



**Getting Loan Mods for Successors:
Saving the Family Home After a Death or Divorce**

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Problem


Divorce, permanent relocation, or death of a borrower, and your client is:

- a remaining co-borrower
- a non-borrower, owner of the property (heir)

But the servicer

- won't talk to your client
- says she can't apply for a loan modification

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What we'll talk about

- Figuring out if your client is on the note or just subject to the mortgage
- Signing rules for a remaining co-borrower
- Assumptions
 - Should the client assume the mortgage?
 - Can the client assume the mortgage?
- Special rules
 - HAMP
 - Freddie & Fannie
 - FHA
- Practice tips
- Litigation theories

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Is your client on the note?

- “Mortgage” = promissory note + mortgage
- Promissory note: the promise to repay a fixed amount of money on certain terms (client should have a copy with original closing docs)
- Mortgage: the security instrument, which gives the creditor the right to foreclose if the note is not paid (publicly recorded; client should have a copy with closing docs)

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Is client's interest "subject to" the mortgage?

- Mortgage is the security interest in the land
- Most likely your client's interest is "subject to" the mortgage
 - if your client signed the mortgage, or
 - received her interest in the home **after** the mortgage was signed
- If your client was on title at the time the mortgage was taken out, and didn't sign the mortgage, her interest may not be subject to the mortgage > talk with an attorney!

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On title, but not on the note

- May not realize it; she went to the closing and signed the mortgage and other docs
- Usually the name(s) on the monthly mortgage statements are the borrower(s) on the note
- Client has no personal liability; could walk away with no risk of deficiency
- Mortgage servicer will often refuse to talk with her

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Does your client own the home?

Was she on title with “right of survivorship”?

- A way of owning property jointly where when one owner dies, his or her interest flows automatically to the remaining owner(s)
- The property passes outside of probate (does not pass through the will or to the heirs at law)
- Should be no need to probate an estate (in order to deal with the house)

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Does your client own the home?

- Spouses who owned the home jointly as Tenants by the Entireties (TBE)
 - Married at the time of the deed
 - Deed says “as Husband and Wife”
 - Automatic right of survivorship
- Client and decedent owned the home as joint tenants with right of survivorship

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Does your client own the home?

Deed

George Smith ("grantor"), hereby conveys to Gerald Oster and Olivia Johnson, as joint tenants with right of survivorship ("grantees"), the property at:

All that tract or parcel of land lying and being...
Land Lot 235, District 13, Lot B...
the plat recorded at...

Deed

George Smith ("grantor"), hereby conveys to Gerald and Olivia Johnson, as Husband and Wife ("grantees"), the property at:

All that tract or parcel of land lying and being...

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Does your client own the home?

- Your client inherited through a will
- Your client inherited through intestate law
- Your client is the remaining beneficiary of an inter vivos trust
- Your client was awarded the home in a divorce decree or property settlement agreement

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Client not the sole owner?

- If client is living in the home, wants to save the home, and needs a loan modification: she needs to become the **sole owner**.
 - Other heirs willing to cooperate? Heirs can sign quit claim deeds or sign over their interest in the probate process.
- Or, other owners willing to sign on and participate in loan mod process
 - Are they living in the home?

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Client is a Co-Borrower (signed the note)

- Good news! Much easier to deal with.
- The trick: showing the servicer that the other borrower (deceased or divorced and out of the picture) does not need to sign docs or participate in the process.
- Identify what rules apply:
 - FHA-insured loan?
 - Fannie or Freddie owned?
 - HAMP-participating servicer?

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What Rules Apply?

- FHA insured (HUD mortgagee letters)
 - FHA loan # on monthly statements and on the mortgage
- Fannie Mae owned (Fannie Servicing Guide)
 - <https://knowyouroptions.com/loanlookup>
- Freddie Mac owned (Freddie Servicing Guide)
 - <https://ww3.freddiemac.com/loanlookup/>
- HAMP participating servicer (Treasury's MHA Handbook)
 - <http://www.makinghomeaffordable.gov/get-started/contact-mortgage/Pages/default.aspx>

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Co-borrower client: Fannie Mae or Freddie Mac

