

CONSUMER DEBT AND MORTGAGE RELIEF STRATEGIES WHITE PAPER

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Debt incurred by Consumers and small businesses in on the rise in today's complex and struggling economy. Credit card debt is on the increase, unemployment is prevalent in today's struggling economy and all of that coupled with the massive swell in home foreclosures have put us all on notice that debt management is perhaps the most imperative skill of the day. The foregoing has created a need to better understand the various debt relief techniques available through the law. This white paper is intended to educate debtors on some of the most important debt relief tools available through either use of strategized negotiation or though relief by way of the 2005 revised Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). The following discussion will focus on many topics, including, loan modifications, short refinancing and short selling techniques, lien stripping, cramming down debt, and debt relief through the bankruptcy code.

Prior to discussing the intricacies of debt relief, it is important to recognize there are two forms of debt relief; one by filing for relief under the Bankruptcy Code, and one by negotiating with your creditors. It is important to note, only bankruptcy is a court proceeding. However, any negotiation you complete is a contract and can be protected by contract law.

Individuals who have amassed large debts have many options. The first option in most cases is to contact your creditors and attempt to work out a payment plan, to pay off your debt if you can. In many cases you will be able to negotiate \$0.50 (fifty cents) on the dollar or less. However, if an individual finds that non-bankruptcy alternatives are not feasible, a decision then must be then made between filing a Chapter 7 liquidation proceeding or a debt reorganization proceeding under Chapter 13. A Chapter 7 bankruptcy filing is best described as obtaining a discharge from debts (with some exceptions) while retaining some assets such as a home, household goods and an automobile as long as they do not exceed certain values determined by the U.S. Bankruptcy Code. Chapter 7 is consider a "liquidation" decision however if filed correctly and using the Bankruptcy Code to the best of your ability some assets can be retained while crushing debt is removed.

Chapter 7 basics

To be eligible to file a Chapter 7 bankruptcy the filer should have resided or be domiciled in a state of the United States. In addition, they can not have been a debtor in a bankruptcy case in the 180 day period prior to filing the current bankruptcy case; they must receive counseling from an approved nonprofit budget and credit counseling agency

prior to the filing and pass the “median family income” test. In order to receive a discharge in a Chapter 7 an individual may not have received a Chapter 7 bankruptcy discharge in the previous eight (8) years or a Chapter 13 discharge in the previous six (6) years.

The element that will fully determine if you can file a Chapter 7 is the “median family income” level. The individual or couple must review income made within the previous six months and average it out. If when the average income is measured against the “median family income” as stated in 11 U.S.C. § 707(b)(7) and it falls below, then a Chapter 7 filing is appropriate. If the household income exceeds the “median family income”, then the individual or couple will be subject to the means testing. The means testing calculation takes the average amount of the income received during the six-month period prior to the bankruptcy filing and subtracts it from the average monthly expenses. This determines the margin of excess income. Using this figure you determine if the excess income exceeds the margin allowed by 11 U.S.C. § 707(2)(A)(i) and if you are eligible to file a Chapter 7 bankruptcy.

Chapter 13 basics

If you are unable to file for Chapter 7 due to the “median family income” level being too high and failing the means testing, then your other option is filing a Chapter 13. A Chapter 13 bankruptcy filing allows a person to seek protection of their property and develop a plan of paying back creditors by making monthly payments to a Trustee under Court supervision. The plan can be for as little as 24 months or for as long as 60 months.

To be eligible to file a Chapter 13 bankruptcy, like a Chapter 7 case, the filer must reside in a state of the United States but must also have regular income, have unsecured debt less than \$336,900 and secured debt less than \$1,010,650 and receive counseling from an approved non profit budget and credit counseling agency.

The primary advantage of a Chapter 13 filing over a Chapter 7 filing is that a debtor by paying a portion of his or her pre-bankruptcy debts over the life of the Chapter 13 plan can obtain a discharge of the unpaid balances while retaining all of their asset, avoid foreclosure of a home and more debts are deemed dischargeable in a Chapter 13 verses a Chapter 7.

