



THE KIRWAN LAW FIRM

## **So You're Upside-Down on Your Home, Condo, or Investment Property The Asset Protection / Foreclosure Defense Solution**

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Americans today are living in an increasingly uncertain world. Daily swings of 300 points in the Dow Jones Industrial Average are commonplace, financial markets are suffering historic losses, banks are going broke, the real estate market is at a standstill, and the unemployment rate is climbing. The merger of these financial pitfalls have left a wave of economically disenfranchised citizens who have watched their investments and retirement savings be severely depleted in the span of just a few short years. Today, these same individuals face the difficult task of staving off creditors while attempting to hold onto a diminished financial portfolio.

Investors and home owners, speculating that the dramatic real estate bubble would continue, have watched in horror as the bubble burst. While real property transactions are now commonly confined to short sales, mortgage rates continue to climb and these investors now understand that their once seemingly sound investment is without any foreseeable return. This memorandum is intended to provide the reader with a fighting chance when confronted with a foreclosure claim. The article is divided into three parts covering everything from what to do with the sour asset to protecting yourself from the claims of creditors. The first section explores some of the more traditional options including mortgage modifications, short sales, deeds in lieu of foreclosure, and foreclosure itself, and why pursuing these options as stand alone solutions can be fraught with problems. In the following section, we posit an intelligent alternative to these traditional approaches. This alternative starts with Asset Protection Planning (i.e., helping you keep the assets you have left and safeguarding your income sources from garnishment), and then uses the increased leverage your new financial landscape provides to give you a strategic leg up in getting the bank to eliminate your mortgage debt through Short Sales, Deeds in Lieu of Foreclosure, and Foreclosure defense. Finally, I have included a Foreclosure Information Sheet written in an FAQ format that helps answer some of the primary questions people have about foreclosures. So, let's move on to examining your options.

### **PART 1 - Traditional Approaches**

#### **Mortgage Modification.**

When the TARP (Troubled Asset Relief Program) was first initiated, people held out hope that the banks receiving TARP money from the government would use that cash to reduce their mortgage balances to somewhere near the property's fair market value. Unfortunately, this has not happened. What banks have been willing to do (from a mortgage modification standpoint) is either (i) modestly reduce a person's interest rate, (ii) reduce a person's monthly mortgage payment for a period of six

months to five years with the difference being added to their loan balance (i.e., the amount of money you owe to the bank actually increases each month you pay the reduced amount), and (iii) some combination of (i) and (ii) (I'll call these "Short Term Modification Offers"). What they have not been willing to do is to actually reduce the principal balance of the loan which is what most people are looking to accomplish because it offers the only real long term solution to being upside down on your real estate.

When you call to inquire about having your loan modified, the banks will not even talk to you unless you are already late on your payments. This means that the most responsible people who take proactive steps to work with the bank *before* they default on their obligations are turned away and forced to hurt their credit score to even get the process going. The banks' thinking must be something like "Well, if they have made all their payments to date, they must care about their credit score. Therefore, if we turn them away, we will most likely be able to extract more money from them before they ultimately default." Makes you love your bank, right?

Even worse, the banks have been lying to you to further their own self interest. If you are late on your payments and seek a loan modification from the bank, they ask you to first give them (i) a statement of your monthly expenses, (ii) a statement showing your monthly income and where that income comes from, (iii) a list of all of your assets and how they are owned, (iv) your last two years tax returns, (v) copies of your bank statements for the last few months, and (vi) a "hardship letter" detailing your financial woes and why you deserve to have your loan modified (I'll refer to these as the "Financial Roadmap Documents"). Note that what you have just done is given them a road map to all your assets and sources of income so that if you ultimately get foreclosed on and end up with a deficiency judgment against you, the bank will have an even easier time taking your possessions and garnishing your income sources. Even more disturbing is that the banks generally refuse to provide you with the criteria they use to determine (i) whether you qualify for "loan modification," and (ii) if so, what type of modification you qualify for. This means that you can not even make an informed decision about the likelihood of your modification request being approved before giving the bank the roadmap to your assets and income sources. Finally, the bank often tells you that you have to keep making your payments while they process your application (the process they told you couldn't be started unless you stopped making payments), which can take several months; otherwise the likelihood of getting an approval will be diminished. Once again, the banks use these fear tactics to do their best to extract as many payments from you before telling you that the only thing they are willing to do is make you one of the Short Term Modification Offers, which rarely helps you at all in the long term and ensures that the bank gets to keep receiving payments.

