UNDERSTANDING SENATE BILL 61, "HELPING FAMILIES SAVE THEIR HOMES IN BANKRUPTCY ACT OF 2009"

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This article elaborates on the current form of "Helping Families Save Their Homes in Bankruptcy Act of 2009," otherwise known as Senate Bill 61. The act itself has been greatly misconstrued by the widespread mischaracterization of what it accomplishes, and such misconceptions could seriously harm those who improperly rely on broad readings of clearly limiting terms.

The Helping Families Save Their Homes in Bankruptcy Act of 2009 (HFSTH) currently before the Nevada Senate is intended to give the bankruptcy courts more leeway on modifying loans on primary residences that debtors can no longer afford.

First and foremost, HFSTH as currently proposed only applies to individual debtors who file for bankruptcy protection under reorganization, more commonly known as a Chapter 13 bankruptcy. Further, any loan modifications would only apply to primary residences of the debtors, and not investment property. This is important, as attorneys unfortunately meet on a daily basis with clients who believe that they will be able to modify the loans on their investment property. Please tell your clients that this is not the case!

With that said, here are some critical factors of HFSTH:

1. Debtors with regular monthly income may be able to adjust their computation of debts by excluding secured or unsecured portions of debt on their primary residence;
2. The current value of the debtor's primary residence must be less than the secured debt limit; or
3. The current value of the debtor's primary residence that was sold in foreclosure or that the debtor surrendered to the creditor is less than the secured debt limit; and
4. The current credit counseling requirement is inapplicable to a Chapter 13 debtor who submits a certification that the debtor has received a notice that the holder of a claim secured by the debtor's primary residence may commence a foreclosure on the debtor's primary residence.

While a good start, one of the many problems with HFSTH is that a debtor must be current on their mortgage loans and show good faith to the bankruptcy courts in order to ask the court to modify their existing mortgage loan. Moreover, the debtor must prove to the court that the foreclosure process has been initiated or that a loan modification has been attempted. Unfortunately, the latter cannot be accomplished unless the debtor is delinquent in their mortgage payments, thereby creating a situation wherein the debtor will ultimately have to make higher Chapter 13 payments.

Senate Bill 61 would also give the following advantages to a debtor:

1. Modifies the interest rate of the secured claim to the rate posted by the Federal Reserve on the day that the debtor's case was filed and the automatic stay imposed;
2. Modifies the terms of the loan to a maximum of 40 years or 480 payments versus the 30 years or 360 payments that are the general standard today;
3. All modified payments would be made directly to the mortgage company;
4. The debtor would not be subject to paying the fees, costs or charges for modifying the loan, unless the mortgage company files the appropriate proof of claim within one year of the modification, or within 60 days of closing the Chapter 13 bankruptcy case; and
5. Any modification through the bankruptcy court would carry the potential to waive any prepayment penalties on mortgages.

In sum, if a debtor can qualify under HFSTH as currently written, the above-mentioned factors could reduce the financial strains placed on a debtor in trying to keep their home.

However, bankruptcy practitioners beware! HFSTH could also hurt the finances of a debtor under the following circumstances:

1. If the debtor's current mortgage interest rate is 4 percent and the interest rate at the time of filing for bankruptcy protection is 9 percent, the debtor will assume the 9 percent interest rate as their fixed annual rate of interest; or
2. If the debtor has been paying for 10 years on his/her mortgage they will essentially take the remaining principal balance plus the new interest rate and amortize that over a maximum of 30 years, thereby paying more interest on their home; or
3. If the debtor is delinquent in discussing loan modification prior to filing for relief under Chapter 13, they will then have to bring the loan arrearages current after filing to allow the bankruptcy court to modify, thereby increasing Chapter 13 plan payments; or
4. Once a loan is modified, under common practice a mortgage company will immediately file a proof of claim for the fees involved in a modification; and
5. Note that HFTSH is currently looking into giving mortgage lenders a portion of any future equity that would be created in a home secured by the HFSTH Act.

While this Senate bill was constructed in the spirit of attempting to alleviate pressures on Americans faced with the cliff-diving real estate market, it has many pitfalls, has been bombarded by the banking lobby and, unfortunately, has been wildly misinterpreted.

The act, as proposed, ***does not*** allow the bankruptcy judge to reduce the principal amount owed on the property. There is no such language in the bill whatsoever, yet media and many advocates of the bill are making this misrepresentation. A Chapter 13 bankruptcy is the only chapter under the U.S. Bankruptcy Code that allows liens to be stripped, and current lien stripping only pertains to second- and third-position liens, not first-position liens. The public is misguided by the mass media reports that a loan may be modified with principal reduction. What the public wants to hear is that the loan will be re-written or modified to the current market value of the property. This is not the case. It is merely rewriting the loan to a fixed interest rate and extending the loan an additional 10 years.

So while not perfect, HFSTH, as proposed, will help stem approximately 6,600 daily foreclosures and help keep families in their homes. NL

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