Medley of Mortgage Issues

Tara Twomey, Of Counsel, National Consumer Law Center
Odette Williamson, Staff Attorney, National Consumer Law Center
Geoff Walsh, Staff Attorney, National Consumer Law Center

Lauren Mahoney
National Consumer Law Center

December 8, 2014

This Webinar is provided by the National Consumer Law Center and the Legal Assistance Foundation (LAF) of Chicago with a grant from the Office of the Illinois Attorney General.

Presenter/Moderator – Tara Twomey

- Tara Twomey is currently Of Counsel to the National Consumer Law Center and the Project Director for the National Consumer Bankruptcy Rights Center.
- She has previously lectured at Stanford, Harvard and Boston College Law Schools.
- She is a contributing author of several books published by the National Consumer Law Center, including Foreclosures and Bankruptcy Basics.

Presenter – Odette Williamson

- Odette Williamson has been a staff attorney at NCLC since July, 1999.
- She attended Tufts University and Boston College Law School.
- She is co-author of NCLC's Foreclosures, and Foreclosure Prevention Counseling.

Presenter – Geoff Walsh

- Geoffry Walsh is a staff attorney at the National Consumer Law Center (NCLC) who focuses on foreclosure prevention, consumer bankruptcy, and other consumer credit issues.
- Walsh is co-author of *Foreclosures*, *Consumer Bankruptcy Law and Practice*, Foreclosure Prevention Counseling and others.
- Walsh earned his B.A. from University of Michigan and is a graduate of Temple University Law School.

Mortgage Medley:
An Update on Mortgage Related Programs

NCLC®
NATIONAL CONSUMER LAW CENTER®

Geoff Walsh
Odette Williamson
Tara Twomey
National Consumer Law Center

Recent Developments in FHA Loss Mitigation

Topics

- Revisions of Loss Mitigation Waterfall
- 2015 Servicing Handbook
- Escalations & Notices
- Distressed Asset Sales Program (DASP)

Current FHA Foreclosure Rates

- Slightly better 2014 than 2013
- But, 7.6% now in seriously delinquent status
- Very bad for certain origination years:
  - 2007 & 2008: 24% seriously delinquent

– HUD, FHA Single-Family Mortg. Ins. Fund Programs, Report to Congress FY 2014 Q31 (Mar. 31, 2014)

FHA Serving Handbook – Coming 2015

- On September 11, 2014, HUD issued a draft version of its Single Family Housing Policy Handbook related to mortgage servicing.
- HUD claims the new handbook consolidates policy and provides a comprehensive guide for servicing.
- Comments closed Nov. 14, 2014.

2015 Servicing Handbook Issues

- Effect of guidance outside handbook
- Borrower income definitions
- Successors
- Detail on waterfall and FHA-HAMP in particular
- Face-to-Face meeting rule details
- Bankruptcy

Key HUD Mortgagee Letters for FHA Loss Mitigation Options

- **ML 2000-05** (Jan. 19, 2000) (general protocol for FHA loss mitigation; defining partial claim, forbearance, income calculation, and non-home retention options)
- **ML 2009-23** (July 30, 2009) (initial version of FHA-HAMP; some portions substantially superseded)
- **ML 2012–22** (Nov. 16, 2012) (major revisions to FHA-HAMP and to general loss mitigation protocol; more flexible target income calculation for FHA-HAMP; new loss mitigation flow chart)
- **ML 2013–32** (Sept. 30, 2013) (updating loss mitigation flow chart; defining "continuous income"; capitalization of arrears under FHA-HAMP; treatment of prior bankruptcy)

The FHA Loss Mitigation “Waterfall”

- Step-by-step progression of options
- Current version found in Appendix to ML 2013- 32
- Consider first for forbearance (repayment) plans
- Special forbearance for unemployed borrowers
- If cannot repay in six months, consider for standard FHA mod

The FHA Loss Mitigation “Waterfall”

