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**EVERYTHING YOU WANT TO KNOW ABOUT LOAN
MODIFICATIONS THAT THE LOCAL MEDIA
CANNOT FIGURE OUT AND TELL YOU DURING
THEIR NEWSCASTS**

I have a confession to make: I am a boring person. I just wasted my Friday evening, watching this week's entire "investigative series" on loan modifications in Arizona. While I have a good understanding of the process, challenges and existing case law, I truly wanted to believe that our local media knew something more. Perhaps with their celebrity status and supposed concern for their viewers, the local media would offer some new information or insight during this difficult time endured by so many.

To date, the local media has failed miserably. To be fair, every local network news station seems to be confused and mesmerized by loan modifications. Here are some examples:

Channel 5 – Last year they actively promoted a local loan modification company on news segments. That same loan modification company posted on its website that it was an "Arizona-licensed loan modification company." The company has since corrected its website after my client sued them.

Channel 3 – You would think that the two best investigative reporters in Phoenix could single-handedly close down every loan modification shop in town. They are so dedicated to recover every \$27.50 overcharge from the water company on behalf of homeowners, but continue to give loan modification companies an inexplicable free pass.

Channel 10 – Do they even have investigative reporters?

Channel 15 – Do not get me started.

Channel 12 – You had your chance to set yourself apart from your competitors this week. You just lost the self-proclaimed “most valuable advertising demographic” when you chased off Conan. Can Steve Carell carry your entire prime time programming? I wish that I was the agent for “The Office” cast – they will probably get a “Seinfeld” or “Friends” payday during the next contract negotiation.

And the saddest part is that this week’s reporter and staff clearly worked diligently, producing the series. Why put forth all that effort and not interview a few attorneys? People are losing their homes!!! Telling them that the bank does not care is old news and does not help borrowers successfully modify their mortgages. But enough media critiques. You want some easy-to-understand, straightforward answers.

1) Here Is A Simple Explanation Of The “Net Present Value Test” (“NPV Test”) And What It Actually Means For A HAMP Loan Modification.

The biggest gaffe committed by Channel 12 this week was scaring you with the “bank’s secret formula” that decides whether you receive a HAMP loan modification. Watching that episode convinced me that the media just does not get it. Here is how the NPV Test works.

It is true that the banks use the NPV Test to determine whether they make more in modifying your mortgage or proceeding with the foreclosure. But the banks may only use this formula if you fall behind two (2) mortgage payments. Did you hear that part on the news? If you missed it on television, do not worry. The intellectuals failed to explain it.

And all you have to know about the NPV Test is that most of the mathematical equation is supplied with numbers fabricated by the bank to get that equation answer that the bank wants to reach. No matter how complicated the NPV Test may appear, remember it is not a real math problem. Just more bank nonsense.

Instead of $2 + 2 = 4$, it is $2 + \text{what ever number the bank wants} = \text{the result that the bank wants}$. It is a little early in the HAMP lawsuits presented before Arizona courts, but I cannot wait to see how the banks explain their numbers to the judges and juries.

The reason most loan modification applications are analyzed under the NPV Test is that by the time the bank reviews your HAMP application, you are probably two (2) months behind. **NOW DO YOU UNDERSTAND WHY THE BANK INTENTIONALLY EITHER DELAYS OFFERING YOU AN APPLICATION OR REVIEWING YOUR LOAN MODIFICATION APPLICATION, OR CLAIMS THAT YOU HAVE NOT SUBMITTED ALL THE REQUIRED INFORMATION? IT IS ALL PART OF THE BANK'S PLAN TO INTENTIONALLY DISQUALIFY YOU FROM RECEIVING A HAMP LOAN MODIFICATION!!!**

WHAT IS THE SOLUTION? No, I am not going to tell you stay current on your mortgage payments. True, it is a good idea, but often unrealistic for distressed borrowers. And even if you do, the bank will continue to delay processing your HAMP application.

THE MOMENT THAT YOU SENSE YOUR MORTGAGE IS TOO HIGH OR YOU KNOW YOU CANNOT CONTINUE TO MAKE THE CURRENT MORTGAGE PAYMENTS, YOU (PREFERABLY YOUR ATTORNEY) MUST FORMALLY REQUEST A LOAN MODIFICATION APPLICATION FROM YOUR LENDER.

Your obvious response to me is, "Andrich, the bank will just ignore my requests." Maybe. But letters to the bank, requesting a loan modification application make great exhibits to any lawsuit against your bank for loan fraud. If the bank refuses to provide you with a timely HAMP application (each bank has its own specific application forms – also part of the delay tactic), it is possibly a material breach of your loan, and you may even have the right to rescind the loan. (Editor's note: If you want a bold prediction, my guess is that Mr. Obama or the State of Arizona will pass a law requiring all lender loan modification application forms to be posted on each lender's website and easily accessible to the public.)