- Fannie Mae: Proof of income and signature on loan mod documents by all original borrowers on the loan, unless a divorce decree or legal separation agreement can be provided.
- Servicers have discretion not to require the signature of a co-borrower in situations of contested divorce
- Fannie Mae Servicing Guide, Sec. 609.03.06
- Freddie Guide at Chapter C65.7

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Co-borrower client: HAMP

- “Unless a borrower is deceased or divorced, all parties who signed the original loan documents or their duly authorized representatives should sign HAMP documents.” (MHA Handbook V 4.4, Ch II, Sec. 5.7)
- Servicer can waive signature requirement for “mental incapacity, military deployment or contested divorce.” (Sec. 5.7)
- Servicers should use “good business judgment” on when to waive signatures. (Sec. 5.7)
- Occupying co-borrower may be considered for HAMP if a quitclaim deed has been recorded showing that non-occupying co-borrower has relinquished all rights in the property. (Sec. 1.2)
- Death or Divorce during a TPP (Sec. 8.9.1)

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Practice Tips: Co-borrower Client

Provide servicer with:

- Death certificate showing the other co-borrower is deceased
- Divorce decree showing that your client was awarded the home
- Recorded quitclaim deed showing that your client is the sole owner of the home
- Letter from the other co-borrower stating that (s)he is not living in the house, has no interest in the house, and is not contributing financially to mortgage payments

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- So..... what do I do if my client wasn't a borrower? (client did not sign the note)
- First step: Client needs **information** in order to weigh the options.

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Non-borrower: Right to Information

- Servicers may cite privacy regulations in refusing to communicate with a non-borrower owner
- Gramm-Leach-Bliley Act
- GLBA prohibits covered financial institutions from disclosing “nonpublic personal information” to a “nonaffiliated third party.” 15 U.S.C. § 6802(a).

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Right to Information

- Much information about the mortgage is public:
 - the fact that it exists (publicly recorded in deed records)
 - original principal balance, maturity date
 - once foreclosure starts: the fact of delinquency, current balance owed
 - Generally available loss mitigation programs
- You don't need original borrower's financial info; what matters for loan mod is your client's info
- Successor homeowner (client) is not a "non-affiliated third party." She owns the home secured by this mortgage.

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Right to Information

- Specific exceptions to GLBA apply. Disclosure is permitted when it is:
 - Pursuant to a transaction requested by the consumer
 - With the consumer's consent or at the consumer's direction
 - In connection with servicing the consumer's account
 - To the consumer's representative (e.g., an estate representative)
 - To someone with a beneficial interest "relating to the consumer" (e.g., successor owner of the home)
- 15 U.S.C. § 6802 (e)(1), (2), and (3)

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CFPB Reg and Bulletin

- 12 CFR 1024.38(b)(1)(iv)
 “A servicer shall maintain policies and procedures... reasonably designed to...
 (iv) Upon notification of the death of a borrower, promptly identify and facilitate communication with the successor in interest of the deceased borrower with respect to the property secured by the deceased borrower’s mortgage loan.”
- This section of RESPA not privately enforceable... but send a Notice of Error!

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CFPB Reg and Bulletin

- CFPB Bulletin 2013-12 (Oct. 15, 2013) explains how servicers can comply with the Reg:
- Servicers must let successors in interest know what documents they need to provide for communication & assumption
- Servicers must let successors in interest know what their options are
- Servicers must develop policies for suspending foreclosure and processing assumption and loan modifications simultaneously

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Once you get information: What does the client want?

- Always start with what your client wants long-term
 - Want to keep the house? (condition?)
 - Want to be personally liable on the note?
 - Is their ownership interest subject to the mortgage? (nonpayment > foreclosure)
 - Can they get a loan mod? (pass NPV test?)
 - How great is the risk of a deficiency?

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What does the client want?

- Can client afford the existing payment?
- Is the loan current?
- After most intra-family transfers (via death, divorce, or transfer to a spouse or child of the borrower), the successor has the right to **just keep paying**.
- Creditor cannot foreclose based on the transfer (Garn-St Germain Act, discussed below)

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To assume or not to assume...

- Does client need a loan modification?
- Does client want to **assume** the note?
 - Assuming will mean the client is personally liable on the note
 - Not assuming the mortgage usually means losing the home (if the client needs a loan modification)
- This is a financial, legal, and emotional assessment that has to happen **FIRST**

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What's an assumption?

