

HOMEOWNER STRATEGIC DEFAULTS, SHORT SALES & MORTGAGE FORECLOSURES

When you bought your home, you gave the bank a **Mortgage Note** and a **Mortgage Deed**. The Note contains the loan amount and the repayment terms. The Mortgage gives the bank a lien against your property. You are the **Mortgagor** (you are 'giving' the mortgage.) The bank is the **Mortgagee** (it is 'receiving' the mortgage.) When the Note has been paid in full, the bank will give you a **Satisfaction of Mortgage** which is recorded in the public records.

WHAT IS A MORTGAGE FORECLOSURE?

When the property owner fails to make payments to the bank, the bank will file a **Mortgage Foreclosure Complaint** in the county where the property is located. A copy of the Complaint is served on the property owners together with a **Summons** requiring that a written Answer be filed with the court within 20 days. The Answer should contain the **Affirmative Defenses**, if any. Upon failing to file a timely Answer, the court will enter a default judgment granting the bank's foreclosure.

At the same time that the bank files the Complaint, it also files a **Notice of Lis Pendens**. This recorded

document puts everyone on notice that there is a pending legal action against the property.

In the Complaint, the bank will name as additional defendants anyone who holds a second or junior mortgage, a judgment lien, Homeowner Association liens and tenants. As part of the mortgage foreclosure process, the junior liens will be removed as liens against the property.

In most Florida counties, including Orange, Osceola and Seminole, the Court will require that the parties attend **Mediation**. Mediation is an informal meeting conducted by a mediator to attempt to settle the case, possibly through a **Mortgage Modification Agreement**. As part of the Mediation, the homeowner is required to produce financial documents. Neither party can be forced to accept a modification, only encouraged to do so. Many times the Mediation is successful and the note and mortgage is modified and the Mortgage Foreclosure is dismissed.

If the parties cannot reach an agreement at the Mediation, the bank will proceed with their foreclosure action. In that the issue is very simple, either the homeowner paid the payments or they did not, the court often grants a **Summary Judgment of Foreclosure** without a trial. The Final Judgment of Foreclosure declares the amount due on the

mortgage principal and adds to that the court costs, interest and attorney's fees and sets a foreclosure sale date typically in about four weeks.

Historically, foreclosure sales were done on the courthouse steps or in a designated room or area of the Courthouse. However, in Orange County, foreclosure sales are now done on the Internet.

Ten days after the sale date, the Clerk will issue a **Certificate of Title** to the highest bidder at the foreclosure sale. The highest bidder is often the bank that is doing the foreclosure. On that day, the property is no longer owned by the homeowner. If the homeowner or tenants have not vacated the property as of that date, the court clerk will issue a **Writ of Possession** which the Sheriff will enforce. The Writ is posted on the front door and, 24 hours later, the Sheriff will keep the peace while all people and possessions are removed from the home.

The mortgage foreclosure process, from filing the Complaint to the Certificate of Sale, can take as little as three months (very rare) and up to 9 to 12 months or even much longer. However, if an Answer to the complaint is not filed, the time for the process will be much closer to the three month period.

CAN A MORTGAGE FORECLOSURE BE BENEFICIAL?

There will always be positives and negatives to a mortgage foreclosure. One benefit is that the homeowner is not making mortgage payments while the mortgage foreclosure is pending. In other words, they live in the home for free except to maintain the electricity and utilities. Hopefully, during that time, the owner will have put the mortgage payment into a savings account for use at the end of the foreclosure. If the process takes a year, they will then have a nest egg to perhaps purchase another property or rent a new home.

Another possible benefit is that often, once the mortgage foreclosure has been filed, the bank is more willing to agree to a mortgage modification. Usually, banks are very slow in discussing modifications until there is a default in payment and mortgage foreclosure has begun. Modification is usually done at the Court required **Mediation. Mortgage Modifications** usually include a reduction in the interest rate and an extension of the term of the mortgage (from 30 years to 40 years for example.) The goal is to provide a reduced monthly payment that the homeowner can afford. As part of the modification, all the unpaid interest, court costs and

attorney fees are added to the mortgage principal. Often, the new payment equals about one-half of the old payment.

WHAT IS STRATEGIC DEFAULT?

A strategic default occurs when a person can afford to pay the mortgage, but decides not to pay, often because the value of the property is substantially less the loan balance. Often, the person has tried to modify the mortgage terms with the bank but the bank has refused to do so or simply won't cooperate with the homeowner. In that the mortgage foreclosure will lead to damaged credit and a possible deficiency judgment, a strategic default clearly has risks.

WHAT IS A SHORT SALE?

