

Should I stay or should I go?

Some call it the “Mortgage Meltdown” or the “Great Recession”. In either case, millions of people with a home mortgage are impacted. The so-called “underwater” phenomenon. Meaning the home is worth less than what’s owed on the mortgage. The question posed by the 1982 Clash hit “Should I stay or should I go?” is on many people’s minds. “Strategic default” is something folks consider. That is intentionally default on the mortgage or they simply move and go. There are a number of issues to consider here. One is whether the mortgage is recourse or non-recourse. Other questions involve options available to people in this predicament. The last time this whole mess happened was the “Great Depression”. In the 1930’s the California Legislature passed what are known as anti-deficiency laws which protect underwater homeowners from civil suits for deficiency judgments after foreclosure. The thinking was: we don’t want salt pouring into a gaping wound – these people were foreclosed and lost their homes – we don’t want them to get sued on top of that. However, these laws only protect folks who have so-called “purchase money” loans. Typically, this is limited to the original loan(s) used to buy the house. For those folks who refinanced, pulled cash-out or took home equity lines of credit, they may not be able to use these old laws to protect themselves. Traditionally, the banks have not pursued underwater homeowners for deficiencies. However, recent media reports have stated that lenders are selling off these loans to collection agencies which may pursue them later. There is a four year statute of limitations for breach of a written contract (which a mortgage loan is). Therefore, handling the underwater mortgage can be a delicate undertaking. The Legislature is back at work on at least three laws (two others passed one in 2008 and another in 2010) which, if passed, will be a boon to homeowners and which will expand the anti-deficiency protections. In the interim, when considering “Should I stay or should I go?” there are six basic options available: 1) Loan modification, 2) Short Sale, 3) Deed in Lieu, 4) Foreclosure 5) Litigation and 6) Bankruptcy. For those who want to stay, or at least to stay longer, the options to consider are Loan modification, Litigation or Bankruptcy. Loan modification has been a mixed bag. The Obama administration has tried, but has come up short, in providing programs to assist homeowners in modifying loans. Some people get their loans modified, but it seems the vast majority are asked to run around submit and re-submit paperwork, put on some trial modification and then typically get rejected for a permanent modification. This is not to say one should not try to get their loan modified; It’s just not that easy. Bankruptcy may be an option for some. Folks seeking this option should speak to an experienced bankruptcy attorney. Often bankruptcy only delays the inevitable foreclosure as banks often win “relief from stay” and foreclose the property in the end. Litigation is where I spend most of my efforts. Two main ways of attack include: 1) it’s an illegal or void loan; and 2) the bank used “illegal procedure” in the foreclosure. We have had good success in keeping people in their homes based on these approaches. The ultimate goal, for those who wish to stay, is to obtain a modification through the litigation process. Short Sale and Deed in Lieu are options for those who choose the “go” option. They may be addressed in future articles. When asking the question: “Should I stay or should I go?” These are six options to be considered.

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