The pros and cons of Chapter 13 and a Chapter 7

The disadvantages to a Chapter 13 verses a Chapter 7 is that the filer will have to pay something to unsecured creditors, a reduced amount against entire debt. However in a Chapter 7 filing it could result in a discharge from most or all pre-bankruptcy obligations without any payments. Another disadvantage to a Chapter 13 is that a discharge will not be received until all payments required by the plan are complete whereas a Chapter 7 debtor will usually receive a discharge in three months from filing.

It is essential that when trying to figure out if bankruptcy is the right option to contract an attorney to discuss the entire matter, review your current financial situation, determine what is most important to keep and let go and decide which is the best plan for their situation.

Avoiding Foreclosure

In these economic times the percentage of foreclosures in America is on the rise. The homeowner who is facing foreclosure of their primary residence has several options in an attempt to avoid foreclosure. They can negotiate with the lender in an attempt to modify or refinance the loan, get a short sale approved or deed the residence back to the lender in lieu of foreclosure. If the lender is unwilling to negotiate with the homeowner or their representative then there are options of filing a Chapter 13 bankruptcy or a reverse mortgage if the property in jeopardy is an investment property.

Even with all of these options at the disposal of the homeowner there still must be a determination by the homeowner if they indeed wish to save the home from foreclosure or to just allow it to be foreclosed on. Once foreclosure becomes evident, first and foremost the homeowner must make the determination if they in fact want to try to keep the home, if they are financially able to save the home or if it would be more feasible to allow the home to go into foreclosure.

Most homeowners attempt to avoid foreclosure due to the misconception that they will save their credit rating if their home is not foreclosed on. Unfortunately this is not correct. Once the homeowner has missed four continuance payments on the mortgage their credit report will already reflect in a negative manner equal to a foreclosure. If the homeowner's only reasoning for saving the home is to save their credit rating they are already hindered. Most homeowners want to save their home because they need a place to live and need assistance to get out of a situation which millions of American have gotten themselves into.

If the homeowner wants to avoid foreclosure and it is not too late in the process, the auctioneer is not at the front door, and then the homeowner can open a line of negotiations with the lender in an attempt to refinance the existing loan. The lender will look at the homeowner's credit rating at the time of the negotiations – are there any other bills outstanding, are they in any other financial distress – and if there is equity in the home (approximately 25-30%).

In addition the lender will look to the amount of time the homeowner has gone without making a mortgage payment. Sometimes the refinancing will be as simple as moving from an ARM loan to a fixed mortgage rate or if there is a FHA loan involved the homeowner could qualify for a partial claim. A partial claim is when the loan is brought current and a lien is placed on the property for the outstanding amount owed until the property is sold or refinanced. Normally, with most negotiations a forbearance agreement is used by the lender in which the homeowner is allowed to delay or reduce payments for a short period of time with the understanding that another option will be used at the close

of the time to bring your account to a current status. It is a temporary cease of any and all legal action against the homeowner until a plan of action is determined. This step of refinancing to avoid foreclosure must be used early on in the process. The homeowner must move quickly once a Notice of Default is initiated.

What If the Homeowner Does Not Want To Keep The Home

If the homeowner has made the determination that they will not be able to keep the property though a loan modification there are a couple of options that they can attempt to negotiate with the lender. The first option is a short sale. A short sale is when the homeowner's property has been de-valued below the mortgage leaving a shortage between what the current market value of the property and the present mortgage on the property held by the lender. With the lenders agreement the homeowner can sell the property for the fair market value and the deficiency in the mortgage is then considered unsecured. At this junction, the lender can either go after the homeowner for the rest of the unsecured debt through either filing suit themselves or selling the note to another to collect the debt for them. The lender could also forgive the debt altogether. When the debt is forgiven the homeowner is taxed on the amount forgiven as the amount is considered income to the homeowner.

