AGING OUT OF PLACE: THE TOLL OF REVERSE MORTGAGES AND HOW TO FIX THE PROGRAM

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Reverse mortgages can be a handy tool for seniors wanting to access the equity in their home while remaining in that home. But for many seniors, the promise of a reverse mortgage may actually lead to poor financial outcomes, such as bankruptcy or foreclosure. This Note examines various proposals for reforming the reverse mortgage program. It details the decline of seniors' overall financial health and consequently, the decline of reverse mortgage outcomes. This Note argues that the reverse mortgage system should be redeveloped so that it can continue to serve as an important source of financial stability for the elderly. Improving counseling requirements, offering larger cash incentives, or utilizing annuity enhancements are promising solutions recommended by this Note for achieving the goals that the reverse mortgage program originally set out to accomplish.

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"They ain't gonna take this house. I'll go to the deep blue sea, they're not going to take this house."[1]

I. Introduction

Leroy Roebuck is in for the fight of his life as he attempts to remain in the house where he raised a family and resided for the last fifty-five years.[2] Leroy's story is all too familiar for older Americans, whose American Dream morphed into a nightmare. He is just one of the millions of Americans[3] who decided to "age in place" by securing a reverse mortgage, only to receive the most dreaded of correspondences—a notice of foreclosure.[4]

Eighty-six-year old Leroy worked most of his life at a curtain manufacturer in Philadelphia.[5] A frugal man, he took the bus to work every day and in 1970 he purchased his parents' house.[6] When the house needed repairs, he was not sure how he would pay for them.[7] Then an ad came across the TV for reverse mortgages and Leroy's question was answered, or so he thought.[8]

Leroy first borrowed $83,000 in 2008 against a $112,000 home valuation.[9] Years later, when lenders pursued Leroy again for a reverse mortgage, the home's value had appreciated to $241,000, allowing him to extend his credit past $150,000.[10] All told, Leroy borrowed over $100,000.[11]

1. Nick Penzenstadler & Jeff K. Lowenstein, *Seniors were sold a risk-free retirement with reverse mortgages. Now they face foreclosure*, USA TODAY (Jun. 11, 2019, 8:22 PM), https://www.usatoday.com/in-depth/news/investigations/2019/06/11/seniors-face-foreclosure-retirement-after-failed-reverse-mortgage/1329043001/.
2. *Id.*
3. *Annual HECM Endorsement Chart*, NAT'L REVERSE MORTG. LENDERS ASS'N, https://www.nrmlaonline.org/annual-hecm-endorsement-chart (last updated Sept. 2020).
4. *Age in Place With a Reverse Mortgage*, REVERSE MORTG. INFO. (May 16, 2018), https://reverse.org/blog/age-in-place-with-a-reverse-mortgage/.
5. Penzenstadler & Lowenstein, *supra* note 1.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

The bank sent Leroy his first foreclosure notice in 2013.[12] Leroy violated the terms of his mortgage when he forgot to renew his homeowners insurance—only $250.[13] So, acting reasonably; his lender, Bank of America, took out its own insurance on the property to protect their investment.[14] Less reasonably, it was a $5,000 policy—two and a half times more than the lapsed policy—which was then added to the loan balance.[15] Leroy's failure to maintain homeowner's insurance did not immediately constitute a default, but it led to assessment fees and penalties which have snowballed over the last six years.[16] Now, Leroy owes the bank more than $20,000.[17]

How has Leroy managed to stay in his house? First, he entered a City of Philadelphia diversion program to renegotiate with his lenders and obtain a more feasible monthly payment.[18] The proposed plan was rejected, and Leroy has since filed for bankruptcy protection twice.[19] Arthritic and partially blind, Leroy has managed to remain in his home thanks to a health deferment to foreclosure.[20] For now, he lives there year to year, hoping that judges will continue to view his situation favorably and extend the deferment.[21] Nevertheless, in Leroy's own words, "this is like a nightmare, man."[22]

A handy instrument, the reverse mortgage allows people over age sixty-two to access the equity in their home without making any monthly mortgage payments.[23] Just maintain some fees and requirements and you will live out your days on the homestead.[24] Yet, in the aftermath of the Great Recession, nearly one hundred thousand reverse mortgages have failed,[25] with black and working-class communities bearing the brunt of the hardship.[26]

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. Amy Fontinelle, *Reverse Mortgage*, INVESTOPEDIA, https://www.investopedia.com/mortgage/reverse-mortgage/ (last updated Feb. 14, 2020).
24. *Id.*
25. Penzenstadler & Lowenstein, *supra* note 1.
26. *Id.*

The industry abounds with proposals to stem the tide of reverse mortgage foreclosures.[27] On the ground level, some critics argue that hidden fees and deceptive practices are to blame;[28] of course, curing lending of hidden fees and deceptive practices is the regulator's holy grail.[29] More still, some blame the high number of foreclosures on a lack of counseling,[30] a lack of compassionate servicing,[31] or fast-approaching deadlines.[32] Yet the U.S. Department of Housing and Urban Development ("HUD"), which sets the guidelines for reverse mortgages,[33] had its own changes in mind for 2019.[34]

Over the last few years, HUD has acknowledged the failing reverse mortgage program and has begun to implement changes to reduce the number of foreclosures, thereby strengthening the Home Equity Conversion Mortgage ("HECM") program.[35] HECM is the

27. Nick Penzenstadler, *Reverse mortgages left many seniors in foreclosure. Here's what can be done to stop it*, USA TODAY (Jun. 11, 2019, 9:23 PM) [hereinafter *Reverse mortgages left many seniors in foreclosure*], https://www.usatoday.com/story/news/investigations/2019/06/11/6-steps-prevent-reverse-mortgage-foreclosure/1341346001/.

28. Ingrid Evans & Daniel Oren, *Toppling Reverse Mortgage Abuse*, AM. ASS'N FOR JUST. (Dec. 2017), https://web.justice.org/what-we-do/enhance-practice-law/publications/trial-magazine/toppling-reverse-mortgage-abuse.

29. *See* Colin Robertson, *Misleading Mortgage Rates and Programs*, TRUTH ABOUT MORTG., https://www.thetruthaboutmortgage.com/misleading-mortgage-rates-and-programs/ (last visited Mar. 7, 2021).

30. Jill Schlesinger, *The risks of reverse mortgages*, CHI. TRIB. (Aug. 15, 2017, 4:40 PM), https://www.chicagotribune.com/business/success/tca-the-risks-of-reverse-mortgages-20170815-story.html.

31. Michael Sainato, *'I Don't Know What Else to Do': Homeowners Turn to Crowdfunding to Avoid Foreclosures*, THE PROGRESSIVE (Oct. 22, 2018), https://progressive.org/dispatches/homeowners-turn-to-crowdfunding-181018/.

32. *National Consumer Law Center Urges HUD to Reduce Foreclosures on Widows and Widowers of Reverse Mortgage Borrowers*, PA. LEGAL AID NETWORK (Nov. 29, 2018), https://palegalaid.net/news/national-consumer-law-center-urges-hud-reduce-foreclosures-widows-and-widowers-reverse.

33. *Home Equity Conversion Mortgages for Seniors*, U.S. DEP'T. HOUS. & URB. DEV., https://www.hud.gov/program_offices/housing/sfh/hecm/hecmhome (last visited Mar. 7, 2021).

34. Joshua Wilson, *New Reverse Mortgage Rules 2019: Updated Reverse Mortgage Loan Changes*, GOODLIFE HOME LOANS (Mar. 8, 2019), https://goodlifehomeloans.com/reverse-mortgage-changes.

