 percent for amounts over that, though the total is limited to $6,000). The continuing mortgage premium and interest would be tacked onto the loan balance each month.

45 *See A Rising Debt Loan,* AARP (Apr. 17, 2006), http://www.aarp.org/money/credit-loans-debt/info-2006/risingdebt.html.

46 Tara Siegel Bernard, *Reverse Mortgages Still Costly, But Less So,* N. Y. Times (Apr. 17, 2010), http://www.nytimes.com/2010/04/17/your-money/mortgages/17money.html?pagewanted=all.

> If the same homeowner applied for a Saver reverse mortgage, he would be eligible to receive $212,800. But after deducting a $40 up-front mortgage premium, and $3,600 in closing costs, he would get about $209,000.[47]

Significantly, while Ms. Bernard cautions that her calculations for HECM Saver loans exclude any servicing or origination fees, she notes that it is "unclear if lenders will waive them as they have with the standard reverse mortgages."[48]

While the variety and depth of associated costs means that traditional reverse mortgages are not always cheap to obtain, it is important to recall that, before the widespread availability of reverse mortgages, aging homeowners in the United States had essentially only two options to remedy a shortfall in savings needed to pay for costs incurred later in life. The first, long-term care insurance, was a cost-effective option for younger persons, but too costly for many seniors to purchase because the monthly premiums would be prohibitively expensive.[49] While NAELA currently encourages younger, healthier individuals to obtain long-term care insurance, it specifically recommends against using reverse mortgage proceeds to do so, noting that there is a mismatch between the ideal age for purchasing long-term care insurance and that required for reverse mortgage eligibility, and that "paying for this prohibitively expensive [long-term care] insurance through a reverse mortgage is like using credit cards to pay off a home loan," because the senior is "paying for an expensive product with an expensive loan."[50] The second traditional option that predates reverse mortgages is for the homeowners to sell their home to pay for nursing home expenses. This option is one, which many seniors have found to be emotionally draining, socially uprooting, and altogether less attractive than "aging in place" by remaining in their homes.[51]

What about homeowners whose home value exceeds the federal government's nationwide reverse mortgage loan limit, which remains at $625,500.[52] Before the financial crisis, many companies offered proprietary products often called "jumbo" reverse mortgages to serve these homeowners. Until its demise in 2008, Lehman Brothers was the largest issuer of securities based on "bundles" of thousands of such private reverse mortgages. Yet by 2010, non-HECM proprietary products made up less than 2 percent

---

47 Tara Siegel Bernard, *Reverse Mortgage Rules to Change,* N. Y. Times (Oct. 3, 2010) , http://bucks.blogs.nytimes.com/2010/10/03/reverse-mortgage-rules-to-change/.

48 *Id.*

49 Natl. Acad. Elder L. Attys., *Reverse Mortgages Can Help Pay for Senior Health Care Under the Right Circumstances,* Eye on Elder Issues (Aug. 2005, Vol. 2, Issue 6), http://naela.org/pdffiles/EyeOnElderIssuesAug05.pdf.

50 *Id.*

51 A July 2008 AARP Public Policy Institute report noted that 87 percent of Americans age 50 or older want to receive long-term care in their own homes. AARP Public Policy Institute, *A Balancing Act: State Long-Term Care Reform,* In Brief 161 (July 2008), http://assets.aarp.org/rgcenter/il/inb161_ltc.pdf.

52 The $625,500 loan limit continues through the end of 2011. *See* Ltr. from Carol J. Galante, Acting Asst. Sec. for Housing-Fed. Housing Commnr., U.S. Dept. of Housing and Urban Dev., *Mortgagee Letter 11-29* (Aug. 19, 2011), http://portal.hud.gov/hudportal/documents/huddoc?id=11-29ml.pdf.

of the reverse mortgage marketplace.[53] Faced with reduced home values, concerns about the solvency of private banks, and a limited secondary market for reverse mortgages because few Wall Street firms are currently willing to purchase such "bundles" of reverse mortgages, very few private lenders now offer such "jumbo" reverse mortgages for homeowners.[54]

So what makes reverse mortgages an attractive product in spite of their high cost? First, there are no restrictions on how homeowners can spend their reverse mortgage proceeds, enabling reverse mortgage holders to pay for health care items not covered by Medicare and Medicaid, such as eyeglasses, dentures, additional in-home care, or essential overhead expenses such as home repairs, utility bills, and homeowner's insurance. Some homeowners even use the proceeds of their reverse mortgage to pay off their current "forward mortgage," leaving them the remainder as spendable income. Second, there is no tax upon the proceeds because the borrowers are (at least initially) "borrowing" against their home equity. Similarly, unless homeowners choose to receive their reverse mortgage proceeds as a lump-sum advance, there is no effect on their Social Security or Medicare benefits.[55] An August 2005 article in *Eye on Elder Issues* (a NAELA electronic newsletter discontinued in June 2008) noted that many "aggressive planners" argue that reverse mortgages should be mandatory for many aging homeowners.[56] Yet NAELA responded that "this policy would not be in the best interest of older persons or of society as a whole," and that "home equity should be considered a supplement to Social Security, Medicare, and Medicaid — not a replacement."[57] Requiring homeowners to use reverse mortgages to pay premiums for long-term care insurance would likely preclude many seniors on tight budgets from maintaining their home and paying insurance as required by the reverse mortgage loan agreement, which potentially leads the senior borrowers to violate their loan agreement and lose their homes as a result.[58]

IV. Possible Risks for Borrowers in Reverse Mortgage Transactions

While there are very detailed analyses of lender-side risks that might be of interest

53 Elizabeth Ecker, *Private Products: Return Inevitable, Impact Unknown,* Reverse Mortgage Daily (Apr. 28, 2011), http://reversemortgagedaily.com/2011/04/28/private-products-return-inevitable-impact-unknown/.

54 At present, major players in the "jumbo" reverse mortgage market include Generation Mortgage (based in Atlanta) and RBC (Royal Bank of Canada). Readers should recall that privately offered products such as these "jumbo" reverse mortgage loans are, by definition, not federally insured HECMs, and will have their own methods of calculating costs and fees. Regarding the HECM loan limit, The American Recovery and Reinvestment Act of 2009 (signed into law by President Obama on Feb. 17, 2009) approved the loan limit increase of $625,500, and HUD Mortgagee Letter 2009-07 (issued Feb. 24, 2009) initially made this loan limit increase effective until Dec. 31, 2009, thus enabling many seniors with higher-priced homes but reduced retirement savings to tap into more of their home equity.

55 Alsip, *Texas' New and Improved Reverse Mortgage, supra* n. 38, at 1077. Alsip noted that homeowners choosing a lump-sum advance should nevertheless seek counseling to confirm their continued uninterrupted eligibility for Medicaid benefits if retaining the lump-sum advance as a liquid asset.