– Next step: consider for standard FHA mod
  - Capitalize, fixed interest rate (about 4.2% now), 360 mo. Term
  - Must reduce payment by 10%
  - Only for borrowers with “surplus income”
  - Few borrowers will have this surplus income, so go to next step and next consider for “FHA-HAMP”

The FHA Loss Mitigation "Waterfall"

- FHA-HAMP
- Differs significantly for Treasury and GSE HAMP
- Uses formula for "target payment" that may set payment as low as 25% of monthly income
- To achieve target payment, after rate reduction & term extension, uses FHA "partial claim"
  - The HUD partial claim is like principal forbearance
  - Non-interest bearing lien ("loan" from HUD)
  - Includes deferred principal, arrearages of PITI, plus legal fees and costs
  - Total partial claim may not exceed 30 percent of the unpaid principal balance as of the default date
  - But excess arrearages over the 30% may be capitalized

New FHA-HAMP FAQs

- Issued February 12, 2014
- FAQ available at: http://portal.hud.gov/hudportal/documents/huddoc?id=hamp_faq13-32.pdf
- A borrower can be approved for an FHA-HAMP modification even if the arrearage exceeds the maximum partial claim limit.
- The excess arrears over the partial claim cap can be added to interest- bearing principal.

New FHA-HAMP FAQs

- A front-end DTI ratio of 40% (post-modification) is the ultimate eligibility cutoff.
- The partial claim is applied only as needed to meet the target payment.
- The FAQs include an odd rule for calculating the maximum partial claim if the borrower received previous claim.

Key HUD Mortgagee Letters – Servicing Procedures

- **<u>ML 2013-38</u>** (Oct. 28, 2013) (due diligence time frame for completing foreclosure and attorney's fees limits; mediation time exempted from countable foreclosure time (12 mos. to sale for IL; $1750 atty. fees for IL))
- **<u>ML 2013-39</u>** (Oct. 28, 2013) (early loss mitigation review timelines and requirements for escalation/review of loss decisions)
- **<u>ML 2013–40</u>** (Nov. 1, 2013) (servicers' duty to inform borrowers in default in writing of outcomes of monthly loss mitigation reviews and appeal rights; implements certain CFPB rules time frames; including incomplete application notices)

Escalations

- Under Mortgagee Letter 2013-39, an "escalated case" is a written inquiry or complaint alleging:
  - Improper analysis/denial of option
  - Foreclosure initiated or continued contrary to HUD policy
  - Any other violation of HUD regulations, policies, or mortgagee letters

Evaluations During Foreclosure

- Mortgagee Letter 2013-40 (Nov. 1, 2013) includes rules regarding foreclosure stops.
- The servicer must refrain from sale if a complete application received at least 37 days before sale.
- The borrower has 14 days from an offer to accept it with no sale in the meantime.
- If the application is received less than 37 days from sale, the servicer must use its best efforts to review the borrower and document those efforts.

Evaluations During Foreclosure

- Under Mortgagee Letter 2013-40, decisions of loss mitigation to the borrower must be:
  - In writing
  - With “actual reasons” for denial of any option
  - And include point of contact and procedure for appeal/escalation

New Applications

- CFPB “one bite at the apple” for complete applications limits only CFPB/RESPA remedies
- For FHA, if prior denial of option:
  - May re-apply if changed circumstances
- For FHA, if prior option failure:
  - May re-apply if changed circumstances, except no new mod if prior mod past 24 mos.

Bankruptcy Issues

- Mortgagors with an active Chapter 7 or Chapter 13 bankruptcy case are eligible for FHA loss mitigation options to the extent that such loss mitigation does not violate federal bankruptcy law.