- Subjects client to personal liability on the note
- Gives clients all rights of a borrower
- Does not relieve original homeowner of personal liability unless creditor agrees

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Starting Point: **The Client** gets to decide whether or not to assume the mortgage

- **Not** the servicer; **not** the mortgagee
- *Olson v. Etheride*, 686 N.E.2d 563 (Ill. 1997) (contracting parties can modify who has primary responsibility for payment of a debt, without reference to the wishes of the creditor of that debt)
- Restatement 2nd of Contracts § 323 Comment a (“The assent of the obligor is not ordinarily necessary to make an assignment valid.”)
- See *generally* Restatement 3rd of Property (Mortgages), §§ 5.1, 5.2 (transfers with and without assumption of liability)

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State contract law: mortgages are freely assumable

Generally, contractual rights can be freely assigned unless the assignment is clearly restricted. *Burkhardt v. Bailey*, 260 Mich.App. 636, 653, 680 N.W.2d 453 (2004). An assignee stands in the same position as the assignor and acquires the same rights, subject to the same defenses, that the assignor possessed. *Id.* However, it has long been established that contracts of a personal nature, which contemplate personal association and services, are an exception to this rule and are not assignable without consent. *Northwestern Cooperage & Lumber Co. v. Byers*, 133 Mich. 534, 538, 95 N.W. 529 (1903); see also *Board of Trustees of Michigan State Univ. v. Research Corp.*, 898 F.Supp. 519, 521-522 (W.D.Mich., 1995). “Personal contracts are those involving a personal trust in a party or the special skills and knowledge of a particular individual or group of individuals.” *Board of Trustees, supra* at 522.

Virchow Krause & Co. v. Schmidt, 266271, 2006 WL 1751835 (Mich. Ct. App. June 27, 2006).

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How Do You Get An Assumption?

- No necessary formal words
 - “Any words indicating the transferee’s intent to undertake personal liability for the obligation will suffice.” *Carpenter v. United States*, 69 Fed. Cl. 718, 725 (U.S. Claims 2006)
 - Restatement 3rd of Property, Mortgages, 5.1
- Making payments, seeking modification can show assumption
 - *Chicago Assets Co. v. Watrous*, 262 Ill.App. 254 (1st Dist. 1931)
- Best if you can point to a specific communication saying “I hereby assume and promise to pay this debt.”
 - *Brush v. Wells Fargo Bank, N.A.*, 911 F.Supp.2d 445, 459-462 (S.D. Tex. 2013)

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Assumptions Help Mortgagees

- Absent a release, the mortgagee can still sue the original mortgagor; assumption adds another party to go after on the debt
- Restatement 3rd of Property: Mortgages § 5.1
- *Bay v. Williams*, 1 N.E. 340 (Ill. 1884) (granting mortgagee right to sue to collect mortgage debt from grantor even though mortgagee was not a party to the assumption)

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Mortgagees Can Restrict Assumptions, IF The Restrictions Are In The Contract

- *Olson v. Etheride*, 686 N.E.2d 563 (Ill. 1997)
- Restatement 2nd of Contracts § 323 Comment a (“The assent of the obligor is not ordinarily necessary to make an assignment valid.”)

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Due-on-Sale Clauses

- Permit the mortgagee to cancel the mortgage contract if the property is transferred
- Don't usually forbid assumptions, per se, but assumptions of residential mortgages seldom happen outside a transfer of ownership
 - See Restatement 3rd of Property, §§ 5.1, 5.2
- No due-on-sale clause, no right to foreclose when property transferred
 - *Coffing v. Taylor*, 16 Ill. 457 (1855)

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Example

“If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender’s prior written consent, Lender may require immediate payment in full of all sums secured by the Security Instrument.”

