

## THE TRUTH ABOUT FORECLOSURE RESCUE

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I am an attorney in Florida who specializes in foreclosure rescue services, which includes foreclosure defense, loan modification, short sale facilitation and, occasionally, deed-in-lieu-of-foreclosure. Homeowners come to me with a wide range of different situations, and I have been doing this long enough now to see patterns and reoccurring misconceptions. The purpose of this article is to give homeowners in distress<sup>1</sup> some straight talk with regard to available options.

This housing crisis we are in has been going on for a while now, 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 lender or homeowner association 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.

The first truth you need to understand concerns the litigation. First, you can defend your own suit *pro se*.<sup>2</sup> But let’s be honest – that doesn’t work. I have had some fairly sophisticated non-lawyers<sup>3</sup> come to my office after they have done their best looking for me to undo the damage. Sometimes I can, and sometimes I cannot. The reality is that even an actual attorney may not be able to 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 to 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.

Now, the concern 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 make. First, without one, you will probably lose the suit by default and you will 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. Second, if your long-term strategy is to work something out with the bank, such as loan modification or short sale, then having a decent defense will give you better leverage in your negotiations. In the case

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<sup>1</sup> 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.

<sup>2</sup> *I.e.* without an attorney.

<sup>3</sup> *E.g.* accountants, business consultants, etc.

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 worth having at almost any price.<sup>4</sup>

The second truth we will expose here concerns loan modification. Loan modification companies have been demonized by the media and penalized by state authorities. Moreover, you have been bombarded with materials from loan modification companies that continue to spring up despite the opposition. 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 banks are behind the intensive bad press modification companies have received. As this point, it does not matter. Legislators in many states have passed laws that prohibit loan modification companies from taking money up-front. They are supposed to complete the modification<sup>5</sup> first and then charge the homeowner. From a business perspective, that model does not work. So, many companies have continued to do business in violation of the new laws.

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

The banks want you to work on the loan modification by yourself, so they can avoid dealing with a professional who knows the game. By all means, feel free to have a go at it if you wish. The truth is you are very likely to have a frustrating and unproductive experience. Look, 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 bank<sup>6</sup> will “lose” your faxes, 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 real relief. In that case, you will have wasted a great deal of time and energy, you will still be vulnerable to losing the home and, worse still, you may have made it impossible for a professional to go behind you and clean up the mess.

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 they are set up

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<sup>4</sup> 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.

<sup>5</sup> Or, at least, reach certain milestones.

<sup>6</sup> More specifically, the lender's servicing company.

to deal with the process and 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 there is that danger.

Now, because modification is time-consuming and tedious, the service is usually pretty expensive. 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 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.

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,<sup>7</sup> 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.<sup>8</sup> 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 such companies will downplay 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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<sup>7</sup> With the possible exception of California.

<sup>8</sup> 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.