

FAQ - Loan Foreclosure Fraud

The following FAQs were compiled from a panel discussion on fraudulent foreclosures that was held on May 29, 2009. Participants in the seminar included representatives from the Department of Real Estate, State Bar of California, Lombardo & Gilles Law Firm, and the Monterey County District Attorney's Office. The answers to the FAQs may be general in nature. To address your own situation, you should seek professional legal, real estate and/or financial advice from a licensed and experienced person(s).

Q. - What is a homeowner's recourse if they have been scammed?

A. - First, the homeowner should file a complaint with the Department of Real Estate against the business and its owners. Second, the homeowner should always file a complaint with their local police. Third, the homeowner should file a consumer complaint with the District Attorney's Consumer Protection Unit.

Q. - If a lender is considering a loan modification, how important is the borrower's story as to why the borrower needs a loan modification?

A. - It is extremely important. It is the only way to personalize a borrower's situation. Lenders are receiving hundreds of thousands of requests to modify home loans. It is important that a borrower be able to distinguish him or herself from all the other borrowers asking for loan modifications. The only way to do this is by explaining what has led to the borrower's situation that is now requiring a loan modification.

Q. - Why should a homeowner try to modify their loan as opposed to letting the property go into foreclosure or filing bankruptcy?

A. - The primary reason is keeping your home. Perhaps it is in a good school district or otherwise in a great area that the homeowner wants to keep living in. This is conditional, of course, upon the homeowner being able to afford to continue making the monthly payments (albeit reduced) to a lender.

Q. - In a bankruptcy situation, can a second mortgage be settled as well?

A. - In bankruptcy, most secured lenders are going to seek relief from the automatic stay in order to foreclose on the home. Typically, this will be the holder of the first mortgage. The holder of a

second mortgage has the right to foreclose but usually will not seek it if the property has negative equity. If the second mortgager does not seek to enforce its rights to the home in a bankruptcy proceeding, then it is possible to wipe out the second mortgage through bankruptcy.

Q. - What is the statute of limitations on attempting to recover short sale deficiencies?

A. - There is no defined statute of limitations for a lender in this situation. It is questionable whether the lender would have any cause of action against a borrower for a deficiency resulting from a short sale. The statute of limitations would depend upon the lender's allegations (or basis) of liability as plead by the lender in the court papers.

Q. - Does an attorney need an advance fee agreement to negotiate a loan modification?

A. - It is good practice to obtain a written fee agreement, but it is not required unless the charge exceeds \$1000.

Q. - If I hired a law firm to help me modify my loan, can their administrative (non-attorney) staff help with the modification or do they have to be separately licensed?

A. - Non-attorneys can assist, but they must be properly supervised by an attorney. The non-attorney cannot give legal advice or otherwise engage in conduct constituting the practice of law.

Q. - How does a client know that they are entitled to the return of some or all of their advanced fee?

A. - They can ask for an accounting, and the attorney is required to comply with the request. If the client disagrees with the accounting, he or she can obtain fee arbitration through the local county bar association.

Q. - What is the State Bar doing to regulate attorneys who advertise loan modification services?

A. - We have a number of pending investigations concerning this issue, which can be resolved in various ways depending upon the severity. In some cases, we will simply enter an agreement that misleading advertising be corrected. In other instances, we may file formal disciplinary charges.

Q. - Are there any limitations on attorneys helping clients modify their home loans?

A. - No, other than the general ethical duties applicable to the legal profession.

Q. - I understand that the State Bar is concerned about attorneys providing loan modification services. What issues are the State Bar concerned with?

A. - In many cases, attorneys can provide useful services in helping clients obtain loan modifications. The State Bar becomes involved when there are allegations of misconduct, including (1) failing to perform services after being paid, (2) recklessly failing to perform competent legal services; (3) splitting legal fees with non-attorneys, (4) entering improper partnerships with non-attorneys, (5) assisting non-attorneys in the unauthorized practice of the law, (6) charging unconscionably high legal fees, and (7) using false or misleading advertising.

Q. - When licensees (attorneys, real estate agents, etc.) enter into agreements on loan modifications, do their agreements have to be individualized or can they be in general form for all customers?

A. - The State Bar does not require a specific format for legal fee agreements. However, it may be better practice to provide individualized fee agreements, so that the client knows what services he or she will receive.