56 Natl. Acad. of Elder Law Attys., *Reverse mortgages can help pay for senior health care, supra* n. 49.

57 *Id.*

58 *Id.*

to those representing lenders,[59] the likelihood that Elder Law practitioners will have clients who have or are considering a reverse mortgage makes borrower-side risk an area of more common concern. For the borrower, the risks of a reverse mortgage are not usually a function of the reverse mortgage product, itself. Rather, they are related to the deceptive, abusive, and often-illegal practices of a small number of reverse mortgage lenders. While deceptive lending practices are continually met with industry, consumer, and regulatory efforts to root them out, a review of some of the most troublesome past practices, and the response on all of these fronts, remains instructive.

In its December 2007 hearings on reported financial abuses in the reverse mortgage industry, the United States Senate Special Committee on Aging received written statements and heard testimony from numerous victims of financial abuse and from concerned Elder Law attorneys who highlighted several areas of particular concern.[60] Especially troubling to several participants at the hearing was the lack of certification, background checks, or sufficient training required of reverse mortgage loan counselors, the very individuals who are often in the best position to protect the borrower against unscrupulous lending practices, questionable financial decision-making, or both. For the first two decades of the HECM program (1987-2007), HECM counseling was often limited to a phone interview confirming that the potential borrowers understood the terms of the loan transaction. There was no face-to-face meeting to ensure that the reverse mortgage product being considered was suitable for the needs and financial circumstances of the borrower.[61] In her testimony before the Senate Special Committee, Margaret Burns, who served as director of Single Family Programs at the FHA under George W. Bush, noted that funding for reverse mortgage loan counseling consisted of only $3 million per year spread over more than 100,000 transactions, and was "severely inadequate."[62] Critics of the old counseling process, such as AARP Strategic Policy Advisor Donald Redfoot, in-

59 Chen Hua, *Contingent claim pricing with applications to financial risk management,* (unpublished Ph.D. thesis, Ga. St. U., May 7, 2008), http://digitalarchive.gsu.edu/rmi_diss/22/. (accessed Nov. 18, 2011).

60 U.S. Senate Special Comm. on Aging, *Reverse Mortgages: Polishing Not Tarnishing the Golden Years* (Dec. 12, 2007), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:42743.wais.

61 Ltr. from Cole to McCaskill, *supra* n. 34. Cole, Senior Staff Attorney for California Advocates for Nursing Home Reform, recommended on behalf of the Coalition to End Elder Financial Abuse that "[j]ust as it has been determined to be good public policy to have a suitability requirement for financial investors," the current counseling system should be "expanded to include a suitability component whereby the counselor asks the senior a series of questions to learn why they are taking the loan." In particular, Cole recommended that "[c]ounselors should be able to suggest alternatives to reverse mortgages, and to inquire as to what the senior intends to do with the funds. The suitability criteria should contain a set of inquiries whose responses would lead the counselor to disapprove a loan where appropriate." This view ultimately reflecting Cole's belief that "reverse mortgages…should only be used as a last resort." *See also* U.S. Senate Special Comm. on Aging, Reverse Mortgages, *supra* n. 60. In a more limited recommendation, Donald Redroot, Strategic Policy Advisor for AARP's Public Policy Institute, recommended as his final written recommendation that "state and federal agencies should develop new cost disclosures and suitability standards for reverse mortgages that are used to purchase investments, annuities, and long-term care insurance." Redroot's recommendations may be more limited because AARP has played an early and significant role in providing training for HECM reverse mortgage counselors.

62 U.S. Senate Special Comm. on Aging, *Reverse Mortgages, supra* n. 60, Statement of Margaret Burns, Director, FHA Single Family Program Dev., U.S. Dept. of Housing and Urban Development.

sisted that "counselors should serve as an independent source of unbiased information for consumers and should not have conflicts of interest."[63]

In response to these criticisms and the concerns of other elder advocates and consumers, HUD issued numerous Mortgagee Letters to clarify reverse mortgage counseling procedures. On May 6, 2008, Mortgagee Letter 2008-12 established new fee guidelines for reverse mortgage counseling, most notably that 1) counseling agencies must inform clients of the fee structure (capped at $125) in advance of providing services; 2) a client must not be turned away because of an inability to pay; and 3) the counseling agency may not withhold counseling or the Certificate of HECM Counseling (required to obtain a reverse mortgage loan) based on a client's failure to pay.[64] In contrast to the old practice of allowing non-HUD approved reverse mortgage brokers to participate in the HECM program, Mortgagee Letter 2008-24, issued on September 16, 2008, prohibits non-HUD approved lenders from originating HECM products.[65] On March 27, 2009, HUD issued Mortgagee Letter 2009-10, which mandated significant changes to the reverse mortgage counseling process.[66] Not only must the borrower, not the lender, now initiate the contact to the counseling agency to help ensure that counseling is "provided by an independent third party that is neither directly nor indirectly associated with the mortgage transaction," but reverse mortgage lenders must also now "provide every client with a list of no fewer than 10 HUD-approved counseling agencies that can provide HECM counseling, five of which must be in the local area and/or state of the prospective HECM borrower, with at least one agency located within reasonable driving distance for the purpose of face-to-face counseling."[67] Further, reverse mortgage counselors are now required to review a client's unique financial situation during a counseling session, and provide budgetary analysis based on the client-provided income, assets, debts, and monthly expenses.[68] More recently, other HUD Mortgagee Letters have clarified that only individuals on a HUD-approved roster could counsel potential reverse mortgage borrowers.[69] Such new

63 U.S. Senate Special Comm. on Aging, *Reverse Mortgages, supra* n. 60, Statement of Donald Redroot, PhD, Strategic Policy Advisor, AARP Public Policy Institute.

64 For a comprehensive list of HECM Mortgagee Letters issued by HUD, *see* U.S. Dept. of Housing and Urban Dev., HECM Mortgagee Letters, http://www.hud.gov/offices/hsg/sfh/hecm/hecmml.cfm (accessed Nov. 18, 2011).

65 Ltr. from Brian D. Montgomery, Asst. Sec. for Housing-Fed. Housing Commnr., U.S. Dept. of Housing and Urban Dev., *Mortgagee Letter 2008-24* (Sept. 16, 2008), www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/08-24ml.doc.

66 Ltr. from Brian D. Montgomery, Asst. Sec. for Housing-Fed. Housing Commnr., U.S. Dept. of Housing and Urban Dev., *Mortgagee Letter 2009-10* (Mar. 27, 2009), http://bit.ly/vxaNSO.

67 *Id.*

68 *Id.*

69 Ltr. from David H. Stevens, Asst. Sec. for Housing-Fed. Housing Commnr., U.S. Dept. of Housing and Urban Dev., *Mortgagee Letter 2009-10* (Nov. 6, 2009), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14700.pdf. ML 2009-47 clarifies further requirements that reverse mortgage counselors must meet, and enables HUD to remove a counselor from the HUD-approved roster for numerous reasons, including failure to comply with training requirements or failure to "provide information to clients on options other than HECMs, the financial implications of an HECM, the tax consequences of an HECM, and any other information required by HUD or requested by the applicant." Significantly, 2009-47 also provides that "[c]ounselors may also be removed from the Roster for providing misrepresentations or fraudulent statements; for promoting, representing, or recommending any specific lender;

requirements, if properly enforced, will go a long way towards ensuring that a potential reverse mortgage borrower is well-advised.