- Mortgagors who have received a Chapter 7 bankruptcy discharge and failed to reaffirm the FHA –insured mortgage debt are eligible to be considered for loss mitigation options

ML 2013-32

Similar policy – ML 2008-32

HUD’s Distressed Asset Sales Program (“DASP”)

- What it involves:
  - FHA-insured loans
  - In default, but pre-foreclosure sale
  - Grouped in pools (100-1000+ loans per pool)
  - HUD sells the loan pools at public auction

DASP - Purpose

- According to HUD, two goals:
  - Revenue for insurance fund
  - More flexible loss mitigation options (i.e., principal reduction) for borrowers

DASP- Effect on Borrowers

- The note is transferred to HUD before auction.
- Lender gets paid from the insurance fund.
- The transfer ends loan’s participation in FHA’s insurance program.
- Decisions on loss mitigation and foreclosure now are up to loan’s new owner.

DASP – Two Types of Loan Pools

- National Pools
- Neighborhood Stabilization Outcome ("NSO") Pools (focus on a city or region)

HUD Reports on DASP

- Some data released Sept. 1, 2014
- 90,000 loans sold through DASP
- 80% under National Pools; 20% under NSO pools (one-half of NSO loans subject to outcome target)
- 2,000 loans reported as “performing”
- Reduced losses to insurance fund reported

DASP Sales - Problems

- Did servicer/owner effectively review for all FHA loss mitigation options before payoff and transfer of loan to HUD?
- Lack of Notice to Borrower
- What data is HUD collecting?
  - Is HUD's "marketplace" hypothesis correct?
  - Relies on self-reporting by new owner
  - Terms to measure "successful" outcomes are vague

DASP Sales

- Litigation issues
- Parties
  - Old owner, new owner, both?
- Claims
  - Due process?
  - Contract – which contract?
    - Mortgage, insurance agreement
  - HUD regulations?

CFPB Mortgage Servicing Rules

CFPB Mortgage Servicing Rules

- Successors in interest – Applicability of ATR (Interpretive Rule July 11, 2014)
- Proposed changes (November 20, 2014).
  - Second bite at the apple
  - Successors in interest
  - Complete Application Notification
  - Servicing Transfers
  - Bankruptcy

Reverse Mortgages

HECM Guidelines

- 12 U.S.C. § 1715z-20
- 24 CFR § 206.1 et seq.
- Mortgagee Letters & other notices
- HECM Handbook 4235.1 REV-1
- Litigation
  - Bennett v. Donovan
  - Plunkett v. Castro
- HUD information available at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/hecm/hecmhomelenders

Big Changes for HECMs

- Reverse Mortgage Stabilization Act of 2013
  - Amends 255(h) of the National Housing Act
  - Authorizes HUD to make changes to the program through notice or Mortgagee Letter
  - Protect the fiscal safety and soundness of the program
- Mortgagee Letters
  - Substantial changes beginning with Mortgagee Letter 2013-27 (effective September 30, 2013)
  - Mortgagee Letter 2014-22 – Financial assessment
- Litigation

Big Changes for HECMs

- Financial assessment
- If non-borrowing spouse can stay after death of mortgagor-spouse

UPDATED!

Financial Assessment

- Mortgagee Letter 2014-22
- Assess borrowers' ability to meet ongoing financial obligations, primarily pay for taxes and insurance
- If flunk financial assessment then money is set aside to pay taxes and insurance

Attachment 2

HECM FINANCIAL ASSESSMENT AND PROPERTY CHARGE GUIDE

EFFECTIVE FOR HECM CASE NUMBERS ISSUED ON OR AFTER

March 2, 2015

Financial Assessment

- Credit history
  - Property charge payment history
- Cash flow/ residual income analysis
- Extenuating circumstances and compensating factors

"Frankly, your credit score concerns me."

