

**YOU CAN GO HOME AGAIN: ACHIEVING THE GOALS OF HUD'S
REVERSE MORTGAGE PROGRAM WHILE PROTECTING NON-
BORROWER SPOUSES AND OTHER HEIRS**

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Abstract

Reverse mortgages provide homeowners ages 62 and older with a way to monetize the equity in their homes, thereby allowing these homeowners to access funds to pay for unexpected life expenses, to supplement dwindling retirement savings, or for any other purpose they choose. While these products can provide quick access to a large amount of money, they also come with a caveat: the homeowner posts his or her home as security for the reverse mortgage, and lenders generally recover the loan amount by foreclosing on the home when the borrower dies or permanently leaves the home. While some borrowers may find this arrangement to be acceptable and use a reverse mortgage knowing its consequences, this note analyzes two areas of concern where borrowers or their heirs have found themselves facing unexpected hardship due to a reverse mortgage: surviving spouses who are not party to a reverse mortgage transaction and thus face foreclosure when a borrower spouse dies, and heirs who are not properly informed of their rights to purchase a house secured by a reverse mortgage. This note will begin by giving a brief overview of reverse mortgages—explaining what they are, discussing their history, and looking at their prevalence in the U.S. mortgage market. Next, it will analyze both issues previously mentioned, and will look at efforts to remedy these problems and the effectiveness so far of these remedies. Finally, this note will offer suggestions for how reverse mortgages can continue to exist as a viable option for informed seniors in need of funds, while at the same time ensuring that heirs are protected and are aware of their rights.

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I. Introduction: An Overview of Reverse Mortgages

Reverse mortgages are financial products that allow older borrowers (those ages 62 and up) to receive a loan secured by the equity in the borrower's primary residence.¹ In a reverse mortgage, a borrower will receive a principal amount from the lender, with interest subsequently accruing on that original principal amount.² This amount can be received either as a lump sum at the loan's inception, or at scheduled intervals to act as a continuing income stream for the borrower.³ In either case, the reverse mortgage must be the primary lien on the home, meaning that the borrower must pay off any existing mortgages on the home prior to receiving a reverse mortgage (or must

¹ See, e.g., *Frequently Asked Questions about HUD's Reverse Mortgages*, U.S. DEP'T OF HOUS. & URBAN DEV. [hereinafter *HUD FAQs*], http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/hecm/rmtopten [<https://perma.cc/3ZJ9-GR4B>]; *What Is a Reverse Mortgage?*, CONSUMER FIN. PROTECTION BUREAU [hereinafter *What Is a Reverse Mortgage?*], <http://www.consumerfinance.gov/askcfpb/224/what-is-a-reverse-mortgage.html> [<https://perma.cc/3GXV-4M5K>].

² See *What Is a Reverse Mortgage?*, *supra* note 1.

³ See *HECM Payment Options*, NAT'L REVERSE MORTG. LENDERS ASS'N: YOUR GUIDE TO REVERSE MORTGAGES, www.reversemortgage.org/About/Types-of-Reverse-Mortgages/HECM-Payment-Options [<https://perma.cc/3NYT-TJNA>].

pay them off at the same time, since the borrower may use reverse mortgage proceeds to pay off the existing mortgage).⁴

Borrowers are not ordinarily entitled to access all of the equity in their homes by way of a reverse mortgage.⁵ Rather, the amount of funds to which a borrower is entitled varies based on the borrower's age, with older borrowers entitled to more proceeds from a reverse mortgage.⁶ Furthermore, reverse mortgage borrowers must ensure they pay all property taxes, maintain homeowner's insurance on the residence, and pay any homeowners' association dues for the entire time that they live in the home.⁷ If a borrower fails to do any of these things, the borrower will be in default on the reverse mortgage, at which point the lender may place the borrower into foreclosure.⁸ Because of these continuing payment requirements, borrowers can encounter financial difficulties if they lack other funds and rely on their reverse mortgage proceeds to pay their continuing obligations.⁹ Accordingly, to help ensure that borrowers will not find themselves unable to pay these ongoing expenses, borrower access to reverse mortgage proceeds is subject to the results of a financial assessment that lenders conduct of each prospective reverse mortgage borrower.¹⁰ Based on the results of this financial assessment, borrowers may either be denied a reverse mortgage or be required to reserve a portion of the

⁴ See *Borrower Requirements and Responsibilities*, NAT'L REVERSE MORTG. LENDERS ASS'N: YOUR GUIDE TO REVERSE MORTGAGES, <http://www.reversemortgage.org/About/Borrower-Requirements-and-Responsibilities> [<https://perma.cc/Y66B-HDFP>].

⁵ See *HUD FAQs*, *supra* note 1.

⁶ See *Features of Reverse Mortgages*, NAT'L REVERSE MORTG. LENDERS ASS'N: YOUR GUIDE TO REVERSE MORTGAGES [hereinafter *Features of Reverse Mortgages*], <http://www.reversemortgage.org/About/Features-of-Reverse-Mortgages> [<https://perma.cc/67HC-7538>].

⁷ See *id.*

⁸ See *What Should I Do if I Have a Reverse Mortgage and I Can't Pay My Property Taxes or Insurance?* CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/askcfpb/1509/what-should-i-do-if-i-have-reverse-mortgage-and-i-cant-pay-my-property-taxes-or-insurance.html> [<https://perma.cc/6WWL-WTQH>].

⁹ See, e.g., Carole Fleck, *Are Reverse Mortgages Helpful or Hazardous?*, AARP BULLETIN (Apr. 2013), www.aarp.org/money/credit-loans-debt/info-04-2013/are-reverse-mortgages-helpful.html [<http://perma.cc/TC3V-2PUA>].

¹⁰ See *Features of Reverse Mortgages*, *supra* note 6.

proceeds as a “Life Expectancy Set-Aside,” which may be used only to pay the continuing expenses incurred by the homeowner.¹¹

The key difference between reverse mortgages and traditional loans is that unlike traditional loans, the principal and interest that accrue under a reverse mortgage need not be repaid until the borrower no longer uses the home as his principal residence.¹² Often, this condition means that the loan need not be repaid until the borrower moves out of the home (for instance, into an assisted living facility) or dies.¹³ Once a borrower no longer uses a home as his principal residence, either the borrower or his heirs must either repay the loan or surrender the home to the lender.¹⁴

This distinction may be better illustrated by example. If a borrower takes out a traditional mortgage on a \$300,000 house, he or she will make payments to the lender until the \$300,000 (plus interest) has been repaid. On the other hand, if an elderly borrower owns a \$300,000 home outright and decides to take out a reverse mortgage, the elderly borrower will *receive* some part of that \$300,000 from the lender. Alternately, if this borrower owns a \$300,000 home but still owes \$50,000 from an existing traditional mortgage, the borrower will still be permitted to get a reverse mortgage, but will first need to use reverse mortgage proceeds (or some other source of funds) to pay off the existing mortgage. In either case, interest will accrue on the amount received by the borrower, but the borrower will not be required to repay any principal or interest as long as the borrower remains living in the home.¹⁵ Once the borrower dies or permanently leaves the house, principal and interest will be due, and the lender will foreclose on the house if they are not repaid.¹⁶

In addition to deferred repayment obligations, another advantage of reverse mortgages is that they may be more accessible for credit-challenged borrowers, particularly when compared to a traditional home equity loan.¹⁷ While potential reverse mortgage borrowers are subjected to the previously-mentioned financial

¹¹ *See id.*

¹² *See HUD FAQs, supra* note 1.

¹³ *See id.*

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See* CONSUMER FIN. PROT. BUREAU, REVERSE MORTGAGES: REPORT TO CONGRESS 122 (2012) [hereinafter REVERSE MORTGAGES: REPORT TO CONGRESS].

assessment, the assessment focuses more on borrowers' recent history paying home-related expenses, such as property taxes and homeowners' association fees, as well as on examining borrowers' income and assets.¹⁸ Reverse mortgages also provide an opportunity for borrowers with less-than-stellar financial assessments to still receive a loan, with the life expectancy set-aside being used as a safety mechanism by lenders to decrease the likelihood of these borrowers being unable to pay their homes' recurring expenses.¹⁹ Home equity loans, meanwhile, tend to focus more on traditional measures of creditworthiness and generally require a credit score of at least 660.²⁰ Accordingly, reverse mortgages may provide another avenue for seniors with impaired credit to access the equity in their homes.

Three types of reverse mortgage currently exist in the United States: (1) single-purpose reverse mortgages, issued by some state or local government agencies or non-profits and can only be used for the purpose specified by the lender (generally home repair or payment of property taxes); (2) proprietary reverse mortgages, issued and backed by private companies; and (3) Home Equity Conversion Mortgages (HECMs), federally-insured and backed by the U.S. Department of Housing and Urban Development (HUD).²¹ Today, the vast majority of reverse mortgages are HECMs, and as such, this note will focus mainly on HECMs.²²

¹⁸ See Kenneth R. Harney, *Window is Rapidly Closing to Get Hassle-Free Reverse Mortgage*, WASH. POST (Apr. 9, 2015), https://www.washingtonpost.com/news/where-we-live/wp/2015/04/09/window-is-rapidly-closing-to-get-hassle-free-reverse-mortgage/?utm_term=.b72d59ecc039.