Even so, borrowers who have completed the loan counseling and begun receiving the proceeds can still lose their Medicaid eligibility if they retain the loan proceeds (often from a lump-sum loan) as an asset in a bank or other account rather than spend them in the month of receipt.[70] In a written statement to the Senate Special Committee on Aging, seasoned California Elder Law attorney Prescott Cole noted that the enactment of the Deficit Reduction Act of 2005 (DRA'05) not only limits the amount of equity that a prospective Medicaid recipient can have in his home and still qualify, but DRA'05 also expressly encourages seniors to eliminate their excess home equity by taking out a reverse mortgage.[71] To Cole, such language is "a form of unwarranted commercial endorsement" of reverse mortgages that is both "unprecedented" and possibly even misleading, given that "most seniors won't be staying in nursing homes long enough to exhaust their equity and therefore will never qualify for long-term Medicaid."[72] Cole further warned that the DRA'05 endorsement of reverse mortgages is often cited by unscrupulous lenders to promote products that not only fail to meet the borrower's needs, but even result in a deliberate theft of the borrower's home equity.

One possible home equity theft scenario involves unmarried seniors (usually women, whether single or widowed) who may be bound for a nursing home in the near future. The equity that a reverse mortgage removes from the home simply converts to assets that

---

or *for any other reason HUD determines serious enough to justify an administrative action."* (emphasis added) *See also* Ltr. from David H. Stevens, Asst. Sec. for Housing-Fed. Housing Commnr., U.S. Dept. of Housing and Urban Dev., *Mortgagee Letter 2010-37* (Nov. 8, 2010), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14696.pdf. The requirement that lenders provide potential borrowers with a list of approved counseling agencies was further clarified in ML 2010-37.

70 While Medicare is able to provide for lifetime maximum 180 days of consecutive hospitalization or skilled nursing care, it generally does not pay for "custodial care," such as that provided by nursing homes, but rather only for medically necessary skilled nursing facility or home health care. In contrast, Medicaid provides a long-term care benefit, but in many states, a recipient must "spend down" nearly all other liquid assets until their assets are less than a state-determined standard of eligibility, which is currently 133 percent of Temporary Assistance to Needy Families. At present, an individual in the lower 48 states must have an income less than $1,207 to qualify. *See* 2010 Poverty Guidelines, https://www.cms.gov/MedicaidEligibility/downloads/POV10Combo.pdf (accessed Nov. 18, 2011). In contrast, in income cap states, "medically needy" eligibility requires that an individual income not exceed 300 percent of the Supplemental Security Income (SSI) monthly benefit for a single person. While there was no increase in the Consumer Price Index from the third quarter of 2008 to the end of 2011, there is a 3.6 percent cost of living adjustment (COLA) in SSI for 2012, such that a qualifying individual would receive $698 and a or $1,048 for a qualifying individual with a spouse) in 2012, *See also* SSI Federal Payment Amounts in 2012, http://www.ssa.gov/oact/cola/SSI.html (accessed November 18, 2011). As such, in 2012, individuals in income-cap states seeking medically needy eligibility for Medicaid must make less than $2,094 per month.

71 Ltr. from Cole to McCaskill, *supra* n. 34, at 3.

72 *Id.* Citing California's Office of Statewide Health Planning and Development, Cole notes that "within 90 days after admission, 70 percent of seniors who go into nursing homes will be discharged either because they go home, are sent to an assisted living facility, or die." Cole further states his belief that "[b]ecause reverse mortgages are generally unsuitable for long-term care estate planning, the federal government should not be recommending them."

would be used to pay for the senior's nursing home expenses. Whether those assets are received as a lump sum or as a line of credit, if those assets are retained in a bank account instead of being spent in the month of their receipt, the reverse mortgage proceeds would exceed the Medicaid asset limit ($2,000 in liquid assets for an individuals or $3,000 for a couple) and thus trigger a spend-down requirement.[73] Second, should a borrower remain in a skilled nursing facility for 12 months, the reverse mortgage loan, itself, will be due, possibly forcing a single borrower (with no "community" spouse living in the house) to have to sell the house to pay off the lender.[74] Third, the senior will receive the "residue equity" left over after the house is sold and the reverse mortgage lender is paid. This equity now becomes part of the senior's liquid assets. It can easily exceed Medicaid asset limits, again triggering a spend-down requirement, which leads Cole to argue that "the senior would have been better off financially if she had never taken a reverse mortgage."[75]

Equally disastrous for some past borrowers was the improper "bundling" of reverse mortgages with other financial products, such as deferred annuities, which tied up the proceeds of the reverse mortgage for several years before a borrower could access them without paying a significant penalty. Here, Cole noted that the lender's fees and insurance requirements result in a total cost of approximately 6 percent for a reverse mortgage (which, for many borrowers, would be a rather conservative estimate of the overall cost).[76] In the early 2000s (and even more so in today's era of historically low interest rates), Cole noted it was "impossible for a deferred annuity to generate interest that would offset the true costs of the reverse mortgage."[77] In 2007, one member of the Senate Special Committee on Aging, Claire McCaskill (D-MO), proposed the Reverse Mortgage Proceeds Protection Act (S. 2490) that would prohibit reverse mortgage lenders from requiring seniors to purchase an annuity with the proceeds of the reverse mortgage. The bill became law as part of the Housing and Economic Recovery Act (HERA) and the Foreclosure Prevention Act of 2008.[78] Further, a handful of lawsuits filed in 2006 and 2007 against the nation's then-largest reverse mortgage lender, Financial Freedom Senior Funding Corporation, sought remedies for the disastrous results of reverse mortgage/ annuity combination sales.[79]

---

73 For a quick overview of 2012 asset limits affecting Medicaid eligibility, *see* http://www.karplaw.com/index.php?go=news.news&news_id=200.

74 Most reverse mortgages include an "acceleration clause" under which the loan becomes due if the borrower ceases to use the collateralized house as a primary residence for 12 months or longer.

75 Ltr. from Cole to McCaskill, *supra* n. 34, at 3. To its credit, the National Reverse Mortgage Lenders Association does point out on its Question & Answer page that any liquid assets in excess of these amounts will still leave a borrower ineligible for Medicaid. *See* NRMLA, *About Reverse Mortgages, supra* n. 44.

76 Ltr. from Cole to McCaskill, *supra* n. 34, at 3.Cole provides an example that shows the dangers of using a reverse mortgage to purchase a deferred annuity. A senior taking out a reverse mortgage to finance a $100,000 ten-year deferred annuity, for example, would, after ten years, owe $183,000 on the $100,000 reverse mortgage loan, and, along with additional fees, will have spent about $200,000 to buy a $100,000 deferred annuity.