Financial Assessment

- Evaluate payment history in following order:
  - Mortgage debt and housing-related expenses
  - Installment debts
  - Revolving debts
- Look back period 12 or 24 months

Appendix 1 - Model HECM Financial Analysis Worksheet

MODEL HECM FINANCIAL ASSESSMENT WORKSHEET FHA CASE NO.__________________

MORTGAGOR NAME	MORTGAGOR NAME
PROPERTY STREET ADDRESS	PROPERTY CITY, STATE, ZIP CODE

SECTION A: PROPERTY CHARGE PAYMENT HISTORY

PROPERTY CHARGE	CURRENT	DELINQUENT IN LAST 24 MONTHS
REAL ESTATE TAXES	☐ YES ☐ NO	☐ YES ☐ NO
OTHER ASSESSMENTS	☐ YES ☐ NO	☐ YES ☐ NO
HOA/PUD/CONDO FEES	☐ YES ☐ NO	☐ YES ☐ NO
HAZARD/HOMEOWNERS INSURANCE IN PLACE FOR LAST 12 MONTHS		☐ YES ☐ NO
FLOOD INSURANCE IN PLACE FOR LAST 12 MONTHS		☐ YES ☐ NO ☐ N/A

SECTION B: CREDIT HISTORY

CREDIT ACCOUNT	NUMBER OF DELINQUENT PAYMENTS LAST 24 MONTHS		
	30 DAY	60 DAY	90 DAY

SECTION C: ASSETS

ASSET ACCOUNT	*minus*	MORTGAGOR FUNDS NEEDED TO CLOSE	NET VALUE

Financial Assessment

- Serious events such as foreclosure, default, late payments of mortgage, taxes, insurance and other property charges
  - All housing payments on time in last 12 months/ no more than 2 thirty day late mortgage payments in 24 months
- Need extenuating circumstance such as death, divorce, unemployment, medical bills, etc.
- No catch-all provision

Financial Assessment

- Set aside full amount or partial amount to pay property charges
- Based on formula that projects increase in taxes and insurance, interest rate, and life expectancy of youngest borrower

SECTION J: MONTHLY PROPERTY TAXES AS % OF MONTHLY INCOME		
	TOTAL MONTHLY PROPERTY TAXES	$________________
divided by	TOTAL MONTHLY EFFECTIVE INCOME FROM ALL SOURCES	$________________
equals		________________%

SECTION K: EXTENUATING CIRCUMSTANCES

SECTION L: COMPENSATING FACTORS

RESULTS OF FINANCIAL ASSESSMENT			
PROPERTY CHARGE PAYMENT HISTORY	ACCEPTABLE	☐ YES	☐ NO
CREDIT HISTORY	ACCEPTABLE	☐ YES	☐ NO
RESIDUAL INCOME	ACCEPTABLE	☐ YES	☐ NO

DE UNDEWRITER CHUMS ID	DE UNDERWRITER SIGNATURE	DATE

Non-Borrower Spouse

- Non-borrower spouse on loans originated before August 4, 2014
  - Bennett & Plunkett

- Non-borrower spouse on loans originated after August 4, 2014
  - Non-borrower spouse protected from eviction going forward
  - Mortgagee Letter 2014-07

UPDATED!

Non-borrower spouse

- Future origination of HECMs with non-borrower spouse
  - Mortgagee Letter 2014-07
  - Loans originated after August 4, 2014
- Defer the due and payable status of loan until death of non-borrower spouse
- Or other condition

Non-borrower Spouse Eligibility

- Eligibility - Mortgagee Letter 2014-07
  - Married at the time the loan was made and remain married
  - Specifically named as non-borrower on HECM documents
  - Occupy and continue to occupy home as principal residence

Non-borrower Spouse Eligibility

- Eligibility
  - Establish legal ownership or ongoing legal right to remain
  - Assume all obligations in the loan document
  - Ensure that the HECM not called due for other reasons
- The principal limit will be based on the age of the youngest borrower or non-borrower spouse

Non-Borrower Spouse

- Standard scenario – Younger spouse taken off the deed, based on promise from broker/originator – that she will be able "to take over the mortgage" upon spouse's death
- HUD estimates that 20% of 595,000 outstanding HECMs have this problem – 119,000 homeowners (or less)