¹⁹ See *id.* (explaining the life expectancy set-aside functions like an escrow account funded either in part or entirely by reverse mortgage proceeds, and is designed to increase the likelihood that borrowers with negative financial assessment results can pay the continuing upkeep on their homes).

²⁰ Polyana da Costa, *Home Equity Loans, HELOCs Catch Fire Again*, BANKRATE (July 31, 2015), <http://www.bankrate.com/finance/home-equity/home-equity-loans-helocs-available-again-1.aspx> (“Mike Kinane, senior vice president for consumer lending at TD Bank, says homeowners generally need a minimum credit score of 660 to 680 for equity loans.”).

²¹ See *Reverse Mortgages*, FED. TRADE COMM'N: CONSUMER INFO., <https://www.consumer.ftc.gov/articles/0192-reverse-mortgages> [<https://perma.cc/WCC8-4F5F>].

²² See REVERSE MORTGAGES: REPORT TO CONGRESS, *supra* note 17 at 31.

II. *The HECM Program*

President Ronald Reagan signed the HECM program into law in 1988 as a pilot program through the Federal Housing Authority (FHA).²³ In the decade after the program's inception, it was nowhere near the dominant force it now is in the reverse mortgage market—less than 40,000 HECMs were made between 1988 and 1998 and private lenders sought during this time to establish their own, non-government-insured alternatives to HECMs.²⁴ The HECM program came to dominate the reverse mortgage market after it was permanently authorized in 1998.²⁵ Reverse mortgages remained a fairly niche product, however, with their popularity peaking in 2009 with 114,692 originations and declining in recent years, reaching only 48,902 originations in 2016.²⁶ As of early 2015, the reverse mortgage market was estimated to be a mere 1 percent of the size of the traditional mortgage market in the United States.²⁷

Despite the small size of the current US reverse mortgage market, senior citizens in the US hold over \$6 trillion in home equity, meaning that there exists a large potential market for reverse mortgages as this population continues to age and require funds to cover their expenses.²⁸ Reverse mortgages may be especially appealing to seniors of limited means.²⁹ As studies show that around 4 in 10 Americans between ages 55 and 64 lack any sort of retirement account and that those in this age group with a retirement account have a

²³ *See id.* at 17.

²⁴ *See id.*

²⁵ *See id.*

²⁶ *Annual HECM Endorsement Chart*, NAT'L REVERSE MORTG. LENDERS ASS'N (Jan. 13, 2017), <https://www.nrmlaonline.org/2017/01/13/annual-hecm-endorsement-chart> [perma.cc/S6ZD-EFDR].

²⁷ *See* CONSUMER FIN. PROT. BUREAU, SNAPSHOT OF REVERSE MORTGAGE COMPLAINTS: DECEMBER 2011–DECEMBER 2014 4 (2015) [hereinafter SNAPSHOT OF REVERSE MORTGAGE COMPLAINTS].

²⁸ *See Senior Home Equity Exceeds \$6 Trillion in First Quarter*, NAT'L REVERSE MORTG. LENDERS ASS'N (June 24, 2016), <https://www.nrmlaonline.org/2016/06/24/senior-home-equity-exceeds-6-trillion-first-quarter> [perma.cc/S6ZD-EFDR].

²⁹ *See* Swarn Chatterjee, *Reverse Mortgage Participation in the United States: Evidence from a National Study*, INT'L J. FIN. STUD. 4, 5 (2016), www.mdpi.com/2227-7072/4/1/5/pdf (citing a study finding reverse mortgages are likely to help borrowers “with low incomes, modest wealth, and poor health”).

median account balance of just over \$100,000, it seems likely more of these Americans will be forced to rely on home equity as a supplemental source of retirement income.³⁰ Furthermore, as more employers abandon defined-benefit pension plans in favor of ones requiring employees to invest in individual retirement accounts, seniors with inadequate retirement savings or seniors suffering losses in investments may view reverse mortgages as a valuable financial lifeline.³¹ Finally, reverse mortgages may also be helpful for seniors who require money for sudden, unexpected life events.³² Accordingly, as more members of the Baby Boomer generation retire in the coming years, the reverse mortgage market may see more seniors looking to monetize the equity in their homes due to financial need.

Given that reverse mortgages tend to appeal most to borrowers of limited means or borrowers suffering financial hardship, questions arise as to the consumer protection features surrounding these products. A unique feature of HECMs versus other types of reverse mortgages is that HECMs require borrowers to undergo counseling from a HUD-approved independent counselor before the borrower is eligible to receive a HECM.³³ By statute, counseling must address: (1) options available to borrowers besides HECMs; (2) other ways borrowers can convert their home equity to liquidity; (3) financial ramifications of a HECM; and (4) the fact that a HECM may carry tax consequences, affect eligibility for government aid programs, and impact the borrower's estate and heirs.³⁴ The statute also leaves room for agency discretion, allowing HUD to require counselors to discuss "any other information that the [HUD] Secretary may require" with prospective borrowers.³⁵ HECMs are also nonrecourse loans, meaning that neither borrowers nor their estates are liable for loan balances that exceed a home's value at the time that the reverse mortgage must be repaid (this amount is to be covered by the federal government's insurance on these loans).³⁶ Borrowers' heirs, meanwhile, are protected by the so-called "95 percent rule," meaning that they are, at

³⁰ See SNAPSHOT OF REVERSE MORTGAGE COMPLAINTS, *supra* note 27, at 5–6.

³¹ See Chatterjee, *supra* note 29, at 5–6.

³² See *id.* at 6.

³³ See 12 U.S.C. § 1715z-20(f) (2012); REVERSE MORTGAGES: REPORT TO CONGRESS, *supra* note 17, at 3.

³⁴ 12 U.S.C. § 1715z-20(f) (2012).

³⁵ See *id.*

³⁶ See REVERSE MORTGAGES: REPORT TO CONGRESS, *supra* note 17, at 18.

least in theory, entitled to settle the amount of a reverse mortgage with the lender for 95 percent of the home's value at the time of the borrower's death.³⁷

III. *The Non-Borrower Surviving Spouse Issue*

Despite these apparent built-in protections for HECM borrowers, a series of issues has emerged, calling into question the adequacy of these safeguards. The first of these issues concerns non-borrower spouses—that is, spouses of reverse mortgage borrowers who for a variety of reasons are not party to the borrower's contract with the lender (and in some cases are not on the home's deed). Often, the non-borrower spouse issue will emerge when one spouse is younger than 62 years old and thus is taken off the home's title in order for the other spouse to qualify for a reverse mortgage.³⁸ Alternately, since reverse mortgage proceeds are calculated based on the age of either the borrower, with older borrowers eligible to receive more money due to a higher "Principal Limit Factor,"³⁹ removing a younger spouse from a home's title could result in a greater reverse mortgage payout. In these situations, when the spouse remaining on the title dies, lenders move to force repayment of the reverse mortgage and, in the event the loan cannot be repaid, will foreclose on the home, leaving the surviving non-borrower spouse without a place to live.⁴⁰

³⁷ See Jessica Silver-Greenberg, *Pitfalls of Reverse Mortgages May Pass to Borrower's Heirs*, N.Y. TIMES (Mar. 26, 2014), https://dealbook.nytimes.com/2014/03/26/pitfalls-of-reverse-mortgages-may-pass-to-borrowers-heirs/?_r=1.

³⁸ See *Cautions*, NAT'L REVERSE MORTG. LENDERS ASS'N: YOUR GUIDE TO REVERSE MORTGAGES [hereinafter *Cautions*], <http://www.reversemortgage.org/Borrow-with-Confidence/Cautions> [https://perma.cc/R4YW-HXV9].

³⁹ *Oversight of the Federal Housing Administration's Reverse Mortgage Program for Seniors: Hearing Before the Subcomm. on Ins., Hous., & Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 112th Cong. 5–6 (2012) (statement of Charles Coulter, Deputy Assistant Secretary for Single Family Housing, U.S. Department of Housing and Urban Development); see generally *Plunkett v. Castro*, 67 F. Supp. 3d 1, 6 (D.D.C. 2014) ("The principal limit factor is an actuarial variable based on the age of the youngest borrower and the expected loan interest rate.").

⁴⁰ See, e.g., René L. Robertson, Note, "*But It's My House Too*": HUD's Failure to Include Statutorily Required Protections for Non-Borrowing Spouses in Reverse Mortgage Regulations, 27 QUINNIPIAC PROB. L.J. 94

Empirical stories abound in which borrowers were misled by reverse mortgage brokers to sign away their ownership interest in their homes, believing based on the brokers' statements that they would be able to reinstate their interests at a later date.⁴¹ Congress seemingly sought to address this non-borrower spouse issue when it wrote the statute authorizing the HECM program, forbidding HUD from insuring a reverse mortgage unless the obligation to repay the loan was deferred until the homeowner's death, the sale of the home, or other events specified by HUD and specifying "[f]or purposes of this subsection, the term 'homeowner' includes the spouse of a homeowner."⁴² Nevertheless, HUD's own interpretation of this statute negated any protections for non-borrower surviving spouses, with the Department passing a rule stating that a reverse mortgage was to become due and payable "if a mortgagor dies and the property is not the principal residence of at least one surviving mortgagor."⁴³ This rule was eventually interpreted by both HUD and by lenders to permit foreclosure on non-borrower surviving spouses provided that those spouses were not party to the original HECM agreement.⁴⁴

(2013) (explaining challenges faced by non-borrower surviving spouses in HECM reverse mortgages).