35. U.S. DEP'T. HOUS. & URB. DEV., Mortgagee Letter 2019-15 from U.S Department of Housing and Urban Development to All FHA Mortgagees, All Underwriters, All Appraisers, All Inspectors, All Consultants, All Counselors, All Organizations, All Governmental Entity Participants, All Real Estate Brokers and All Closing Agents (Sept. 23, 2019) [hereinafter MOE Letter] (available at https://www.hud.gov/sites/dfiles/OCHCO/documents/19-15hsgml.pdf) (on file with author); U.S. DEP'T. HOUS. & URB. DEV., Mortgagee Letter 2017-12 from U.S. Department of Housing and Urban Development to all FHA-Approved Mortgagees and All HUD-

umbrella term for traditional reverse mortgages and the variations the lending industry subsequently developed.[36] One of these changes included relaxing the regulations for non-borrowing spouses upon the death of the borrowing spouse.[37] Another change involved HUD increasing the initial insurance payment but lowering monthly premiums, which so frequently trigger defaults.[38]

This Note will illuminate the dramatic shift in debt carriage over the last few decades. Specifically, how older Americans have been saddled with the largest share of household debt in history. Further, this Note will lay the foundation for its analysis with a thorough description of HECMs (a.k.a. reverse mortgages), the positive impact reverse mortgages can produce, the important role reverse mortgages play in elder insolvency, and the declining health of the HECM program. Next, this Note will examine HUD's recent changes to the HECM rules under the Trump administration and the likely effect on borrowers improving the health of the HECM system. Before concluding, this Note will offer some suggestions from industry leaders and economic researchers about what can be done to improve outcomes for both borrowers and the system itself.

II. Background

A. The Reverse Mortgage: The Instrument

A seemingly contemporary concoction, the reverse mortgage actually dates back to 1961.[39] The first recipient was Mrs. Nellie Young of Portland, Maine.[40] An enterprising loan officer of Deering Savings and Loan designed a mortgage for Young, the widow of his former high school football coach, that would allow her remain in her home after

Approved Housing Counselors (Aug. 29, 2017) (available at https://www.hud.gov/sites/documents/17-12ML.PDF) (on file with author).

36. Julie Kagan, *Home Equity Conversion Mortgage (HECM)*, INVESTOPEDIA, https://www.investopedia.com/terms/h/hecm.asp (last updated Sept. 10, 2020).

37. *See generally HOME EQUITY CONVERSION MORTGAGE (HECM) INFORMATION REGARDING SURVIVING NON-BORROWING SPOUSES*, U.S. DEP'T. HOUS. & URB. DEV., https://www.hud.gov/program_offices/housing/sfh/hecm/surviving_non_borrowing_spouse (last visited Mar. 7, 2021).

38. MOE Letter, *supra* note 35.

39. *The History of the Reverse Mortgage*, AM. ADVISORS GRP., (last visited Mar. 7, 2021) https://www.americanadvisorsgroup.com/news/history-reverse-mortgage.

40. *Id.*

her husband died.[41] The next two decades experienced a boom in lobbying efforts to encourage the federal government to insure the mortgages.[42] The game changed in 1987 with the enactment of the Housing and Community Development Act, which arranged for reverse mortgages to be managed by the HECM program under HUD's control.[43] With the passage of the bill, reverse mortgages were federally insured, and it was off to the races.[44]

The instrument itself can be understood quite simply. First, eligibility hinges on age.[45] The mortgagor must be at least sixty-two years old to qualify.[46] Unlike a forward mortgage that requires a homeowner to make monthly mortgage payments, the loan balance for a reverse mortgage is not due until the borrower dies, moves away permanently, or sells the house.[47] The borrower has many equity accessing options: a lump sum, an annuity, term payments, a line of credit, or an annuity or term payment paired with a line of credit.[48] The mortgagor must purchase mortgage insurance, pay the mortgage fees, and maintain the taxes and insurance on the mortgaged property.[49] Further, the mortgagor must maintain the property itself.[50] Failure to meet these obligations can result in fines with high interest that, if left unattended, can quickly lead to a default, acceleration and foreclosure.[51]

41. *Id.*
42. Michael G. Branson, *History of the Reverse Mortgage–1969 to Present Day Facts*, ALL REVERSE MORTG., INC. (Mar. 16, 2019), https://reverse.mortgage/history.
43. Wade Pfau, *A Brief History Of Reverse Mortgages In The United States*, FORBES (Nov. 29, 2018, 2:05 PM), https://www.forbes.com/sites/wadepfau/2018/11/29/a-brief-history-of-reverse-mortgages-in-the-united-states/#52ef529d1ba3.
44. AM. ADVISORS GRP., *supra* note 39.
45. Amy Fontinelle, *Reverse Mortgage*, INVESTOPEDIA, https://www.investopedia.com/mortgage/reverse-mortgage/ (last updated Feb. 14, 2020).
46. *Id.*
47. *Id.*
48. *Id.*
49. Dennis Miller, *3 Ways a Reverse Mortgage Can Leave You Homeless*, MARKETWATCH (Oct. 7, 2013, 6:15 AM), https://www.marketwatch.com/story/3-ways-a-reverse-mortgage-can-leave-you-homeless-2013-10-07.
50. *Id.*
51. *See What Should I Do if I Have a Reverse Mortgage Loan and I Can't Pay My Property Taxes or Homeowners Insurance?*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/ask-cfpb/what-should-i-do-if-i-have-a-reverse-mortgage-and-i-cant-pay-my-property-taxes-or-insurance-en-1509/ (last updated Aug. 30, 2019).

B. The Benefit of the Home Equity Conversion Mortgage

It is not difficult to find someone willing to decry the existence of the reverse mortgage. Reverse mortgages have gained a bad rap over the years—deservedly so in many cases—but it is argued that failure for some should not destroy an investment vehicle that has been helpful for others.[52] Seniors often face difficulty unlocking the equity in their homes because their fixed income will not support a home equity loan.[53] The National Council on Aging describes this puzzling phenomenon as "house rich but cash poor." [54]

Traditional home equity loans are accompanied by large out-of-pocket fees for origination, appraisals, title searches, recording costs, and servicing costs.[55] Further, they still come with regular monthly payments that do not exist for reverse mortgages.[56] Some people are in need of a consistent and long-term source of income that a normal home equity loan cannot offer.[57]

Home equity lines of credit ("HELOCs") are no better. These work just as the name suggests: homeowners access a line of credit using their equity in their home as collateral.[58] That does not, however, prevent the lender from cutting off the line of credit[59]—or worse, calling the loan.[60] That is why HELOCs best serve people who only plan to be in their home a short period of time and can afford the monthly payments.[61]

52. *Cf.* Janna Herron, *Should you get a reverse mortgage? The reasons you should or shouldn't*, USA TODAY (Jun. 12, 2019), https://www.usatoday.com/story/money/2019/06/12/reverse-mortgages-how-do-they-work-and-who-should-consider-one/2881617002/ (explaining that reverse mortgages are financial tools that are neither inherently good nor bad).

53. *See generally* Michele Lerner, *Accessing home equity in a tight economy has become problematic*, WASH. POST (Jun. 11, 2020, 5:30 AM), https://www.washingtonpost.com/realestate/equity-rich-but-cash-poor--what-can-a-homeowner-do/2020/06/10/1856e51e-9a0c-11ea-a282-386f56d579e6_story.html.

54. *Home Equity*, NAT'L COUNCIL ON AGING, https://www.ncoa.org/economic-security/home-equity/ (last visited Mar. 7, 2021).

55. *Reverse Mortgage Facts for Seniors*, NAT'L COUNCIL ON AGING (last visited Mar. 7, 2021) https://www.ncoa.org/economic-security/home-equity/reverse-mortgages/reverse-mortgage-facts/.

56. *Id.*

57. *Reverse Mortgage vs. Home Equity Loan*, NASDAQ (Dec. 12, 2011, 9:26 AM), https://www.nasdaq.com/articles/reverse-mortgage-vs.-home-equity-loan-2011-12-12.

58. Max Fay, *Home Equity Line of Credit (HELOC)*, DEBT.ORG (last visited Mar. 7, 2021), https://www.debt.org/real-estate/mortgages/home-equity-line-of-credit/.