77 *Id.*

78 *S.2490: Reverse Mortgage Proceeds Protection Act,* Congressional Research Service Summary, http://www.govtrack.us/congress/bill.xpd?bill=s110-2490&tab=summary (accessed Nov. 18, 2011).

79 Charles Duhigg, *Tapping Into Homes Can Be Pitfall for the Elderly,* N.Y. Times (Mar. 2, 2008), http://www.nytimes.com/2008/03/02/business/02reverse.html.

A much more common danger in reverse mortgage transactions is that non-disclosure and/or misunderstanding of certain key loan terms will result in unwanted surprises for the borrower. Nearly all reverse mortgage products contain an acceleration clause that speeds up repayment in the event that the borrower is absent from the home for specified periods (often 12 months) due to illness, or if liens are put on the home without the lender's permission (as first lien-holder), or even if property is transferred out of the borrower's name.[80]

Significant issues arise when one spouse in a reverse mortgage loan is 62 or older (and thus old enough to qualify for an HECM loan), but the other spouse is not yet 62. The first concerns the non-recourse nature of HECM loans. Must a surviving spouse who was not 62 at the time the HECM loan was executed (and thus not a borrower) pay the full mortgage balance owed to keep the home when that balance exceeds the value of the house, itself? For the first two decades of HECM lending, the answer was "no." As originally promulgated in 1994, The HUD Handbook on Home Equity Conversion Mortgages provides that:

> "The HECM is a "non-recourse loan." This means that the HECM borrower (or his or her estate) will never owe more than the loan balance or value of the property, *whichever is less*; and no assets other than the home must be used to repay the debt."[81] (emphasis added)

Yet HUD abruptly reversed this "whichever is less" approach in December 2008, when it promulgated Mortgagee Letter 2008-38, which stated that an heir, including a surviving spouse who was not named on the mortgage, must pay the full HECM loan balance to keep the home, *even when the balance exceeds the value of the property* (emphasis added).[82] In response to this significant policy change, in March 2011, AARP filed suit against HUD in the U.S. District Court for the District of Columbia. The suit was filed on behalf of three non-borrowing spouses who were unable to pay the full loan when their borrower-spouses passed away, and who were thus facing foreclosure.[83] AARP's suit

---

80 *Reverse Mortgages: A Lawyer's Guide to Housing and Income Alternatives,* 22, 48 (David A. Bridewell & Charles Nuts, eds., ABA, Apr. 1997, currently out of print).

81 U.S. Dept. of Housing and Urban Development, *Home Equity Conversion Mortgages* 4235.1 REV-1, Paragraph 1-3(c). http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsgh/4235.1 (accessed Nov. 12, 2011).

82 Ltr. from Brian D. Montgomery, Asst. Sec. for Housing-Fed. Housing Commnr., U.S. Dept. of Housing and Urban Dev., *Mortgagee Letter 2008-38* (Dec. 5, 2008), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_20411.doc (accessed Nov. 11, 2011). This letter sought to clarify the "non-recourse" nature of HECM Loans. ML 2008-38 states: "Some program participants mistakenly infer ... that a borrower (or the borrower's estate) could pay off the loan balance of a HECM for the lesser of the mortgage balance or the appraised value of the property while retaining ownership of the home. This is not correct ... Non-recourse means simply that if the borrower (or estate) does not pay the balance when due, the mortgagee's remedy is limited to foreclosure and the borrower will not be personally liable for any deficiency resulting from the foreclosure."

83 Press Release, *HUD Targeted in Suit For Illegal Reverse Mortgage Foreclosure Actions,* AARP (Mar. 8, 2011), http://www.aarp.org/about-aarp/press-center/info-03-2011/hud_targeted_in_suit_for_illegal_reverse_mortgage_foreclosure_actions.html.

asserts that these three spouses were a small number of a much larger class of surviving non-borrower spouses who faced HECM foreclosure actions. In April 2011, in what HUD dubiously claims was not a response to the AARP lawsuit, HUD issued Mortgagee Letter 2011-16,[84] which rescinded Mortgagee Letter 2008-38, and ostensibly returned to the "whichever is less" rule from the 1994 HECM Handbook.

AARP's lawsuit against HUD also raised a second and closely related question: Can a non-borrowing surviving spouse (who did *not* hold title with the borrower on the forward mortgage as joint tenants with rights of survivorship) be considered a "homeowner" for purposes of the HECM loan? This question arises from the varying interpretations of "homeowner" in an HECM statute addressing the displacement of homeowners:

> "The Secretary may not insure a home equity conversion mortgage under this section unless such mortgage provides that the homeowner's obligation to satisfy the loan obligation is deferred until the homeowner's death, the sale of the home, or the occurrence of other events specified in regulations of the Secretary. For purposes of this subsection, the term "homeowner" includes the spouse of a homeowner."[85]

On its face, this statute presents no ambiguity. Both spouses can be homeowners. But a significant latent ambiguity arises because the statute does not address whether a non-borrowing spouse can be considered a homeowner and thus receive the enumerated protections. Had the District Court for the District of Columbia sided with AARP and decided that a non-borrower surviving spouse was in fact a homeowner, then non-borrower surviving spouses who faced foreclosure could receive the protections afforded by the statute. This did not happen. Instead, in July 2011, AARP's lawsuit against HUD on behalf of three surviving spouses facing foreclosure was dismissed without prejudice for lack of standing.[86] The court stated that the relief sought by the plaintiffs would not redress their injuries because HECM lenders, not HUD, were the parties exercising contractual foreclosure rights against non-borrower surviving spouses.

Some reverse mortgages also include possible penalties if the borrower decreases or discontinues the number or amount of payments, thus discouraging a borrower for borrowing less money, borrowing less often, or both. Many reverse mortgage loan agreements also contain shared appreciation clauses that give the lender the right to divide with the homeowner or devisee any proceeds from the sale of the home that are attributable to an increase in property value during the life of the loan.[87] Yet as acknowledged in an article in *Reverse Mortgage Daily,* a widely read online news source for the reverse mortgage lending industry, false or misleading advertising claims promulgated by unethical

---

84 Ltr. from Robert C. Ryan, Asst. Acting Sec. for Housing-Fed. Housing Commnr., U.S. Dept. of Housing and Urban Dev., *Mortgagee Letter 2011-16* (Apr. 5, 2011), http://portal.hud.gov/hudportal/documents/huddoc?id=11-16ml.pdf (accessed Nov. 11, 2011).

85 12 USC § 1715z-20(j), http://us-code.vlex.com/vid/equity-mortgages-elderly-homeowners-19225068.

86 *Bennett v. Donovan,* http://scholar.google.com/scholar_case?case=7559179309343601149&hl=en&as_sdt=2&as_vis=1&oi=scholarr (D.C. July 15, 2011).