⁴¹ See Nat'l Consumer Law Ctr., Comments to the Department of Housing and Urban Development on Notice and Request for Comment Regarding the Alternative Option for Claim Payment Announced in Mortgagee Letter 2015-03 (Mar. 9, 2015) [hereinafter NCLC Comments], nclc.org/images/pdf/foreclosure_mortgage/reverse-mortgages/comment-hud-mortgagee-letter-02032015.pdf [<https://perma.cc/GNS6-96ET>].

⁴² 12 U.S.C. § 1715z-20(j) (2012).

⁴³ 24 C.F.R. § 206.27(c) (2016).

⁴⁴ See, e.g., *Bennett v. Donovan* (*Bennett I*), 703 F.3d 582, 586 (D.C. Cir. 2013) (noting the contradiction between §1715z-20(j) and §206.27(c) in a case where a lender foreclosed on a non-borrower surviving spouse but declining to take any further action); *What Happens if I Have to Move Out of My Home into a Nursing Home or Assisted Living and I Have a Reverse Mortgage?*, CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/askcfpb/243/what-happens-if-i-have-to-move-out-of-my-home-into-a-nursing-home-or-assisted-living-and-i-have-a-reverse-mortgage.html> [<https://perma.cc/S356-PKMV>] (warning a non-borrower spouse will likely need to move out if the borrower enters assisted living and no longer resides at the home subject to the mortgage).

IV. *Bennett I and Bennett II*

The apparent contradiction between Section 1715z-20(j), which seemingly shielded non-borrower surviving spouses from foreclosure, and Section 206.27(c), which nullified any such protection, led to litigation against both HUD and reverse mortgage lenders. On the HUD side, this litigation reached its apex with the *Bennett* cases.⁴⁵ In *Bennett I*, a group of non-borrower surviving spouses sued the Secretary of Housing and Urban Development, alleging that HUD's rule in Section 206.27(c) was inconsistent with the spousal protections provided for in Section 1715z-20(j).⁴⁶ Each of the plaintiffs in *Bennett I* was married to an older individual and had removed themselves from their homes' titles in order to receive a higher HECM payout in the older spouse's name.⁴⁷ Despite assurances by reverse mortgage brokers that the plaintiffs could remain in the houses even after their borrower spouses died, lenders moved to foreclose on the plaintiffs' houses after the plaintiffs' spouses had died.⁴⁸ Subsequently, the plaintiffs brought suit against HUD, alleging that Section 1715z-20(j) gave them statutory protection against foreclosure and that HUD's guidance under Section 206.27(c) directly contradicted Congress's intentions in passing the statute and should thus be invalidated.⁴⁹

The *Bennett I* court observed the contradiction between these two provisions and, ruling the plaintiffs had standing to sue HUD, also opined HUD had statutory authority to remedy the plaintiffs' injury—specifically, by taking ownership of the loans in question and refusing to foreclose while the non-borrower surviving spouse still reside in the home.⁵⁰ Anticipating one of the issues that would emerge in later litigation concerning the HECM program, the *Bennett I* court spent a great deal of time discussing the availability of a remedy against third-party reverse mortgage lenders.⁵¹ Because the court's examination

⁴⁵ See *Bennett I*, 703 F.3d 582; *Bennett v. Donovan (Bennett II)*, 4 F. Supp. 3d 5 (D.C. Cir. 2013).

⁴⁶ See *Bennett I*, 703 F.3d at 584.

⁴⁷ *Id.* at 585.

⁴⁸ *Id.* at 585–86.

⁴⁹ See *id.* at 586.

⁵⁰ See *id.* at 588–90 (finding HUD has the authority to accept the assignment of a mortgage originally issued by another lender if accepting such assignment would further the purposes of the HECM program).

⁵¹ See *id.* at 586–89.

focused on standing, a key consideration was whether judicial remedies could resolve the plaintiffs' claims.⁵² Citing precedent that counseled against seeking remedies against third parties for injuries caused by government regulation, the court took pains to find a way that HUD could remedy the non-borrower surviving spouse issue on its own, without any need to seek redress against the lenders themselves.⁵³ In looking for a solution, the court relied on a section of the HECM authorization statute empowering the HUD Secretary to "take any action necessary" within the confines of several enumerated options in order "to further the purposes of [the HECM program]."⁵⁴ One of the options provided by the statute was to "accept[] an assignment of the insured mortgage notwithstanding that the mortgagor is not in default under its terms."⁵⁵ Under a program where reverse mortgages on homes occupied by non-borrower surviving spouses are assigned to HUD, the court reasoned, lenders would be financially incentivized to send these loans to HUD in exchange for full repayment, since doing so would allow them to avoid potential market risk and the legal challenges of the foreclosure process.⁵⁶

In *Bennett II*, the court ruled on the actual validity of HUD's interpretation in Section 206.27(c), finding that Section 1715z-20(j) was unambiguously constructed to protect all spouses, regardless of whether or not the spouse was party to the reverse mortgage contract.⁵⁷ The court used *Chevron* analysis⁵⁸ to compare Section 206.27(c) with Section 1715z-20(j), and in doing so paid particular attention to the second sentence of Section 1715z-20(j), which reads, "[F]or purposes of this subsection, the term 'homeowner' includes the spouse of a

⁵² See *id.* at 586 (explaining a plaintiff's standing in federal court requires the plaintiff "show that it is likely . . . a decision in their favor will redress their injury") (internal citation and quotation marks omitted).

⁵³ See *id.* at 587.

⁵⁴ 12 U.S.C. § 1715z-20(i) (2012); *id.* at 588.

⁵⁵ 12 U.S.C. § 1715z-20(i) (2012).

⁵⁶ See *Bennett I*, 703 F.3d at 589.

⁵⁷ See *Bennett II*, 4 F. Supp. 3d at 12 ("Subsection (j) means what it says: the loan obligation is deferred until the homeowner's *and* the spouse's death.").

⁵⁸ *Chevron* analysis is a method used to review the legality of agency interpretations of authorizing statutes, which asks in part whether the "plain meaning" of a statute indicates that Congress spoke directly to the issue the agency seeks to interpret and, if so, requires that the agency defer to the "unambiguously expressed intent of Congress" rather than the agency's own interpretation. See *id.* at 8–10 (quoting *Chevron, U.S.A. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984)).

homeowner.”⁵⁹ The court cited case law holding statutes should be interpreted in a way that avoids rendering any part of them extraneous, and accordingly found Congress would not have included this provision unless it intended to extend additional protections to spouses not already included in the HECM statute’s definition of “homeowner.”⁶⁰ Accordingly, the court in *Bennett II* “conclude[d] that Congress intended to give ‘homeowner’ a more expansive meaning in subsection (j)” than in the rest of the HECM statute.⁶¹ The court also relied on the legislative history of Section 1715z-20(j) in interpreting the statute, which stated that Section 1715z-20(j) was meant to “defer[] any repayment obligation until *death of the homeowner and the homeowner’s spouse*.”⁶² Based on this information, the court concluded its *Chevron* analysis by finding Congress clearly articulated an intent to protect non-borrower spouses from foreclosure in Section 1715z-20(j), and HUD’s interpretation of the statute was incorrect.⁶³

V. *HUD’s Solutions: The TID and the MOE*

While the court in *Bennett II* could hold HUD’s interpretation of Section 1715z-20(j) to be invalid, for procedural reasons it could not require HUD to adopt the remedy suggested in *Bennett I*.⁶⁴ Accordingly HUD was tasked with devising an appropriate remedy to the non-borrower surviving spouse issue that was in line with the court’s interpretation of Section 1715z-20(j) as articulated in *Bennett II*.⁶⁵ This remedy came about in pieces, and eventually resulted in the “Trigger Inapplicability Decision” (TID) and the “Mortgagee Optional Election” (MOE).⁶⁶ The District Court for the District of Columbia analyzed the legal sufficiency of both remedies in *Plunkett v. Castro*.⁶⁷

⁵⁹ *See id.* at 10–13.

⁶⁰ *Id.* at 10–11 (“[A] court must not interpret a statute so as to render any words within that statute as ‘mere surplusage.’”) (citing *Potter v. United States*, 155 U.S. 438, 446 (1894)).

⁶¹ *See id.* at 12.

⁶² *See id.* at 13 (quoting S. REP. NO. 100–21, at 1987).

⁶³ *See id.* at 14.

⁶⁴ *See id.* at 15 (“[T]his Court has no choice but to identify the legal error and then remand to the agency.”) (internal citation and quotation marks omitted).

⁶⁵ *See id.*

⁶⁶ *See Plunkett v. Castro*, 67 F. Supp. 3d 1, 1 (D.D.C. 2014) (discussing two solutions to the non-borrower surviving spouse issue HUD implemented).

