

AS ONE MIGHT expect, the foreclosure of a reverse mortgage in New York is more challenging than other foreclosures. First, there are detailed statutes to be complied with (RPL § 280, the reverse mortgage for persons 60 years of age or older and RPL § 280-a, for persons 70 years of age or older). Then, there is the pervasive problem of who to serve when the borrower has died. (Death is not the sole basis for concluding a reverse mortgage, but it is likely the most common.)

As for the detailed statutes, each discusses the requirements for a reverse mortgage at its inception. Failure to comply would no doubt be an impediment to foreclosure, so any lender making such a loan must be certain that it is in compliance. While the details of the requirements are important, they are best left to a reading by lenders and servicers.

Additionally, there are other mandates such as items to which a reverse mortgage will be subject. For example, the borrower 70 or older *must* be given lifetime possession. (For the borrower 60 or older, a fixed-term can be in the mortgage.) For the borrower 70 or older, an escrow account must be maintained by the lender for taxes and insurance. (This is an option left up to the lender for the 60-year old borrower.) If the lender suspends or ceases payments to the borrower, or makes late payments, then it is subject to forfeiture of twice the interest that would have been earned in the period in which the payments were suspended, ceased, or made late. The sale or transfer of the mortgaged property must result in termination of the reverse mortgage loan—that is, the due-on-sale provision is mandatory.

Notification

If foreclosure becomes necessary, the borrower has a right to designate a third party who shall be notified first. In the absence of such designation, the holder of the reverse mortgage must notify the local or county office on aging/senior services of its intent to commence a foreclosure action. The notified entity is then required to take appropriate action to protect the interests of the mortgagor. This is an unusual predicate confined solely to reverse mortgages.

Mindful that the death of a borrower is typically the event that triggers the need to foreclose, the lender or servicer is immediately confronted with an obvious problem—the

absence of a borrower. In New York, title to the real estate of a deceased person passes automatically by operation of law to the deceased's heirs at law (if there was not a will) or to the beneficiaries (if there was a will). This means that the property owners to be foreclosed upon are these heirs or beneficiaries. Who are they? File information at the inception of the mortgage may be helpful, but may not be complete or accurate at the time of the borrower's death.

In some instances, of course, family members (if there are any) will file an estate proceeding: either administration if there is not a will or probate if there is a will. Then, not only will a legal representative be appointed, but there will be an official court record as to who the heirs or beneficiaries are. This record will allow service of process upon the individuals who actually own the real estate.

Reverse Mortgage Foreclosures

Judicial Perspective from New York

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Dilemma & Resolution

However, appointing an estate representative does not always occur and even when it does, the estate might not be attended to for many months. If the foreclosure is to proceed, the foreclosing lender is faced with a dilemma. When its investigation reveals, for example, that the deceased didn't have a will (that anyone knows about) and was survived by two sons, then service of process should be affected upon those two offspring.

After the foreclosure sale, though, either the title company for the bidder at the sale, or if

the lender takes back the property, the title insurer for its purchaser will in essence ask "how do we know that the two sons you served were the only heirs at law?" Without some confirmation from a court proceeding, title insurers will be reluctant to assume that a mere investigation revealed all of the facts. After all, if there is another child, and the two sons are trying to keep the property from that sibling, a claim could arise in the future. In short, just making a decision about who to serve may not save the day.

An alternative is for the foreclosing lender itself to have an estate representative appointed. Unfortunately, this can be time-consuming and expensive, although there may not be much choice. It is the fact of the deceased borrower that adds considerable time (and sometimes uncertainty) to the foreclosure of the reverse mortgage in a judicial state like New York. ■



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