87 *See e.g.,* Jay Romano, *Your Home; For Lenders, A Cut of the Profits.* N.Y. Times (Apr. 18, 2004), http://www.nytimes.com/2004/04/18/realestate/your-home-for-lenders-a-cut-of-profits.html?pagewanted=all.

and/or uninformed lenders generate increased scrutiny from consumer groups, Congress, and governmental agencies (such as the GAO), and thus merit an industry-wide avoidance of certain claims or language identified as misleading.[88]

V. State Approaches to Reverse Mortgage Regulation

As the use of reverse mortgages grew in the decade before the current financial crisis, state legislatures, especially those in high-population states such as California, became increasingly responsive to consumer complaints and concerns about unscrupulous lending practices in the reverse mortgage market. Reverse mortgage lending has slowed over the past two to three years. Yet demands upon state legislatures to address consumer's concerns about disclosure requirements or unscrupulous reverse mortgage sales or lending practices will remain.[89] The decline of traditional and subprime mortgage lending in the current financial crisis means that some traditional forward mortgage loan officers may seek to transition to reverse mortgage lending, yet may initially lack detailed knowledge about reverse mortgage transactions and the laws that govern them.[90] Nearly all reverse mortgage lenders will be serving seniors whose retirement savings have been substantially reduced due to market downturns. Over the past two decades, states have taken a number of different approaches to the regulation of their respective reverse mortgage marketplaces.

In response to concerns about loss of valuable federal public benefits, such as Med-

88 Reva Minkoff, *Advertising Compliance: Big Issue Facing Industry,* Reverse Mortgage Daily (Nov. 24, 2009), http://reversemortgagedaily.com/2009/11/24/advertising-compliance-big-issue-facing-industry/. As excerpted in the Reverse Mortgage Daily article, the GAO report noted new phrases to avoid include: "'Eliminate your current mortgage debt payment' — Mortgage debt is not eliminated by a reverse mortgage, only postponed. 'Make no payments during your lifetime' — This makes borrowers think that they do not have tax and insurance obligations, which they still must pay during their lifetime. 'Tax free' — The panel advised against using this phrase, as loan officers are not tax specialists and are not licensed to give tax advice. Furthermore, a reverse mortgage is only tax free at certain points, depending on how the funds are dispersed. 'Stay in your home as long as you live' – This is only true if the terms of the reverse mortgage are complied with. 'Your heirs will inherit all remaining equity.' 'The lender cannot take or own your home' — If a borrower defaults on a reverse mortgage, the lender can take the home. 'No income or credit requirements to qualify.'" Further, the Reverse Mortgage Daily article noted that "other HUD hot buttons include the use of logos that do not belong to the lender, especially government logos, the use of the term 'government-backed program,' and deadlines for responses. The panel added that costs of a reverse mortgage should not be ignored because a reverse mortgage does have significant costs, and the borrower should be aware of that." *See also Reverse Mortgages: Product Complexity and Consumer Protection Issues Underscore Need for Improved Controls over Counseling for Borrowers,* U.S. GAO (June 29, 2009), http://www.gao.gov/new.items/d09812t.pdf.

89 For the most current comprehensive guide to state-by-state legislation on reverse mortgages, *see* Thomson Reuters/West, 50 State Statutory Survey, 0090 Surveys 74 (last updated August 2011).

90 In her testimony before the U.S. Senate Special Committee on Aging on December 12, 2007, California resident Carol Anthony, whose mother lost $165,000 in home equity in a dubious reverse mortgage transaction, noted that attendance at reverse mortgage lending seminars has skyrocketed, as many traditional mortgage lenders and aspiring lenders *see* reverse mortgages as a "new California Gold Rush" and even employ direct-mail and DVD marketing featuring celebrities (such as James Garner) well-known to those in the target demographic for reverse mortgages. *See* U.S. Senate Special Comm. on Aging, *Reverse Mortgages, supra* n. 61, Statement of Carol Anthony.

icaid, Supplemental Security Income, and Nutritional Assistance (food stamps), many state legislatures have chosen to exclude reverse mortgage loan proceeds from the income and assets that would otherwise be considered in determining an individual's Medicaid eligibility.[91] Preserving federal benefits for the seniors who receive them is good policy not only for the seniors, but also for the states, themselves. After all, seniors who lost eligibility for such federal benefits would then presumably turn to state government programs to try to meet their needs.

State legislatures have a unique opportunity to regulate reverse mortgage counseling for non-HECM loans, which make up only 2 percent of the current reverse mortgage market. Such loans are, by definition, not governed by federal HECM counseling requirements. Some states require that potential reverse mortgage borrowers complete counseling; other states only require that the potential borrower be informed that such counseling is available.[92] Perhaps wary that counseling alone may be insufficient, at least two states have sought to grant rescission power to reverse mortgage purchasers. A 2009 legislative measure in Minnesota, SF 489, would have allowed borrowers to rescind a reverse mortgage agreement within 30 days of signing it, but was vetoed by the governor in spite of ardent support from the state's attorney general.[93] In 2009, however, the Washington state legislature granted purchasers of non-HECM (proprietary) reverse mortgages in its state the same rescission rights as those enjoyed by HECM purchasers under federal law.[94]

---

91 As an example, the following language occurs in both Colorado law (C.R.S.A. § 11-38-110, initially passed in 1992) and California law (Cal.Civ.Code § 1923.9, initially passed in 1997):

(a) To the extent that implementation of this section does not conflict with federal law resulting in the loss of federal funding, reverse mortgage loan payments made to a borrower shall be treated as proceeds from a loan and not as income for the purpose of determining eligibility and benefits under means-tested programs of aid to individuals. (b) Undisbursed reverse mortgage funds shall be treated as equity in the borrower's home and not as proceeds from a loan [here California adds: resources, or assets] for the purpose of determining eligibility and benefits under means-tested programs of aid to individuals.

For even earlier examples, *see* Massachusetts M.G.L.A. 19A § 36: (originally passed in 1989); South Carolina § 29-4-50 (originally passed in 1984); Minnesota M.S.A. § 256.99 (originally passed in 1979). These last two laws were before HECMs were available, but presumably in response to seniors obtaining reverse mortgage loans from state or private lenders.

92 *See e.g.,* Hawaii's reverse mortgage counseling requirements at HRS § 506-10: "Prior to accepting an application for a reverse mortgage loan, a lender shall refer every borrower to counseling from an organization that is a housing counseling agency approved by the United States Department of Housing and Urban Development, and shall receive certification from the counselor that the borrower has received counseling." Contrast this approach with that of Colorado at C.R.S.A. § 11-38-11, which allows a prospective borrower to waive the counseling: "No reverse mortgage shall be made by a lender unless the loan applicant attests, in writing, that the applicant has been advised by the lender to obtain independent counseling regarding the advisability of such applicant's entering into a reverse mortgage transaction and that such applicant has either obtained such counseling or waived such counseling in writing"; or with Indiana's approach at IC 24-4.4-2-503, which simply requires that a potential borrower be presented with brochure about the availability of HUD-certified housing counselors. *See also* North Carolina N.C.G.S.A. § 53-269 (state-supervised training requirements for all reverse mortgage counselors).