⁶⁷ *Id.*

The TID was a remedy that HUD allowed solely for the plaintiffs in the *Bennett* cases as well as a companion case, *Plunkett*.⁶⁸ As HUD described it, the TID was not a solution the agency had chosen to implement. Rather, it was the automatic result of the court's holding in *Bennett II*.⁶⁹ Under the TID, HUD advised lenders holding the non-borrower plaintiffs' reverse mortgages that lenders need not foreclose on the plaintiffs' homes, despite the foreclosure requirement technically being "triggered" by the borrower spouses' deaths.⁷⁰ Specifically, the TID waived the "due and payable" requirement articulated in HUD's HECM regulations, which states in part that "the mortgage balance will be due and payable in full if a mortgagor dies and the property is not the principal residence of at least one surviving mortgagor"⁷¹ Accordingly, once the TID was applied, lenders could continue holding the reverse mortgages on the non-borrower surviving spouses' homes, during which time interest would continue to accumulate under the loan.⁷² Once the loan balance reached 98 percent of the maximum statutorily-allowed amount (either the appraised value of the home at the time the HECM was initiated or \$625,500),⁷³ lenders had the option of assigning the reverse mortgage to HUD, who would manage the loan until a valid "trigger event" occurred—most likely the death or permanent relocation of the non-borrower surviving spouse.⁷⁴ Mirroring the *Bennett I* court's reluctance to find a remedy directly against private reverse mortgage lenders, HUD emphasized that the relationship between the lender and the borrower (and, by extension, the non-borrower spouse) was separate from any activity HUD undertook. Thus, lenders still had the option to foreclose on non-borrower surviving spouses even if the TID no longer mandated foreclosure after a borrower's death.⁷⁵ Nevertheless, lenders' financial interest would counsel against foreclosure in the presence of the TID, as the lenders could continue to earn interest on the reverse mortgage

⁶⁸ See *id.* at 19 (explaining the TID is available only to the *Bennett* and *Plunkett* plaintiffs).

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ 24 C.F.R. § 206.27(c)(1) (2017); *id.*

⁷² See *Plunkett*, 67 F. Supp. 3d at 19.

⁷³ *Id.* at 6.

⁷⁴ See *id.*

⁷⁵ *Id.*

and be guaranteed the ability to eventually assign the reverse mortgage to HUD.⁷⁶

The court in *Plunkett* offered scathing criticism of HUD's decision not to extend the TID to parties outside of the *Bennett* and *Plunkett* litigation.⁷⁷ While HUD argued the *Bennett II* decision was intended to apply only to the plaintiffs in that specific case, the *Plunkett* court quickly rejected this logic, stating "[t]he [*Bennett II*] Court . . . held that Congress had unambiguously required the protection of *non-borrower surviving spouses* under subsection (j)—not that Congress had unambiguously required the protection of Mr. Bennett and Mrs. Joseph."⁷⁸ Accordingly, HUD's failure to expand the TID to all non-borrower surviving spouses (or, more specifically, to provide evidence that it had even considered doing so) was found to be arbitrary and capricious, and the agency was directed to reconsider its application of the TID to include a wider group of individuals.⁷⁹ Nevertheless, HUD eventually issued guidance affirming its refusal to expand the TID outside of its initial coterie of recipients, citing the agency's "obligation to protect the soundness of the [HECM] insurance funds" and the fact that applying the TID to a wider group of non-borrower spouses would create excessive financial risk for these funds.⁸⁰ These justifications for HUD's decision, however, seem to run against the realities of the HECM market at the time of the *Bennett* litigation, where it was estimated that only 4 percent of a total of 60,000 HECM originations were made to a single spouse.⁸¹

HUD articulated its first post-*Bennett* HECM fix applicable to all borrowers in Mortgagee Letter 2014-07. In this letter, HUD declared that HECMs issued to homeowners with a non-borrower

⁷⁶ *Id.* at 19 ("[A]bsent the triggering event, the mortgagee has a significant financial incentive not to foreclose on the non-borrower surviving spouse: namely, the ability to continue earning interest on a loan that is fully insured by the federal government up to the maximum loan amount.").

⁷⁷ *See id.* at 19 ("What the basis is for HUD's assumption that the Court would hold 24 C.F.R. § 206.27(c)(1) invalid as to the *Bennett* and *Plunkett* plaintiffs and not to other surviving spouses is unfathomable.").

⁷⁸ *Id.* at 20 (emphasis added).

⁷⁹ *Id.* at 22.

⁸⁰ U.S. DEP'T OF HOUS. & URBAN DEV., MORTGAGEE LETTER 2015-03 (2015) (on file with author) [hereinafter MORTGAGEE LETTER 2015-03].

⁸¹ Brief for Nat'l Reverse Mortg. Lenders Ass'n Amici Curiae Supporting Respondents at 7, *Bennett v. Donovan*, No. 11-cv-0498 (ESH), 2013 WL 4510049 (D. D.C. June 11, 2013) [hereinafter Reverse Mortg. Lenders Ass'n Amici Curiae].

spouse after August 4, 2014 would receive FHA insurance only if they contained a provision deferring the reverse mortgage's due and payable status for non-borrower surviving spouses.⁸² Mortgagee Letter 2014-07 had the effect of protecting non-borrower surviving spouses from inadvertently being foreclosed on for any HECMs issued after August 4, 2014, but also prevented borrowers from consciously taking out a reverse mortgage in only one spouse's name for financial planning reasons.⁸³ Such a restriction on borrower choice was criticized as a "paternalistic" deprivation of an important financial option for "couples for whom [taking out a reverse mortgage in one spouse's name] [was] the only real option to remaining in their homes and achieving some financial security in their golden years."⁸⁴ Furthermore, while this guidance ensured that the type of non-borrower surviving spouse issue leading to the *Bennett* litigation would not repeat itself in the future, it failed to address issues faced by non-borrower surviving spouses connected to HECMs issued prior to August 4, 2014. HUD accordingly was criticized for its failure to address non-borrower surviving spouses who would not be subject to the protections provided for in Mortgagee Letter 2014-07.⁸⁵

HUD's next step was to introduce the MOE, which was first explained in Mortgagee Letter 2015-03 and sought to rectify the non-borrower surviving spouse issue for HECMs issued before August 4, 2014.⁸⁶ Again echoing the same concerns expressed in *Bennett I*, HUD claimed that it could not legally interpose itself into the private contracts between borrowers and lenders that formed the basis of the

⁸² See U.S. DEP'T OF HOUS. & URBAN DEV., MORTGAGEE LETTER 2014-07 (2014) (on file with author) [hereinafter MORTGAGEE LETTER 2014-07].

⁸³ See, e.g., Robin Faison, Comment on the Department of Housing and Urban Development (HUD) Notice: FR-5735-N-02 Home Equity Conversion Mortgage (HECM) Program: Non-Borrowing Spouse—Solicitation of Comment (May 5, 2014), <https://www.regulations.gov/document?D=HUD-2014-0034-0002> (criticizing HUD's decision in Mortgagee Letter 2014-07 forbidding insurance of reverse mortgages lacking non-borrower surviving spouse protections as removing an option by which borrowers could receive more money from their reverse mortgage and thus avoid "financial travesty").

⁸⁴ Reverse Mortg. Lenders Ass'n Amici Curiae, *supra* note 81, at 8.

⁸⁵ See, e.g., Mary Blevins, Comment on the Department of Housing and Urban Development (HUD) Notice: FR-5735-N-02 Home Equity Conversion Mortgage (HECM) Program: Non-Borrowing Spouse—Solicitation of Comment (May 30, 2014), <https://www.regulations.gov/document?D=HUD-2014-0034-0008>.

⁸⁶ See MORTGAGEE LETTER 2015-03, *supra* note 80.

challenged reverse mortgages.⁸⁷ Accordingly, the MOE sought to correct the specific issue identified by the court in *Bennett II*—HUD’s erroneous decision to insure mortgages that lacked protections for non-borrower surviving spouses—by allowing mortgagees in non-borrower surviving spouse situations to apply to HUD to have their reverse mortgages assigned to the agency.⁸⁸ The MOE differed from the TID in that it required a lender electing to assign the mortgage to HUD to do so within 30 days of notification of the death of the borrower spouse, rather than being able to hold the instrument until it had reached 98 percent of its maximum amount.⁸⁹ Furthermore, the MOE imposed a set of criteria on individuals hoping to benefit from it: as first articulated by HUD, to qualify for the MOE, a non-borrower surviving spouse had to show that he or she (1) was legally married to the borrower (or engaged in a same-sex relationship akin to marriage if same-sex marriage was not allowed in the borrower’s state at the time the reverse mortgage was written), (2) resided in the property secured by the HECM as a principal residence at the origination of the HECM and during the HECM borrower’s life, and (3) was able to obtain good and marketable title to remain in the property secured by the HECM for life.⁹⁰ Beyond these basic requirements, HUD also applied certain more stringent requirements making it more challenging for non-borrower spouses to get relief under the MOE.⁹¹

VI. The MOE’s Failure to Provide Relief and Mortgagee Letter 2015-15

Despite the apparent solution presented by the MOE, in practice the MOE provided less of a safeguard than non-borrower surviving spouses might have hoped. Again citing its “statutory

⁸⁷ See *Bennett v. Donovan (Bennett I)*, 703 F.3d 582, 586 (D.C. Cir. 2013); MORTGAGEE LETTER 2015-03, *supra* note 80 (“[R]ecognizing the legally binding nature of existing private mortgage contracts entered into by the borrowers and mortgagees, FHA did not impose this Deferral Period for any HECMs that were assigned FHA Case Numbers prior to August 4, 2014, because FHA does not have authority to alter existing legally binding private contracts entered into between private parties.”).