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Courts Strike Down Due-on-Sale Clauses

- In 1970s, homebuyers took over the seller’s existing mortgage rather than taking out a new mortgage at double-digit interest rates
- Banks tried to enforce “due-on-sale” clauses against these home buyers / loan assumers
- Courts across the country (but not in Illinois, that I can find) often held that due-on-sale clauses were unenforceable as a matter of state property law.
 - *E.g., Wellenkamp v. Bank of Am.*, 582 P.2d 970, 976-77 (Cal. 1978).
 - Key: unreasonable restraint upon alienation of property

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Garn-St Germain Depository Institutions Act

- Garn-St. Germain Depository Institutions Act at 12 U.S.C. § 1701j-3 *et seq* (1982)
- Pre-empts state laws that formerly protected homeowners against bank's oppressive use of due-on-sale clauses:

“Notwithstanding any provision of the constitution or laws (including the judicial decisions) of any State to the contrary, a lender may ... enter into or enforce a contract containing a **due-on-sale clause** with respect to a real property loan.”

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Silver Lining: Exceptions to Garn

- A due-on-sale clause cannot be enforced when an interest in real property is transferred:
 - Via devise, descent, or operation of law upon the death of a joint tenant or TBE
 - To a spouse or child of the borrower
 - To a spouse pursuant to a divorce decree or separation agreement
 - And others. See 12 USC § 1701j-3(d)

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What Garn Means

- You can't use a due-on-sale clause to refuse to honor an assumption that is in one of the protected classes
- Fannie Mae Servicing Guide § 408 recognizes this legal reality, calling for "non-qualifying" assumptions for widows, heirs, divorcees
- See, e.g., *Brush v. Wells Fargo Bank, N.A.*, 911 F.Supp.2d 445, 459-462 (S.D. Tex. 2013) (citing legislative history showing that Congress carved out exceptions to due-on-sale clauses in Garn St. Germain because it believed "that it would be unfair and inappropriate for lenders to enforce due-on-sale clauses under certain circumstances – such as involuntary transfers resulting from the death of a borrower.")

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But The Mortgage Has Been Accelerated!

- So???
- Loan mods are always offered to people after the mortgage has been accelerated
- Ask for basis of denial
 - No law forbidding assumptions
 - Never seen investor guidelines that forbid assumptions
- Remember—an assumption helps the ultimate owner of the loan by giving them more recourse in the event of non-payment

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Right to Assume

- Bottom line: right to assume after a Garn-exempt transfer
 - Even if the loan is in default
 - Without credit screening
- Once you have assumed, right to apply for a loan modification under existing programs, same as any borrower.

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Assumption and Modification

- But, most people don't want to assume unless they can get a modification
- Could end up on the hook (personally liable) for a debt you can't afford
- Most investors have implemented RULES requiring servicer to evaluate first for loan modification, then approve simultaneous loan mod + assumption!

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HAMP Rules

- Non-borrowers who inherit or are awarded sole title following a death or divorce may apply for a HAMP mod; “servicers should collect an initial package from the non-borrower who now owns the property” and evaluate it “as if he or she was the borrower.” (MHA Handbook, Ch II, Sec. 8.8)
- Surviving homeowner remains eligible for new TPP, even if gets booted out of existing TPP (8.9.2)
- Requires servicer to stay foreclosure for non-borrower while assumption process chugs forward (8.9.2)
- Simultaneous assumption and modification IF “applicable law” and “investor guidelines” permit assumption (8.8)

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Freddie Mac

- Provides for simultaneous modifications and assumptions, after borrower’s death, by someone, “like a surviving spouse,” with an ownership interest in the property
 - B65.12, B65.28 in the Single Family Seller Servicer Guide
 - Freddie Mac Bulletin 2013-3 (Feb. 15, 2013)
- Points of concern:
 - What happens in divorce?
 - Language not entirely clear that assumption can’t involve new credit screening

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Fannie Mae

- References “exempt” transactions—basically the Garn-St Germain exceptions
- Requires communication with new owners in exempt transactions
- Loan mod requests for new owners in exempt transactions have to be evaluated as if they came from borrowers
- See Fannie Mae Lender Letter LL-2013-04, and Fannie Mae Servicing Guide Announcement SVC-2013-17; Fannie Guide Sec. 408.02

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FHA rules

- HUD has a general policy of free assumability
- With a credit review
- Unless the new owner is via “devise or descent”
- HUD Handbook 4330.1 Rev-5 Chapter 6
- Not quite clear where that leaves divorcees

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Practice Tips: things you may hear from servicers

- The house is in an estate. Properties in an estate cannot qualify for HAMP.
- The property is not owner-occupied.
- Ms. Smith is not the borrower. Non-borrowers cannot be considered for HAMP.
- Ms. Smith does not qualify to assume the loan because the DTI is 50%.
- Ms. Smith can only assume the loan if it's current.
- This investor does not allow for LAMP (our "loan assumption and modification program").