93 Betsy Sundquist, *Legislative Efforts to Hold Back Foreclosure Tide Died in Committee, Vetoed,* Finance and Commerce (May 28, 2009), finance-commerce.com/2009/05/legislative-efforts-to-hold-back-foreclosure-tide-died-in-committee-vetoed/.

94 S*ee* Washington State's RCW 31.04.520: "The borrower in a proprietary reverse mortgage transaction has the same right to rescind the transaction as provided in the truth in lending act, Regulation Z, 12

Matching the level of protection afforded by federal law to purchasers of HECMs and applying it to proprietary reverse mortgages was a safe bet.

In contrast, a smaller group of states has even entered the reverse mortgage market as participants, or at least has the statutory authority in place to do so. Connecticut has long provided its own state-funded reverse mortgage program, the Reverse Annuity Mortgage (RAM) program, which offers a reverse mortgage income stream to seniors 70 or older over a term of either five or 10 years. Borrowers must have annual incomes of $81,000 or less, and can receive a loan of up to 70 percent of the appraised value of their homes, as long as the loan amount does not exceed $417,000.[95] Both of these approaches (state-provided reverse mortgages versus significant rescission power in the hands of consumers) have their appeal. Not every state is able to offer its own state-funded reverse mortgage program, and few have contemplated the rescission powers that Minnesota considered and Washington granted to reverse mortgage borrowers.

Yet significant preemption issues arise whenever state laws directly or impliedly conflict with existing federal law, or touch upon fields in which there is already comprehensive federal law in place.[96] In a much criticized ruling by the Office of the Comptroller of the Currency in January 2004, laws passed by numerous states to address an "epidemic" of predatory lending were rendered largely ineffective because many of their requirements ran afoul of the National Banking Act, which was originally passed in 1864.[97] Even so, as evinced by California's 2006 passage of reverse mortgage law Chapter 202, and the many other state statutes requiring more detailed reverse mortgage counseling, state legislatures continue to pass laws to combat abusive lending practices in their respective

---

C.F.R. Sec. 226," http://apps.leg.wa.gov/rcw/default.aspx?cite=31.04.520.

95 Connecticut Housing Finance Authority, Reverse Annuity Mortgage Program, http://www.ctreversemortgage.com/email_process.html (accessed Nov. 12, 2011). Other states have similar but often unused statutory authority: *See* OCGA 50-26-17(b): "The [Georgia Financing & Housing] Authority may issue bonds for reverse equity mortgages to enable the elderly to maintain a decent and appropriate residence while providing necessary cash for living expenses"; *see also* Illinois 20 § 3805/7.27 § 7.27: "The [Illinois Housing Development] Authority may offer non-recourse reverse mortgage loans to qualified borrowers…"; *see also* Indiana 28-15-11-9: "The authority may develop a model reverse annuity mortgage conforming to the requirements of this chapter, and may offer reverse annuity mortgages to qualified participants."; *see also* Iowa I.C.A. § 16.53 (language identical to Indiana); Maine's Elderly Homeowner Home Equity Loan Guarantee Fund at 30-A M.R.S.A. § 4942; Montana 90-6-504; New Jersey 46:10B-18.

96 For an impressive but disturbing overview of how one law, the Home Owners' Loan Act of 1933 (which refinanced home loans and thus prevented foreclosure for more than 1 million homeowners during the Great Depression), has been used to pre-empt and thus nullify significant portions of state-promulgated laws on mortgage lending and even usury in states such as California, Georgia, and New York, *see* C.F. Muckenfuss III & Robert C. Eager, *Preemption Under the Home Owners Loan Act,* Gibson, Dunn & Crutcher, LLP, http://www.gibsondunn.com/fstore/documents/pubs/Home_Owners_Loan_Act_Preemp.pdf (accessed Nov. 12, 2011).

97 For perhaps the most comprehensive critique of this OCC ruling, *see* Nicholas Bagley, *The Unwarranted Regulatory Preemption of Predatory Lending Laws,* 79 N.Y.U. L. Rev. 2274 (Dec. 2004), which argues that courts should not categorically defer to agency decisions to preempt state laws, and that "[b]ecause the predatory lending laws only minimally affect national bank lending powers, do not impose costs on the national banking system, and do not generate spillover effects, they do not interfere with national banks in a way that can justify the OCC's wholesale preemption."

reverse mortgage marketplaces.[98] In doing so, states continue to challenge the notion that federal law provides a ceiling for consumer protections in the lending marketplace.

Some scholars have focused upon the need to curb pre-emption of those federal lending regulations that are already in place to protect consumers. Deanne Loonin of the National Consumer Law Center and Elizabeth Renuart of Albany Law School have argued that "there should be no federal preemption of any aspect of a credit relationship without equivalent, meaningful, and enforceable regulation of that aspect at the federal level," and that, "at a minimum, laws of general application; banking and lending laws enacted pursuant to federal statutory law; and anti-predatory lending laws" should remain in force.[99] More realistically, and in direct response to recent funding cuts to legal aid programs, Loonin and Renuart recommend expanding legal representation to older consumers through existing legal aid and pro bono programs, and note that while "consumer and debt problems are among the most commonly reported by elders …. many legal services and pro bono programs have not yet made consumer law a priority service area."[100] Even absent more specific state statutes to protect them, seniors who believe they are victims of predatory lending can still pursue traditional common law causes of action, such as breach of fiduciary duty, fraud, and deceit.[101]

---

98 For an overview of the 2006 passage of California reverse mortgage law Chapter 202, *see* Leslie Ramos, *Chapter 202: California Provides Further Protection For Seniors Contemplating Reverse Mortgage Loans,* 38 McGeorge L. Rev. 45 (2007). The Assembly Committee on Banking & Finance, Committee Analysis of SB 1609, at 5 (June 26, 2006) notes that the law was created not "to stifle or hinder reverse mortgages," but to combat abuse and ensure that seniors have all the relevant information needed before entering into such a complicated and possibly life-changing transaction." Even with such laws on their side, however, consumers may encounter a statute of limitations problem, as when one plaintiff's claims against a reverse mortgage lender were barred by the statute of limitations, "because the claims arise out of the terms of the RM agreement and Providential's full disclosure of those terms at the formation of the agreement made discovery of any injury possible with the exercise of reasonable diligence." In footnote 32, Ramos also provides a list of state statutes requiring reverse mortgage counseling: Haw. Rev. Stat. § 506-10 (Supp. 2005); Mass. Gen. Laws Ann. chi. 167E, § 2 (West 1999 & Supp. 2006); Minn. Stat. Ann. § 47.58, subdue. 8 (West 2002); N.C. Gen. Stat. § 53-269 (West 2003); *see also* Haw. Rev. Stat. § 480-2 (1993 & Supp. 2005) (making a violation unlawful and subject to civil penalties). For an overview of numerous pre-financial crisis state responses to both perceived and real reverse mortgage lending abuses, *see* Kelly Burke, *Elderly risk losing homes in reverse mortgage trap,* Sydney Morning Herald (Feb. 28, 2007), http://www.smh.com.au/news/national/elderly-risk-losing-homes-in-reverse-mortgage-trap/2007/02/27/1172338624566.html.