Before moving on from this discussion on mortgage modifications, I want to raise a problem that most people (99.99999%, I'd guess) who have tried to solve their own mortgage problems have encountered. They call the bank to discuss their options and first encounter the seven circles of voice mail hell. When they finally reach a live person (let's call her Susie), Susie is generally not very helpful. Even if you can get through to Susie's supervisor, they turn out to be equally inept. Why

do you think these people are so unhelpful? The problem, I believe, is actually multifaceted. To begin with, there are so many people calling in to seek help that the bank simply can't afford to hire (and train) highly intelligent individuals armed with the cognitive skills necessary to find creative solutions that benefit both the bank and you. So what ends up happening is that the bank hires hundreds (or thousands) of low level employees that they can pay \$9.00 /hr to answer phone calls. Next the bank comes up with certain "programs" that have black and white criteria that must be met before the bank can help you. These are necessary because all of the low level, "Susie" type employees need clear cut boxes to put people in. If you appear to qualify for one of these programs (they do not give Susie all the details), Susie will tell you to provide the bank with your Financial Roadmap Documents. Once you do this, your information is given to a group of people that you can never speak to in order for them to evaluate whether they can lower your interest rate or payments. They then give Susie a "Yes" or "No" answer regarding your request with no mention of the reasons WHY you are being approved or declined. This means that if you do not like the answer Susie gives you, you are stuck because even if Susie wanted to give you more information, she simply doesn't have it to share. Three other problems that compound these problems are most banks are (i) behemoth organizations that, due to their size and bureaucracy, are good at doing simple, routine, repeatable tasks like providing checking accounts, making loans, etc., but awful at dealing with unique problems, (ii) arrogant and used to having the upper hand in all dealings with their customers, and (iii) profit driven, greedy organizations that may find it easier and more profitable to collect mortgage insurance rather than do right by their customers (even though they are largely at fault for the collapse of the real estate market).<sup>1</sup>

With all this in mind, I want to urge you to be highly suspicious of people offering to help you get a mortgage modification prior to the property going into foreclosure. These people typically want to receive a fee for their services and are rarely successful in getting you something you could not have negotiated yourself. Given all the practical problems enumerated above (the "Susie" problem, the bank's bureaucratic inefficiencies, arrogance, greed, etc.), what do you think is the likelihood of their being able to reach some "special person" at the bank who will extend them wonderful modification terms that are not being offered to the public at large? Exactly! Moreover, the typical contract these "mortgage modification experts" have you sign when you hire them is written in difficult to understand legalese and states that they will be deemed to earn their fee, even if they only get you a minor benefit (i.e., no real benefit at all). They also are quick to have you send the bank your Financial Roadmap Documents with no regard to how doing so could hurt you in the future. In short, be very careful if you choose to deal with one of these groups. It has been my experience that they often do more harm than good.

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<sup>1</sup> I want clarify that my negative observations regarding the banks apply primarily to larger national banks. There are some wonderful smaller banks that offer better customer service and even better technology. I suggest that you consider giving these banks your business rather than rewarding the banks that choose to treat their customers so poorly. If you need a recommendation, please ask me.

Walking Away From the Property.

Given the fact that the banks are so unwilling to provide people any meaningful modifications to their mortgages, many have made the choice of walking away from the property altogether. This is certainly understandable since it will likely be years before the market value of your upside down property returns to the price you paid for it. In addition, keeping the property will require you to (i) keep making interest payments, (ii) keep paying property taxes, (iii) keep paying home owner / condominium association fees, (iv) keep paying to have the property maintained and insured, and (v) lose out on the interest you could have made on all the money you spent on interest, property taxes, insurance, and upkeep costs. In short, the combination of a depressed market and ongoing costs practically ensures the investment in the property will be a loser in many cases so the best bet is to cut your losses now.

If you do decide to walk away from a piece of property, you have three basic options (i) the short sale, (ii) the deed in lieu of foreclosure, and (iii) letting the bank simply foreclose on the property.

