



## MEMORANDUM

**TO:** RAS BORISKIN CLIENTS

**FROM:** Sara Z. Boriskin, Managing Partner

**RE:** 2018 Changes to RPAPL §1304 and CPLR §3408

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We are writing to advise you of important changes to New York State law which will have a significant impact upon the foreclosure of reverse mortgages, the most significant of which are (1) the amendment of RPAPL§1304 to include reverse mortgages in the definition of home loan, and (2) the amendment of RPAPL§1304 to require reverse mortgage servicers to send a 90 day pre-foreclosure notice on reverse mortgage home loans. Set out below please find a detailed analysis of the legislation and its impact to the reverse mortgage servicer.

Effective May 12, 2018, RPAPL §1304 has been amended to add subsection 1-A requiring the service of a specific pre-foreclosure 90 day notice for reverse mortgage home loans as such term is defined below. The notice mandated by this section requires the servicer to specify, in checklist format, the basis for the default. Practically speaking and as a best practice, to avoid future delays with first legal filings which may occur on or after May 12, 2018, effective immediately, for all default types, on all new referrals not yet referred to law firms, reverse mortgage servicers should commence sending 90 day pre-foreclosure reverse mortgage notices to borrowers.

Retroactively effective April 20, 2017<sup>1</sup>, RPAPL §1304(6) has been amended to include in its definition of “home loan” reverse mortgages in which:

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<sup>1</sup> Notably, the effective date of reverse mortgages being defined as a home loan is April 20, 2017, a year ago. To the extent that retroactive effect would apply, it would suggest that all foreclosure actions filed since April 20, 2017 would be a nullity in light of the requirement to send a 90 day pre-foreclosure notice. As the effective date of the provision requiring the reverse mortgage 90 day pre-foreclosure notice is May 12, 2018, despite the retroactive amendment to the definition of home loan to include reverse mortgages, there is a sufficient legal basis to conclude that neither the standard 90 day nor the reverse mortgage 90 day notice is needed for any foreclosure action filed on or before May 11, 2018. *See Stroud v. State*, 711 NYS2d 305 (Ct of Claims 2000).

- (1) The borrower is a natural person; and
- (2) The debt is incurred by the borrower primarily for personal, family, or household purposes; and
- (3) The loan is secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling, or a condominium unit, in either case, used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling; and
- (4) The property is located in this state.

The inclusion of reverse mortgages in the definition of home loan triggers the following legal requirements:

**(1) Filing of a certificate of merit with the complaint pursuant to CPLR §3012-b.**

The need for a certificate of merit will require the servicer to execute a statement of review, which is currently standard practice for New York forward mortgages. The statement of review will require the servicer to complete a review of the relevant loan documents (note, mortgage, assignments and any other instruments of indebtedness, including any modification, extension, and consolidation agreement), together with the servicing records for the referenced loan including the loan payment history. Based upon the servicer's review, a statement must be executed confirming that the loan is in fact in default, that notice of the default, if required, has been properly mailed to the borrower(s), that 90 day notices, if required, have been properly mailed to the borrower(s) and that the information contained in the complaint, including the identity of the proper plaintiff entitled to enforce the loan documents is accurate.

**(2) Serve 90 day pre-foreclosure notices on a reverse mortgage home loan.**

As with the 90 day pre-foreclosure notice in forward mortgages, the reverse mortgage 90 day notice must be sent via first class mail and certified mail, to the mortgaged property and to the last known address of each borrower. The heading on the notice must be in 16 point font, and the body of the notice must be in 14 point font. Additionally, the letter must contain at least 5 counseling agencies which are geographically located near the borrower. If there are not 5 counseling agencies in the borrower's county, the servicer should include additional counseling agencies from neighboring counties. As a best practice, a servicer should consider including counseling agencies from all counties to insure compliance with the requirement. Notably, to the extent that the servicer is made aware that the borrower is a non-English

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Therefore, while there is risk to be assumed in reaching that conclusion, there is legal precedent to commence foreclosure actions on reverse mortgages on or before May 11, 2018 without sending a 90 day pre-foreclosure notice.

speaker and the borrower speaks one of the top 6 common languages spoken in New York, the 90 day letter is required to be sent in the non-English language. According to the Department of Financial Services, the top 6 most common non-English languages spoken in New York are: Haitian-Creole, Italian, Korean, Spanish, Russian, and Chinese (Traditional). **A sample reverse mortgage 90 day notice without the counseling agencies is annexed hereto for your ease and convenience.**

From a *legal standpoint*, reverse mortgages that are being defaulted due to move-out or death of the borrower should not be included under the statutory definition of a “home loan” because the borrower is deceased and/or does not occupy the mortgaged property. In those instances, a 90 day reverse mortgage notice is not required, similar to the approach taken for 90 day notices on forward mortgages. However, practically speaking, it must be noted that there remains some ambiguity with proceeding in this fashion for reverse mortgages since the new statutory template for reverse mortgage 90 day notices includes both occupancy and death defaults in the checklist of default reasons. In light of the inclusion of these default reasons on the statutory 90 day notice template, the courts may hold that the 90 day notices are required for occupancy and death defaults. While the law appears to be clear, in light of the risk associated, proceeding without the 90 day pre-foreclosure notice on death or move-out defaults is a business decision that servicers can make. However, as mentioned hereinabove, a servicer best practice would be to send the 90 day pre-foreclosure notice on all files not yet referred.