59. *Id.*

60. *Id.*

61. *Id.*

This instrument serves only a small portion of seniors, specifically those who are very early in retirement or not yet retired. Seniors who are still working can draw from their earned income to make the monthly payment; and seniors who have just started their retirement journey have not felt the financial drain that a long post-retirement lifespan can create.[62]

No mortgage payments before one vacates their home, or passes on, is a novel feature that an eligible person may find fits their needs.[63] Further, no matter how massive the loan balance on a reverse equity mortgage grows, the liability can never exceed the value of the property.[64] Under normal home mortgage circumstances, when the bank moves to foreclose on the mortgages, they hold a foreclosure sale.[65] In many states, if the proceeds from the foreclosure auction do not satisfy the debt owed on the mortgage, a frequent outcome, the lender can then sue the borrower for a deficiency.[66]

C. The Growing Financial Instability Among the Qualified Population

Although the reverse mortgage industry has boomed since 2008 (the year baby boomers first turned sixty-two),[67] so too has economic distress among America's older population.[68] The rate of households led by someone sixty or older that carried some debt increased by 20 percent between 2001 and 2013.[69] More startling, the median debt among households that carry debt has increased more than 100 percent.[70]

62. Will Englund, *Millions of Baby Boomers Are Getting Caught in the Country's Broken Retirement System*, WASH. POST (May 4, 2020, 10:12 AM), https://www.washingtonpost.com/business/2020/05/04/baby-boomers-retirement/ ("Half of Americans are at risk of not being able to maintain their standard of living in retirement, according to a Boston College study.").

63. *See* Fay, *supra* note 58.

64. *See id.*

65. James Chen, *Judicial Foreclosure*, INVESTOPEDIA, https://www.investopedia.com/terms/j/judicial_foreclosure.asp (last updated Sept. 11, 2020).

66. *Id.*

67. AM. ADVISORS GRP., *supra* note 39.

68. Deborah Thorne et al., *Graying of U.S. Bankruptcy: Fallout from Life in a Risk Society*, IND. L. STUD. RES. PAPER NO. 406 1, 1 (Aug. 18, 2018), https://ssrn.com/abstract=3226574.

69. *Id.* at 4.

70. *Id.* at 5.

One of the side effects of the shifting debt burden is the increased rate of elderly bankruptcy filings.[71] A depletion in the social safety net in favor of 401(k) plans and an increase in out-of-pocket spending on healthcare, drives bankruptcy filings skyward.[72] A mere shift in the average age of the population is not sufficient to explain the increase in bankruptcy filings among older Americans.[73] Since 1991, the percentage of the adult population over sixty-five has increased by only 2.3 percent, but the rate of bankruptcy filings among that same age group has risen over 12 percent.[74]

The spike in elder bankruptcy is no anomaly. Bankruptcy filings have declined for every age group except the elderly in the last two decades.[75] The blame is falling squarely on the shoulders of a weaker social safety net, pension plans that pose greater levels of risk, and ever increasing costs, particularly the out-of-pocket costs associated with medical care.[76] Even in the case of those that have pension plans or receive social security, the payouts are not in line with historical expectations.[77] This is because social security payments are not keeping up and 401(k) plans are heavily market dependent.[78]

D. Rising Foreclosure Rates and The Role of the Reverse Mortgage

As the national share of personal debt shifts to the elderly population and bankruptcy rates among the elderly rise, so too have incidents of foreclosure.[79] Between 2007 and 2011, the foreclosure rate

71. Tara Siegel Bernard, *'Too Little Too Late': Bankruptcy Booms Among Older Americans*, N.Y. TIMES (Aug. 5, 2018), https://www.nytimes.com/2018/08/05/business/bankruptcy-older-americans.html.

72. *Id.*

73. Thorne et al., *supra* note 68, at 11.

74. *Id.* at 17.

75. C.K. Prahalad, *Too little, too late: Why is bankruptcy rising among older Americans?*, ECONOMIST (Sept. 10, 2018), https://www.economist.com/democracy-in-america/2018/09/10/why-is-bankruptcy-rising-among-older-americans.

76. Robbie Brown, *Facing Foreclosure After 50*, N.Y. TIMES (July 19, 2012), https://www.nytimes.com/2012/07/19/us/foreclosure-rates-surge-for-older-americans-aarp-says.html.

77. Thorne et al., *supra* note 68, at 4.

78. *Id.*

79. Jenifer McKim, *More Seniors Are Taking Loans Against Their Homes–And It's Costing Them*, WASH. POST (Aug. 25, 2017), https://www.washingtonpost.com/business/economy/more-seniors-are-taking-loans-against-their-homes—and-its-costing-them/2017/08/25/5f154072-883a-11e7-961d-2f373b3977ee_story.html?noredirect=on.

among the seventy-five and older population grew more than eight-fold[80] and represented an astounding 3 percent of all homeowners over seventy-five.[81]

The reverse mortgage has played no small role in this tale of riches to rags.[82] In 2017, there were roughly 636,000 reverse mortgages.[83] Almost 90,000 of these mortgages were behind on their fees and taxes and were expected to conclude in foreclosure.[84] Further, 18 percent of reverse mortgages created between 2009 until 2016 are expected to default from unpaid fees.[85]

The high rate of reverse mortgage failures are hitting African American communities especially hard.[86] Chicago, Baltimore, Miami, Detroit, Philadelphia and Jacksonville have been the hardest hit.[87] A USA Today investigation found a sixfold increase in reverse mortgage failures located in predominantly black neighborhoods compared to neighborhoods that are 80 percent white.[88] Even when controlling for income, that same disparity persisted.[89]

In Chicago, the areas where reverse mortgages have wreaked the most havoc mirror the zones that were first devastated by redlining in the 1930s.[90] In one small area on the city's south side there have been one thousand reverse mortgage foreclosures in the last five years, a number that exceeds the total in some states.[91] In fact, the 60628 zip-code has been the hardest hit in the nation—the foreclosure rate is nine times the national average.[92]

The reverse mortgage is an interesting and useful wealth management tool. Still, it does not come without its dangers.[93] As personal debt in America continues to shift to older Americans,[94] unlocking home equity through a reverse mortgage will become even more enticing.

80. Brown, *supra* note 76.
81. *Id.*
82. McKim, *supra* note 79.
83. *Id.*
84. *Id.*
85. *Id.*
86. Penzenstadler & Lowenstein, *supra* note 1.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

Therefore, it is critical to better understand the changes that the Federal Housing Administration ("FHA") institutes as the population ages and becomes more insolvent.[95] Considering HUD's recent changes to the HECM program,[96] it remains to be seen whether seniors will face greater risk or disadvantage.

III. Analysis

The Trump Administration did not sit idly by as the reverse mortgage crisis pushed older Americans to the brink and damaged the Mutual Mortgage Insurance Fund. Rather, since 2016, HUD has undertaken a handful of initiatives aimed at reducing the number of reverse mortgage foreclosures and stabilizing the Mutual Mortgage Insurance Fund.[97] HUD changed reverse mortgage insurance premiums, lowered the maximum draw percentage, increased the maximum insurable claim amount, implemented a second appraisal requirement, and loosened the requirements on recently widowed non-borrowing spouses who undertake to transfer the mortgage.[98] The following four subsections will examine each of these initiatives for their efficacy and short comings.