***The Short Sale.*** The term “short sale” simply means that you go out and find a buyer that is willing to buy the property for a price that is less than the amount you owe the bank. For example, let’s say you bought a home for \$500,000 at the peak of the real estate market and financed \$450,000. You go ahead and list the property for \$250,000 and find a buyer named Willie who is willing to buy it for \$200,000. Next, you go to the bank to see if they will agree to allow you to sell the home to Willie for \$200,000. At this point, the bank will ask you to provide them with your Financial Roadmap Documents and will then either (i) accept your short sale request and write off the full \$250,000 balance of your debt (\$450,000 loan - \$200,000 sales price = \$250,000), (ii) accept your short sale request but ask you to pay all or a portion of \$250,000 balance due, (iii) accept your short sale request and ask you to sign a new promissory note to the bank where you will pay all or a portion of the \$250,000 over a period of time, or (iv) deny your short sale request altogether. Obviously, most people are hoping for option (i).

Also understand that unless the bank is affirmatively waiving the right to collect the deficiency from you **IN WRITING** (i.e., it is cancelling the promissory note you signed and agreeing not to try and collect from you in the future), that you are **STILL LIABLE UNDER THE NOTE**. A Short Sale (or a Deed in Lieu of Foreclosure, for that matter) is not some magical process where your debt to the bank is automatically forgiven. That being the case, please be clear that unless you are getting a WRITTEN deficiency waiver, a Short Sale does not benefit you and may actually hurt you. Banks usually act like they are doing you a favor by agreeing to a Short Sale, but think about this for a minute. If the bank is NOT giving you a WRITTEN deficiency waiver and the property is sold in a Short Sale, you have to (i) find a real estate agent, (ii) deal with the inconveniences of showing the property, (iii) provide your Financial Roadmap Documents, and (iv) attend a closing. And for all this effort, you get nothing in return. On the other hand, the bank collects cash, and they no

longer have to worry about (i) paying property taxes, (ii) paying home owner / condominium association fees, (iii) paying to insure the property, (iv) paying to maintain the property and protect it from being vandalized, (v) listing the property and finding a buyer, and (vi) having an employee deal with a closing. Put that way, it doesn't seem like such a good deal, does it? In addition, once the property is sold, you have lost all your negotiating leverage if they come after you for the deficiency and since you have given them your Financial Roadmap Documents, you are now easier to collect from.

I also want to quickly mention here that while there are many honest, capable, real estate agents who actually do understand the short sale process, there are also many others who will do you more harm than good. First, real estate agents are not attorneys and I have met very few of them who actually understand all the nuances of the legal documents you will be signing as the short sale goes from initial contract to the closing. I have seen short sale contracts that do not require that you get a deficiency waiver as a condition for the Short Sale (which means that you could be contractually obligated to sell the property without getting any benefit in return), and closing documents that contain language where you are actually confirm the bank's right to collect the deficiency from you and that even have you waive rights that makes future collection efforts easier. Second, real estate agents only get paid if the sale goes through. Therefore, there may be personal financial disincentives to explaining all the downsides of a short-sale transaction you are entering. Like I said above, there are many good real estate agents out there and I have personally worked with several of them. The best approach is to have your real estate agent do what they do best (i.e., list the property and sell it to potential customers), but have them work with your attorney who can do what they do best (i.e., read contracts and closing documents to protect your legal rights). This being said, understand that an "offer" is a legal contract that should be reviewed by your attorney **BEFORE** you sign it. If, instead, you rely on your real estate agent to give you good legal advice, I can only say that you have been warned.

***The Deed in Lieu of Foreclosure.*** The term "deed in lieu of foreclosure" means that you go to the bank and ask them to simply take back your property without going through the foreclosure process. Presently, banks are not very willing to accept a deed in lieu of foreclosure and are far more likely to go through the full foreclosure process. Even though the deed in lieu process is quicker and less expensive, banks are typically large bureaucratic organizations that have a morass of generally unintelligent rules and guidelines that they feel compelled to follow, and, consequently, deeds in lieu are accepted by banks far less often than you would think. Just as with the short sale, if the bank is willing to accept a deed in lieu of foreclosure, they will either (i) write off the full balance of your debt, (ii) ask you to pay all or a portion of the balance due, or (iii) ask you to sign a new promissory note to the bank.