⁸⁸ See *Plunkett v. Castro*, 67 F. Supp. 3d 1, 18 (D. D.C. 2014) (“Through Mortgagee Letter 2014-07, HUD has assured that in the future no further contracts which fail to protect surviving spouses will be consummated.”).

⁸⁹ MORTGAGEE LETTER 2015-03, *supra* note 80, at 7–8.

⁹⁰ *Id.* at 11–14.

⁹¹ See generally *id.*

obligation to ensure the fiscal soundness of the FHA insurance funds,” HUD had imposed a set of particularly high standards on borrowers seeking to utilize the MOE.⁹² In order to qualify for the MOE, a non-borrower spouse must have had a Principal Limit Factor greater than or equal to that of the borrower spouse (the Factor Test) or the non-borrower spouse’s Principal Limit Factor must have resulted in a principal limit greater than or equal to the unpaid principal balance at the time the MOE was sought (the Principal Limit Test).⁹³ In practice, this condition meant that non-borrower spouses must have either been able to secure the same amount of funds as their spouses at the time the HECM was written (an unlikely scenario when a non-borrower spouse was removed from the home’s title due to a disparity in age) or must have had the financial capability to pay down the balance between the loan amount as issued and the surviving spouse’s principal limit.⁹⁴ For senior citizens relying on a reverse mortgage to supplement insufficient retirement savings, the latter condition too would be a difficult one to meet.⁹⁵ Thus, evaluating the MOE in light of these restrictions, the Consumer Financial Protection Bureau concluded in 2015 “[b]ecause of the complex limitations on eligibility . . . it is unlikely that many non-borrowing spouses with pre-August 4, 2014 HECMs will receive a deferral.”⁹⁶ Tellingly, none of the plaintiffs in the *Bennett* cases or in *Plunkett* were eligible for the MOE.⁹⁷ Furthermore, since the MOE was (and remains) optional, lenders retained the ability to foreclose on non-borrower surviving spouses rather than assign the mortgages to HUD.⁹⁸

The court in *Plunkett* acknowledged the difficulties that would be faced by a non-borrower spouse seeking to utilize the MOE, but nevertheless chose to uphold the MOE as a valid remedy in line with both HUD’s statutory authority and the court’s guidance in *Bennett II*.⁹⁹ In upholding the MOE, the *Plunkett* court placed particular focus

⁹² See *Plunkett*, 67 F. Supp. 3d at 13–14; MORTGAGEE LETTER 2015-03, *supra* note 80.

⁹³ MORTGAGEE LETTER 2015-03, *supra* note 80, at 9.

⁹⁴ See *Plunkett*, 67 F. Supp. 3d at 15 (describing the ways in which a borrower could satisfy each of these elements in order to qualify for the MOE).

⁹⁵ See SNAPSHOT OF REVERSE MORTGAGE COMPLAINTS, *supra* note 27.

⁹⁶ See *Plunkett*, 67 F. Supp. 3d at 10.

⁹⁷ *Id.* at 9 (“[T]hat said, none of the six named plaintiffs at the time of the remand was eligible for the MOE.”).

⁹⁸ See MORTGAGEE LETTER 2015-03, *supra* note 80, at 4.

⁹⁹ See *Plunkett*, 67 F. Supp. 3d at 15–16.

on the discretion granted to HUD in *Bennett* to devise an appropriate solution to the non-borrower surviving spouse issue, as well as HUD's mandate to ensure the financial soundness of its HECM insurance program.¹⁰⁰ Some commenters have taken particular issue with the latter justification for the MOE, arguing HUD has refused to disclose the potential costs of a more comprehensive solution and, regardless of costs, the amount of reverse mortgages which could possibly involve a non-borrower surviving spouse is relatively small.¹⁰¹ Despite this opposition and the questions raised as to the practicality of the MOE for borrowers, however, the MOE has continued to be upheld as a valid remedy by which HUD can overcome the contradiction between Section 1715z-20(j) and Section 206.27(c).¹⁰²

HUD further solidified the MOE's position in Mortgagee Letter 2015-15, eliminating the requirement that non-borrower surviving spouses meet either the Factor Test or the Principal Limit Test, and affirming that the MOE was the only way for these individuals to seek relief from foreclosure after the death of a borrower spouse.¹⁰³ This change coincided with litigation challenging these tests as requirements to secure relief under the MOE. In *Snyder v. Castro*, the plaintiffs alleged in part that the guidance issued in Mortgagee Letter 2015-03 failed to provide adequate relief in line with the holdings in the *Bennett* cases and *Plunkett*, since it would be nearly impossible for non-borrower surviving spouses to qualify under either the Factor Test or the Principal Limit Test.¹⁰⁴ Subsequently, in its motion to dismiss the case, HUD cited the guidance issued in Mortgagee Letter 2015-15 to explain why the plaintiffs' claims had been rendered moot: "The plaintiffs have now obtained essentially all the redress they sought, namely, the option for their spouses' mortgagees to assign the mortgages to HUD upon the death of their

¹⁰⁰ *See id.*

¹⁰¹ *See* NCLC Comments, *supra* note 41.

¹⁰² *See* *Bombet v. Donovan*, No. 13-118-SDD-SCR, 2015 U.S. Dist. LEXIS 34192 at *12 (M.D. La. Mar. 19, 2015) (dismissing plaintiff's challenge to the MOE on grounds *Plunkett* had ruled it a valid remedy).

¹⁰³ U.S. DEP'T OF HOUS. & URBAN DEV., MORTGAGEE LETTER 2015-15 (2015) (on file with author) ("FHA determined that it is possible for it to make the MOE assignment claim option available to mortgagees without requiring satisfaction of either the Factor Test or the Principal Limit Test.").

¹⁰⁴ Complaint for Declaratory and Injunctive Relief at 10, *Snyder v. Castro*, No. 1:15-cv-00568-ESH (D.D.C. Apr. 15, 2015).

spouses.”¹⁰⁵ *Snyder* eventually was dismissed after the plaintiffs failed to reply to HUD’s motion to dismiss,¹⁰⁶ and it appears the MOE in its current form is regarded as a sufficient remedy by HUD for non-borrower surviving spouses. The next question that arises, then, concerns the possibility of private legal remedies against the reverse mortgage lenders themselves.

VII. Private Litigation Against Reverse Mortgage Lenders

Lawsuits against lenders by non-borrower surviving spouses resulted in a far less clear-cut solution than the suits against HUD did. In *Bennett I*, the court held reverse mortgage contracts between lenders and the original borrowers were to be judged independently of the validity of HUD’s rule in Section 206.27(c).¹⁰⁷ In so deciding, the court relied heavily on another case that held non-government third parties had no need to reverse a position they had taken based on an erroneous agency policy.¹⁰⁸ The court in *Bennett II* refined this view, holding that because HUD erred in insuring reverse mortgages which were written to exclude the appropriate spousal protections, the plaintiffs’ relief was to come from HUD alone and thus the relationship between the plaintiffs and the individual lenders was to be addressed separately.¹⁰⁹ Accordingly, courts have been faced with litigation concerning the contractual obligations of reverse mortgage lenders to non-borrower surviving spouses, although their holdings have not been nearly as uniform as those addressing HUD’s role or the validity of the solutions HUD implemented.

While *Bennett I* seemed to affirmatively answer the question of whether reverse mortgage lenders could in their private capacities foreclose on non-borrower surviving spouses, courts differed in their holdings when faced with non-borrower surviving spouses suing

¹⁰⁵ Defendant’s Motion to Dismiss for Mootness at 1, *Snyder v. Castro*, 2015 WL 3901842 (D. D.C. June 12, 2015) (No. 1:15-cv-00568 (ESH)).

¹⁰⁶ Order Granting Motion to Dismiss, *Snyder v. Castro*, No. 15-0568 (ESH) (D. D.C. July 8, 2015).

¹⁰⁷ See *Bennett v. Donovan (Bennett I)*, 703 F.3d 582, 586 (D.C. Cir. 2013) (“Even if HUD should never have insured these mortgages, the lenders now had a lawful right to foreclose under the mortgage contracts themselves, and that right did not depend on the legality of HUD’s regulation.”).

¹⁰⁸ *Id.* at 587 (citing *Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004)).

¹⁰⁹ See *Bennett v. Donovan (Bennett II)*, 4 F. Supp. 3d 15 (D.C. Cir. 2013).

reverse mortgage lenders.¹¹⁰ The majority of courts have wholeheartedly adopted *Bennett I*'s conclusion that the lender-borrower relationship was entirely separate from HUD and thus should not be affected by the language in Section 1715z-20(j).¹¹¹ Certain courts in these cases have stressed the independence of both HUD and the private lenders, arguing the court was powerless to interfere with the contract between the borrower and the lender and that the court was also powerless to force HUD to accept assignment of a reverse mortgage even in the presence of the MOE.¹¹² Other courts have focused on Section 1715z-20(j), holding it should be read to apply narrowly to eligibility for HUD's HECM insurance program, rather than to any aspect of the lender-borrower relationship.¹¹³ Some courts, meanwhile, have shown a willingness to at least temporarily forestall a private lender's foreclosure action, acknowledging that HUD had

¹¹⁰ Compare *Welte v. Wells Fargo Bank Nat'l Ass'n*, 189 F. Supp. 3d 965, 976 (C.D. Cal. May 27, 2016) (holding in part that Section 1715z-20(j) applied only to HUD and imposed no duties on financial institutions) with *Smith v. Reverse Mortg. Sols., Inc.*, 200 So. 3d 221, 226–28 (Fla. Dist. Ct. App. 2016) (holding Section 1715z-20(j) precluded a lender from foreclosing on a surviving spouse who signed a reverse mortgage but was not a named borrower).

