CONSUMER BANKRUPTCY

Bankruptcy Strategies for Assisting Foreclosure Clients

For those with mortgage problems bankruptcy offers options

By Craig D. Robins

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In the past two years I've helped a great deal of clients who were either in foreclosure or who owned homes that were very much underwater. I am also seeing a lot of clients who have been rejected after trying to modify their mortgages, such as under the HAMP program. There are several bankruptcy options that can provide great relief for such clients.

This month's column is aimed at general practitioners and non-bankruptcy attorneys who may not be that familiar with how bankruptcy can be used to help clients with mortgage problems during these recessionary times.

Chapter 13 Bankruptcy

Consumers who have seriously fallen behind on their mortgages and who want to keep their homes can use a Chapter 13 payment plan to cure mortgage arrears over a five-year period. However, this option is only available to those consumers who can not only afford to make their new post-petition mortgage payments, but can also make an additional monthly Chapter 13 plan payment approximately equal to 1/60th of the mortgage arrears.

A benefit of filing Chapter 13 is that the consumer can also resolve all credit card and medical debt as well, often paying just cents on the dollar.

There is a further significant benefit to those consumers who have a second mortgage that is totally underwater. In these situations where the house is worth less than the balance owed on the first mortgage, the consumer can bring a "cramdown" proceeding and effectively "strip-off" and totally eliminate the second mortgage. This benefit `alone can often save the consumer over a hundred thou-

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sand dollars.

In order to qualify for Chapter 13 filing, the consumer must have a regular and steady source of income. Some clients, who would like to save their home, unfortunately cannot do so if they do not have sufficient monthly income.

Chapter 7 Bankruptcy

This type of bankruptcy enables a consumer to discharge most obligations including liability on a mortgage.

When I meet with a client who has significant mortgage arrears, and whose mortgage balances greatly exceed the value of their home, I discuss the concept that it may no longer be viable to save the home. Bankruptcy can provide a way out of bad, highly-leveraged real estate. A recent study indicated that one-fourth of all U.S. homes were underwater.

With these clients I often recommend a two-step process to extend their ability to remain in the home for a period of time, and to discharge their liability on the mortgage and ultimately any deficiency owed after a foreclosure sale. It is often possible to remain in the house for one to two years or more, without paying any mortgage or real estate tax payments.

Assuming that you can interpose one or more genuine, good faith defenses in a foreclosure proceeding in Supreme Court, you can then prevent a default judgment and take the foreclosure proceeding out of the automatic conveyor belt type of processing, effectively delaying the process by many months, or a year or more.

These days there are a host of possible foreclosure defenses including bringing shoddy or defective paperwork to the court's attention, citing issues which may indicate that the lender may not have proper standing, and identifying improper mortgage assignments.

By defending a foreclosure proceeding, the foreclosure process can be greatly slowed down.

Strategic default

Sometimes I come across a client who is current on his or her mortgage, but whose home is extremely underwater. In such instances I discuss the possibility of a "strategic default" which is when the consumer stops paying the mortgage, not because he or she can no longer afford it, but because keeping the house is no longer viable or financially worthwhile.

A Morgan Stanley report last year revealed that about 12 percent of all mortgage defaults are now "strategic," which is a great increase from mid-2007, when the level was only 4 percent

Bankruptcy eliminates recourse

By filing a bankruptcy and possibly engaging in foreclosure defense, the consumer will have to eventually walk away from the home, but they will probably be able to stay in it for several years without making any payments – all without financial recourse from the mortgage company.

There is also a strategy for timing the filing of the bankruptcy. Although the bankruptcy filing can be done at any time, doing so at the right time will get the homeowner a few extra months in the house, as the bankruptcy stay will stop the foreclosure proceeding until the lender can get permission to lift it.

Although most consumers are eligible for Chapter 7 filing, they must nevertheless pass the means test which Congress imposed about six years ago. As such, this approach should work for most consumers except those with high incomes or substantial non-exempt assets.

If the dream of home ownership has become a nightmare, then remember that there are bankruptcy options out there.

Editor's Note: Craig D. Robins, a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past twenty years. He has offices in Coram, Mastic, West Babylon, Patchogue, Commack, Woodbury and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Please visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.