***The Foreclosure.*** The term “foreclosure” means that the bank files a law suit against you to enforce its rights against you under the mortgage. When you first bought the property, you signed a lot of paperwork. Among those documents was a promissory note (where you promised to pay back the bank the amount you borrowed from them at some interest rate and on some payment schedule) and a mortgage (where you agreed to let the bank take back the property if you didn’t make your payments under the note). If the bank files a foreclosure lawsuit against you, you will be formally served, meaning that a law enforcement officer or process server will personally deliver a “Summons” to you informing you that you have been sued together with the Complaint (the actual law suit paperwork). I will discuss the benefits of fighting a foreclosure lawsuit later, but I did want to mention here that unless you respond to the lawsuit within twenty days, the bank can obtain a default judgement against you, meaning that they automatically win and will acquire title to the property without litigating the merits of their claim.

If the bank prevails on its claim, the property is later sold at auction. After the property is sold, the bank can seek a judgment against the borrower for the deficiency between the sales proceeds and what remains due under the promissory note. Going back to the example in the section on Short Sales, if the bank forecloses on a property on which you owe \$450,000, the bank will first add its attorneys’ fees, bank fees, and past due interest to the principle amount (lets say you now owe \$480,000) and then subtract the sale proceeds from the distressed property. If the property was sold to someone other than the bank for \$200,000, the bank can obtain a judgement against you for \$280,000 (i.e., \$480,000 - \$200,000) and start the process of taking your assets and garnishing your sources of income. Judgments in Florida can last up to twenty years.

I have heard some people claim that they are not worried about the bank getting a deficiency judgement against them, usually for three reasons. First, they are under the impression that the banks are not seeking deficiency judgements. While this may be true for the moment, the bank has up to five years from the date you defaulted (i.e., typically after you stopped making payments) to obtain a deficiency judgement. At the present time the banks are overwhelmed so it does not seem odd to me that they are taking a “first things first” approach, which may mean holding off on seeking deficiency judgments, with plans to go after them in the future. I also think it is a distinct possibility that the banks will start selling their right to obtain deficiency judgements to collection agencies willing to pay pennies on the dollar for the right to harass you and collect money from you in the future. This way the bank makes money without having to invest the time and aggravation of seeking the judgements themselves. The second reason I have heard for people balking at a deficiency judgment is that they do not have any assets for the bank to go after. While this may be true at the moment, as previously stated, the bank may hold a judgment for a twenty year period. In addition, you will be earning income in the future and this income may be subject to garnishment. The final reason I have heard is that the person says they will just file for

bankruptcy if the bank gets a deficiency judgement. In 2005, Congress passed a horrible bill that modified the bankruptcy laws making it much harder to file for Chapter 7 bankruptcy. If you are thinking that you will simply file for bankruptcy to get rid of a judgement, you may be in for a rude awakening. It would be far better to visit a bankruptcy attorney before a foreclosure lawsuit is filed against you to make sure that you are, in fact, eligible to file a Chapter 7 bankruptcy. I personally think that people who simply hope and pray that the bank never seeks a deficiency judgement are playing with fire. As you will see below, there is a much better approach.

#### Pre-Foreclosure Lawsuit Negotiations vs. Post-Foreclosure Lawsuit Negotiations.

I wanted to reiterate here that before a foreclosure lawsuit is filed against you, if you try and negotiate with the bank, you will be dealing with bank employees. While I am sure that these people are generally nice folks, you have to understand that they have very little power to negotiate with you. The bureaucratic banks have a set of guidelines, formal processes, and acceptable solutions that have to be followed by the person you end up speaking to on the phone. Therefore, even if they like you and sincerely want to help you, their hands are tied. In addition, the bank personnel who ultimately make the decision as to whether or not your loan modification request / short sale offer / deed in lieu of foreclosure offer is accepted is oftentimes some person in the back room who you are never allowed to speak with directly. After a foreclosure lawsuit is filed, however, your attorney can negotiate with the bank's attorney who oftentimes has the authority to negotiate solutions that lie outside those the bank employees are allowed to offer you. Therefore, sometimes the foreclosure lawsuit can give you options that are not available pre-lawsuit.