Non-Borrower Spouse

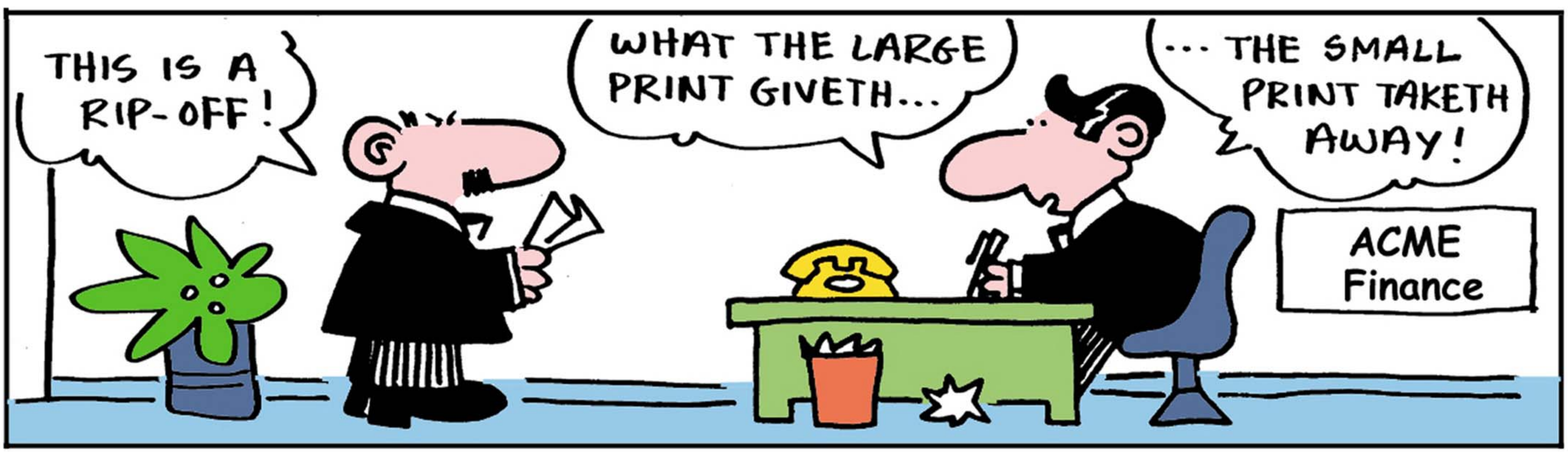
- HECM Statute
  - 12 U.S.C. § 1715z-20(j).

- HUD may insure a reverse mortgage only if “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 other occurrences to be defined by HUD

- Homeowner is defined to include the spouse of the homeowner

HUD's Regulation

- Inconsistent with statute
- Terminates HECM upon death of "mortgagor"
- Mortgage documents mirror regulations so lenders call HECMs due upon death of borrowing spouse, despite the promises of broker



AARP's Litigation

- *Bennett v. Donovan*, 797 F. Supp. 2d 69 (2011) - Widows lack standing

- Court of Appeals reversed in *Bennett v. Donovan*, 703 F. 3d 592 (2013)

AARP's Litigation

- *Bennett v. Donovan*, 4 F. Supp. 3d 5 (2013)
  - *"Bennett II"*
  - Statutory language unambiguously protects spouses from displacement even if they are not named borrowers on loan
  - Remand to HUD to determine remedy

AARP's Litigation

Plunkett v. Castro, 2014 WL 4243384 (Aug. 28, 2014)

- *Bennett* and *Plunkett* consolidated
- On remand HUD issued two "determinations"
- HUD concluded that it was NOT required to provide any relief to non-borrowing surviving spouses but came up with an alternative program and interpretation of regulations based on court's decision (MOE & TID)

Plunkett v. Castro - MOE

- Married to borrower at origination and until death
- Have title to property or legal right to remain
- Loan cannot be in default for any other reason
- No claims that will invalidate loan or claims resolved in favor of lender
- NBS must have a PLF greater than or equal to PLF of HECM borrowing spouse at origination or NBS' current PLF is greater than current unpaid principal balance