A. Changes to the Mortgage Insurance Premiums and Draw Percentage

HUD, through the FHA, has increased the mortgage insurance payments ("MIPs") down payment to 2 percent of the appraised value of the house or the maximum lending limit, depending on which amount is smaller.[99] Therefore, the upfront cost of insuring the mortgage will be greater, but the monthly premiums will not be as costly. Will these changes place reverse mortgagors at a higher risk of default, lead to continued destabilization of the HECM program, and make it harder for seniors to access reverse mortgages? A recent article in USA Today suggests that decreased monthly premiums would help reverse

95. *Id.*
96. Ben Lane, *Study: Recent Changes to Reverse Mortgage Rules Cut Default Risk in Half*, HOUS. WIRE (July 15, 2016, 5:56 PM), https://www.housingwire.com/articles/37546-study-recent-changes-to-reverse-mortgage-rules-cut-default-risk-in-half/.
97. MOE Letter, *supra* note 35.
98. *Id.*
99. Wilson, *supra* note 34.

mortgagors stay in their homes.[100] It is likely, however, the reverse mortgagors that took the line of credit or annuity plan will experience this benefit because it can be taken out of their monthly return. Lump sum recipients that may have used the money for a single large expense, like a medical operation, are still at risk with lower annual premiums.[101]

While the thought of lower annual premiums is generally welcoming, they are accompanied by a simultaneous 2 percent increase in upfront premiums.[102] Suppose a reverse mortgagor with a home value of $726,525 (the maximum value),[103] draws on the maximum allowable equity—roughly 60 percent.[104] They would have an upfront premium of nearly $9,000.[105] Although the changes to MIPs appear to be beneficial to reverse mortgagors on the back end,[106] they may very well be pricing others out of the market for what can be a useful wealth-perpetuating investment tool.

Balancing the desire to see as few foreclosures as possible while also still offering a competitive and worthwhile investment product is a delicate task for the FHA. Since the 2017 reforms—including the increased up-front mortgage premiums—the volume of new mortgages (also known as the take-up) has plateaued between 50,000 and 60,000.[107] A study from the Brookings Institute shows the demand for reverse mortgages would rise 50 percent if the mortgage insurance premiums were lowered back to the original 0.5 percent,[108] while still mitigating the foreclosure risk.[109] Although the reverse mortgage program has played a key role in foreclosure and insolvency among the elderly, the

100. Penzenstadler & Lowenstein, *supra* note 1.
101. *Id.*
102. Alex Spanko, *HUD to Raise Premiums, Tighten Limits on Reverse Mortgages*, REVERSE MORTG. DAILY (Aug. 29, 2017), https://reversemortgagedaily.com/2017/08/29/breaking-hud-to-raise-premiums-tighten-limits-on-reverse-mortgages/.
103. Michael G. Branson, *The 2019 Reverse Mortgage Limit is officially $726,525*, ALL REVERSE MORTG., INC. (Mar. 28, 2019), https://reverse.mortgage/2019-limits.
104. *See* Spanko, *supra* note 102.
105. *See* Wilson, *supra* note 34; Spanko, *supra* note 102.
106. *See* Wilson, *supra* note 34; Spanko, *supra* note 102.
107. MARTIN NEIL BAILY ET AL., THE UNFULFILLED PROMISE OF REVERSE MORTGAGES: CAN A BETTER MARKET IMPROVE RETIREMENT SECURITY?, BROOKINGS INST. (2019), available at https://www.brookings.edu/wp-content/uploads/2019/10/ES_20191024_BailyHarrisWang-1.pdf.
108. *Id.*
109. *Id.*

Brookings Institute's research does not suggest that fewer new loans will actually mitigate the losses.[110] In fact it is just the opposite.

Older Americans are notably under-prepared to maintain a "comfortable" standard of living for their long retirement lives.[111] The wealth created through paying down a mortgage and developing equity in their home may be the only source of income in retirement that will allow older Americans to maintain their standard of living.[112] HUD's 2014 (setting the maximum draw at 60 percent of the home's value) and 2017 changes have placed a barrier between homeowners and the equity in their homes, causing the market for reverse mortgages to plateau.[113] The barrier appears to be a net positive for the Mutual Mortgage Insurance Fund, however.[114] It currently has a capital ratio of 4.85 percent, which is up from 0.4 percent in 2014 and higher than the statutorily required level.[115]

B. Changes to the Maximum Insurable Claim

In a December 2018 letter, HUD announced that for the 2019 fiscal year, the maximum claim amount would be raised over $40,000 to $726,525.[116] Raising the maximum claim amount represents a potential windfall for lenders[117] but presents an interesting question to mortgag-

110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *HUD Report: Mutual Mortgage Insurance Fund Exceeds Statutory Capital Ratio in 2019*, ABA BANKING J. (Nov. 14, 2019) [hereinafter *HUD Report 2019*], https://bankingjournal.aba.com/2019/11/hud-report-mutual-mortgage-insurance-fund-exceeds-statutory-capital-ratio-in-2019/.
115. *See HUD Report 2019*, *supra* note 114; Lane, *supra* note 96.
116. Letter from Brian D. Montgomery, Assistant Sec'y for Hous. - Fed. Hous. Comm'r, U.S. Dep't of Hous. and Urban Dev., to All FHA Approved Mortgagees, All Direct Endorsement Underwriters, All FHA Roster Appraisers, All FHA Roster Inspectors, All FHA-Approved 203(k) Consultants, All HUD-Approved Hous. Counselors, All HUD-Approved Nonprofit Organizations, All Governmental Entity Participants, All Real Estate Brokers, All Closing Agents (Dec. 14, 2018), available at https://www.hud.gov/sites/dfiles/OCHCO/documents/18-12hsgml.pdf.
117. Chris Chow, *Reverse Mortgage Business Welcomes Increased 2019 HECM Lending Limits*, REVERSE MORTG. DAILY (Dec. 17, 2018), https://reversemortgagedaily.com/2018/12/17/reverse-mortgage-business-welcomes-increased-2019-hecm-lending-limits/.

ors. While greater financial freedom for mortgagors seems like a welcome sight, the increased claim limit means larger lump sums and greater risk of foreclosure.[118]

Lenders are also excited for the potentially greater volume that an increase in drawable equity may bring.[119] Others remain skeptical that the increased draw will only affect the decisions of wealthier homeowners on the margins of reverse mortgage compatibility.[120] Although average reverse mortgagors may stand to gain little from these changes,[121] mortgage companies are excited for the opportunity to steal some high-value business from the proprietary reverse mortgage industry.[122] This serves very wealthy reverse mortgagors whose homes are too valuable to be federally insured,[123] thus they pay exorbitant fees and premiums to protect the mortgagee.[124] Nevertheless, this change represents a widening of a market that has seen a 10 percent failure rate since the Great Recession.[125]

For some borrowers, this change will effectively repeal the Obama administration's initiative to shore up failing lump sum plans.[126] In 2014, recognizing the specific difficulty that the lump sum draws were exerting on seniors and the program's solvency, the FHA lowered the maximum lump sum draw to 60 percent of the home value.[127] According to a 2016 study from Boston College's Center for Retirement research, the 2014 changes projected to reduce tax- and insurance-associated defaults by up to 50 percent.[128] Although the Obama era changes are still intact,[129] increasing the maximum-insurable claim opens the HECM program to greater risk, thus undercutting some of the progress.

118. Penzenstadler & Lowenstein, *supra* note 1.
119. Jessica Guerin, *Will Increased HECM Claim Amounts Boost Reverse Mortgage Production?*, HOUS. WIRE (Dec. 18, 2018, 1:03 PM), https://www.housingwire.com/articles/47737-will-increased-hecm-claim-amounts-boost-reverse-mortgage-production/.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. Kagan, *supra* note 36.
125. Lane, *supra* note 96.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Cf.* Jessica Guerin, *Spotlight: The 10/2 Changes*, HOUS. WIRE (Sept. 25, 2017, 12:05 PM), https://www.housingwire.com/articles/45990-spotlight-the-10-2-changes/.