The recently passed 2007 Mortgage Forgiveness Debt Relief Act provides non-recognition of the income, which would otherwise be includable. Of course the forgiveness of the shortage of the mortgage is up to the lender. If the lender refuses to forgive the shortage the homeowner has the option to have the short sale of the home and then file a Chapter 7 bankruptcy which would discharge all outstanding debt that the homeowner has including the shortage on the mortgage which had become an unsecured debt upon the short sale.

Another option for the homeowner if they are not going to keep the home is a deed in lieu of foreclosure. The lender again must approve this process and in which the homeowner basically deeds the home over to the lender in satisfaction for the loan in full. In this situation the homeowner will not have the shortage as described in the short sale however the lender will now own the property. This is sometimes a more difficult negotiation for the homeowner to the lender. The key to this in the negotiation is to relate to the lender the expense they are saving from going through the foreclosure against the fact that the property could be sold in the near future. Unfortunately a deed in lieu of a foreclosure can only be perfected when there is no second or junior lien holder on the property.

Unfortunately, in most circumstances the homeowner has waited too long and the time for negotiation is long past when they walk through the attorney's door for help. In most cases the homeowner has already received the Notice of Default, several demanding letters and the letter that foreclosure is eminent. In this situation the homeowner who wants to keep their property or at least get some breathing room in order to decide what to do has the option of filing a Chapter 13 bankruptcy in order to avoid foreclosure. The Chapter 13 gives immediate protection in the form of an automatic stay. An automatic

stay stops all foreclosure processing immediately upon the filing of the Chapter 13 petition.

The homeowner will then have an opportunity to make a repayment plan with the lender in which the lender would receive 100% of the missed payments over 36-60 months. Of course the debtor must stay current with all mortgage obligations at the same time as paying back the default. In addition the Chapter 13 will allow the debtor to look at their entire financial situation and any unsecured debt that they have such as credit cards, medical bills, judgments or personal loans can be repaid at a small percentage of the total amount owed within that same 36-60 month pay back period. This would allow the debtor to have more disposable income. Depending on the type of property being foreclosed on and the debtor's situation, a Chapter 13 bankruptcy could also make available such actions like a "cram down" or "lien strip" of the mortgage if the market value of the property is far below the present mortgage. These should be discussed with your attorney, as each situation is different.

Loan Modifications

What should owners of homes know about dealing with today's economy? The new words of "Short Sale" or "Loan Mortgage Modification" are new terms that homeowners never thought they would need to hear or understand what they mean in order to possibly save their homes or their credit. No one planned for such a drop in home values and such a rise in costs.

With all the new terms and with all the sever changes in this economy, it is no wonder that homeowners fear doing anything when they are faced with financial hardship. Homeowners need not longer fear these terms and more importantly understand why loan modifications and short sale refinancing may make the difference between a homeowner keeping their home, avoiding bankruptcy and saving their credit.

We all heard about the great "bailout" of 2008. We heard both the pros and the cons with our government bailing out several banks, insurance companies, financial institutions and etc. However, the biggest pro for homeowners will come from this bailout. The pro is that mortgage companies are now starting to stop foreclosure sales, short sales and going back to the owners to modify their loans so to allow them to keep their home irrespective of their failure to pay their mortgage payments. Therefore, debtors will begin to see an order of process for homeowners to fight to keep their homes in these unprecedented times of financial suffering.

A loan modification will be likely the first step for homeowners to consider. A loan modification is simply a homeowner asking the mortgage company to modify the current terms of their mortgage. Homeowners will ask a mortgage company to modify their mortgage because of being late on payments, variable interest rates, too high of monthly mortgage payments and etc.

There are many aspects to modifying your payment terms that differentiate refinancing a mortgage to modifying mortgage. When refinancing, you may or may not move into a fixed interest rate. You may or may not decrease your payments. The biggest benefit to refinancing is often the ability to pull out equity in order to pay other bills. As stated earlier, you will need to have very high credit in this market to refinance.