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Practice Tips: divorce or family breakup

- Work with the family law attorneys
- Get disposition of debts in family law court:
 - Who is responsible for mortgage?
 - Order assigning rights and responsibilities/ acknowledging assumption of mortgage by remaining spouse?
- Get disposition of title in family law court
 - Divorce decree should clearly award the property
 - And/or quit claim deed to remaining spouse
- Consider consolidating the foreclosure into the divorce proceeding
 - *In Re the Marriage of Schweih's*, 584 NE2d 472 (Ill. App. 1991)
 - *In Re Marriage of Elliott*, 638 NE2d 1172 (Ill. App. 1994)

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Practice Tips: after a death

- Property passes automatically upon death to heirs
 - True whether intestate succession or via a will
- Trick is getting the servicer to recognize
 - Estate?
 - Title company opinion?

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Do you need to open an estate?

- How was the property held?
 - Property held in joint tenancy, tenancy by the entireties, land trust, passes outside of probate: there is nothing to probate!
 - Affidavit of joint tenancy and copy of death certificate
- Was there a will?
- Did the borrower die intestate?
- Is there a faster/easier way:
 - Fast-track probate for smaller estates?
 - Affidavit of descent or affidavit of heirship?, coupled with quit claim deeds from other heirs?

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Documents to have ready

- Death certificate (unaltered – some clients black out SS# of the deceased)
- Proof your client owns the home
- Proof your client is the representative of the estate (if you open an estate)
- Proof of the homeowner's insurance in your client's name (start this early – it can slow you down)

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Inform the servicer in writing of client's ownership interest

- Tell the servicer in writing that your client is a the successor owner of the home
- Request information about the loan and available loss mitigation options
- Cite 12 CFR § 1024.38(b)(1)(iv)

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Servicer Noncompliance

- Send a Notice of Error under RESPA, 12 CFR § 1024.35.
 - Set up a private right of action for servicer's failure to correct the error
 - Actual damages, costs, attorney's fees
 - Statutory damages if pattern and practice
- Tell the CFPB!
 - Send an email to: CFPB_servicingrules@cfpb.gov.
 - File a complaint: www.consumerfinance.gov

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Servicer Noncompliance

The screenshot shows the CFPB website interface. At the top, there is a navigation bar with links for HOME, INSIDE THE CFPB, GET ASSISTANCE, PARTICIPATE, LAW & REGULATION, and SUBMIT A COMPLAINT. The main content area features a large blue banner with the heading "Everyone has a story" and a sub-heading "Did you know that your stories and complaints help inform the work we do to create a safer marketplace?". Below this, there is a section titled "You could still end up paying interest on a zero percent interest credit card offer" with a sub-heading "What could be better than zero percent interest for one year? Nothing, nada, free...right? Not exactly. Credit card companies market these promotions as a way for you to save money. But, what some credit card companies may not have been telling you is that some purchases could cost you more than you expect. Learn more about credit card promotion offers and see why they could cost you more than you think." To the right of this section, there is a "SUBMIT A COMPLAINT" sidebar with options to "Submit a complaint", "Check the status of your complaint", and "Whistleblowers". At the bottom, there is a "GET ASSISTANCE" section with three buttons: "SUBMIT A COMPLAINT", "TELL YOUR STORY", and "PAY FOR COLLEGE". The footer of the page includes the URL "http://www.consumerfinance.gov/complaint" and the date "1:00 PM 9/9/2014".