Q. - Is there any differentiation in treatment where an attorney or other licensee charges only partial advanced fees (i.e. a small fee up front and the remainder once negotiation is completed)?

A. - Unlike real estate brokers, attorneys are permitted to charge advanced fees without obtaining advance approval from the State Bar. So, the answer to your question is no.

Q. - What should someone do if they suspect they have already given a "scammer" money to help with a loan modification?

A. - They should immediately file a complaint with the California Department of Real Estate (DRE). To do this, they can log onto www.dre.ca.gov and download a complaint form, fill it out and send it into the DRE offices. Then, they should contact the supposed scammer and demand a refund for the payment previously made. In addition, they should also contact their local law enforcement agencies (i.e., the Police or DA) regarding the possibility of filing charges for unfair/unlawful business practices, grand theft, and/or conspiracy to commit a crime. If they are unable to contact their lender directly and work out a loan modification, they should look to a

trusted, licensed and legitimate advisor, such as an attorney or licensed real estate broker, and/or contact a HUD Approved Counselor to ask for assistance with their loan modification or situation. They can also file a complaint with the Better Business Bureau and may be able to take the scammer to Small Claims Court to obtain a judgment for fraud if the scammer did not already refund their money. A more complete menu of options available to a person who has been the victim of a scammer is provided in the DRE's Consumer Alert on Loan Modification Fraud. It is available in English and Spanish and can be accessed through the DRE's website.

Q. - What would you advise a friend of yours to do who is facing foreclosure with respect to getting help from a third party?

A. - I would advise them to contact their lender themselves and discuss various options, including a work out via a loan modification. Before they finalize anything, I would encourage them to run it by a trusted advisor or friend who is a licensed real estate agent or attorney familiar with real estate finance, lending and loan modifications. If they did not have someone like that, I would encourage the individual to seek out the most reputable real estate broker with mortgage lending experience, and recommend that they check their license status at www.dre.ca.gov and check their references to be sure they had satisfied customers. I would also suggest interviewing several of their past clients, if possible, and then determine if they are the right loan service provider to assist in the process. They can also contact a HUD approved certified counselor for assistance. Please see DRE's Consumer Alert.

Q. - If I am in the process of modifying my loan, should I stop making payments?

A. - One of the greatest tricks of loan scammers is to get their victims to stop making payments and stop contacting their lender directly. This way the homeowner now has no communication with the lender and does not know what is or is not happening with respect to their loan. Do not fall for this. Keep in contact with your lender, and keep in contact with your licensed or HUD approved representative -- if not daily, at least every other day, to be sure that things are moving in the right direction. If you fall for the trick of the scammers and stop making payments, you may find in a few months that your home has already been foreclosed on and you didn't even know it was happening. Be very careful with this and look at who is advising you to stop making payments. Beware of that type of advice, which is extremely dangerous, especially when it comes from a stranger.

Q. - What kind of information will a bank need to modify a loan?

A. - Generally, they will need most if not all the same information they needed to make the loan. If you used a limited or no documentation or "easy qualifier" (no income verification) process

originally, they may require more than what you originally provided, so be prepared. Have the information ready and be sure it is accurate.

Q. - Is there something I can do if the bank is giving me the run around or not responding to loan modification requests?