Nevertheless, home values that are equal to or greater than the maximum-insurable claim make up a small portion of the overall pie, so any effect will likely be negligible.[130]

C. Second Appraisal Requirement

In an uncharacteristic change of procedure, as of October 1, 2018, the FHA requires reverse mortgagors to perform a second appraisal when the present circumstances warrant it.[131] The FHA identified inflated home appraisals as a significant cause of reverse mortgage failures and believe a second appraisal requirement will help determine whether flagged applications should move forward or be halted.[132] This second appraisal is a part of the "collateral risk assessment" that must now be performed prior to the execution of the loan.[133] After the appraisal has been completed, the mortgage may only be insured up to the level derived from a calculation based on the lower of the two appraised values.[134]

This sensible policy does not come from government altruism or a dear and earnest concern for baby boomers and the greatest generation, however. Instead, these changes are necessary to shore up the Mutual Mortgage Insurance Fund after some tough years of defaults.[135] Defaults caused by what the FHA calls "optimistic collateral values driven by exaggerated property appraisals."[136] On its face, the change appears to be pro-mortgagor; however, the cost of the second appraisal, ranging between $300 and $450,[137] is offloaded onto the mortgagor because the appraisal cost can be rolled into mortgage premiums.[138]

130. Jessica Guerin, *Will Increased HECM Claim Amounts Boost Reverse Mortgage Production?*, HOUS. WIRE (Dec. 18, 2018, 1:03 PM), https://www.housingwire.com/articles/47737-will-increased-hecm-claim-amounts-boost-reverse-mortgage-production/.

131. Penzenstadler & Lowenstein, *supra* note 1.

132. *FHA Changes Reverse Mortgage Appraisal Rules Through September 2019*, FHA.COM, (Oct. 30, 2018) [hereinafter FHA.com], https://www.fha.com/fha_article?id=1976.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Ellen Chang, *How Much Does a Home Appraisal Cost? It Depends on Several Factors*, BANKRATE (Jan. 11, 2021), https://www.bankrate.com/mortgages/how-much-does-an-appraisal-cost/.

138. FHA.com, *supra* note 132.

Nevertheless, despite the increased cost associated with the second appraisal, the requirement will likely provide greater protection to seniors.[139] As of November 2018, nearly one quarter of reverse mortgage applications had been flagged for a second appraisal.[140] What importantly remains to be seen is whether this improvement will continue. After all, a considerable number of failed reverse mortgages have come from poorer communities where deceptive practices, like inflated home valuations, led to foreclosures.[141]

If HUD and the FHA only value the second appraisal in so far as it benefits the Mutual Mortgage Insurance Fund, and not in how it protects older Americans, this change may only be temporary. HUD only cites an improvement in the health of the Mutual Mortgage Insurance Fund for implementing and extending the second appraisal program.[142] Once HUD's HECM balance sheet returns to good health, will it maintain the second appraisal initiative, or will it revert to the old system whereby inflated home values led to seniors unknowingly engaging in risky investment vehicles? HUD's reasoning behind initiating the program suggests that it will not exist forever.[143] In the meantime, the second appraisal requirement is a welcome tool to mitigate the risk that reverse mortgage recipients shoulder.

D. Non-Borrowing Spouse Foreclosure Changes

Another long-standing shortcoming of the HECM program has been the hardship imposed on non-borrowing spouses in situations where the non-borrowing spouse is widowed. Upon the death of the original mortgagor, the loan balance becomes due in 120 days.[144] If the surviving spouse cannot pay the balance owed, the bank will foreclose

139. *Cf.* Jessica Guerin, *FHA Automates Reverse Mortgage Second-Appraisal Process*, HOUS. WIRE (November 30, 2018, 1:39 PM), https://www.housingwire.com/articles/47567-fha-automates-reverse-mortgage-second-appraisal-process/.
140. *Id.*
141. Penzenstadler & Lowenstein, *supra* note 1.
142. FHA.com, *supra* note 132.
143. *Id.*
144. Weiner Brodsky Kider PC, *HUD Updates MOE Assignment Requirements for HECMs*, JDSUPRA (Oct. 8, 2019) [hereinafter JDSUPRA], https://www.jdsupra.com/legalnews/hud-updates-moe-assignment-requirements-55751/.

on the mortgage.[145] Oftentimes, the spouse is not on the original loan because he or she would have not yet turned sixty-two at the date of origination.[146]

Thus, these widow(er)s are often out on the street, despite the program's intent to keep vulnerable individuals in their homes.[147] For years, the rules allowed widowed non-borrowing spouses to obtain assistance from HUD upon the death of a spouse.[148] Yet such assistance was predicated on three requirements: the widow(er) requesting the assistance within 120 days of the borrowers date of death, the loan balance and net principal being within the FHA's tolerance levels, and producing all requested documentation.[149]

Naturally, in the forefront of a non-borrowing spouse's mind upon the death of their husband or wife is burial, grieving, and learning how to carry on alone. What many of these non-borrowing spouses are *not* thinking about is reaching out to an obscure federal housing program for assistance on a mortgage that is described as "aging in place."[150] Further, the servicing companies are either not aware or lack compassion for these non-borrowing spouses.[151] What these widows and widowers are after is a Mortgagee Optional Election ("MOE"), which allows the widow or widower to defer the due and payable date of the mortgage.[152]

145. Chris Clow, *Non-Borrowing Spouse Scenario Sheds Light on Reverse Mortgage Misunderstandings*, REVERSE MORTG. DAILY (July 15, 2019), https://reversemortgagedaily.com/2019/07/15/non-borrowing-spouse-scenario-sheds-light-on-reverse-mortgage-misunderstandings/.

146. *Essential Information for Non-Borrowing Spouses of Home Equity Conversion Mortgage Borrowers*, MONEY MGMT. INT'L., https://www.moneymanagement.org/-/media/docs/essential-information-for-non-borrowing-spouse.ashx (last visited Mar. 7, 2021).

147. *Federal Reverse Mortgage Program Results in Widows Losing Their Homes After Death of Spouse*, NAT'L CONSUMER L. CTR. (Mar. 12, 2018), https://www.nclc.org/media-center/fed-reverse-mortgage-program-results-widows-losing-homes-death-spouse.html.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *How HUD is Failing to Protect Widows and Widowers of Reverse Mortgage Borrowers: Case Studies and Recommendations*, NAT'L CONSUMER LAW CTR. (Nov. 2018), https://www.nclc.org/images/pdf/foreclosure_mortgage/reverse-mortgages/how-HUD-failing-to-protect-widows-nov2018.pdf.

Until August 4, 2014, lenders were able to foreclose on homes encumbered with reverse mortgages after the death of the borrower despite the non-borrowing spouse's presence in the home.[153] Thereafter, surviving spouses could remain in the home only upon the timely completion of an MOE, which allows HUD to pay the insurance claim to the lender while holding the mortgage until the death of the non-borrowing spouse or some other default.[154] Although a step in the right direction, HUD has denied many applicants because they could not meet the required deadlines.[155] In fact, non-borrowing spouses were frequently denied, even though the delay was caused by either HUD, the loan servicer, or in some cases, both.[156]

In light of the difficulties, HUD has instituted some changes, hoping that they will ease the burden of newly widowed non-borrowing spouses and bring some much needed fiscal security to the HECM program.[157] First, HUD has eliminated the deadlines for the MOE assignment election and assessment.[158] The associated notification requirements have also been eliminated.[159] In its place, HUD has implemented a more compassionate 180-day period they describe as a "reasonable diligence time frame."[160] Second, HECMs that are subject to an already existing loss-mitigation repayment plan will no longer have to become current within 120 days.[161] HUD has also eliminated the requirement for non-borrowing spouses to acquire good and marketable title to the property secured by the HECM,[162] or alternatively demonstrate a legal right to reside in the property for life.[163] Finally, lenders must now re-

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. Letter from Brian D. Montgomery, Assistant Sec'y for Housing–Fed. Housing Comm'r, to All FHA-Approved Mortgagees, All Direct Endorsement Underwriters, All FHA Roster Appraisers, All FHA Roster Inspectors, All FHA-Approved 203(k) Consultants, All HUD-Approved Nonprofit Orgs., All Governmental Entity Participants, and All Real Estate Brokers All Closing Agents (Sept. 23, 2019), available at https://www.hud.gov/sites/dfiles/OCHCO/documents/19-15hsgml.pdf (on file with author).
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*

quest information from borrowers to attempt to identify non-borrowing spouses.[164] Although the new changes need more time to be properly vetted for their efficacy, HUD's continued protection of non-borrowing spouses is a step in the right direction.