¹¹¹ See *Welte*, 189 F. Supp. 3d, at 976–77 (explaining Section 1715z-20(j) imposes a duty on HUD, but not on an individual lender); *Larsen v. OneWest Bank, FSB*, 2015 Tex. App. LEXIS 11474, at *31 (Tex. App. Nov. 5, 2015) (“[T]here is no requirement that any reverse mortgage documents in this case must comply with any provision in 12 U.S.C. § 1715z-20 before a lender may foreclose.”); *Aldi v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. LEXIS 79639 (D. Conn. Feb. 17, 2015) (“In the instant case, the Court agrees with defendants that 12 U.S.C. § 1715z-20 governs HUD’s insurance of reverse mortgages . . . [t]hat HUD erred by doing so does not create a cause of action running from plaintiffs to defendants.”); see also *Smith*, 200 So. 3d at 233 (Shepherd, J., dissenting) (arguing HUD’s creation of the MOE and acceptance of assignment of reverse mortgages constitutes HUD’s implicit acknowledgement Section 1715-20(j) does not apply to individual lenders).

¹¹² See *Bombet v. Donovan*, 2015 U.S. Dist. LEXIS 34192, at *8 (holding plaintiff’s claim could not be redressed by the court since the court lacked power to prevent a private reverse mortgage lender from foreclosing and also lacked the power to force HUD to accept assignment); *Nationstar Mortg. LLC v. Carey*, 2014 Del. Ch. LEXIS 248, at *5 (Del. Ch. Nov. 26, 2014) (holding *Bennett II* did not affect a private mortgage contract and a private lender retained the right to foreclose even in the presence of the MOE).

¹¹³ See *Washington-Jarmon v. OneWest Bank, FSB*, 513 S.W.3d 103, 112 (Tex. App. 2016).

fashioned a remedy for the issue and that a non-borrower surviving spouse should, at a minimum, be able to attempt to use it.¹¹⁴ At least one court has gone even further, disagreeing completely with the strict divide between HUD's remedy and the private contract between borrower and lender and arguing that because any HUD-insured HECM should qualify for the spousal protections specified in Section 1715z-20(j), these protections would be meaningless if they did not apply equally to lenders as they do to HUD.¹¹⁵

Outside of the basic issue of whether or not Section 1715z-20(j) is applicable to private lenders, another compelling issue that has arisen in litigation between reverse mortgage lenders and non-borrower surviving spouses concerns the duties owed by lenders to potential reverse mortgage borrowers.¹¹⁶ Prior to the *Bennett* cases, there were no federal guidelines requiring disclosures to non-borrower spouses prior to the borrower spouse executing a reverse mortgage.¹¹⁷ In practice, however, anecdotal evidence seems to suggest lenders were aware of the consequences of originating a reverse mortgage when a non-borrower spouse was present and, at least in some cases, attempted to discuss the issues presented by this situation with potential borrowers and their spouses.¹¹⁸ In other cases, lenders went a step further and required non-borrower spouses to sign certifications attesting they understood the consequences of entering into a reverse mortgage (including the possibility of foreclosure after the borrower spouse's death) and had sufficient opportunity to discuss the transaction with their own independent experts.¹¹⁹ Subsequent to the

¹¹⁴ See *Kinzler v. Liberty Reverse Mortg.*, 2014 U.S. Dist. LEXIS 190416, at *7 (C.D. Cal. Apr. 2, 2014) (granting plaintiff a temporary restraining order against lender's foreclosure action in the aftermath of *Bennett II*).

¹¹⁵ See *Smith*, 200 So. 3d at 228 ("The subject reverse mortgage is insured by HUD pursuant to a Congressionally prescribed scheme that expressly requires deferment of the obligation to satisfy the loan secured by such mortgages until the death of the borrower and any spouse of the borrower.").

¹¹⁶ See, e.g., *Washington-Jarmon*, 513 S.W.3d at 106.

¹¹⁷ See *Welte v. Wells Fargo Bank Nat'l Ass'n*, 189 F. Supp. 3d 965, 970 (C.D. Cal. May 27, 2016) ("Prior to 2014, no HUD guideline required disclosures to non-borrowing spouses . . .").

¹¹⁸ See *Faison*, *supra* note 83 (commenting, as a reverse mortgage originator, "[a]ny originator, that does not *EXPLAIN* in detail the ramifications of the [non-borrower spouse], is a criminal, and along with the current lender's required attorney's letter, is quite enough for the borrowers to fully recognize the results after the last borrower is no longer living in the home.").

¹¹⁹ See, e.g., *Washington-Jarmon*, 513 S.W.3d at 106.

Bennett litigation, however, HUD explicitly required lenders to disclose certain information to potential non-borrower spouses prior to issuing a reverse mortgage. In Mortgagee Letter 2014-07, HUD added the first disclosure requirement, mandating that any non-borrower spouse on a reverse mortgage written on or after August 4, 2014 sign a certification acknowledging that while they were to be protected from foreclosure in the event of the borrower spouse's death, they were still required to abide by a set of listed conditions in order to remain in the house.¹²⁰ Then, in Mortgagee Letter 2015-03, HUD added a second disclosure requirement for non-borrower spouses seeking to utilize the MOE, mandating that they certify to their status as a non-borrower spouse and that they acknowledge the conditions under which the MOE would no longer be valid and the house would go into foreclosure.¹²¹ HUD's guidance indicated that a reverse mortgage could not be included in the HECM program if it lacked the first disclosure,¹²² and could not be assigned using the MOE if it lacked the second.¹²³

Outside of these certifications and disclosures, however, courts have seemed reluctant to impose on reverse mortgage lenders any broader duties to non-borrower spouses, at least in the absence of mental defects or other issues that could interfere with cognition.¹²⁴ Furthermore, despite the requirement that potential reverse mortgage borrowers receive counseling prior to obtaining a HECM, evidence seems to indicate that borrowers and non-borrower spouses may not have been adequately informed of the risks posed by removing a homeowner from the title to a house secured by a spouse's reverse mort-

¹²⁰ MORTGAGEE LETTER 2014-07, *supra* note 82, at 8–9.

¹²¹ MORTGAGEE LETTER 2015-03, *supra* note 80, at 10.

¹²² MORTGAGEE LETTER 2014-07, *supra* note 82, at 8–9.

¹²³ MORTGAGEE LETTER 2015-03, *supra* note 80, at 10.

¹²⁴ *See Welte v. Wells Fargo Bank Nat'l Ass'n*, 189 F. Supp. 3d 965, 975 (C.D. Cal. 2016) (holding under California law, a non-borrower spouse was not a "borrower-client" of a bank and thus was owed no duty by the bank, and explaining further that the bank would have no duty of care regardless since it did not unduly influence the borrower's or non-borrower spouse's decisions); *Wiseman v. First Mariner Bank*, 2013 U.S. Dist. LEXIS 136229, at *46–51 (D. Md. Sep. 23, 2013); *see also Biggs v. Eaglewood Mortg. LLC*, 582 F.Supp. 2d 707, *aff'd*, 353 F. App'x 863 (4th Cir. 2009), *cert. denied*, 560 U.S. 939 (2010) (holding a traditional mortgage lender had no duty to provide a more "suitable" loan to elderly borrowers than the one provided and the contract was valid absent mental impairment of the mortgage parties).

gage.¹²⁵ Notwithstanding these concerns, however, some courts have relied on HUD's HECM counseling requirement to further insulate lenders from any finding that they owed a duty to non-borrower spouses. Courts in these cases have argued that due to this required counseling, all parties to a reverse mortgage transaction should be even better informed of the transaction's inherent risks than parties to other types of financial transactions, and lenders should accordingly bear less responsibility to potential borrowers.¹²⁶ HUD's notification requirements may become even more of a shield for lenders in the future, as HUD updated these requirements in Mortgagee Letter 2015-03 to mandate that borrowers electing to take the MOE certify that they understand the conditions under which a protected non-borrower spouse could still face foreclosure (specifically, failure to abide by the continued ownership requirements set out in the Mortgagee Letter).¹²⁷ While this expanded counseling requirement may (and in many cases likely will) lead to borrowers having better information about their reverse mortgages, it may also allow lenders to further disclaim any duties to inform non-borrower spouses about the risks of the transaction, relying instead on HUD's counselors to provide the information for them.

Another interesting question arising out of litigation between lenders and non-borrower surviving spouses concerns fraud. In some cases, reverse mortgage salespeople fraudulently led spouses younger than age 62 to believe that they could remove their names from home titles and then add their names back once they reached the age of eligibility for a reverse mortgage.¹²⁸ Notably, the *Bennett* plaintiffs

¹²⁵ See *Wiseman*, 2013 U.S. Dist. LEXIS 136229, at *13–14 (recounting plaintiff's argument that HECM counseling did not adequately address consequences of removing herself from her home's title prior to her husband executing a reverse mortgage).