#### Income Tax Problem.

In the event the bank writes off all or any portion of your debt, you may have to pay income taxes on the amount written off. I describe why this is in the attached Foreclosure Information Sheet, however, I wanted to point this problem out before proceeding to the next section. There are sometimes solutions to this problem, but you have to know what they are before you enter into a short sale or hand back your property if you want to effectively plan to reduce or eliminate your tax burden.

## **PART 2 - A BETTER SOLUTION**

A much better way to try and solve the upside-down property problem is to take a "Hope for the Best and Plan for the Worst" approach. As you can see from the above discussion, if things do not go as planned, you may have a large judgment in your future. This means that a bank or collection agency will be pursuing your assets and income in the future. Remember, twenty years (i.e., the length of a judgment) is a long time.

Start with Asset Protection.

*A Brief Overview.*

Unfortunately, most people who are upside down on real estate start by seeking a Short Sale or loan modification and readily give up their Financial Roadmap Documents without thinking through the consequences of doing so. A far more intelligent approach is to begin with asset protection planning. Many people think that once a potential creditor is identified that asset protection becomes an impossibility. This is simply not true. While the number of total available planning options may decrease once a creditor appears, depending on your assets, your income, and the source of potential liability, there are oftentimes excellent opportunities to permanently protect both your income and assets even if the creditor is staring you in the face. In addition, transfers can be made that enable you to honestly complete your Financial Roadmap Documents while still not disclosing information and assets that may reduce the bank's willingness to forgive your debt. Finally, a good asset protection attorney can help you craft your Financial Roadmap Documents to provide additional information that increases your negotiating leverage and gives you additional legal defenses if your asset protection plan is ever challenged.

Once your asset protection planning is in place, it is far easier to form intelligent strategies to eliminate your mortgage debt. Short Sales and foreclosure defense become vastly more effective since your Financial Roadmap Documents have been crafted to show both a financial situation deserving of relief and a general inability by the bank to collect if a judgment is actively sought. This obviously improves your negotiating leverage. In addition, if the worst case scenario does come to fruition and the bank obtains a judgment against you, your asset protection plan will give you a fighting chance to keep the assets you worked so hard to amass. If you decide to forego asset protection, your negotiating leverage with the bank is decreased, the likelihood of being on the wrong side of a judgment goes up, and the bank's ability to take your assets is practically guaranteed.

*Asset Protection Comes First.*

BEFORE you stop making payments, provide Financial Roadmap Documents to the bank, or, if its too late for that, at least before you go into foreclosure, your first step should always be to engage in asset protection planning. Asset protection planning involves legal methods to build barriers between creditors (including a bank with a deficiency judgment) and your assets and sources of current and future income. While the tide of foreclosures in Florida has prompted a number of area attorneys to expand their litigation practice to include some form of a real estate department, I would caution any potential client from engaging an attorney for asset protection planning unless the attorney specifically concentrates their practice in asset protection planning. This area of the law requires a vast knowledge of trust and estate planning, income, gift, and estate tax law, business entities and corporate law, the law of fraudulent transfers, and creditor's rights law. If you are a business owner, the good asset protection attorney will also take in to consideration crucial factors including (i) licensing issues, (ii) bonding issues, (iii) existing legal contracts, (iv) relationships with vendors, (v) relationships with business partners, (vi) relationship with factors and other lenders, (vii) insurance issues, and the list goes on. If you own real estate, it is important to consider (i) the

Florida documentary stamp tax, (ii) existing mortgages and loan acceleration clauses, (iii) title insurance and the effect a transfer may have on your ability to assert an insurance claim, etc. In short, the devil is always in the details. The consequences of employing an inexperienced attorney can be catastrophic and require the forfeiture of any assets you may have hoped to retain. If you are interested in learning more about the specifics of asset protection planning, Adam O. Kirwan, J.D., LL.M. has written a book entitled “The Asset Protection Guide for Florida Residents.” It is the only book of its type in that it specifically covers Florida law and is written for the non-attorney to understand. It can be purchased on [KirwanLawFirm.com](http://KirwanLawFirm.com).

