

# COPING WITH UPSIDE DOWN REAL ESTATE IN AN ECONOMIC DOWNTURN

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## OUTLINE

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### (1) INTRODUCTION

- Historical Background
  - Economic Cycles - Booms and Busts
  - Investment vs Speculation
- Change in Financing
  - Democratization of Credit
  - Securitization of credit
  - Set-up for Default

### (2) GETTING AWAY FROM THE UPSIDE DOWN PROPERTY

#### (1) **NEGOTIATED REMEDIES**

- a. **Do Nothing** - wait it out
- b. **Buy Time** - Work-out / Forbearance
  - Loan Modification or Refinance
  - Impact of SB 1137 - requires lender attempts to modify
  - FDIC - BofA programs
  - Modification Assistants

#### c. **Sell the Property**

- Equity Sale - Equity Sales Act
- No Equity - SHORT SALE

#### **SHORT SALE STRATEGIES**

- Voluntary Process = Low percentage
- Lenders require default & hardship/financials
- Lender may demand PN or Lien Release
- It's all about leverage

#### (1) **Can Lender get a Judgment?** - Who holds liens?

- Watch for Junior lienholders

#### **Know CA foreclosure law**

#### (2) What do you have to lose

- Disclosure of assets
- Credit Damage
- Debt Forgiveness Taxes

Fed - Debt Relief Act of 2007 - now 2012

CA - Debt Forgiveness Act - 9/08 = 07-08

Legal vs Moral Obligations

Paying something may be worth it - it's all negotiable

#### d. **Give it Back to the Lender** - Deed in Lieu of Foreclosure

- It's a Sale - Triggers change in title hierarchy
- Not generally accepted

### **3 RULES OF FORECLOSURE**

1. Security First Rule
2. Single Action Rule
3. Acquisition Loan Rule

## (2) **FORCED REMEDIES - FORECLOSURE/BANKRUPTCY**

### A. **FORECLOSURE**

#### 1. **Non-Judicial - (Trustee Sale)**

Fast Track: 111 days  
Notice of Default - 90 days  
Notice of Sale - 21 days  
Sole Security - No Deficiency Judgment  
Realistic Time Line - 7 months - Moratorium?

#### 2. **Judicial - (Sheriff's Sale)**

Civil Lawsuit - Breach of Contract - 1 year +  
Sheriff's Sale - Deficiency Judgment  
1 year Right of Redemption if deficiency judgment

#### 3. **Impact on Junior Creditors**

Acquisition vs refi lender (Acquisition Loan Rule)  
Rights of Sold-out Junior lienholders  
*Judgment Avoidance Strategies*

#### 4. **Handling Property during foreclosure**

Rent Collection - Assignment of Rents under Deed of Trust  
Property Tax / Utilities / HOA bills

#### 5. **Handling Personal debt - credit cards**

#### 6. **Occupier status after foreclosure**

Cancellation of leases & contracts  
Owner-Occ gets 3 day notice - Tenant gets 60 days

### B. **BANKRUPTCY** - Getting a "Fresh Start"

Automatic Stay - Lenders can get stay released  
New Rules - harder to escape debts - Means testing and credit counseling  
Chapter 7 liquidate vs Chapter 13 payment plan  
No Debt Forgiveness Tax

## (3) **ACTION STEPS**

Don't panic - Get competent legal, tax, & Realtor advice  
BPE Consultation program - \$200 Flat fee for risk assessment and strategic action plan  
Watch for possible further protections for borrowers at Fed and State levels  
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