HECM Loan Proceeds

- Principal limit
  - Established at closing
  - Maximum amount the borrower can get from the HECM
  - Age, interest rate, value of the home (or amount established by HUD, whichever is less)
- Principal Limit Factor (PLF) table published by HUD
  - PLF x value of home (or HUD limits) = initial principal limit

FHA INFO #14-34

- Reviewing options with respect to similarly situated non-borrowing spouses
- Indefinite extension of time to start foreclosure
- If borrower meets criteria outlined in notice
- Request for an extension optional – at lender's discretion

FHA INFO #14-34
June 25, 2014

FHA SINGLE FAMILY HOUSING **NEWS**

NEWS AND UPDATES

TO: All HECM-Approved Mortgagees and Servicers

Update

HECM Reasonable Diligence Timeframe Extensions

Pursuant to a June 10, 2014 Court Order in *Plunkett, et al. v. Donovan*, FHA issued a determination in regards to the four named Plaintiffs in *Plunkett*, who are Non-Borrowing Spouses of now deceased Home Equity Conversion Mortgage (HECM) borrowers. The determination allows the Mortgagees holding the four HECMs at issue in that case and the two at issue in the prior *Bennett et al. v. Donovan* case, the option of electing to assign those specific HECMs to the Department provided that certain specific parameters are met. FHA, through its normal administrative processes, is reviewing its policies to determine the possible application of such an option with respect to similarly situated Non-Borrowing Spouses.

In order to allow FHA to complete this review and, if appropriate, to proceed with any appropriate policy announcement through its normal administrative processes, FHA is exercising its discretion to provide HECM Mortgagees with an indefinite extension of time in which to take first legal action to commence foreclosure and to comply with reasonable diligence timeframes. This indefinite extension will become available as of June 25, 2014 and will remain in place and available for Mortgagees electing to avail themselves of this extension until such time as FHA issues a Mortgagee Letter or other statement to formally address similarly situated Non-Borrowing Spouses. The Mortgagee may elect to take such an extension in any circumstance in which the Mortgagee believes the following criteria are or reasonably can be met:

- The Non-Borrowing Spouse would have had a Principal Limit Factor ("PLF") greater than or equal to the PLF of the HECM borrower spouse, or the Non-Borrowing Spouse's PLF

Plunkett v. Castro - TID

- Trigger Inapplicability Decision “TID”
- Court’s earlier decision on remand invalidated the application of 24 CFR 206.27(c)(1)
- Death of borrowing spouse no longer a trigger
- Lender no longer required to foreclose on non-borrowing surviving spouse in order to benefit from HECM insurance program benefits
- Can continue to hold HECM till reach 98% of maximum loan amount and assign loan to HUD

Plunkett v. Castro – TID

- TID -- not a voluntary remedy, but rather the "automatic result of the Court's ruling in *Bennett II*
- But, despite the "automatic" nature of the TID, HUD applied TID <u>only</u> to the Bennett & Plunkett named plaintiffs
- Not to all similarly situated non-borrower surviving spouses

Plunkett v. Castro - TID

- Contract still enforceable so lenders can choose to foreclose on non-borrower spouse but have financial incentive not to foreclose
- HUD applied analysis to plaintiffs' loans
- On remand court instructed HUD to consider whether TID remedy applies to non-borrower spouses
- **"It is well-established that "an agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so."**

Waiting on HUD

- Make TID applicable to all non-borrowing spouses
  - Lender discretion
- AARP – renewed motion for class certification