There are several advantages to asset protection planning. First, there are oftentimes ways to permanently protect both your assets and future income from judgment creditors despite the fact that you are already having financial problems and know the bank is coming after you. This means that even in a worst case scenario where you end up with a bank getting a large judgment against you, they simply will not be able to take your savings, other real estate, home, future income, etc. Second, a good asset protection attorney will always be able to make it much more costly, difficult, and time consuming to reach your assets in the future. This will result in the creditor giving up (in which case your assets are safe) or your having far better negotiating leverage to settle the judgment for pennies on the dollar. Third, anytime you transfer assets after you have identified a potential creditor, you are at risk of a court determining that you made a “fraudulent transfer.” While the fraudulent transfer laws are far too complex to describe here, fraudulent transfers can be reversed by the court meaning that the creditor can not only get the asset from you but could also get a judgment against the person to whom you transferred the property. This means that if you transfer property to a sibling, parent, child, friend, etc., you could be exposing them to liability. In contrast, there are ways to (i) legally transfer assets that cannot be unwound as fraudulent transfers, (ii) to start tolling the statute of limitations with respect to transfers made by you (meaning that even if the transfer is fraudulent, they might still be barred reversing the transfer if they wait too long), and (iii) protect your family and/or friends from liability if you do make transfers to protect assets. Only an asset protection attorney can help you make intelligent decisions regarding transfers. Please do not rely on your typical real estate / litigation / foreclosure attorney to give you accurate advice in this area. It's like asking your dermatologist to do your brain surgery.

Asset protection planning can also provide you additional advantages when it comes to the Financial Roadmap Documents that may be requested by the bank. First, the asset protection attorney can help you make an informed decision about whether you want to provide the bank with the Financial Roadmap Documents in the first place. There are advantages and disadvantages associated with giving a creditor this type of detailed information about your assets and income. Sometimes you are better off refusing the bank's request and sometimes it is better to comply. Which will be best for you will depend on your individual facts and circumstances. Second, if it does make sense to provide the Financial Roadmap Documents to your bank, carefully executed asset protection planning can allow you to truthfully complete these documents while not disclosing all of your assets. In this manner, you can oftentimes negotiate a better outcome with the bank which will help

minimize the potential for a judgment in the first place. Finally, if you are going to give the bank your Financial Roadmap Documents, there is a right way and a wrong way to go about this. Most of the real estate agents and foreclosure attorneys simply ask you to fill out the bank's forms and then pass them on to the bank without given any thought as to whether there might be a way to present this information in a way that will increase your likelihood of getting a deficiency waiver while still being honest and accurate. I assure you that this can be accomplished if you understand asset protection, the negotiating process, and have some common sense.

The problem with most of the attorneys and law firms advertising foreclosure defense services is that they are litigators who know little or nothing about asset protection planning. By focusing solely on defending the lawsuit without any regard for asset protection planning, they hurt your prospects for negotiating a good settlement to begin with and leave you wide open to attacks on your assets if the bank ultimately wins. And lets face it, while there are many benefits to be derived by fighting the bank with respect to a foreclosure lawsuit, since you did borrow the money there is always a chance of ending up with a judgment against you. Asset protection planning can provide you with significant benefits. Moving forward with the bank with respect to a loan modification / short sale / deed in lieu without first engaging in asset protection planning is like going to war without wearing any armor. You can do it, but aren't you smarter than that?

#### Defend the Foreclosure Lawsuit.

The next step to consider after an asset protection plan has been established is to defend the foreclosure lawsuit. Many people believe that once a foreclosure action is initiated, hiring an attorney for assistance is pointless. That is usually incorrect. Whether you are interested in keeping the property, or simply walking away from it, there is sometimes much that can be done to benefit you.