### **(3) Perform regulatory filings with the Department of Financial Services.**

Similar to 90 day pre-foreclosure notices in forward mortgages, the notice must also be registered, within three business days after the mailing of the 90 day reverse mortgage pre-foreclosure notice, with the New York State Department of Financial Services. For purposes of registering the mailing with the Department of Financial Services an account will need to be established and a login obtained from the Department of Financial Services, if you do not already have one.

Additionally, there are additional filings to be performed with the Department of Financial Services that our office is able to assist with as follows:

- (a) Within 5 business days of filing the lis pendens/first legal
- (b) Within 30 days of judgment
- (c) Upon the loan resolution via loss mitigation, discontinuance, dismissal or other.

In addition to these impactful changes, Senate Bill 7508c, also amended CPLR §3408 to continue the requirement for settlement conferences on enumerated reverse mortgage default types after the current version of CPLR §3408 sunsets effective February 13, 2020.

**Conclusion:** If a reverse mortgage qualifies a home loan pursuant to the statutory definition: (1) 90 day pre-foreclosure notices are required effective May 12, 2018; (2) Step 1 filings must be performed within 3 business days after sending the 90 day pre-foreclosure notice and then at 3 additional milestones; (3) Certificates of Merit will be required on first legal filings and (4) Settlement conferences will continue to be required.

If you would like to discuss the changes and their impact on your servicing processes, please do not hesitate to contact me directly.

**SAMPLE LETTER WITHOUT COUNSELING AGENCIES**

**YOU COULD LOSE YOUR HOME TO FORECLOSURE.  
PLEASE READ THE FOLLOWING NOTICE CAREFULLY.**

DATE

BORROWER'S ADDRESS

LOAN NUMBER:

PROPERTY ADDRESS:

DEAR BORROWER(S):

AS OF \_\_\_\_\_, WE AS YOUR LENDER OR SERVICER CLAIM THAT YOU'RE REVERSE MORTGAGE LOAN IS \_\_\_ DAYS IN DEFAULT. UNDER NEW YORK STATE LAW, WE ARE REQUIRED TO SEND YOU THIS NOTICE TO INFORM YOU THAT YOU MAY BE AT RISK OF LOSING YOUR HOME.

WE, THE LENDER OR SERVICER OF YOUR LOAN, ARE CLAIMING THAT YOUR REVERSE MORTGAGE LOAN IS IN DEFAULT BECAUSE YOU HAVE NOT COMPLIED WITH THE FOLLOWING CONDITIONS OF YOUR LOAN:

\_\_\_\_\_ YOU ARE NOT OCCUPYING YOUR HOME AS YOUR PRINCIPAL RESIDENCE

\_\_\_\_\_ YOU DID NOT SUBMIT THE REQUIRED ANNUAL CERTIFICATE OF OCCUPANCY

\_\_\_\_\_ THE NAMED BORROWER ON THE REVERSE MORTGAGE HAS DIED

\_\_\_\_\_ YOU DID NOT PAY PROPERTY TAXES  
{SERVICER NAME} PAID YOUR PROPERTY TAXES FOR THE FOLLOWING TIME PERIODS:

\_\_\_\_\_  
{QUARTER/YEAR}

\_\_\_\_\_ YOU DID NOT MAINTAIN HOMEOWNER'S INSURANCE

{SERVICER NAME} PURCHASED HOMEOWNER'S  
INSURANCE FOR YOU ON THE FOLLOWING DATE(S)  
AND FOR THE FOLLOWING COST(S):

\_\_\_\_\_ YOU DID NOT PAY WATER/SEWER CHARGES

{SERVICER NAME} PAID WATER/SEWER CHARGES FOR  
YOU ON THE FOLLOWING DATE(S) AND FOR THE FOLLOWING  
COST(S):

\_\_\_\_\_ YOU DID NOT MAKE REQUIRED REPAIRS TO YOUR HOME

IF THE CLAIM IS BASED ON YOUR FAILURE TO PAY PROPERTY OR  
WATER AND SEWER CHARGES OR MAINTAIN HOMEOWNER'S  
INSURANCE, YOU CAN CURE THIS DEFAULT BY MAKING THE  
PAYMENT OF \$\_\_\_\_\_ FOR THE ADVANCEMENTS WE MADE  
TOWARDS THESE PAYMENTS ON YOUR BEHALF.

YOU HAVE THE RIGHT TO DISPUTE THE CLAIMS LISTED ABOVE BY  
CONTACTING US, BY CALLING \_\_\_\_\_ OR SENDING A LETTER TO  
\_\_\_\_\_. THIS MAY INCLUDE PROOF OF PAYMENTS MADE  
FOR PROPERTY TAXES OR WATER AND SEWER CHARGES OR A  
CURRENT DECLARATION PAGE FROM YOUR INSURANCE COMPANY,  
OR ANY OTHER PROOF TO DISPUTE THE SERVICER'S CLAIM.