A. - The key here is to be tenacious. These lenders and servicers (lenders) are large with hundreds, and even thousands of employees. Whenever you call your lender, you should plan on being on the phone for a long time (figure an hour or so). Don't call from a cell phone, or while driving the kids to school. Treat it like an important business conversation. Have a pad and paper available, and have your loan information available. When you call, you do not need to tell your entire story to the first live person you reach. That person is most likely a level 1 customer service representative, who in most cases just wants to collect from you any arrearages you have on your loan. Tell them that you are calling to request a loan modification. You need to get to the "loss mitigation," "asset division" or "foreclosure prevention" division (or whatever that lender calls the department that deals with loan modifications and/or doing work outs with distressed borrowers who need their loan modified). A good plan is to tell the first live person you reach that you are trying to modify your loan and ask that they direct you to the right division within the lender's institution. Once they give you that name of the division, write it down. Ask if there is a direct number for that division. If yes, write it down. Then ask if they can transfer you to that division. Once they do, when you talk to someone in that division, just tell them you are looking to discuss a loan modification and ask if you have reached the correct division in the institution. If they say yes, then before you tell them your story, ask for their full name and return telephone number with extension (most every lender has multiple extensions, so be diplomatic. But be persistent -- it will be difficult to find that same person again if you do not have their extension number). In addition, you should ask for the name and extension of their supervisor so that if you have any problems, concerns, or even positive feedback, you know who you can contact. The individual with whom you are talking may not want to give you all of this information, but try. And of course, be sure to write all of the information you learn down on that pad because you will find yourself referring to it time and time again. Now you are finally talking to the correct person to discuss your situation (it has probably taken you 20 minutes to get there, by the way). Start explaining your situation. Be sure to listen to what they say in response, and make notes about what documentation you need to provide and where it needs to be sent and in what format, etc. At this point, you are basically stating your case and trying to get the lender to agree to modify your loan. Make certain to ask the individual what you should expect, how long it takes, how you should best communicate in the future, etc.

Q. - Can I modify a loan if I have already received a foreclosure notice?

A. - Yes, you can modify your loan right up until the trustee's sale occurs. But remember that you should not pay any upfront fees to anyone offering or performing loan modification services.

Q. - If I have a first and a second on my house, am I eligible to modify one or the other (or both)?

A. - You will likely need to modify both. That means twice as much work and likely two different lenders. Remember a loan modification is nothing more than two parties involved in a contract agreeing after the contract has already commenced to change the terms of that contract. Your qualifications may determine if you are eligible for a loan modification, but without a willing lender and a willing borrower a modification cannot occur. You are basically asking to adjust the terms of your loan agreement with the lenders after the fact.

Q. - In your experience, are there any tell-tale signs of loan modification scams?

A. - Asking for and collecting fees upfront should be a huge red flag. Some advance fee payments are legal, but please see the DRE Consumer Alert. If you are not dealing with a California attorney, and/or a licensed California real estate broker, you should be dealing with a HUD approved non-profit counseling agency. If they ask you to sign something up front with a notary stamp required or with the words "Quitclaim", "conveyance", "All Inclusive Deed", "Assignments of Rent" or anything that appears to be a legal transfer of title that may ultimately be recorded, stop! All you are doing is asking for help to modify your loan. You do not need to give up any interest, title or even partial ownership to anyone to do that.

Q. - Is there anything you can do to get lenders to uphold their promises and actually work with homeowners to modify their loans?

A. - There are federal efforts (including massive appropriations) to encourage loan modifications. Also, the recent California law, AB X27, signed by Governor Schwarzenegger creates a 90 day delay in foreclosures for those lenders doing business in California that do not have a DRE, DOC or DFI approved "Comprehensive Loan Modification Program."

Q. - Is the short sale process improving for homebuyers? If so, how?

A. - I think over time, as lenders continue to work through the inventory of unsold foreclosed homes (REOs), the process internally for each lender should improve. But make no mistake, a short sale is a very complex, time consuming and difficult transaction for the seller, lender and the new buyer. If you are involved in a short sale, be sure to plan accordingly and expect difficulties. It is just the nature of a short sale transaction. The original borrower (typically the seller) is getting nothing for the sale, and the lender is forced to accept a reduction in its principal loan balance in an environment with very volatile housing prices. Also, the lender is relying on

information from many different sources and its sole goal is to minimize its financial loss. That is why they call the division you deal with "loss mitigation". Every step of the way the lender wants to push any cost or burden to someone else involved in that transaction so as to minimize its losses.

Q. - Are investment properties exempt from short sales?

A. - No, any property can be a candidate for a short sale. It is very much like a loan modification. All you need is a willing lender and a willing borrower to agree to a short sale in order for it to occur. This can happen with owner-occupied property, investment property or even commercial property.

Q. - Does a licensed realtor who charges a partial advanced fee (small amount up front with a remainder at the time of negotiation) need to file an advanced fee contract with the DRE?

A. - If the licensee is providing loan modification services but splitting up payment with a small payment up front and the rest near the end, then yes, the licensee must have a DRE-vetted agreement (the agreement must be submitted to the DRE and a "no objection" letter issued) and must place those funds in trust.