A loan modification is generally considered a short term refinance, in order to help you get back on your feet, or to wait out this uncertain real estate market. You will be moved into a lower fixed interest rate, for five or ten years. The most significant benefits of a loan modification is that your credit score does not come into play. An attorney will negotiate with the bank on your behalf based upon your hardship. As such, your credit is not affected with the change. There are no closings needed in a loan modification, as such, there are no closing cost, no points being paid, no new title insurance fees, no application fees, or any other fees typically incurred in a traditional mortgage transaction.

Homeowners can seek this relief on their own directly with the mortgage company. However, the process is very time consuming and often frustrating for a homeowner. It recommended that you hire a law firm to help get you through the process.

One final point is that mortgage companies today are requiring that loan modifications be conducted first and attempted by the homeowner before they will even consider a Short Sale.

Short Refinancing

A hybrid tool that is generally used to avoid foreclosure is a called a short finance. This term refers to both refinancing and modifying a loan, while discharging the value of debt, which makes a homeowner “upside down”. This tool allows homeowners to refinance their loans, but with some of the debt forgiven. Essentially, if a mortgage on a home exceeds the fair market value of that home, homeowners can now though their attorney negotiate with the lien holder to forgive the debt in excess of what a home could reasonably sell for in today’s market.

Short Sale refinancing is similar to stripping a lien. The difference is that in lien stripping, the entire loan can be discharged, but only if the fair market value of a senior lien “eats up” the value of the secured property. Through a short sale refinance program, a homeowner can partially strip a lien, whether or not there is another lien senior to it.

For example: You owe \$225,000 on a condominium that you purchased at the peak of the real estate market in 2001. Over the course of seven years, you have paid off \$10,000 in principal. As such, the current value of your principal is \$215,000. Subsequently, home values have declined by 15%, and your home is now worth \$190,000. The rate on your subprime mortgage has increased, and you can't afford the higher payments. Rather than foreclosing, the mortgage company agrees to discharge

\$25,000 of the debt and refinances the mortgage for \$190,000 for the next 30 years. This is a loan you can afford as a result of forgiveness of debt coupled extending the time to pay the loan.

Short Sales

If a homeowner cannot pay the loan modification that was negotiated with the mortgage company, a Short Sale may be the next option. A Short Sale is simply the sale of a home for less than the value of the mortgage owed on the property. It is no secret that most home values are much less than homeowners purchased their homes. Short Sales are a good option if the homeowner simply does not want to save their home and needs to get out from underneath the debt of the mortgage. The best part of a Short Sale for the homeowner is that any amount due owing to the mortgage due to the shortness of the sale the homeowner is released from liability coupled with a release of tax liability pursuant to the 2007 mortgage forgiveness relief act.

More specifically, a short sale, also called a distress sale has significant benefit for the lender because the lender avoids the expenses and hassle of seizing a delinquent customer's property. In addition, lenders realize that they could lose money if the borrower's home is auctioned in a foreclosure proceeding.

To decide whether or not to do a short sale, lenders look at various factors. Those factors are:

1. Whether the seller truly has a hardship limiting his or her ability to pay the mortgage.
2. Whether it would be cheaper to simply repossess and sell.
3. How many other properties the lender has in default.
4. Whether there are cosigners on the mortgage who can be held responsible for the balance covered on the mortgage.

Even when borrowers engage in a legitimate short sale, there is no guarantee of success. It's difficult to have an agreement where the interests of all parties are satisfied. One has to take into account the interests of the lender, homeowner, agent, buyer and investor who held the mortgage. Also, if the husband and wife were divorcing, then both would have to agree to have a short sale. With regard to managing a short sale, it's important that sellers review loan documents with an attorney to make an informed decision. Also, is recommended to that you hire a law firm to help get you through the process.

