

THE TRUTH ABOUT FORECLOSURE RESCUE

June 6, 2009

I am an attorney specialized in foreclosure rescue services, including foreclosure defense, loan modification, short sale facilitation and, occasionally, deed-in-lieu-of-foreclosure. Homeowners come to me with a range of different scenarios, and I have been doing this long enough now to see patterns and reoccurring misconceptions. I write this article now to give homeowners in distress¹ some straight talk about available options.

This housing crisis we are in has been going on for a while, and I think most people know something about foreclosure. Let me just highlight, then, the difference between the foreclosure proceedings and loss mitigation. The former refers to the actual lawsuit commenced by the lender² as required in most states to re-capture title to the property. The latter refers to negotiations with the lender towards some kind of workout arrangement. These are two entirely separate processes—if it helps, think of it as “litigation and mitigation”—but there is some important interplay between the two.

Truth about Foreclosure Defense

The first thing you need to understand concerns the foreclosure proceedings. Now, you can defend your own lawsuit *pro se*,³ but let’s be honest – that doesn’t work. I have had some fairly sophisticated non-lawyers⁴ come to my office after they have done their best with the lawsuit looking for me to undo the damage. Sometimes I can, and sometimes I cannot.

The reality is that even a licensed attorney probably cannot defend a foreclosure suit to best effect unless he/she has some specific background and experience in this rather specialized field of law. There are particular affirmative defenses that need to be raised and particular measures that need to be taken in order to properly contest a foreclosure suit. There is no point trying to explain all the ins and outs because (i) I would have to write a book to do it, and (ii) you would still make a mess of it.

Generally, the concern here is money. You would like to have an attorney represent you, but you are not sure you can justify the expense. There are two reasons the money you spend on a defense lawyer is the best investment you can possibly make. First, without a defense attorney, you will probably lose the suit by default and be out of the house within three to five months. Compare that with a properly contested suit that will almost surely linger on for eight months to a year or more. In the very worse case scenario, you still get the benefit of an additional three months without making mortgage payments. How much is that worth to you? Second, if your long-term strategy is to work something out with the bank, such as loan modification or short

¹ I use the term loosely here to include both the situation where the homeowner has trouble making the mortgage payments, either because of a bad loan or a financial hardship, and where the property is “upside-down.” More often than not, the two situations overlap, but the distinction remains important.

² Or homeowner association.

³ *I.e.* without an attorney.

⁴ *E.g.* accountants, business consultants, etc.

sale, then having a strong defense will give you better leverage in your negotiations. In the case of a loan modification, any small improvement in the terms will equal thousands of dollars of savings over the life of the loan. As for short sales, the extra leverage may allow you to avoid a deficiency judgment and/or mitigate your tax exposure. Taking this into account, a good defense attorney is well worth having at almost any price.⁵

Truth about Loan Modification

The second issue is loan modification. Loan modification companies have been demonized by the media and penalized by state authorities. Additionally, you have been bombarded with materials from loan modification companies as well as phone calls from their representatives, so you are understandably nervous about doing business with them. My opinion in this regard is as follows.

My firm is actively prosecuting two different loan modification companies for fraud, and I know of a few others that are simply incompetent. That said, the percentage of bad companies in the loan modification business is probably similar to that of any industry, and I suspect the major banks are the ones behind the intense, bad press modification companies have received. At this point, though, it does not matter much.

Legislators in many states have passed laws that prohibit loan modification companies from taking money up-front. The new rule is that such companies must first complete the modification,⁶ and then charge the homeowner. From a business perspective, that model does not work. The result, by and large, has been that many modification companies—mostly, the legitimate ones—have closed their doors, and the ones that remain have simply ignored the new laws.⁷

So, while I feel sorry for legitimate loan modification companies that have been punished unfairly by the press and legislators, I have to admit the ones that continue to solicit your business now probably cannot be trusted. If they are willing to flaunt the state attorney general's office, they may well be willing to defraud you. That leaves you with two choices.

The banks want you to work on the loan modification by yourself because they want to avoid dealing with a professional who knows the game. By all means, feel free to have a go at it if you wish, but you will very likely have a frustrating and unproductive experience.

Banks lose money when they modify a loan—a lot of money. You just cannot expect them to make that process easy for you. What is going to happen is that the bank⁸ will “lose” your correspondences, make you wait hours on the phone, require copious documentation, etc. And, ultimately, if you do not know the parameters and other criteria the bank is looking for, your request will either be denied or the bank will offer a modification that does not provide any

⁵ I cannot speak for others, but my firm offers the service at a very reasonable flat rate, so it should be a no-brainer. You will come out *way* ahead financially.

⁶ Or, at least, reach certain milestones.

⁷ The other option is to only do business in those states that don't have the new law.

⁸ More specifically, the lender's servicing company.

real relief. Usually, homeowners waste a great deal of time and energy, remain vulnerable to losing the home and—in the worst case scenario—make it impossible for a professional to go behind and clean up the mess. Allow me to explain.

Sooner or later, you are going to end up speaking to a loan modification company, or a law firm that does loan modifications, about re-doing the workout because (i) they are set up to deal with the process and (ii) they know, or should know, how to negotiate for real relief. Unfortunately, some lenders will not entertain new discussions once a loan has been modified, or they will require a certain length of time to pass before re-negotiating. That is not always the case, but it is a palpable danger of which you should be aware.

Now, because modification is time-consuming and tedious, the service is usually pretty expensive.⁹ If it is not, you have to be worried that the company is trying to scam you. So, again, the problem is money. Some agencies have set up free services, do-it-yourself clinics and the like. I have personally done some *pro bono* work for these organizations and I applaud their efforts. They are people with good intentions and, no doubt, they bring about good results for some homeowners. I have nothing bad to say about them, but I just do not know how viable an option this really is.

Modifying a loan is hard work, and the demand for the service far outstrips the supply. Good professionals cannot afford to do it for free and these agencies are flooded. Consequently, your file will likely languish and/or you will achieve less than optimum results. The same is true with free foreclosure defense services.

Final Truth

So, where am I going with all this? In my mind, there is only one solution that consistently makes sense. You have to find a law firm that offers both foreclosure defense and loss mitigation services. It will not be free, but this approach has undeniable benefits.

First, with a law firm, you do not have to worry about being scammed. If an attorney rips you off, all you have to do is report the incident to the Bar Association and someone will get to the bottom of it for you. Loan modification companies are unregulated,¹⁰ so you are pretty much on your own there.

Just as importantly, a skillful defense attorney knows how to use the litigation to benefit the mitigation and vice-versa.¹¹ Besides the peace of mind you will get from working with a qualified attorney, you will almost certainly end up saving significantly in both the short-term and the long-term. Also, bear in mind that loan modification companies cannot represent you in the lawsuit. In order to avoid losing your business, some modification companies will downplay

⁹ The typical range is \$2,000 – 3,000.

¹⁰ With the possible exception of California.

¹¹ I will not try to go into the full explanation here, but I have written other articles detailing the interplay between foreclosure defense and loss mitigation. See “Litigation and Mitigation: Considerations for the Foreclosure Defense Lawyer” published by Thompson West.

that aspect. However, for the reasons mentioned herein, you have to be very mindful of the consequences. After all, it is your home.

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