¹²⁶ See *Welte*, 189 F. Supp. 3d at 975 ("Moreover, the fact that the Weltes were required to undergo HUD counseling and obtain a certificate of completion prior to applying for a reverse mortgage reduces the foreseeability of harm and moral blame attached to Wells Fargo."). But see *Wiseman*, 2013 U.S. Dist. LEXIS 136229, at *50 (denying defendant lender's motion to dismiss fraud claims against an employee who potentially misled reverse mortgage borrowers partially on the grounds that, while the borrowers underwent HUD counseling, the court had no evidence as to the content of the counseling or the circumstances surrounding it).

¹²⁷ See MORTGAGEE LETTER 2015-03, *supra* note 80, at 14–15.

¹²⁸ See, e.g., *Aldi v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. LEXIS 79639, at *7 (D. Conn. Feb. 17, 2015) (describing how a bank employee fraudulently

both claimed to have been misled into relinquishing their interest in their homes this way.¹²⁹ In these cases, reverse mortgage borrowers seemingly have plausible grounds for relief through antifraud laws. To bring a case for common law fraud, a plaintiff must show (1) a false representation was made as to a statement of fact, (2) the representation was known to be false by the party making it, (3) the representation was made to induce the other party to act on it, and (4) the other party acted on the false representation in such a way that the representation caused injury.¹³⁰ In order to hold a lender accountable, however, courts have sometimes asked whether the lender owed a duty to disclose the correct information to the party that received the misrepresentation, at times finding the lender lacked any duty to non-borrower spouses as non-parties to the reverse mortgage transaction, leaving them unprotected.¹³¹

VIII. State Consumer Protection Laws: A Potential Solution for Non-Borrower Spouses

Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL) may provide an effective template for bringing fraud claims against lenders in situations where one spouse has been led by mistake or deception to remove his or her name from a home's title prior to the other spouse receiving a reverse mortgage.¹³² The UTPCPL creates a private right of action for "any person who

led someone to believe she could be added to a home's title after reaching the age of 62); *Wiseman*, 2013 U.S. Dist. LEXIS 136229, at *47–50 (explaining misrepresentations made by a mortgage lender concerning a widow's ability to remove her name from the home's title and maintain residence in the home secured by the reverse mortgage after her husband's death).

¹²⁹ *Bennett v. Donovan (Bennett I)*, 703 F.3d 582, 585 (D.C. Cir. 2013) ("Appellants allege that they were assured by their brokers that they would be protected from displacement after their spouses died, and that in reliance on this protection, they quitclaimed interest in the homes they had owned jointly with their spouses . . .").

¹³⁰ See, e.g., *Aldi*, 2015 U.S. Dist. LEXIS 79639, at *8–9.

¹³¹ See, e.g., *Welte*, 2016 U.S. Dist. LEXIS 129109, at *17 (holding that for a non-borrower surviving spouse to bring a case of fraud against a lender, the spouse must show the defendant bank owed a duty to disclose to the consequences of removing her name from the home's title). But see *Aldi*, 2015 U.S. Dist. LEXIS 79639, at *9 (holding a suit could continue against a lender based on misrepresentations made by that lender's agent).

¹³² 73 PA. CONS. STAT. § 201 (2015).

purchases or leases goods or services . . . and thereby suffers any ascertainable loss of money or property . . . as a result of the use or employment by any person of a [fraudulent] method, act or practice”¹³³ Penalties for violations of the UTPCPL can be severe, with the court having discretion to award treble damages if it sees fit to do so.¹³⁴ Pennsylvania courts have broadly interpreted the meaning of “person who purchases” under the UTPCPL to include individuals who, though not legally party to reverse mortgages, disclaimed their interest on homes secured by reverse mortgages based on misrepresentations made by lenders during the discussions leading up to the reverse mortgage closing.¹³⁵ In *Morgan v. World Alliance Financial Corp.*, the plaintiff brought a claim under the UTPCPL alleging he was deceived into removing his name from the deed to the house he and his wife owned.¹³⁶ Specifically, the plaintiff claimed his reverse mortgage broker had him sign paperwork transferring his ownership interest without first adequately explaining the process and the broker’s behavior constituted an “unfair or deceptive practice[.]” under the UTPCPL.¹³⁷ In rejecting the defendants’ arguments that the plaintiff was a non-party to the reverse mortgage and thus lacked standing, the court held “direct privity” was not needed to bring a claim under the UTPCPL. Rather, a claim could be brought by any party “intended to rely upon the fraudulent conduct, and those whose reasonable reliance was specially foreseeable.”¹³⁸ The court also rejected the defendant lender’s claim that, because the misstatements made to the plaintiff were made by an employee of a third-party

¹³³ 73 PA. CONS. STAT. § 201-9.2 (2015).

¹³⁴ *Id.*

¹³⁵ *See, e.g., Morgan v. World Alliance Fin. Corp.*, 2013 U.S. Dist. LEXIS 13870, at *16 (E.D. Pa. Jan. 31, 2013) (denying defendant’s motion to dismiss for lack of standing under the UTPCPL because although plaintiff was not party to the reverse mortgage in question, he “gave up something of significant value—his ownership interest in the Property—in order to consummate the reverse mortgage transaction”); *Johnson v. MetLife Bank, N.A.*, 883 F. Supp. 2d 542, 548 (E.D. Pa. 2012) (finding standing under the UTPCPL does not require privity of contract, and the fact that an individual disclaimed his interest in a residential property following negotiations with a reverse mortgage lender was sufficient to qualify the individual as a “purchaser” for purposes of the UTPCPL).

¹³⁶ *Morgan*, 2013 U.S. Dist. LEXIS 13870, at *4.

¹³⁷ *Id.* at *4–9.

¹³⁸ *Id.* at *14–17 (internal citation and quotation marks omitted).

mortgage broker, the lender should not be held liable.¹³⁹ Instead, the court held the fact that the lender and the mortgage broker worked together on marketing and originating the loan meant the lender could face liability for the broker's misstatements.¹⁴⁰

While the UTPCPL, or a law like it, would not provide protection to non-borrower spouses who disclaimed their interest in a property following an honest and informed discussion with a lender, the UTPCPL and the private right of action under it would give standing to deceived non-borrowers to argue their case in a court of law. Given the criticism HUD has faced for no longer allowing individuals to voluntarily sign up for a reverse mortgage excluding one spouse, interpreting state consumer protection statutes the way Pennsylvania courts have interpreted the UTPCPL may provide reverse mortgage consumers a way to have more choice while also being protected from unscrupulous actors in the marketplace.

Other states have similar consumer protection laws,¹⁴¹ although the UTPCPL is unique in the way Pennsylvania courts have interpreted it to encompass non-borrower spouses as well as in the way it has been held applicable to parties working alongside those who make false statements. Courts in other states have varied in their application of their respective consumer protection statutes for deceptive tactics in the reverse mortgage market. In particular, courts have shown some reluctance to adopt the expansive view of parties to whom lenders owe a duty that Pennsylvania courts have. In a case similar to *Morgan*, where a non-borrower spouse was allegedly deceived about the consequences of removing her name from the title to a property, a California court held the plaintiff was not a "borrower-client" and was thus owed no duty by the lender despite the plaintiff having worked jointly with the lender's agent as the plaintiff and her husband were acquiring the reverse mortgage.¹⁴² Additionally, courts have at times taken an especially narrow view of the parties that can be found liable for misleading consumers in a reverse mortgage transaction, finding only parties who actually make material misstatements (rather than all parties to the transaction facilitated in

¹³⁹ *Id.* at *17–21.

¹⁴⁰ *Id.*

¹⁴¹ *See, e.g.*, MD. CODE ANN., COM. LAW § 13-408 (LexisNexis 2017); MASS. GEN. LAWS ch. 93A, § 2 (2017).

¹⁴² *Welte v. Wells Fargo Bank Nat'l Ass'n*, 189 F. Supp. 3d 965, 974 (C.D. Cal. 2016).

part by those misstatements) can be held liable for fraud.¹⁴³ Particularly in the reverse mortgage context, where customers frequently work with a broker rather than the lending institution itself, this narrow view of liability can severely limit the entities against whom deceived parties can seek recovery.

IX. *Beyond Spouses: Lenders' Failure to Honor Their Commitments under the 95 Percent Rule*

Beyond non-borrower surviving spouses, a second, interconnected issue exists when reverse mortgage lenders refuse to either disclose or abide by the so-called “95 percent rule” designed to prevent heirs from owing more to a reverse mortgage lender than a house is worth in the event they decide to settle the reverse mortgage for cash and purchase the home secured by the reverse mortgage themselves.¹⁴⁴ The basis of the 95 percent rule is codified at 24 C.F.R. § 206.125, which states “[i]f the mortgage is due and payable . . . the mortgagor may sell the property for at least the lesser of the mortgage balance or five percent under the appraised value.”¹⁴⁵ However, these regulations are not automatically incorporated into reverse mortgage documents, and thus borrowers are not automatically entitled to them in the absence of guidance issued by HUD.¹⁴⁶ In one case, a borrower attempted to pay off the reverse mortgage balance on his mother’s house for 95 percent of the home’s balance after her death and was denied the opportunity to do so, with the court explaining that despite HUD regulations articulating the 95 percent rule, the lender had not incorporated this rule into her loan documents.¹⁴⁷

¹⁴³ See *Wiseman v. First Mariner Bank*, 2013 U.S. Dist. LEXIS 136229, at *46–51 (D. Md. Sep. 23, 2013) (finding the reverse mortgage company’s reliance on a bank employee to broker a reverse mortgage transaction shielded the company from liability for that employee’s statements).

