Reverse Mortgage Concerns: Occupancy Determination

Posted By USFN, Monday, August 1, 2016

August 1, 2016

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The reverse mortgage is one of the more powerful financial tools available to seniors due to its ability to increase their monthly income at a dramatic rate. However, management of the product can be difficult due to complex requirements from both the consumer and industry perspectives. Reverse mortgages are the subject of some criticism as a result of these management issues, but the ability to identify and resolve them makes the product stronger every year.

Surviving Non-Borrower Spouse

To illustrate one concern, we can point to the common anecdote of the surviving non-borrower spouse who quickly discovers a dramatically reduced income (as well as foreclosure notices in the mail) upon the death of his or her significant other. To handle this situation, HUD amended its reverse mortgage program in 2014 to better protect individuals in this scenario by providing some guidelines for a non-borrower spouse to remain in the home with the mortgage in place. The primary changes are: (1) the surviving spouse and borrowing spouse must have been married at the time the loan closed and until the borrowing spouse's death; (2) the non-borrowing spouse was properly disclosed to the lender during origination and named as such in the mortgage documents; and (3) the surviving non-borrowing spouse must use the property as his or her principal residence.

Occupancy

A primary issue today is the occupancy requirement. Currently for a reverse mortgage, the property must be the borrower's primary residence. Absences for illness are limited to twelve months. Many lenders satisfy the occupancy requirement with an annual "occupancy certification." The borrower must complete and return to the lender a certification as evidence that the borrower occupies the property. However, a problem lies in the fact that the security instrument does not discuss or require this occupancy certification; it is merely a procedure used by servicers to determine the occupancy status of the borrower.

Borrowers have encountered trouble satisfying the annual certification due to lack of knowledge, confusion as to this requirement, or a failure to complete it on an annual basis. Moreover, borrowers misplace mail regularly; they become ill and require care for longer than one year; and some lose the ability to read effectively. Any of these factors gives rise to legitimate concern regarding foreclosure based on non-occupancy — particularly when it can lead to an inadvertent finding of non-occupancy. This inadvertence can trigger a foreclosure in conflict with the terms of the security instrument, and subsequently nullify a foreclosure and require proceedings to re-instate the mortgage. These are costs that the mortgage industry would like to avoid.

Is there a better way to determine occupancy with regard to reverse mortgages?

One solution is to conduct an annual inspection, including an occupancy determination. The borrower could have the opportunity to prove his or her occupancy status. This would provide lenders with a more concrete basis for initiation of foreclosure due to non-occupancy. Inspection costs are far less than those incurred in defending a lawsuit for unlawful foreclosure, and would better serve as a lender's due diligence in loan servicing practices.

Alternatively, lenders proceeding with foreclosure based on non-occupancy could instruct process servers to examine the subject property for proof of occupancy — and, particularly, for evidence of the individuals who are residing there. Many process servers and realtors already have the skills to investigate this information by reviewing utility and mail records. The process server is in the position to deliver a letter describing the occupancy requirement and a copy of the lender's occupancy certification document to the occupant/borrower. If the occupant is the borrower, the process server can easily make certain that the certification paper is completed and returned to the lender. If the certification matches, foreclosure proceedings can be discontinued, and the borrower can be educated as to the importance of the occupancy certification.

In jurisdictions that employ nonjudicial foreclosures, where no process server is utilized, lenders can modify the certification procedure. For example, lenders can ensure that the certification document uses plain language and states, conspicuously, that the repercussions for not completing the certification process can result in foreclosure. Lenders can also consider making the certification paper the size of a response card with a return envelope, so that it stands out to the recipient and provides a simple means of satisfying the occupancy condition. And finally, lenders in nonjudicial jurisdictions can institute skip trace procedures when non-occupancy is declared on a property. If the current address indicates that the borrowers still occupy the property, additional inspections could be initiated to confirm occupancy and prevent an inappropriate foreclosure.

Lately, the industry has observed an increase in successfully contested foreclosures of reverse mortgages when based on improper findings of non-occupancy. These contested actions are expensive and discredit the financial tools from which many consumers could benefit. In order to maintain a positive consumer/business relationship, it is imperative that these concerns be addressed by ensuring that our industry fulfills a high level of quality across the board.