TAKE CONTROL OF YOUR MORTGAGE
THERE IS HOPE

A FREE COMMUNITY WORKSHOP **FOR HOMEOWNERS**
STRATEGIES FOR TAKING CONTROL OF YOUR MORTGAGE

Hosted by:

Sarasota-Bradenton
Attorneys' Real Estate Council

Presented by

PAUL A. BLUCHER OF BLUCHER LAW GROUP, LLC
7300 Delainey Court
Sarasota, FL 34240

(941) 361-1145
pab@fifthamendment.com

JOINT-PROFESSIONAL COMMUNITY OUTREACH

FEDERAL FORECLOSURE RELIEF PROGRAM

I. OVERVIEW OF “The Homeowner Affordability and Stability Plan” (“HASP” & ”HARP”)

A. Basic Principals.

1. Monthly mortgage payment reduction plan to refinance or modify loan payments down to an amount not more than 31% of borrower’s gross monthly income.

2. Mortgage must be on Primary Residence and Occupied.

3. Mortgage must be owned or securitized by FANNIE MAE or FREDDIE MAC. Also possible through servicers who have agreed to participate (check website).

B. Program Specifics.

1. *Voluntary Program*. – Banks are not required to modify. HASP targets servicers and lenders/investors with monetary incentives – $1,500 to the lender/investor and $500 to the servicer; plus, $1,000 bonus per modification paid to the lender/investors; plus $1,000 for each year borrower stays current up to 3 years.

2. *Verified income*. Borrower has “Good payment history” for REFINANCING. Modifications more applicable where payments have been missed.

3. *Loan Limits*. Absolute maximum of $729,000, but subject to local market values – i.e. $421,000 in Sarasota/Manatee area.

4. *Loan to Value Limits*: – loan cannot exceed 125% of the property’s fair market value.

5. *Cash Incentives To Borrowers*: $1,000 per year for each year of successfully payments up to a cap of 5 years – paid to lender as principal reduction.

6. *Suspends Foreclosure Proceedings*. Borrower is given a chance to get back on track.

7. *Modification Aspects*. Monthly mortgage payment reduction plan to refinance or modify loans payment not to exceed 31% of borrower’s gross monthly income.

a. Interest Rate decrease – 2% floor.
b. Term extensions up to 40 years.
c. Principal reduction possible.
d. No-interest bearing principal forbearance possible – subject to lender’s agreement.
e. Gradual interest rate increase after 5th year of reduced payments. Interest rate is increased in 5 incremental adjustments over the next following 5 years and capped at the prevailing 30-year fixed rate at time of original modification.
f. Short sales still permitted.
g. Bankruptcy does not disqualify.

8. *Do You Qualify*. Go to www.makinghomeaffordable.gov.

II. BORROWER DOES NOT QUALIFY FOR HASP/HARP – NOW WHAT?!

A. <u>What Are the Alternatives</u>?

1. ***<u>Loan Modification</u>:*** The Bank may voluntarily negotiate with the Borrower to modify the terms of the mortgage and note to reduce the monthly payment. The challenge is that this is voluntary on the part of the Bank. Banks will seldom modify loans that are not delinquent.

2. ***<u>Deferment</u>:*** Deferment of monthly mortgage payments is basically an agreement with the bank that the borrower can stop making payments for some stated period of time. Negotiating a mortgage deferment may be allow for enough time for the borrower to sell the property or get better financing. HOWEVER, the Bank will want something in return – i.e. a sizable lump-sum payment at the end of the period (accrued interest and/or principal reduction); total payoff of the loan (mandatory refinancing), higher interest rate or possibly other fees.

3. ***<u>Short Sale</u>:*** The sale of property for a price that is lower than the outstanding mortgage amount and the Bank agrees to accept a discounted payoff of the mortgage. *What about the deficiency?*

4. ***<u>Deed In Lieu of Foreclosure</u>:*** The Bank agrees to accept the transfer of the property from the borrower/owner to satisfy a loan that is in default and avoid a foreclosure lawsuit. NOTE: The goal is for the Bank to take the deed in <u>full</u> satisfaction of the outstanding loan balance in order to avoid a deficiency.