Mortgage Forgiveness Relief Act of 2007

The U.S. real estate boom of the past ten years has seen homeownership rise from 65% to 69%. Unfortunately with the market cooling the value of real estate is plummeting leaving homeowners holding mortgages that greatly out value the real estate they presently hold. There is now something that can help. The Mortgage Forgiveness Debt Relief Act of 2007 was enacted on December 20, 2007 to assist homeowners who

are in such a predicament. Normally, a homeowner, in an attempt to avoid foreclosure would modify their current mortgages, that is, “short sell” the property, or deed their home in lieu of foreclosure back to the bank holding the lien on the property. Such remedies often leave the homeowner with a debt for property no longer in their possession. In most situations the lender would forgive the homeowner’s debt either in part or full. Unfortunately this left the homeowner facing an additional and in most cases, undischargable financial difficulty, the IRS. The IRS now recognizes that debt which is so graciously forgiven by the lender as taxable income. The homeowner receives a tax bill for the forgiven amount for money forgiven and never truly received.

The Mortgage Forgiveness Debt Relief Act is designed to exclude such debt forgiveness on the principal residence if the balance of the loan was less than \$2 million for a debtor’s primary domicile. The act only applies to that debt which was forgiven in the 2007, 2008 or 2009 tax years. Debt reduced through mortgage restructuring, as well as mortgage debt forgiven in connection with a short sale or foreclosure, may qualify for this relief. The requirements are that the debt must have been used to buy, build or substantially improve the taxpayer’s principal residence and must have been secured by that residence. Debt used to refinance qualifying debt is also eligible for the exclusion, but only up to the amount of the old mortgage principal, just before the refinancing.

What does this mean to the homeowner in trouble? Everything. There is now another option available to them, which will not lead them from one financial frying pan to the other. Prior to the Act, homeowners would attempt to negotiate with the lender not to forgive the deficit in the loan but to file suit against them. This was the strategy in the reasoning that a judgment lien is dischargeable under a Chapter 7 or Chapter 13 bankruptcy were IRS liens are not. IRS tax liens remain through the bankruptcy filing and distribution and the homeowner would end up with the lien coming out on the other side of the bankruptcy. Leaving them in the same predicament of owing money on income never actually received.

The Act will not extend to other forgiven debt such as those on second homes, income or rental property, business property, credit cards or car loans. In those instances the filing of a Chapter 7 or Chapter 13 bankruptcy might be in the homeowner’s best interest depending on the financial situation he is presently in. The homeowner should always consult with an attorney regarding what strategy would be in their best interest.

Removing Second Mortgages and Liens through Lien Stripping:

Many individuals are living with financial decisions causing them to hold assets, such as houses, automobiles and boats, whose values have plummeted. Individuals are living in properties whose values have dropped far below the mortgages or driving cars, which are valued at a third of the loans. Those individuals with financial difficulties are looking for assistance through the bankruptcy courts in an attempt to get out from underneath all of the debts and liens acquired, which now vastly exceed their current assets. There are two types of liens, which can be attached to an individual’s property or assets. The first is a voluntary lien, which is basically a situation where you have agreed

to use the asset as collateral for a debt, i.e. mortgages and auto loans. A non-voluntary lien is one that a creditor imposes on you and that gives them the right to force you to sell the asset so that they can be paid, for example: judgments against you or tax liens. These liens are either secured or unsecured as to the asset they are attached to.

The most common issue for an individual nowadays is the situation where a homeowner who has a first and second mortgage on a primary residence is facing bankruptcy and wondering if they have the ability to save the family home. As real estate markets fall and the fair market values of the homes fall, homeowners are left with mortgages that far exceed the current fair market value of their homes. There is a process, which could be of help to many in this situation, and it is called “lien stripping”.

“Lien stripping” refers to the process of reducing a secured claim to the value of the underlying collateral. It uses the combined effect of 11 U.S.C.A. § 506(a) and 11 U.S.C.A. § 506(d) to bifurcate the lien into secured and unsecured. The secured lien is allowed in the amount up to the fair market value of the property at the time of the stripping. The balance of the lien, which exceeds the fair market value of the property, is now deemed unsecured.