IV. Recommendations

Ideas for fixing the reverse mortgage crisis abound, from the obvious to the complex. The following Section will propose three recommendations for how to prevent mortgagors from getting in over their heads, while also protecting the program overall.

First, this Section will propose broadening and enhancing the counseling process before the mortgagor has officially applied for the loan. Next, it will propose an expansion of the Cash for Feys program, an initiative that allows banks to access federal funding for buying underwater mortgagors out of their houses, which lenders have long supported. Third, it will propose a novel approach of using loan proceeds to purchase life annuities that protect both the borrower and lender called an annuity enhanced reverse mortgage.

A. Enhanced Counseling Requirements

The very nature of the reverse mortgage makes it a prime candidate for abuse because it opens the pockets of the elderly, a demographic that is most likely to suffer from some amount of diminished capacity.[165] In a recent decision out of the state of California, Sandy Jolly, an advocate for reverse mortgage recipients, won a judgment for $1.6 million dollars after suing Financial Freedom for improper practices.[166]

Financial Freedom was a lender, loan servicer, and subsidiary of OneWest Bank that was heavily invested in the HECM industry.[167] It

164. *Id.*

165. *See* A.B.A. COMM'N. ON L. & AGING & AM. PSYCHOLOGICAL ASSN., ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS (2005) available at https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf.

166. *Consumer Advocate Helps Government to Secure $89 Million Settlement in Reverse-Mortgage Foreclosure Scheme*, EMP. L. GRP. (May 16, 2017) [hereinafter *Consumer Advocate Helps*], https://www.employmentlawgroup.com/in-the-news/press-releases/consumer-advocate-helps-government-secure-89-million-settlement-reverse-mortgage-foreclosure-scheme/.

167. *Id.*

serviced about $80,000 in reverse mortgages at the time of Jolly's lawsuit.[168] The inaptly named lending and servicing corporation was known for aggressively squeezing homeowners, a strategy that earned its chief executive officer the nickname "The Foreclosure King."[169]

Luckily for The Foreclosure King, he was able to sell Financial Freedom in 2015, netting the tidy sum of $380,000,000.[170] Lucky because The Foreclosure King had to liquidate his business assets, not by choice, but because he was tabbed to run the U.S. Department of the Treasury.[171] Yes, The Foreclosure King is former Secretary of the Treasury, Steve Mnuchin.[172] As the Secretary of Treasury, Steve Mnuchin oversaw the nearly $90,000,000 in penalties that his former corporation had to pay the federal government for its widespread misconduct in reverse mortgage servicing.[173] Quite the conflict of interest.

Financial Freedom's naughtiness aside, Jolly points to increasing and strengthening the pre-loan counseling requirements as an important solution in easing the reverse mortgage crisis.[174] Traditionally, government-sponsored programs educated seniors about reverse mortgages to help them come to an informed conclusion.[175] Still, in recent years, cuts to funding these programs have hampered their effectiveness.[176]

Jolly has dedicated her career to protecting seniors from abuse at the hands of predatory lenders pushing bad reverse mortgages.[177] As her parents grew older, they too liked the idea of "aging in place" and were enticed by industry ads featuring bygone celebrities such as James Garner and Robert Wagner.[178] At the conclusion of a single meeting,

168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Reverse mortgages left many seniors in foreclosure*, *supra* note 27.
175. Ingrid Evans & Daniel Oren, *Toppling Reverse Mortgage Abuse,* AM. ASS'N FOR JUST. (Dec. 2017) [hereinafter *Toppling Reverse Mortgage Abuse*], https://web.justice.org/what-we-do/enhance-practice-law/publications/trial-magazine/toppling-reverse-mortgage-abuse.
176. *Id.*
177. *Our Story*, ELDER FIN. TERRORISM, (last visited Mar. 7, 2021) [hereinafter *Our Story*], https://elderfinancialterrorism.com/our-story.
178. *Id.*

Jolly's parents signed the loan application that the salesperson had created *before the meeting*.[179]

The next step for Jolly's parents was loan counseling. The HUD counselor made no effort to verify that the people he was speaking with were indeed the people who applied for the loan application.[180] Further, the counselor either did not try or did not have the training to discern that he was talking with people very clearly lacking the mental capacity to move forward with a reverse mortgage.[181] The counselor's only concern was informing the Hickersons about the process of obtaining a reverse mortgage.[182]

Reverse mortgage applicants are rarely informed of the role of the counselor and the lender.[183] Respectfully, a counselor's job is to teach reverse mortgage applicants about the process and the different programs available.[184] Counselors specifically use what is known as the Financial Interview Tool.[185] Still, the Financial Interview Tool is only concerned with protecting the Mutual Mortgage Insurance Fund, not making sure mortgage applicants are making an informed decision for themselves.[186]

The counseling did not include any inquiry into the loan's suitability for the Hickersons[187] and the matters that they should have been counseled on were omitted.[188] Factors like the Hickersons' financial situation, their health, and the tax and legal implications of the loan.[189] Needless to say, the Hickersons' reverse mortgage led to financial ruin and years of hardship for them and their loved ones.[190]

In-depth counseling could have halted the process in a few different ways. With greater interest, the counselor may have noticed that the Hickersons did not have the capacity to make this decision, that their

179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Getting A Reverse Mortgage*, ELDER FIN. TERRORISM, (last visited Mar. 7, 2021) [hereinafter *Getting A Reverse Mortgage*], https://elderfinancialterrorism.com/getting-a-reverse-mortgage#.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Our Story*, *supra* note 177.

financial situation did not require a reverse mortgage, or that their long-term needs would not be served by the mortgage. Yet, a huge percentage of reverse mortgagors have no idea whether the loan will benefit or hurt them the day they sign the contract.[191]

Ensuring that recipients are aware of the benefits and burdens of a reverse mortgage and, thus, whether it is a good fit, is called suitability.[192] The disclaimer at the end of the reverse mortgage advertisements that says, "a reverse mortgage is not right for everyone"[193] is a flimsy prophylactic after James Garner espouses on its virtues for thirty seconds to a minute.

From five-thousand feet, the problem in Jolly's eyes is that prospective reverse mortgage recipients do not know what they need to do or what they need to know.[194] With that in mind, Jolly developed a five-step procedure for determining the suitability of a reverse mortgage.[195] Jolly advises one to create a financial plan, put one's house in a revocable trust, include trusted advisors, find out how much equity one can access, and explore all possible options before deciding.[196]

A long-term financial plan ought to be comprehensive.[197] That means accounting for age, financial goals and needs, expected costs of the property, both fixed and variable, health, and what one wants to leave to heirs.[198] This plan must look five years into the future at a minimum.[199] Ten years is better, but the best plan would calculate for the expected years of life.[200]

A revocable trust grants the successor or trustee the automatic legal authority to represent one's legal interests, both while alive and after death.[201] With the house and mortgage in a trust, the burden of looking after the fees, charges, taxes, and other items that often lead to foreclosure fall to the trustee, a fiduciary with liability.[202] Without a revocable trust in the case of incapacitation or death, the loan servicing

191. *Getting A Reverse Mortgage*, *supra* note 183.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*

company will not allow the heirs or other representatives of the estate to convey the property without obtaining a court order, which may costs thousands of dollars.[203]

As should go without saying, trusted advisors need to be notified and conferred with before moving forward with a reverse mortgage. Whether it is an attorney, a tax professional or accountant, meeting with a trusted professional is a must.[204] A trusted advisor is more capable of cutting through the complex nuances to help make a more informed decision.[205]

One also needs to determine how much equity is accessible.[206] Robert Wagner may have said that one can unlock the value of a house through a reverse mortgage, but is he correct? Of course not.[207] As discussed earlier, the FHA caps the amount of equity one can access, so purchasers must make sure to use the free calculators available online.[208]

Lastly, there is a whole wide world of ways to turn a house into a money maker for its owners, so go explore them.[209] One does not *have* to "age in place." Owners will never access as much equity as the house has to offer as when it is sold. Although we develop emotional connections to places, sometimes the right decision is to move on. Other options include leasing all or part of the home, downsizing, or getting a line of credit.[210] Without inquiring into potential alternatives to reverse mortgages, one cannot conduct a robust suitability evaluation.