99 Loonin & Renuart, *supra* n. 11.

100 *Id.* at 194.

101 There are effective ways of preventing financial fraud against the elderly that, while more limited in scope, also have the benefit of not requiring such a comprehensive legislative approach. Scholar Nathaniel Nichols has noted that notaries can play a significant role in preventing fraudulent transactions, but observes that only three states — Florida, Georgia, and Washington — currently have notary statutes whose provisions suggest that notaries assess the competency of the signer prior to notarizing a document. *See* Nathaniel C. Nichols, *Home Alone: Home Mortgage Foreclosure Rescue Scams and the Theft of Equity,* 11 J. Afford. Hous. & Community Dev. L. 280, 291 (Spring 2002). In particular, Nichols recommends the use of the mini-mental status examination (MMSE), which is widely used by physicians to assess the cognitive capacity of geriatric patients. In response, many seniors might appreciate the role of notaries in trying to protect them from signing documents when they are not in a condition to exercise their best judgment, but also express doubts about the propriety and qualification of a notary to assess

VI. Federal Regulation of Reverse Mortgages

Outside of legal and financial regulatory circles, few people have probably heard of either Regulation Z, which implements the Truth in Lending Act (TILA), or of the Home Ownership and Equity Protection Act (HOEPA).[102] Yet any borrower or lender in nearly any credit transaction has been subject to the protections or requirements of TILA, and any reverse mortgage borrower is afforded important protections by HOEPA. For anyone advising current or potential reverse mortgage borrowers, a basic understanding of these and other regulations, as well as their interaction with similar laws promulgated by the states is vital.

Regulation Z's TILA-based requirements for reverse mortgages are similar to those for other mortgage transactions. In addition to requiring that all key terms be provided in clear and conspicuous type on the loan document, that the document be integrated as a complete and final contract between the parties, and that the borrower can retain a copy of the loan document, it specifies that there is no requirement that a borrower actually complete a reverse mortgage loan transaction upon signing the application.[103] The Federal Trade Commission asserts that reverse mortgages are still exempt from most of HOEPA's broader requirements (because HOEPA only applies for mortgage interest rates exceeding 8 percent, and targets specific "forward" mortgage practices such as balloon payments).[104] Yet since HOEPA's enactment in 1994, reverse mortgages lenders have been required to meet HOEPA requirements to provide consumers with "adequate information" that goes beyond the general disclosure requirements for open-end credit transactions (in which a borrower can re-borrow against the principal paid thus far) and closed-end transactions (in which the borrower must repay the amount borrowed, along with any interest and

---

capacity using the MMSE. After all, the variety of approaches to assessing competency and capacity, and the often episodic nature of cognitive impairments common in older adults (such as Alzheimer's) have left medical professionals and probate court judges, among others, incredibly careful about making such determinations. For an excellent brief overview of some problems in determining competency and capacity in older adults, *see* Marshall B. Kappa, *Measuring Client Capacity: Not So Easy, Not So Fast,* 13-SUM NAELA Q 3 (Summer 2000), and other related articles in the same issue.

102 Regulation Z, Subpart E, 12 USC § 226.33, Requirements for Reverse Mortgages (http://bit.ly/vcd WWb) specifically governs reverse mortgage transactions. The statutory language for TILA is 15 USC § 1601 *et sequitur.* For an excellent brief overview of the legislative history of TILA, HOEPA and Regulation Z, *see* the "Background and Summary" section of the U.S. Dept. of the Treasury's, Office of Comptroller of the Currency's *Truth in Lending Act: Comptroller's Handbook* (Dec. 2010) http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/truth-in-lending-handbook.pdf, (accessed Nov. 18, 2011).

103 Official Staff Commentary of the Board of Governors of the Federal Reserve System at 73 FR 44522-01, 2008 WL 2900878 (F.R.). The summary of the commentary on the numerous amendments to Regulation Z made in 2008 also provide a clear statement of regulatory purpose of Regulation Z as a whole:

The goals of the amendments are to protect consumers in the mortgage market from unfair, abusive, or deceptive lending and servicing practices while preserving responsible lending and sustainable homeownership; ensure that advertisements for mortgage loans provide accurate and balanced information and do not contain misleading or deceptive representations; and provide consumers transaction-specific disclosures early enough to use while shopping for a mortgage.

104 *Facts for Consumers: High-Rate, High-Fee Loans (Section 32/HOEPA Mortgages),* Federal Trade Commission, http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea19.shtm (last accessed Nov. 18, 2011).

finance charges, by a specified future date).[105] Most significantly, the lender must provide a table of total-annual-loan-cost (TALC) rates, which represent a good faith projection of the total cost of the reverse mortgage to the borrower.[106] By definition, all costs and charges must be included, whether they are finance charges or not.[107] The high initial costs of a reverse mortgage mean that TALC rates are normally highest in the first several years of the loan.[108] Should a creditor be entitled to additional compensation in the form of a portion of home equity or property appreciation (which a creditor will sometimes request as reciprocation for charging a reduced interest rate or even not charging interest), the projected total cost of credit must include this portion.[109]

Further, the Real Estate Settlement Procedures Act (RESPA) of 1974, which governs closing costs and settlement procedures, requires that borrowers (eventually including reverse mortgage borrowers) receive disclosures of loan costs at key steps in the lending process. Extensive November 2008 amendments to RESPA further require lenders to provide a standard Good Faith Estimate (GFE) that clearly discloses key terms and lending costs.[110] Even then, recent changes by the Federal National Mortgage Association (Fannie Mae) that allow for higher margins for reverse mortgage lenders mean that even though the borrower signs a disclosure form from the lender which states the maximum amount the borrower can receive, that amount may change in the time between when a borrower submits an application and the time the loan is actually funded.[111]

While federal regulation of reverse mortgages abounds, and numerous federal agencies, including the Department of Justice, SEC, and the FBI have investigated and prosecuted instances of mortgage and securities fraud, including "reverse mortgage scams,"[112] HUD remains the primary federal agency promulgating regulations for reverse mortgages, and HUD fulfills this responsibility primarily through its promulgation and enforcement of Mortgagee Letters. Yet a still nascent federal entity, the Consumer Financial Protection Bureau (CFPB), may soon assume significant regulatory responsibilities over reverse mortgage lending. The Bureau began operation on July 21, 2011, one year after

---

105 *Introduction to Home Equity Conversion Mortgages (HECM),* NeighborWorks America (2010), http://www.hecmcounselors.org/sites/default/files/uploads/pdfs/HO111%20Manual_FINAL_11082011.pdf.