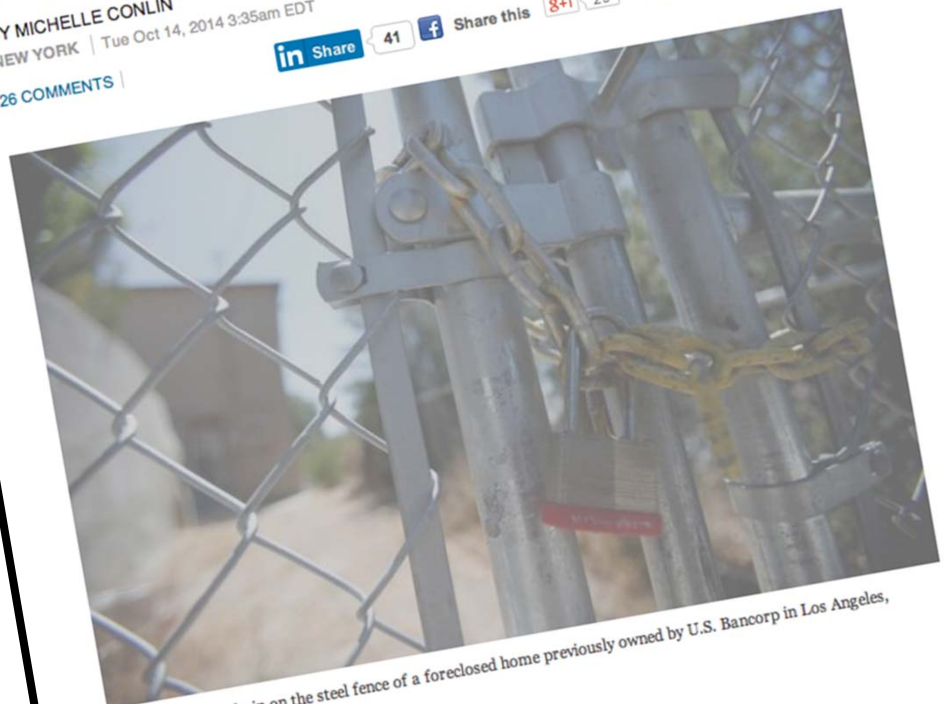
Deficiency Judgments

Americans face post-foreclosure hell as wages garnished, assets seized

BY MICHELLE CONLIN

NEW YORK | Tue Oct 14, 2014 3:35am EDT

26 COMMENTS | in Share 41 | Share this | g+1 25 | Email | Print



A lock secures a chain on the steel fence of a foreclosed home previously owned by U.S. Bancorp in Los Angeles, California July 17, 2012.

CREDIT: REUTERS/MARIO ANZUONI

RELATED NEWS

REFILE-COLUMN-Prepaying student loans

(Reuters) - Many thousands of Americans who lost their homes in the housing bust, but have since begun to rebuild their finances, are

Deficiency Judgments

- Debt buyers instituting collection actions after original credit issued a 1099-C.

- 26 U.S.C. § 6050P – institution to issue 1099-C after identifiable event whether or not actual discharge of indebtedness occurred.
  - Identifiable event can be a decision of creditor to discontinue collection activity and discharge debt. 26 C.F.R. §1.6050P-1.
  - IRS Manual § 1.6050P-1(a) – discharge occurs upon "identifiable event" regardless of whether actual discharge of indebtedness has occurred.

Deficiency Judgments

Compare

In re Reed, 492 B.R. 261 (Bankr. E.D Tenn. 2013)

with

Mennes v. Capital One, N.A., 2014 WL 1767079 (W.D. Wis. May 5, 2014).

Medley of Mortgage Issues

Tara Twomey, Of Counsel, National Consumer Law Center
Odette Williamson, Staff Attorney, National Consumer Law Center
Geoff Walsh, Staff Attorney, National Consumer Law Center

Lauren Mahoney
National Consumer Law Center

December 8, 2014

This Webinar is provided by the National Consumer Law Center and the Legal Assistance Foundation (LAF) of Chicago with a grant from the Office of the Illinois Attorney General.

Next Series of Webinars

- Keep your eye out for our in person training on **Feb. 4-5, 2015**

- Email us your ideas for speakers and topics to trainings@nclc.org

Just a Reminder

- Please fill out the evaluation when you sign-out
- I will email you the PowerPoint and recording in a few days
- Thank you to our speakers!

NCLC®
NATIONAL CONSUMER LAW CENTER®

Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. **www.nclc.org**