USING BANKRUPTCY TO AVOID OR DELAY FORECLOSURE

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A COMMON SCENARIO

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

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 requests relief from the stay.

Generally, foreclosure stops once a Chapter 7 is filed because of the automatic stay. The mortgage company must file a written motion (a formal request) with the court to get rid of this stay if it wants to start foreclosure proceedings before your Chapter 7 bankruptcy is concluded. Once bankruptcy proceedings end, or relief from the stay is granted, the mortgage lender can start foreclosure proceedings. A Chapter 7 filing can buy you time to find alternative living arrangements, obtain a loan modification, or work out an alternative to foreclosure, such as a deed in lieu of foreclosure. The average Chapter 7 bankruptcy takes 3-4 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 the automatic 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.

NOTICE

The bankruptcy court will notify all of your creditors of your bankruptcy filing via regular mail. It is important that you or your bankruptcy attorney personally contact the mortgage company or its attorney after filing. Key information to provide is the bankruptcy case number; the date of the filing; the Chapter 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 when the mortgage company changes 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.

There is much more to bankruptcy than simply filling out forms and filing them with the court. The law is complicated, with many requirements that may create stumbling blocks for the inexperienced filer. 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. If you are ready to take action, or if you would like to discuss your particular situation with an experienced bankruptcy attorney, please call us.