Some of the advantages you may be able to obtain in contesting a foreclosure are:

1. Avoidance of a Deficiency Judgment where the bank seeks to take more than just your property (see the enclosed Foreclosure Information Sheet for more information);
2. Avoidance of having to pay additional income taxes after the foreclosure (see the enclosed Foreclosure Information Sheet for more information);
3. Ability to delay the foreclosure proceedings. This could benefit you by:
  - a. Giving you extra time to find a buyer for your property;
  - b. Giving you extra time to negotiate a Short Sale (coupled with a deficiency waiver) with the bank;
  - c. Allowing you to live on the property rent free for a longer period of time;
  - d. Allowing you to collect rental income from the property for a longer period of time;
  - e. Giving you extra time to see if Congress will pass laws helping people in your situation; and

- f. Giving you access to people (like the bank's attorney) who actually have the authority to negotiate a deal with you.

As mentioned above, if you are served with a summons (i.e., the bank has initiated a foreclosure lawsuit against you), you have twenty days to respond. If you fail to do so, the bank can obtain a default judgment against you. Once the bank has this default judgment, it can be difficult to have it reversed. If you have already missed the twenty day deadline or have a default judgment entered against you, all hope is not lost but you do have additional hurdles to overcome and need to act quickly. At this point, time is not on your side.

The attorneys at the Kirwan Law Firm can advise and assist you through these tough financial times to both protect your valuable assets and mitigate some or all of the far reaching effects of a foreclosure lawsuit. Adam Kirwan is the author of [The Asset Protection Guide for Florida Physicians](#) and the [Asset Protection Guide for Florida Residents](#). Mr. Kirwan concentrates his practice on helping his clients use legally sanctioned techniques and methods to prevent creditors from taking their hard earned assets to satisfy debts. Florida has numerous laws that can be used to prevent a creditor from taking your (i) principal residence, (ii) retirement savings, (iii) earnings and wages, (iv) children's college education savings, (v) certain property owned jointly by a husband and wife, and (vi) various other assets. There are also ways to use trusts, partnerships, and limited liability companies to protect assets from a creditor's claims. Much can oftentimes be done, but you need to know your rights and the nuances of these important laws.

The Kirwan Law Firm can also represent you if property you own is in foreclosure. Our attorneys are experienced in foreclosure defense litigation and can also help you if you are considering a short sale or seeking a deed in lieu of foreclosure. If you are facing a foreclosure or simply trying to understand your legal options, please call us. Remember that your failure to act quickly, may result in the loss of valuable legal rights.



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## **Foreclosure Information Sheet**

This Foreclosure Information Sheet is designed to provide you with a basic understanding of some of the challenges people may face if a home, condominium, or other piece of property they own is foreclosed by the bank. I have always found it easier to learn through example, so below I start by introducing you to a fellow named John who is facing foreclosure<sup>2</sup>. I will start by giving you the basic facts, and will follow up with some specific questions that explain some of the problems John may experience.

### **Meet John.**

Assume that a fellow named John had purchased a condominium three years ago at the peak of the real estate market for \$500,000. John paid \$20,000 of his own money at closing, and the bank loaned him the remaining \$480,000. At the closing, John signed a lot of paperwork including a “Note” and a “Mortgage.” By signing the Note, John legally promised to pay the bank the \$480,000 he borrowed from them. He agreed to pay a certain interest rate, to make monthly payments of a certain amount, and to have the entire loan paid by a certain date. The “Mortgage” John signed stated that if he did not pay back the money he borrowed from the bank (or didn’t make the payments on time), the bank could take John’s condominium so that it could be sold to satisfy John’s debt (i.e., the \$480,000).

John was planning on “flipping” the condominium and paying off the bank when the property was sold. Like most of us, John did not anticipate that the real estate market would crash. John has been trying to sell his condominium for the past two years. Last year, John even lowered the sales price to \$250,000 and still has had no offers. John finally reached the conclusion that he could no longer afford to keep making payments, especially since the condominium would probably not sell for more than \$200,000. After not making payments for three months, the bank finally started foreclosure proceedings. Just yesterday, John was “served” (i.e., was given formal notice) with notice of the bank’s foreclosure lawsuit against him.

### **John’s Potential Problems.**

After being served with notice of the foreclosure suit, John came in to meet with us. These were some of the questions he had.

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<sup>2</sup>John is not a real person. His situation, however, is similar to many people Adam Kirwan has met with recently.