5. ***<u>Foreclosure</u>:*** The Bank files a lawsuit to obtain a judgment affirming the borrower is in breach of the note and mortgage and granting the Bank the right to take the property and remove the borrower. The property is auctioned off on the court house steps, and in the current environment, the Bank typically bids the amount of the judgment (i.e. the outstanding mortgage balance plus costs) and receives title to the property which allows it to evict the borrower. *What about the deficiency?*

6. ***<u>Bankruptcy</u>:*** Borrower can seek protection from creditors and file a petition in bankruptcy court asking the Court to discharge debts. Filing Bankruptcy will automatically "stay" (i.e. stop) collection proceedings by all listed creditors. NOTE: Creditors (i.e. the Bank) can request the stay be lifted in order to proceed.

7. ***<u>Define Deficiency Judgment</u>:*** The Borrower has 2 separate obligations to the Bank: 1) *<u>mortgage</u>* which is lien against your property securing the Banks loan to the Borrower; and 2) the *<u>promissory note</u>* – i.e. the Borrower's promise to repay the loan amount. If the full note is not repaid (whether under short sale or foreclosure) the Bank may try to collect any unpaid amount by seeking a deficiency judgment. The Bank can pursue a deficiency judgment up to 4 years after the foreclosure or short sale unless the Bank discharges and releases any unpaid portion of the loan.

B. <u>Where do I go from Here?</u>

1. Get Help From Experienced Professionals

- <u>Realtor®</u> – Extremely important to get the property listed as soon as possible. More details from the Realtor later.

- <u>Tax Advisor</u> – There are income and capital gains/loss tax issues that only a CPA can properly address. More details from the CPA later.

- <u>Real Estate Attorney</u>. What will/should an Attorney Do?

a. Help the Borrower determine the best Alternative for your particular situation.

b. Help the Borrower determine a strategy for negotiating with the bank – i.e. whether to continue paying mortgage or force the issue by holding payments – what are the pros and cons.

c. Help the Borrower organize, prepare and present information for a hardship package to the Bank. What should and should not be provided: The Bank's web site will identify certain required information, which will likely include:

(1) A hardship letter explaining why the Borrower can no longer afford the loan.
(2) Last two years of tax returns.
(3) Three months of bank statements.
(4) A list of assets and liabilities.
(5) A monthly budget of income and expenses and be prepared to provide proof.
(6) Property appraisal.
(7) Broker Price Opinion ("BPO") – Bank will likely obtain this, but borrower may want confirmation.

d. Negotiate with bank and mortgage insurance company:

(1) Assess the purchase price in light of the amount of debt forgiveness.
(2) Ensure that provisions and contingencies of the Bank in order to close on a short are appropriate – e.g. bank cannot unwind the sale.
(3) Define the key terms and provisions of necessary satisfactions, releases and waivers.
(4) Attempt to preclude sale of residual debt or pursuit of any deficiency in excess of short sale payoff.
(5) The attorney helping negotiate the transaction should perform the closing in order to:
- Prepare, review and provide legal advice about the documents necessary to close;
- Review the Bank's payoff letter and form of release. NOTE: Borrower should try to obtain a release from the note/loan in addition to a satisfaction of the mortgage.

C. Beware Of Scams

1. Thieves and Cons. They call themselves loan modification consultants, negotiators or specialists. Some are legitimate and others are cons and scam artists ("Scammers"). Scammers exploit fear with promises of salvation. Their tactics are tried, tested and effective for the unguarded. Things to watch for as Red Flags:

(1) An unsolicited "rescue" call;
(2) Scare tactics – e.g. the bank will throw you out without any notice;
(3) Aggressive selling of services;
(4) Money back guaranties of success;
(5) Diversion of mortgage payments to the Scammer – they will "take care of everything";
(6) Transfer of the property to the Scammer;
(7) Paying up-front or advance fees to the scammers;
(8) Do not have a local office or provide a verifiable physical address;
(9) Early request for personal information over the telephone or internet – bank account information, social security number, etc.
(10) They do not have any professional licenses – i.e. not a professional Realtor, CPA or attorney.

2. Get Informed. The internet has many consumer-protection oriented web sites. Start with government web sites:

http://www.freddiemac.com/avoidfraud/
http://www.ftc.gov/bcp/edu/pubs/newsletters/ojo/0402.pdf
http://www.yourhome.ca.gov/beware.shtml

3. If it sounds too good to be true... contact an attorney.

III. BANKRUPTCY: REMEDIES FOR FORECLOSURE

A. Introduction-Two Broad Remedies

1. Discharge Mortgage Deficiencies: A foreclosure can result in a deficiency when the value of the property is less than the amount of the mortgage. Bankruptcy can discharge this debt.