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Special issues: reverse mortgages

- Mortgage for seniors; interest accrues, no payment due until a triggering event (borrower dies, sells, or permanently moves out of the house)
- Heirs can redeem the property for 95% of the appraised value
- Mortgagee Letter 2014-07 (April 25, 2014)

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Reverse mortgages

- Surviving non-borrower spouses should be protected from displacement, but HUD issued regulations that violate the statute
- *Bennett v. Donovan*, 703 F.3d 582 (D.C. Cir. 2013) (surviving spouses had standing to sue HUD)
- *Bennett v. Donovan*, 2013 WL 54424708 (D.D.C. Sept. 30, 2013) (HUD's regulation allowing for foreclosure while surviving spouse still lived in the home was invalid)
- *Plunkett v. Donovan*, ___ (D.D.C. Aug. 28, 2014) (remanding to HUD to consider whether foreclosure timelines are now invalid as to all surviving spouses)

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Litigation Issues

- Breach of contract
- Breach of duty of good faith and fair dealing
- Promissory estoppel
- UDAP (but exception for regulated areas?)
- FDCPA
- RESPA – failure to respond to NOE
- Court's equitable powers
- Lack of good faith in settlement conferences/mediation program

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Michigan law

- Michigan Regulation of Collection Practices Act, MCL 445.252
- Michigan statute regarding Due on Sale Clauses, MCL 445.1621-1628
 - “A lender shall not enforce a due-on-sale clause in a residential real property loan in any circumstances under which enforcement is prohibited under section 341(d) of the Garn-St Germain Act.” MCL 445.1626.
 - \$5,000 civil fine per violation, attorney's fees, and injunctive relief. MCL 445.1628.

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Discrimination claims

- FHA and ECOA
- Protected class:
 - Women?
 - Elderly?
- Disparate impact vs. disparate treatment
- Getting data

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Helpful Language in the Note and/or Mortgage

- “Any person who takes over these obligations. . . is also obligated to keep all of the promises made under the Note.”
- “The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 17.”
- Read the note and security deed with a highlighter!

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Good case law

- *Brush v. Wells Fargo Bank, N.A.*, 911 F.Supp.2d 445, 459-462 (S.D. Tex. 2013) (successor had the right to assume the mortgage, and had in fact assumed by signing loan mod agreement)
- *McGarvey v. JPMorgan Chase Bank, N.A.*, 2013 WL 5597148 (E.D. Cal. Oct. 11, 2013) (allowing claims for negligence and unfair and deceptive practices to proceed where mortgage servicer led successor to believe she would be approved for a loan modification)

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“Investor Restrictions”: get the PSA

- “If it becomes aware of a transfer of the property, the Master Servicer will exercise its rights to accelerate the maturity of such Mortgage Loan under the ‘due-on-sale’ clause.”
- “But the Servicer shall not exercise any such rights if prohibited by law from doing so.”
- “If unable to enforce the ‘due-on-sale’ clause, the Master Servicer will enter into an assumption and modification agreement with the new person to whom the property was conveyed.”

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Language You Might Find in PSA's

- “In connection with any such assumption, no material term of the Mortgage Note (including but not limited to the related Mortgage Rate and the amount of the Monthly Payment) may be amended or modified, except as otherwise required pursuant to the terms thereof.”

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Language You Might Find in PSA's

- "Notwithstanding the foregoing paragraph... the Master Servicer shall not be deemed to be in default, breach or any other violation of its obligations hereunder by reason of any assumption of a Mortgage Loan by operation of law or by the terms of the Mortgage Note or any assumption which the Master Servicer may be restricted by law from preventing, for any reason whatever."

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Bankruptcy

- Basic principle in bankruptcy that a “claim” includes a debt secured by the debtor’s home, even if debtor has no personal liability on the note.
- Non-borrowers that are protected under GSG must be allowed to de-accelerate the note and cure arrearage in a chapter 13 plan.
 - See *In Re Jordan*, 199 B.R. 68 (Bankr. S.D. Fla. 1996); *In Re Curinton*, 300 B.R. 78 (M.D. Fla 2003); *Citicorp Mortg. v. Lumpkin*, 144 B.R. 240 (Bankr. D. Conn. 1992); *In Re Alexander*, 20 Fla. L. Weekly Fed. B 463 (Bankr. N.D. Fla. 2007); see also *Johnson v. Home State Bank*, 501 U.S. 78 (1991).
- Servicer required by bankruptcy court to engage with GSG-protected debtor in bankruptcy loss mitigation procedures, even though bankruptcy debtor was not on the note and mortgage. *In Re Smith*, 469 B.R. 198 (Bankr. S.D. N.Y. 2012).

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Questions?

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