The very nature of the reverse mortgage industry makes it ripe for abuses.[211] Furthermore, the highest-ranking member of the very administrative body that guards against abuses stood with the abusers until recently.[212] Not to mention HUD and the FHA are cutting funding for

203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Our Story*, *supra* note 177.
208. *Getting A Reverse Mortgage*, *supra* note 183.
209. *Id.*
210. *See id.*; Christine Bartsch, *5 Ways to Tap Into Your Home Equity for a Comfortable Retirement*, HOMELIGHT (Nov. 27, 2018), https://www.homelight.com/blog/using-your-home-equity-for-retirement-income/.
211. *See Toppling Reverse Mortgage Abuse*, *supra* note 175.
212. *See Consumer Advocate Helps*, *supra* note 166.

reverse mortgage counseling.[213] For at least the near term, preventing these abuses will fall squarely on the shoulders of the applicants and their families.[214] This task is made even more difficult by 60s-era movie stars pulling at the emotions of qualified people.[215] The current counseling scheme cares only for protecting the interests of the federal government and elder people's nest eggs.[216] Before applying for a reverse mortgage, a suitability test must examine the applicant's long term financial plans, speak with trusted advisors, consider moving property into a revocable trust, determine the amount of accessible equity and explore all other alternatives, relative to each applicant's situation. As the greater onus shifts towards the consumer to be educated, we must do more to counsel reverse mortgage applicants.

B. Cash for Keys

The FHA's primary concern when making changes to the HECM program is to protect the Mutual Mortgage Insurance Fund.[217] As of the summer of 2018, the Fund was short some $14,000,500,000.[218] Although there are many culprits for this decline, industry professionals and the FHA point primarily to the current low reverse mortgage volume.[219] Indeed, they have a point, considering reverse mortgage volume is at its lowest level since 2005.[220] Industry professionals' first suggestion to increase the volume is a fairly novel initiative they call "Cash for Keys."[221]

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213. *See* Alex Spanko, *Trump's HUD Budget Would Cut Housing Counseling Funding*, REVERSE MORTG. DAILY (Feb. 13, 2018), https://reversemortgagedaily.com/2018/02/13/trumps-hud-budget-would-cut-housing-counseling-funding/.

214. *See id.*

215. *See Our Story*, *supra* note 177; *see, e.g.*, American Advisors Group-AAG Reverse Mortgage, *AAG-Too Good To Be True-Reverse Mortgage Loan Commercial*, YOUTUBE (Aug. 4, 2016), https://www.youtube.com/watch?v=E1eIIQ6s_u0&ab_channel=AmericanAdvisorsGroup-AAGReverseMortgage (showing actor Tom Selleck explain how a reverse mortgage is actually not 'too good to be true').

216. Alex Spanko, *Reverse Mortgage Players Suggest Back-End Fixes to FHA's Systems*, REVERSE MORTG. DAILY (July 26, 2018) [hereinafter *Back-End Fixes*], https://reversemortgagedaily.com/2018/07/26/reverse-mortgage-players-suggest-back-end-fixes-to-fhas-systems/.

217. *See generally id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

Cash for Keys is, essentially, an outside the box initiative from lenders who want to save the insurance fund and foreclose by getting defaulted reverse mortgagors out of their houses faster.[222] Cash for Keys will make it easier for lenders to get underwater mortgagors out their houses without going through costly foreclosure proceedings.[223] The initiative started gaining steam in the summer of 2017,[224] but industry professionals want to increase reimbursement maximums.[225] Offering a larger cash incentive could be enticing to reverse mortgagors who may be facing other financial burdens, like the cost of healthcare.[226]

But is the acknowledgment of senior vulnerability not the reason the HECM was created? To allow seniors to age in place and remain in their homes despite the financial and health difficulties they regularly face? At the end of the day, the Cash for Keys program is the creation of bankers looking to improve the prospects of the lucrative reverse mortgage industry and maintain Mutual Mortgage Insurance Fund coffers.[227] Currently, most seniors cannot be lured out of their home for a paltry sum of money; the maximum Cash for Keys amount is $3,000.[228]

This approach can be rightly labeled as "throwing money at the problem," and aims to treat the symptoms of reverse mortgage failure but not the cause of the illness. The short-term symptoms are sucking the HECM insurance coffers dry, however.[229] If some of that pressure is not relieved, the whole program could be threatened. After all, the HECM alone is in the hole to the tune of $14,000,500,000.[230] Further, if the mortgagor is in default, it is reasonable to expect them to suffer from some amount of diminished capacity, mental or physical, because the default is often triggered by a failure to pay bills and fees. In the case of

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222. *Id.*
223. *Id.*
224. Alex Spanko, *HUD Issues New Reverse Mortgage Servicing Guidance*, REVERSE MORTG. DAILY (Aug. 25, 2017), https://reversemortgagedaily.com/2017/08/25/hud-issues-new-reverse-mortgage-servicing-guidance/.
225. *Back-End Fixes*, *supra* note 216.
226. *See id.*; *see generally* Amy Loftsgordon, *What's "Cash for Keys" in a Foreclosure?*, NOLO, https://www.nolo.com/legal-encyclopedia/whats-cash-for-keys-in-a-foreclosure.html#:~:text=So%2C%20to%20incentivize%20the%20former,%2Dfor%2Dkeys%E2%80%9D%20deal (last visited Mar. 7, 2021).
227. *See Back-End Fixes*, *supra* note 216.
228. *Id.*
229. *See id.*
230. *Id.*

the former, writing a large check could provide the reverse mortgagor with a means of accessing aid.

To this point, HUD has not loosened the reins on the Cash for Keys program to sufficiently provide relief to defaulting reverse mortgagors and the system itself.[231] In a September 2017 letter to all FHA approved mortgagees and HUD-approved housing counselors, HUD restricted the reimbursement and relocation maximum to $3,000.[232] Further, HUD did not make the changes with a retroactive effective date.[233] Therefore, the program will only be able to serve reverse mortgage cases that were assigned on or after September 19, 2017.[234]

C. Annuity Enhanced Reverse Mortgage Loans

Unlike the Cash for Keys program, which is a back-end fix for the dwindling Mutual Mortgage Insurance Fund, annuity enhanced reverse mortgage loans are a potential front-end fix—a means to attack the cause of reverse mortgage failures and not merely the symptoms.[235] The impetus for the annuity enhanced reverse mortgage loan are the two moral hazards that are associated with reverse mortgages.[236]

First, borrowers are not incentivized to maintain their homes if they believe that the value of the loan will be greater than the value of their house.[237] If the house is already underwater, why do anything to maintain or improve its value? Second, a huge number of elderly homeowners move out of their homes before their deaths.[238] Yet if the value of the house falls below the mortgage amount, there is no reason for the mortgagor to move.[239] These two bad incentives working together nearly ensure that once a reverse mortgage goes underwater, it is going to sink to the bottom of the sea.