Liens can be stripped off of the debtor’s assets in Chapter 13 when there is not enough equity in the assets. Section 506(a) and 506(d) of the Bankruptcy Code acknowledges that a lien is only a secured claim to the extent there is value in the asset to which it attaches. To the extent that the claim exceeds the value of the collateral, that portion of the lien is now unsecured. The most common application of lien stripping is the reduction of car loan liens to the present value of the vehicle however it is currently used more often with home mortgages in bankruptcy situations. Lien stripping with car loans has been limited to vehicles purchased over 910 days.

The Bankruptcy Code does permit a bankruptcy plan to “modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor’s principal residence”. Section 1322 (b)(2). This section provides protection to the holder of a claim secured only by a lien on the debtor’s principal residence by prohibiting any modification of the terms, however the issue arose as to if this section precluded “lien stripping” of under secured residential mortgages in the face of Bankruptcy Code section 506 which appears to permit bifurcation of under secured mortgages and voiding of unsecured portions of the mortgage lien. At least two bankruptcy court judges sitting in Massachusetts have permitted such bifurcations; see *In re Brown*, 175 B.R. 129 and *In re Richards*, 151 B.R. 8.

In any event, there is an exception as to the lien on a principal residence lien and that is if there is a second or third lien on the same property. In this instance those liens, lien stripping is available to render them totally unsecured if the first mortgage balance equals or exceeds the value of the personal residence. The exception is only if there are two distinct mortgages on the property, not a refinancing situation. It should also be noted that the limitation of lien stripping of first mortgages only apply to personal residences, it will be allowed for a mortgage on a building used for business or renting.

As always, all situations relative to a strategy for bankruptcy and lien stripping should be discussed in detail with a bankruptcy attorney to understand all your avenues open to you.

Cramming Down

An other very powerful tool debtors have at their disposal should they find themselves in a bankruptcy situation is the ability to pay only the value of an asset. This is particularly enticing if you have a lien against secured property such as an automobile, mortgage on income property (but not on a residence) or piece of furniture that far exceeds the value of the property. The common term for this disparagement in value vs. loan is being, “upside down”. In most cases, the value of secured property such as an automobile, boat, or furniture you are financing decreases more rapidly than the loan is being repaid.

For example, most debtors own much more on their car or truck than the value of the car or truck, should they try to sell it. Additionally, you may be able to lower the interest rate on your payments (though not on a mortgage). Many debtors have secured loans where they agreed to pay 18%-35% interest, and sometimes even more. In a Chapter 13 bankruptcy you only have to pay most secured debts at the prime rate plus 1-3%, depending on the circumstances of your case. A debtor in a chapter 13 bankruptcy has the ability to motion the bankruptcy court to lower the amount that you owe on nearly all secured debts to pay only the fair market value of that property and to discharge any amount in excess of that value.

The rub on this is that in most cases, you will be required to pay the entire present value of the secured property at a reduced interest rate, commonly referred to as “Till interest” (as a result of a Supreme Court case where one of the parties to the case was named Till). The relevant interest rate is the Prime Rate of Interest (which varies) plus a Risk Premium of 1% - 3%.

There are certain restrictions or limitations on cramming down a debt. The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) places limitations on a Chapter 13 Debtor’s ability to cram down when dealing with Purchase Money Security Interests (“PMSI”). This deals with the situation when the money borrowed was used to purchase the collateral, which is the standard scenario in a car loan. If the collateral for a PMSI debt is an automobile acquired for personal use within 2 ½ (two and half) years prior to the Chapter 13 filing, the debt can not be crammed down to the value of the vehicle. However, if the collateral is not an automobile, the prohibition on strip down only applies if the PMSI debt was incurred within one (1) year prior to the bankruptcy filing.

Conclusion

What is the gist of the foregoing? If you are struggling with debt; if you are inundated with creditors calling; if your home is in jeopardy of foreclosure, or simply feel

overwhelmed by your financial responsibilities, there are a number of potential debt relief solutions at your fingertips.

As always, all situations relative to a strategy for bankruptcy and lien stripping should be discussed in detail with a bankruptcy attorney to understand all your avenues open to you.