IF YOU ARE IN DEFAULT FOR FAILURE TO PAY PROPERTY CHARGES  
(PROPERTY TAXES, HOMEOWNER'S INSURANCE AND/OR  
WATER/SEWER CHARGES) YOU MAY QUALIFY FOR A GRANT, LOAN,  
OR RE-PAYMENT PLAN TO CURE THE DEFAULT BALANCE OWED.

IF YOU ARE IN DEFAULT DUE TO THE DEATH OF YOUR SPOUSE, YOU  
MAY BE CONSIDERED AN ELIGIBLE "NON-BORROWING SPOUSE"  
UNDER A HUD PROGRAM WHICH ALLOWS YOU TO REMAIN IN YOUR  
HOME FOR THE REST OF YOUR LIFE.

IF YOU ARE OVER THE AGE OF 80 AND HAVE A LONG TERM ILLNESS, YOU MAY ALSO QUALIFY FOR THE "AT-RISK EXTENSION," WHICH ALLOWS YOU TO REMAIN IN YOUR HOME FOR ONE ADDITIONAL YEAR AND REQUIRES AN ANNUAL RE-CERTIFICATION.

ATTACHED TO THIS NOTICE IS A LIST OF GOVERNMENT-APPROVED HOUSING COUNSELING AGENCIES AND LEGAL SERVICES IN YOUR AREA WHICH PROVIDE FREE COUNSELING. YOU CAN ALSO CALL THE NYS OFFICE OF THE ATTORNEY GENERAL'S HOME OWNER PROTECTION PROGRAM (HOPP) TOLL-FREE CONSUMER HOTLINE TO BE CONNECTED TO FREE HOUSING COUNSELING SERVICES IN YOUR AREA AT 1-855-HOME-456 (1-855-466-3456), OR VISIT THEIR WEBSITE AT [HTTP://WWW.AGHOMHELP.COM](http://www.aghomehelp.com). A STATEWIDE LISTING BY COUNTY IS ALSO AVAILABLE AT [HTTP://WWW.DFS.NY.GOV/CONSUMER/MORTG NYS NP COUNSELING AGEN-CIES.HTM](http://www.dfs.ny.gov/consumer/mortg_nys_np_counseling_agencies.htm). YOU MAY ALSO CALL YOUR LOCAL DEPARTMENT OF AGING FOR A REFERRAL OR CALL 311 IF YOU LIVE IN NEW YORK CITY.

QUALIFIED FREE HELP IS AVAILABLE; WATCH OUT FOR COMPANIES OR PEOPLE WHO CHARGE A FEE FOR THESE SERVICES.

YOU MAY ALSO CONTACT US DIRECTLY AT \_\_\_\_\_ AND ASK TO DISCUSS ALL POSSIBLE OPTIONS TO ALLOW YOU TO CURE YOUR DEFAULT AND PREVENT THE FORECLOSURE OF YOUR HOME. WHILE WE CANNOT ENSURE THAT A RESOLUTION IS POSSIBLE, WE ENCOURAGE YOU TO TAKE IMMEDIATE STEPS TO TRY TO ACHIEVE A RESOLUTION. THE LONGER YOU WAIT, THE FEWER OPTIONS YOU MAY HAVE.

IF YOU HAVE NOT TAKEN ANY ACTIONS TO RESOLVE THIS MATTER WITHIN 90 DAYS FROM THE DATE THIS NOTICE WAS MAILED, WE MAY COMMENCE LEGAL ACTION AGAINST YOU (OR SOONER IF YOU CEASE TO LIVE IN THE DWELLING AS YOUR PRIMARY RESIDENCE).

IF YOU NEED FURTHER INFORMATION, PLEASE CALL THE New York STATE DEPARTMENT OF FINANCIAL SERVICES' TOLL-FREE HELPLINE AT 877-226-5697 OR VISIT THE DEPARTMENT'S WEBSITE AT [HTTP://WWW.DFS.NY.GOV](http://www.dfs.ny.gov).

IMPORTANT: YOU HAVE THE RIGHT TO REMAIN IN YOUR HOME UNTIL YOU RECEIVE A COURT ORDER TELLING YOU TO LEAVE THE PROPERTY. IF A FORECLOSURE ACTION IS FILED AGAINST YOU IN COURT, YOU STILL HAVE THE RIGHT TO REMAIN IN THE HOME UNTIL A COURT ORDERS YOU TO LEAVE. YOU LEGALLY REMAIN THE OWNER OF AND ARE RESPONSIBLE FOR THE PROPERTY UNTIL THE PROPERTY IS SOLD BY YOU OR BY ORDER OF THE COURT AT THE CONCLUSION OF ANY FORECLOSURE PROCEEDINGS. THIS NOTICE IS NOT AN EVICTION NOTICE, AND A FORECLOSURE ACTION HAS NOT YET BEEN COMMENCED AGAINST YOU.