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231. Letter from Dana T. Wade, Gen. Deputy Assistant Sec'y for Hous., to All FHA-Approved Mortgagees & All HUD-Approved Hous. Couns. (Aug. 24, 2017) (on file with author), https://www.hud.gov/sites/documents/17-11ML.PDF.
232. *Id.*
233. *Id.*
234. *Id.*
235. *See* THOMAS DAVIDOFF, ANNUITY-ENHANCED REVERSE MORTGAGE LOANS, ECON. STUDIES AT BROOKINGS (2019) [hereinafter DAVIDOFF].
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*

Home owners recognized the value that could be realized by borrowing more than the potential payout through selling the house.[240] Essentially, the value of the option to repay the loan with the value of the home was worth more than the upfront costs of insurance.[241] In an article published by the Brookings Institute, Thomas Davidoff argues that reverse mortgages have been "underpriced" and that this underpricing is the cause of the sub optimal outcomes.[242] Davidoff suggests that the best way to move forward will be to minimize the risk of the mortgages at origination.[243]

Davidoff proposes that linking reverse mortgages to life annuities is just the fix that is needed.[244] Linking mortgages with annuities is not such a novel idea nor is it a new proposition.[245] Traditionally, under a reverse annuity mortgage, the mortgage is used to purchase a life annuity for the borrower instead of a lump sum payment.[246] Many homeowners, however, including many of the homeowners whose reverse mortgages end in default,[247] are not in a position to accept an annuitized payment and require a lump sum.[248] Why then, asks Davidoff, are the two approaches not combined?[249]

Rather than purchase an annuity and pay the proceeds to the homeowners or deliver a lump sum, Davidoff's mortgage would purchase a life annuity and deliver the mortality premiums up front.[250] With a normal life annuity, a mortality credit, or what Davidoff calls a mortality premium, represents the invested capital that the insurer retains upon the death of the annuitant.[251] Under this proposal, at the

240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. David Mully, *Using an Annuity to Pay Your Mortgage in Retirement*, MORTGAGELOAN.COM, https://www.mortgageloan.com/using-annuity-pay-your-mortgage-retirement-8399 (last visited Mar. 7, 2021).
247. *reverse annuity mortgage,* DICTIONARY.COM, https://www.dictionary.com/browse/reverse-annuity-mortgage (last visited Mar. 7, 2021).
248. Lauren Russell, *Ways to Receive Reverse Mortgage Proceeds*, ONE REVERSE MORTG.: RETIRING WISE (Jan. 15, 2018), https://www.onereversemortgage.com/blog/2018/01/ways-to-receive-reverse-mortgage-proceeds/.
249. DAVIDOFF, *supra* note 235.
250. *Id.*
251. Michael Kitces, *Understanding The Role Of Mortality Credits–Why Immediate Annuities Beat Bond Ladders For Retirement Income*, KITCES.COM (Apr. 1, 2015, 7:01

time of origination, the reverse mortgagor would borrow an extra sum to fund the purchase of a life annuity or joint life annuity for spouses.[252] The proceeds from the life annuity would be paid to lender for the life of the mortgagor(s).[253] That money would then be used to pay down the principal and interest in the mortgage, thus slowing the growth of the mortgage balance relative to normal reverse mortgages.[254] In the situation where the homeowner moves out of the home before their death, the annuity payments will shift back to the annuitant.[255]

With an annuity enhancement to the reverse mortgage, the mortgage changes in the following important ways. First, the loan balance will grow at slower rate with the annuity enhancement.[256] Second, the initial loan size will be larger to cover the cost of purchasing the annuity.[257] If the mortgagor moves from the home, the annuity proceeds switch back to the mortgagor, and in the meantime, the lender enjoys a lower risk spread.[258]

Further, the loan balance is transferred from the end of the mortgage's life, when the value exceeds the value of the home; this is too early in the life of the loan, when the property value is high compared to the loan balance.[259] Although the same requirements for property expenses exist with an annuity enhanced reverse mortgage, at least the mortgagor will have a stream of income for the remainder of their life, softening the blow of a possible default.

V. Conclusion

Leroy Roebuck's story will certainly not be the last tale of woe heaped upon the recipient of a reverse mortgage. Seeking an opportunity to age in place, millions of Americans have suffered through the

AM), https://www.kitces.com/blog/understanding-the-role-of-mortality-credits-why-immediate-annuities-beat-bond-ladders-for-retirement-income/.

252. DAVIDOFF, *supra* note 235.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*

default and foreclosure nightmares that so frequently accompany reverse mortgages.[260] Particularly poor Americans of color in the midwest and northeast.[261]

Lured initially by flashy language, old-timey celebrities, or door to door salespeople—many people like Roebuck were sold a bill of goods. Diversion programs and special exemptions exist to protect some reverse mortgagors, but many borrowers still end up in bankruptcy.[262] With so many hanging on by a thread, waiting for their fate to be determined at the drop of a gavel, the reverse mortgage program trudges on.

Originally a novel solution to an era specific problem, when homemaking women lost their husbands early and with them, most of their income. Because these widows' earnings were so small, traditional home equity loans could not be offered at affordable rates. Soon, seniors across the country were accessing previously untappable equity in their homes. No longer was their lack of employment an impediment to accessing their home equity, and the days of being house rich but cash poor were over.

With the rise in insolvency and financial distress, however, so too have the instances of foreclosure risen.[263] Central to that story of foreclosure is the reverse mortgage, of which nearly 20 percent are at risk.[264] There is no shortage of fixes or people willing to expound on them.[265]

HUD and the FHA have attacked the problem from a more easily-administrated position where the agencies feel they can create change without the burden of heightened individual monitoring.[266] They have changed the way mortgage insurance premiums are levied.[267] Instead of larger monthly premiums that are susceptible to delinquency, greater upfront premiums provide a cash infusion to the insurance cof-

260. REVERSE MORTG. INFO., *supra* note 4.
261. Penzenstadler & Lowenstein, *supra* note 1.
262. *Id.*
263. *See* McKim, *supra* note 79.
264. *Id.*
265. *See id.*
266. *See* Spanko, *supra* note 102.
267. *Id.*

fers, can be taken out of the first payment, and lower monthly premiums.[268] Higher up-front insurance payments price out many mortgagors, however.[269] Another step in the right direction is the second appraisal requirement. The collateral risk assessment only allows homes to be insured up to the lowest appraised value for the house. Unfortunately, this is another cost to be borne by the mortgagor, making access more difficult.

The final changes that HUD and the FHA have instituted are more lenient foreclosure rules when dealing with the non-borrowing spouse.[270] Widowed spouses are often unaware of their responsibilities or are simply unable perform them. The death of a spouse comes with financial and emotional burdens that leave them unable to deal with notices of delinquency.

Nevertheless, more must be done to protect seniors and the health of the programs. Enhanced counseling requirements may seem obvious, but the federal government is decreasingly interested in funding mortgagor counseling, and they have never shown much interest in counseling for suitability.[271] However, suitability counseling is exactly what the system needs, even if it is a cost to be borne by the mortgagor.

Increasing the scale of the Cash for Keys program would also alleviate some of the pressure on the system. Increasing the amount available to lenders for reimbursement and including mortgages originated prior to Fall 2017 would give lenders and mortgagors more tools to stave off some of the harmful effects of reverse mortgage foreclosure.

Finally, annuity enhanced reverse mortgages have strong potential as a front-end fix. The bad incentives that accompany reverse mortgages have powerful effects on the health of the system. Purchasing a life annuity that pays the mortality premiums up front, while making payments to the lender for the remainder of the life of the loan, will prevent the mortgage balance from growing out of control. And, if the mortgagor moves out of the home, the annuity benefit reverses to the mortgagor so they are not without an income stream.

Good ideas for reforms are always percolating, and they should be on the table. We owe it to Leroy Roebuck and the millions in his

268. *Id.*
269. *See* BAILY ET AL., *supra* note 107, at 18.
270. *See* Montgomery, *supra* note 157.
271. MOE Letter, *supra* note 35.

position to offer them greater protection and get the reverse mortgage program back on its feet.