106 Rohmer & Miller, *supra* n. 5, at 439.

107 *See* the Commentary to Regulation Z, 12 USC § 226.33(c)(1)-1.

108 Rohmer & Miller, *supra* n. 5. The National Center for Home Equity Conversion provides an excellent online reverse mortgage eligibility and cost calculator, http://reverse.org/reverse-mortgage-calculator/ (accessed Nov. 12, 2011).

109 Regulation Z, 12 USC § 226.33(c)(3); Commentary § 226.33(c)(3)-1. Recent news of federal bailouts of the U.S. financial system, in particular, the $700 billion "Emergency Economic Stabilization Act of 2008" (H.R. 1424) has enabled the $300 billion "Housing and Economic Recovery Act of 2008" or "HERA" (H.R. 3221) to go largely unnoticed. HERA seeks to curb the very abusive and deceptive home mortgage practices that led to the subprime mortgage crisis itself.

110 U.S. Dept of Housing & Urban Dev., *Fads about RESPA for Industry,* http://www.hud.gov/offices/hsg/ramh/res/resindus.cfm (updated Mar. 23, 2010).

111 Adrian Saenz, *Changes in reverse mortgages worry industry,* Ventura County Star, http://www.vcstar.com/news/2009/may/01/bc-us--leisure-living-reverse-mortgage-2nd-ld-in/ (May 1, 2009).

112 Lonny A Breuer, Assistant U.S. Attorney General, *Mortgage Fraud, Securities Fraud, and the Financial Meltdown: Prosecuting Those Responsible,* Written Statement to the Judiciary Committee of the U.S. Senate (Dec. 9, 2009), http://www.judiciary.senate.gov/pdf/09-12-09BreuerTestimony.pdf.

President Obama signed the Dodd–Frank Wall Street Reform and Consumer Protection Act.[113] On January 4, 2012, President Obama exercised his recess appointment powers to name former Ohio Attorney General Richard Cordray as the new head of the Consumer Financial Protection Bureau. While Cordray has wasted no time exercising his regulatory powers to investigate matters from bank overdraft fees to reverse mortgage lending, the larger debate about the expansive powers of the CFPB continues.[114] In early February 2012, the CFPB began to reveal its plans for rulemaking practices in general and its oversight of the mortgage industry in particular. While the Bureau is still developing its regulatory muscles, it will likely focus its attention first upon the largest lenders (of traditional and reverse mortgages), and then upon those with a disparate number of complaints compared to lenders of similar size.[115] CFPB's earliest language about reverse mortgages has already prompted the first of many comments in what will remain a spirited debate about the Bureau's role in regulating and possibly reshaping HECM products.[116] Even more broadly, the Bureau includes an Office of Financial Protection for Older Americans, a development that has likewise been met with both celebration and skepticism.[117]

113 The preamble of the Dodd-Frank Act states it is "[a] bill to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes." For full text and legislative history of Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub's. 111-203, H.R. 4173), *see* http://www.govtrack.us/congress/bill.xpd?bill=h111-4173 (accessed Nov. 18, 2011).

114 President Obama originally nominated Harvard Law Professor Elizabeth Warren to lead the CFPB, but her history of outspoken criticism of business practices in the U.S. financial industry assured that her nomination met with strident opposition from many Republicans in the House of Representatives. Fearful of the impact of a potential Warren appointment to head the CFPB, Rep. Spencer Bachus (R-Ala.) even proposed a bill that would have CFPB leadership distributed among a committee of five persons rather than centralized under one agency director. For an overview of Bachus' bill, H.R. 1121, which did not pass, *see* http://1.usa.gov/xQRUDD. For an article describing President Obama's recess appointment of former Ohio Attorney General Richard Cordray to head the CFPB, *see* Helene Cooper and Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chi*ef, N.Y. Times (Jan. 4, 2012), http://nyti.ms/yupmm8 (accessed Feb. 28, 2012). Some Republicans claim that Cordray's appointment was unconstitutional because the Senate was holding minutes-long sessions in early January for the sole purpose of avoiding a Senate recess during which appointments could be made. *See Richard Cordray, Consumer Financial Protection Bureau, Touts Enforcement Powers*, Huffington Post (Jan. 4, 2012), http://www.huffington post.com/2012/01/24/richard-cordray-consumer-bureau_n_1228519.html (accessed February 28, 2012).

115 *See* Elizabeth Ecker, *CFPB Reveals Plans for Mortgage Oversight, Rulemaking*, Reverse Mortg. Daily, Feb. 20, 2012, http://reversemortgagedaily.com/2012/02/20/cfpb-to-tackle-largest-nonbank-lenders-first/ (accessed Feb. 28, 2012).

116 Mary Griffin, *Older Americans and the CFPB* (May 25, 2011), http://www.consumerfinance.gov/older-americans-and-the-cfpb/ The language is as follows:

> Americans aged 62 and older are eligible for reverse mortgages. If you are over 62 and own a home, you can borrow against the equity of that home in small amounts over time. Repayment is due when you no longer own the home or are absent for 365 days. This can help create a steady income during retirement, but it creates a large debt load. Reverse mortgage borrowers need to understand and be prepared for that risk.

117 *Id.*

VII. Conclusion

Even if home equity values are slow to recover over the next many years, aging baby boomers will continue to face expenses late in life that lead them to consider reverse mortgages. The reverse mortgage lenders who remain in today's marketplace have weathered the diminished home values and decreased reverse mortgage loan activity of the past several years. Yet the greatest uncertainty for HECM lenders is that of an uncertain regulatory future. HUD Mortgagee Letters have long clarified the rules for lenders in the HECM program. TILA and HOEPA have long required numerous disclosures of loan costs. Yet lenders might wonder if more scrutiny and more possible regulation via the CFPB or at the level of individual states is really the answer, or if these are simply inevitable consequences of the failure of existing institutions to curb abuses.

No single solution exists to ensure that reverse mortgages are marketed ethically, that consumers who purchase them are informed about the terms of the loan and the risks therein, or that once acquired, the reverse mortgage will be used appropriately. The need for vigilance by and on behalf of aging consumers in reverse mortgages and other financial transactions late in life is ongoing and ever changing. To stop searching for new solutions and pressing for new protections for the elderly would be to fail the generation that has given us so much at the time when they often need us most. Even for those of us who are not yet "old" but who believe that "the best is yet to be," and aspire to be able to grow old with dignity, autonomy, and some degree of comfort, significant incentive exists to ensure that financial products to meet seniors' needs are both available and appropriate. If we work hard enough to establish and maintain security for aging Americans, we, too, might enjoy "the last of life, for which the first was made."[118]

118 As spoken by the protagonist in Robert Browning's poem, *Rabbi Ben Ezra.* Published in Dramatis Personae (1864), http://rpo.library.utoronto.ca/poem/295.html (accessed Nov. 18, 2011).