2. Restructure Mortgage Debts: Bankruptcy offers an opportunity to cure mortgage arrearages and restructure debt so that the Property Owner may keep the property.

B. Chapter 7

1. Discharge Debt: In a Chapter 7 bankruptcy, certain debts, like the mortgage from a foreclosed property, may be "wiped out." In consideration for this relief, the Property Owner must surrender "non-exempt" property to the Trustee who will in turn liquidate that property and distribute the funds to the Creditors. Owner may keep Exempt property.

2. Exempt Property: In Florida, a homestead property is exempt. Therefore, a Property Owner can keep his/her home while discharging the mortgage from an investment property and other debt.

3. Three types of debt:

- **a.** Unsecured Debt is not secured against a property, such as credit cards.
- **b.** Unsecured Priority Debt is a special category of debt (certain taxes or student loans), which is not discharged by bankruptcy.
- **c.** Secured Debt is a debt that is secured against a property, such as a mortgage.

4. Means Test: In order to qualify for a Chapter 7 bankruptcy, the Property Owner's annualized "Current Monthly Income" cannot exceed the County's "Median Family Income." In Sarasota County, an individual filing alone must earn less than $42,468.00; a married couple filing together, $53,939.00; and a married couple with one dependent, $60,162.00. If a Property Owner earns more than this threshold, he/she may look to Chapter 13 for relief.

5. Chapter 7 "Foreclosure Remedies:"

- **a.** Automatic Stay: The filing of a bankruptcy petition temporarily stops all Creditors from attempting to collect their debt. This is called the Automatic Stay and can delay a foreclosure action. This may allow the Property Owner some time to either attempt to negotiate with the lender or temporarily stop a pending Sheriff's sale.
- **b.** Discharge Unsecured Debt: A Chapter 7 will discharge unsecured debt, freeing up money for the Property Owner to meet his/her home mortgage obligations and to keep the home.
- **c.** Discharge Mortgage of Investment Property: Chapter 7 will also allow a Property Owner to discharge the mortgage obligation of an investment property which her/she no longer wants to keep.

d. Keep Investment Property: A Property Owner may even keep an investment property so long as the property does not have any equity which the Trustee may want to capture. However, the mortgage must be paid in full and any arrearages have to be paid up prior to, or shortly after, filing the bankruptcy. In addition, the lender may require the Property Owner to sign a reaffirmation agreement, confirming that the mortgage will not be discharged by the bankruptcy.

C. <u>Chapter 13</u>

1. Restructure debt: In a Chapter 13 bankruptcy, debts are restructured and paid through a 3 to 5 year payment Plan so a Property Owner may keep his/her property.

2. Thresholds:

a. Disposable Income: The Property Owner must earn enough income to be able to maintain Plan payments over the life of the Plan, between 3 and 5 years.
b. Debt Limits: The Property Owner cannot have over $1,010,650 in secured debt and $336,900 in unsecured debt.

3. Chapter 13 "Foreclosure Remedies:"

a. Automatic Stay: This relief is available like in a Chapter 7 bankruptcy.
b. Debt Restructuring: A monthly payment Plan is created using the Property Owner's disposable income in order to be able to keep property and satisfy debt. Monthly payments of secured debt of any property the Property Owner wants to keep must be paid in full and the remaining monthly disposable income is applied to satisfy a portion of the unsecured debt .
c. Mortgage Arrearages: The Property Owner is permitted to cure mortgage arrearages over the life of the Plan.
d. Secured Debt: A portion of secured debt on a property which the Property Owner does not want to keep can be discharged .
e. Cramdown and Stripoff: This is a mechanism which permits a Property owner to cramdown (lower) the secured part of a mortgage to the value of the property and stripoff (remove) the remaining part of the mortgage. The "stripped off" part of the mortgage is then treated as unsecured debt.

(1) Investment Property: This relief is only permitted on an investment property and not on the primary residence.

(2) Wholly Unsecured Second Mortgage: Although this relief is not available with a primary residence, it can be applied to a wholly unsecured second mortgage of a primary residence. A second mortgage is wholly unsecured when the first mortgage is higher than the value of the property.

D. <u>Conclusion</u>

Although bankruptcy may be viewed as an option of last resort, bankruptcy should be considered along with other foreclosure remedies as part of the Property Owner's overall strategy on how to manage a foreclosure.