¹⁴⁴ See, e.g., Jessica Silver-Greenberg, *Pitfalls of Reverse Mortgages May Pass to Borrower’s Heirs*, N.Y. TIMES (Mar. 26, 2014), https://dealbook.nytimes.com/2014/03/26/pitfalls-of-reverse-mortgages-may-pass-to-borrowers-heirs/?_r=1.

¹⁴⁵ See 24 C.F.R. § 206.125(c) (2016).

¹⁴⁶ See *Chandler v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 1122, at *16 (N.D. Cal. Jan. 3, 2014) (relying on HUD’s interpretation of § 206.125(c) to find that while this section could be read to permit estates to take advantage of the 95 percent rule, HUD’s interpretation did not permit them to).

¹⁴⁷ See *id.* at *17.

Responding to concerns about the 95 percent rule not being applied to reverse mortgages, HUD did issue guidance affirming borrowers' right to sell under the 95 percent rule.¹⁴⁸ In addition, HUD directed lenders to inform borrowers' heirs of their right to purchase under the 95 percent rule within 30 days of the original borrower's death.¹⁴⁹ The 95 percent rule as well as the non-recourse nature of reverse mortgages explain why HUD provides insurance on reverse mortgages—while these features provide protection to consumers, lenders would likely be unwilling to commit to them unless they had assurances that they would be compensated for the potential risks they were taking.¹⁵⁰ Consumers pay for this protection through a mortgage insurance premium assessed on their reverse mortgage proceeds, with this amount eventually coming out to 1.25 percent of the total outstanding mortgage balance.¹⁵¹ Accordingly, it makes sense HUD would allow borrowers to take advantage of these protections, as it is the borrowers themselves who ultimately pay for the program to function that way.

Despite the benefits the 95 percent rule provides to heirs seeking to purchase a home formerly subject to a reverse mortgage, courts have been reluctant to find that lenders had an affirmative duty to disclose to heirs their rights under the 95 percent rule.¹⁵² At least one court, however, has supported the contention that a lender could not deny a party's attempt to purchase a deceased family member's home under the 95 percent rule, provided that the party had funds

¹⁴⁸ See, e.g., U.S. DEP'T OF HOUS. & URBAN DEV., MORTGAGEE LETTER 2015-10 (2015) (on file with author) [hereinafter MORTGAGEE LETTER 2015-10].

¹⁴⁹ *Id.*

¹⁵⁰ See, e.g., *What Happens if My Reverse Mortgage Loan Balance Grows Larger Than the Value of My Home?* CONSUMER FIN. PROTECTION BUREAU (2016), <http://www.consumerfinance.gov/askcfpb/1217/what-happens-if-my-reverse-mortgage-loan-balance-grows-larger-value-my-home.html> [https://perma.cc/A5ZP-MLZH].

¹⁵¹ See, e.g., *FHA Reverse Mortgages (HECMs) for Seniors*, U.S. DEPT. OF HOUS. & URBAN DEV. (2017), https://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/hecm/hecmabou.

¹⁵² See, e.g., *Chandler v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 1122, at *13–14 (N.D. Cal. Jan. 3, 2014) (“[T]he plain language of the HECM Deed does not support Plaintiff's position that he was entitled to notice and an opportunity to purchase the Property for 95 percent of its appraised value.”); *Santos v. Reverse Mortg. Sols.*, 2013 U.S. Dist. LEXIS 146334, at *18 (N.D. Cal. Oct. 9, 2013) (holding the federal regulations pertaining to the 95 percent rule do not create a duty for lenders to provide notice to heirs).

immediately available to make the purchase.¹⁵³ In that case, the court also held that HUD's regulation outlining the 95 percent rule did not place a binding duty to notify on reverse mortgage lenders; rather, it was merely HUD's way of expressing its "expectation" that lenders would notify borrowers' heirs of their rights after the borrower had died.¹⁵⁴ Nevertheless, the court held that while the lender was legally justified in not providing notice about the 95 percent rule, it could also not insist on repayment of the loan in full when the borrower's heir brought the 95 percent rule to their attention.¹⁵⁵ Given the 95 percent rule seems to be fairly obscure and precedent suggests it requires great diligence on the part of heirs in order to be invoked, HUD's guidance providing notice requirements to heirs may make this option more accessible for many who otherwise would not have known about it.

X. *A Way Forward: Promoting Reverse Mortgage Transparency While Strengthening State Antifraud Protections*

Given the issues posed by reverse mortgages and the legal wrangling over them to date, two questions emerge—what are the appropriate solutions to these issues and who are the right entities to craft these solutions? There is no shortage of regulatory options to deal with these potential issues posed by reverse mortgages. On the federal side, reverse mortgages are regulated by HUD and by the Consumer Financial Protection Bureau.¹⁵⁶ On the state side, meanwhile, state attorneys general and state consumer protection agencies have taken the lead in regulating the reverse mortgage industry.¹⁵⁷ Additional "regulation," meanwhile, has come from private litigants seeking redress for issues they have encountered either as reverse mortgage borrowers or due to their affiliation with reverse mortgage borrowers.¹⁵⁸

¹⁵³ See *Santos*, 2013 U.S. Dist. LEXIS 146334, at *18–20 (holding that, if true, a lender would have violated the 95 percent rule by informing a decedent's heir that a reverse mortgage could only be settled by full payment of the outstanding balance and neglecting to mention the 95 percent settlement option).

¹⁵⁴ See *id.* at *14–15 (indicating HUD's expressed "expectation" and "the expectation of a federal agency is hardly a requirement").

¹⁵⁵ See *id.* at *18–20.

¹⁵⁶ See MORTGAGEE LETTER 2015-10, *supra* note 148; see also SNAPSHOT OF REVERSE MORTGAGE COMPLAINTS, *supra* note 27.

¹⁵⁷ See *e.g.*, 73 PA. CONS. STAT. § 201 (2015).

¹⁵⁸ See *Santos*, 2013 U.S. Dist. LEXIS 146334.

As for federal regulation, HUD should be commended for eventually taking a proactive approach to protecting non-borrower surviving spouses in its more-recent Mortgagee Letters. By removing the Factor Test and the Principal Limit Test as criteria for a non-borrower surviving spouse to receive mortgage assignment under the MOE, the MOE finally became a usable remedy in line with the court's guidance in *Bennett II*.¹⁵⁹ HUD erred, however, in forbidding reverse mortgages that include a non-borrower spouse from being insured at all. For some borrowers, the higher reverse mortgage payout available in exchange for removing a younger spouse from a home's title may be desirable, or even necessary to prevent financial hardship. Neither HUD nor the federal government should forbid couples from making a conscious and informed decision to take out a reverse mortgage in only one spouse's name. Rather, regulations should exist to ensure that such a decision is, in fact, adequately informed. HUD could build on the guidance it issued in Mortgagee Letter 2015-03, where it mandated counselors discuss the requirements for non-borrower spouses to remain in homes with HECMs after a borrower spouse's death, by requiring additional counseling for borrowers seeking to remove one spouse's name from the home's title.¹⁶⁰ In addition, HUD could impose additional disclosure requirements for lenders seeking to participate in the HECM program, requiring they receive signed non-borrower spouse consent forms prior to originating a reverse mortgage in one spouse's name.

States also have a role to play, regardless of whether HUD makes any of the above suggested changes. Since many of the most egregious reverse mortgage abuses occurred due to fraudulent misrepresentations by mortgage brokers and other salespeople, state antifraud laws should be vigorously used to ensure these individuals deal honestly with potential borrowers. As Pennsylvania courts have with the UTPCPL, other states should interpret contractual duties as running to non-borrower spouses, on the grounds that these individuals were parties to the original reverse mortgage transaction, even if they were not eventually named on the reverse mortgage itself. In addition, courts should hold all parties to a reverse mortgage transaction liable for any fraudulent misstatements made with respect to the transaction. That way, lenders will not be able to escape liability by having third-party brokers be the ones to interact with customers.

¹⁵⁹ See *Bennett v. Donovan (Bennett II)*, 4 F. Supp. 3d 5 (D.C. Cir. 2013).

¹⁶⁰ See MORTGAGEE LETTER 2015-10, *supra* note 148.

In short, state and federal regulators both have important roles to play in ensuring reverse mortgages remain a valuable and usable tool for borrowers aged 62 and older. While these products are not for all borrowers and do come with some notable risks, concrete regulatory action ensuring these risks are known to borrowers, borrowers' spouses, and borrowers' families prior to a reverse mortgage being agreed to can help prevent borrowers from unwittingly giving up any rights. Furthermore, regulators, as well as private litigants through consumer protection laws, can help ensure lenders abide by the rules applicable to them at all stages of the reverse mortgage process. As more of the Baby Boomer generation retires and needs access to the equity in their homes, the changes suggested herein should help ensure that reverse mortgages exist to safely and effectively meet that need.

