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USING BANKRUPTCY TO AVOID OR DELAY FORECLOSURE

Unexpected expenses pop up. Home repairs, car repairs, illnesses, and divorce can drain a budget. Mortgage payments are not made, and the foreclosure notice arrives.Do not panic. Do not throw the foreclosure notice away. There is a solution. It's the "B" word that no one likes to talk about, much less do. It's bankruptcy.

The bankruptcy process involves a complex set of laws, procedures, and deadlines that are found in Title 11 of the United States Code. It will require you to make court appearances, produce documents, and answer intrusive questions. However, as daunting as it may seem, bankruptcy can save your home from foreclosure, and help you get other areas of your financial life under control.

THE FORECLOSURE PROCESS

Foreclosure is the process by which a mortgage lender regains legal ownership and possession of the real estate that is being used as collateral for a mortgage. Every state has its own foreclosure laws and methods of foreclosing. The length of time it takes to foreclose depends on whether your state has a “non-judicial” or a “judicial” foreclosure system. The term “judicial” refers to whether your mortgage lender has to go to court to foreclose on your home.

The foreclosure process is very quick in non-judicial foreclosure states. In some cases, all the mortgage lender has to do is advertise the foreclosure sale in the daily paper for a period of time and notify you in writing of the upcoming foreclosure sale within a certain time frame.

The foreclosure process is much slower in judicial foreclosure states. In a judicial foreclosure state, the mortgage lender must obtain a judgment against you before it can foreclose. In order to obtain a judgment, the mortgage lender must file a lawsuit against you; provide you with a copy of the lawsuit, either by mail or by hand delivery; and give you an opportunity to respond in writing to the court about the lawsuit. If you file a timely response, a court date is set. If you do not respond, a judgment will be entered against you, and your home can be sold at a foreclosure sale.

A bankruptcy filing will halt the foreclosure process in most cases.

THE AUTOMATIC STAY CAN STOP THE FORECLOSURE

One of the biggest benefits of filing a bankruptcy is the “automatic stay.” The word “stay” means “stop” or “cease.” In most cases, a “stay” is imposed automatically, as soon as the bankruptcy is filed. This means creditors cannot move forward with collection activities, such as garnishments, repossessions, or foreclosures, once a debtor files for bankruptcy.

The length of this stay depends on the type of bankruptcy that has been filed and whether you have filed for bankruptcy previously.

> **CAUTION:** Not every bankruptcy gets the benefit of an automatic stay. Very different rules apply if you have had a previous bankruptcy pending within the past year or if you have multiple previous filings. The law governing the automatic stay is extremely complicated (running more than 150 paragraphs, including subparts and sub-sub parts). Be sure to consult with a knowledgeable bankruptcy attorney about the reach of the automatic stay in your particular situation, before you file for bankruptcy.

FORECLOSURE AND CHAPTER 7 BANKRUPTCY

A Chapter 7 bankruptcy is a liquidation bankruptcy. It is not designed to allow you to repay your mortgage arrears. Rather, it will delay foreclosure for the duration of the bankruptcy at best, or until the mortgage lender asks the bankruptcy court to lift (end) the stay and the court agrees.

Generally, foreclosure stops once a Chapter 7 bankruptcy is filed because of the automatic stay. The mortgage company must file a written motion (a formal request) with the court to lift the stay if it wants to start or continue foreclosure proceedings before your Chapter 7 bankruptcy is concluded. Once bankruptcy proceedings end, or the court lifts the stay, the mortgage lender can proceed with foreclosure.

A Chapter 7 filing can buy you time to make alternative living arrangements, obtain a loan modification, or work out an alternative to foreclosure, such as a deed in lieu of foreclosure (you agree to deed the property over to the lender to avoid foreclosure). The average Chapter 7 bankruptcy takes 3 to 4 months to complete.

FORECLOSURE AND CHAPTER 13 BANKRUPTCY

A “Chapter 13” bankruptcy is a reorganization bankruptcy that allows for repayment of pre- bankruptcy mortgage arrears over a 3-5-year time period, provided that ongoing mortgage payments are also made. It is the more appropriate bankruptcy to file if you are behind on your mortgage and want to keep your home. A Chapter 13 bankruptcy works like this:

- Foreclosure proceedings are usually stopped upon the filing of a Chapter 13 because of theautomatic stay.
- Chapter 13 debtors must begin making regular monthly plan payments to a Chapter 13 bankruptcy “trustee” within 30 days after the bankruptcy is filed. A trustee is an individual appointed by the United States Trustee’s Office to review the bankruptcy for compliance with the law and to distribute plan payments to creditors.
- The amount of your plan payment will be designated in your Chapter 13 plan. You (or your bankruptcy lawyer) must calculate the amount of your plan payment. This calculation is based on a variety of factors, including the amount of your debt, income, and assets. Pre-bankruptcy mortgage arrears are repaid out of this plan payment. Some courts also include ongoing mortgage payments; other courts require that you make your mortgage payments directly to the mortgage lender.
- This plan must be proposed within 14 days of filing a Chapter 13 bankruptcy, unless the court grants an extension. Generally, as long as you are making plan payments and mortgage payments, the mortgage company cannot proceed with foreclosure without first receiving relief from the automatic stay.

IMPORTANCE OF STAYING CURRENT ON REGULAR MONTHLY MORTGAGE PAYMENTS

You will pay your mortgage arrearages over time in a Chapter 13, but you must pay your current monthly mortgage payments on time starting with the first due date after you file your case. You are required to keep your regular monthly mortgage payments up to date during the entire course of your Chapter 13 plan. There are consequences if you fail. First, the mortgage company can petition the court to lift the automatic stay. If the court grants that motion, the lender will be free to start foreclosure proceedings. Second, if your mortgage payments are behind when you complete all your Chapter 13 plan payments, the court will not grant your discharge.

ADDED BENEFIT: ELIMINATE SECOND MORTGAGES

Chapter 13 also contains another useful tool if you have more than one mortgage and your property is worth less than you owe. Many people found their homes lost value during the recession of the last ten years. If your home has lost so much value that it is worth less than the first mortgage, there is no value to secure any other mortgage. The second or even third mortgage can be completely eliminated in a Chapter 13 case. The process is called lien stripping, and it can only be accomplished in a Chapter 13 case. Your attorney must file a motion with the court to strip the lien, and you must obtain a discharge. If your case is dismissed or closed without a discharge, the lien will remain in force.

NOTICE TO YOUR LENDER

The bankruptcy court will notify all of your creditors of your bankruptcy filing by regular mail. It is important that you or your attorney personally contact the mortgage company or its attorney after you file. Key information to provide is your bankruptcy case number; the date of the filing; the Chapter under which you filed (7 or 13); and the address of the property that is in foreclosure. The sooner the mortgage company has this information, the sooner it can stop a scheduled foreclosure sale.

LOAN MODIFICATIONS

Both Chapter 7 and Chapter 13 bankruptcies will give you the opportunity to contact your mortgage company about doing a loan modification. A loan modification is a change in the terms of the loan. Changes can include lower interest rates, lower monthly payments, and a longer term for the loan.

CONCLUSION

Filing bankruptcy can stop a foreclosure in its tracks if it is done correctly. A Chapter 7 bankruptcy will buy time, but is not intended to be a long-term solution. A Chapter 13 bankruptcy allows for repayment of the mortgage arrears and is the better option if you wish to keep your home.

It is extremely important to get your bankruptcy done right the first time. Second filings jeopardize the length of time the automatic stay remains in effect. Third filings and beyond may not even receive the benefit of a stay. Therefore, make sure you are scrupulously thorough and honest when providing your financial information to your attorney.