A short sale occurs when the homeowner sells the property and the lender agrees to accept less than the full loan balance. Sometimes the bank agrees to accept the net sales proceeds as payment in full and sometimes the bank requires the homeowner to sign an unsecured promissory note at closing for a portion of the unpaid loan. The bank usually requires that the seller not receive any of the sale proceeds and that the sale be to a stranger in an arm's length transaction.

WHEN WILL A BANK SEND A 1099?

Banks will send a Federal Tax Form 1099 if any debt is forgiven either through a short sale or a mortgage foreclosure because, under IRS rules, forgiven debt is income. Congress passed a recent and temporary Federal law that this “income” will not be counted if it occurred as part of your homestead. It would apply if it related to your rental or investment property. You should always get advice from your tax advisor or CPA as to this issue.

WHAT IS A DEED IN LIEU OF FORECLOSURE?

This occurs when the bank agrees to accept a deed to the property from you rather than going through a lengthy foreclosure process. Although people often hear about deeds in lieu, they are rarely used and they cannot be used whenever there is a second mortgage or other junior liens against the property. However, if the bank agrees to accept deed in lieu foreclosure, the homeowner should insist on the bank giving them a Release from any further liability on the mortgage.

WHAT IS A DEFICIENCY JUDGMENT?

The difference between the amount of the debt and the fair market value of the property is known as the

“deficiency”. The mortgage company has the right to sue you for this deficiency and seek a deficiency judgment. This is a personal money judgment valid for 20 years. It can be sought by motion within 30 days after the foreclosure sale or within 4 years in a separate lawsuit.

HOW WILL MY CREDIT BE AFFECTED?

By the time a foreclosure complaint is filed, your credit will already be substantially lower because of the missed mortgage payments. It is my understanding that, as far as damage to your credit, a deed in lieu is better than a short sale and a short sale is better than a fully completed mortgage foreclosure.

WHAT IS ‘CASH FOR KEYS’ OR OTHER SIMILAR PROGRAMS?

Because the banks are so overwhelmed by the number of defaults and foreclosures, it will sometimes offer to pay the homeowner for a deed in lieu of foreclosure, provided the homeowner moves out and leaves the property broom clean. Although this process might make sense to the average person, it is rarely used (but is becoming more common.)

WHAT IS MEDIATION?

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Mediation often provides the best opportunity to work out a mortgage modification. At the mediation, the bank is represented by an attorney and its representative appears by telephone. The homeowner is required to produce various financial records including copies of pay check stubs, other income records, bank account statements for several months, several years of tax returns and perhaps a current electric bill to prove they still live in the home. The bank will input the information into their formulas and will tell the homeowner what they are willing to do.

Many people have tried, unsuccessfully, to modify their mortgages prior to the foreclosure being filed. It is a very common complaint. The mediation required by the court often is the best chance to work out an agreeable modification. Sometimes, an agreement is not reached at the mediation, but the parties continue working together for months afterward. As long as both parties are working on modification terms, the Court usually won't advance the foreclosure court case.

WHAT IS HAMP?

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The Home Affordable Modification Program has, unfortunately, not been very successful. Its goal is to make the homeowner's principal and interest mortgage payment equal 31% of their gross income. This can be accomplished by reducing the interest rate, extending the term of the loan and not including a portion of the principal balance in the calculations.

WHAT IS HARP?

The Home Affordable Refinance Program seems simple. The law allows a refinance down to the current low interest rates without requiring an appraisal of the property. However, HARP has specific qualifications, including requiring a homeowner to be current on their mortgage in order to qualify. Anyone with an interest rate over 4% should check with their mortgage company about HARP.

WHAT IS 'ROBO SIGNING'?

The banks were not prepared for the massive volume of foreclosures. When so many owners defaulted, there were millions of documents that needed to be filed as part of the mortgage foreclosures. These included assignments of mortgage, lost note affidavits and even affidavits of the amount due the bank. The banks and some law firms resorted to hiring people to

sign these documents even though they had no real knowledge of what they were signing! Those people became known as robo-signers because they simply signed their name to documents without reviewing files.

WHAT IS 'MERS'?

'MERS' stands for Mortgage Electronic Registration Systems. It allowed banks to make 'MERS' the mortgagee rather than the bank itself. This was done so the bank could avoid the costs of recording assignments of mortgage and so that the banks could bundle the mortgages into huge trusts.

WHAT SHOULD I DO NOW?

If you have additional questions or concerns, call me, Attorney Colonel Airth, at (407) 423-5561 to schedule your office consult.

QUESTIONS, COMMENTS, SUGGESTIONS?

Did you read something in this booklet that was not clearly explained? Do you have a question about this topic that was not answered? Have you found a typographical error or a legal inaccuracy in this booklet? Please contact me with your questions, comments or suggestions. Your thoughts and suggestions are greatly appreciated.

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