**1. What is a Deficiency Judgment?**

**I Thought That Once the Bank Took my Property, I Was Done.**

Unfortunately, this is often not the case. Remember that when John signed the Note, he promised to pay back the full \$480,000 he had borrowed from the bank. If the bank foreclosed on his condominium and then sold it for \$230,000, John would be still liable for the difference (i.e., the “deficiency”) of \$250,000. In order for the bank to collect that money, they would sue to obtain a legal “deficiency judgment” against John. After the deficiency judgment is obtained, they have all the rights of a judgment creditor and can attempt to take as many of John’s other assets as they can. They will often also attempt to garnish John’s salary. This is why a keen understanding of how to legally protect your assets from creditors is so important. In Florida, judgments can last as long as twenty years during which time John will have to deal with bad credit and collection attempts. Making matters worse, if John earns too much money, he may not be eligible to file for bankruptcy under the new bankruptcy laws that were enacted in 2005.

**2. But I Have Heard That Banks Are Not Going After Deficiency Judgments. That Means I am Safe, Right?**

Not really. Presently most large banks are so busy with all of the problems in the markets, the increasing number of foreclosure actions they have to deal with, and the mergers of failed banks into more profitable ones, that they have not had the time or the manpower to actively seek deficiency judgments in many cases. On the other hand, many smaller banks and financial institutions are actively seeking deficiency judgments. One other reason John should not get too comfortable is that under Florida law, banks typically have up until five years from the date of the foreclosure to seek a deficiency judgment. Therefore, once things become a little less hectic, the banks may very well pay a few hundred dollars to an attorney to obtain their judgment against John and see how much money they can seize down the road. There are also likely going to be individuals and companies alike who will be willing to buy the bank’s deficiency judgments for pennies on the dollar, and then make their money collecting on these judgments. John *may* be safe today, but tomorrow may not be as pleasant. Once again, John needs to be very aware of protecting his assets moving forward even if the bank is not presently seeking a deficiency judgment.

**3. What Do You Mean that a Foreclosure Could Increase the Amount I Owe in Taxes? What Does the IRS Have to do With my Foreclosure?**

This is an unpleasant fact of which many people are unaware. When John originally borrowed the \$480,000 from the bank, he did not have to pay income taxes on that money because John had a corresponding obligation to pay the bank back the full \$480,000. Put another way, after John borrowed the \$480,000 his net worth did not go up because he took on a \$480,000 liability (i.e., the Note) at the same time that he got the money from the bank. Now assume that the bank forecloses on John’s condominium, and then sells it for \$230,000. Further assume that the amount John owes the bank increases to \$510,000 due to back interest and late fees. Under these facts, John may have to increase his ordinary income for

the year that the foreclosure takes place by \$280,000 (\$510,000 Debt - \$230,000 Sales Price = \$280,000) because the underlying obligation to the bank is gone or marginally enforceable. The bank is required to report this “phantom income” to the IRS using Form 1099C. If John is in the 35% tax bracket, this means that John may have to pay an additional \$98,000 in income taxes!

Thankfully, there are sometimes ways to minimize or eliminate this liability. Whether or not John is eligible for this relief will depend on many facts that are beyond the scope of this information sheet.

**4. How Quickly Do I Have To Act?**

John must act fast or he may lose valuable legal rights. Once John is served with the foreclosure law suit, he typically has only twenty days to respond. Failure to do so could result in the court issuing a judgment in favor of the bank. Once this “default judgment” is issued, it can be much harder to defend against the foreclosure law suit; and sometimes it is impossible.

**5. What Should I Look for in Hiring an Attorney?**

As you can see from the above answers to John’s questions, the issues raised by foreclosure can be numerous and complex. John should hire an attorney or legal team that are well versed in the areas of (i) asset protection, (ii) tax law, and (iii) litigation defense. If John’s legal team cannot counsel him in all of these areas of law, John may end up winning with respect to one aspect of his case, only to find that he still has other problems to deal with. A comprehensive approach is really John’s best shot at a good outcome.

**6. How Will I be Billed if I Hire You?**

The initial consultation is typically \$350. Once we have had a chance to review the facts of your case, we try our best to bill on a flat fee basis. This means that you will know up front what the fee will be before you make your decision as to whether or not you want to hire us. If you hire us, the \$350 consultation fee is applied to reduce the flat fee.