2) There Is No Such Thing As An Arizona Licensed Loan Modification Company.

I will just keep repeating what I have written over the last year. I have heard the loan modification company commercials on the radio. So someone is giving them \$2,500 each time in exchange for a failed loan

modification. You are keeping them in business and it costing you your homes. You think attorneys are expensive? For \$250 Arizona attorneys can definitively tell you whether you truly qualify for a HAMP loan modification. By contrast, the loan modification company offers a free consultation (sales pitch) and will tell nearly everyone that they qualify (even when they do not). Personally, I have sent approximately 33% of my visitors home with bad news when I discover that they do not qualify under the HAMP program. You have to tell people bad news sometimes. But you perform a great service for those people, because they clearly know that an option is legitimately unavailable to them. **STOP DRINKING THE "LOAN MODIFICATION COMPANY KOOL-AID."**

3) There Is No Such Thing As An "Attorney-Backed Loan Modification Company." If You Are Solicited By One, Please Report Them Immediately To The State Bar of Arizona.

The State Bar of Arizona sends each Arizona attorney a monthly magazine. The articles are written by people smarter and more accomplished than me, and every attorney takes seriously what is written (if they do not, those are the ones that usually get suspended or disbarred). January's issue included a one page warning from the State Bar to attorneys: do not take referrals from loan modification companies. The article reminds attorneys that they may not work with loan modification companies because: a) attorneys may not share fees with non-attorneys; b) attorneys may not have a partnership with non-attorneys if any of the activities include the partnership practicing law (Arizona law states that negotiating contract rights is practicing law); c) attorneys may not assist non-attorneys in the unauthorized practice of law; d) attorneys are required to consult with clients and provide competent representation. For your convenience, I attached the State Bar's article.

4) Filing For Bankruptcy Invalidates Any HAMP Loan Modification.

I am not impressed by the new commercial where the three-headed attorney claims that they can modify a borrower's first mortgage and eliminate/reduce the borrower's second mortgage through a Chapter 13

bankruptcy. The HAMP program makes it clear: If you have filed for a bankruptcy, no loan modification.

How long will it take for the banks to approve your loan modification; realize that you have filed for Chapter 13 bankruptcy (your attorney will have to list them as one of your creditors); and then petition the Bankruptcy Court or other court to rescind your loan modification? Look on the bright side, the money you all pay the three-headed attorney on television should put all their children and grandchildren through boarding school.

5) Loan Modification Companies No Longer Offer Money-Back Guarantees If They Fail to Modify Your Mortgage.

One of the tough things about my profession is the following: I consult with a distressed borrower; I warn them to avoid the loan modification companies; the distressed borrower ignores my advice and hires a loan modification company; approximately three (3) months later, that same distressed borrower calls me one week before the foreclosure of their home; the distressed borrower hires the firm to get their money back from the crooked loan modification company.

Loan modification companies still advertise a money-back guarantee, but their contracts reduce that amount by so-called work performed. The good news is that loan modification companies fail to keep good time records and fail to give their customers written status updates (State Bar requires attorneys to do so). Thus, it is pretty easy to get your money back from the loan modification companies. Even if the loan modification company forced you to sign an iron-clad contract, nearly every loan modification company is liable for fraud and negligence. The claims pay more money than contract disputes anyway.

The loan modification companies know their days in the sun are soon at an end. Arizona Department of Financial Institutions will require all modification companies to be licensed starting June 1, 2010. The lawsuits against loan modification companies are on the rise. And ultimately, the Obama administration, a few local federal & state judges or Arizona's next governor will put an end to these loan modification companies. That means every unemployed loan officer, mortgage broker, real estate guru and struggling real estate broker will do and say anything to steal \$2,500 from

you and attempt (often unsuccessfully) to modify your mortgage. By the time you figure out what happened, they will be sitting on the beach of a country with a non-extradition treaty. Meanwhile, you are living on the street, in a homeless shelter or with family/friends.

What else would you like to know about loan modifications? Ladies and gentlemen, you have my telephone number. For the record, I do not want to be interviewed on television. This is pretty easy stuff to figure out for someone with lots of time, a flashy camera truck and production assistants. With a little research, the local media could present a thirty minute television special and regain some credibility with its viewers.



Loan-Modification Services

There's been a boom in what is known as the loan-modification industry, populated by nonlawyer "foreclosure prevention specialists" or "foreclosure consultants." An Ohio case indicates how much trouble you can get into by doing business with or for a marginal foreclosure-prevention service.¹ In that case, the Ohio Supreme Court sanctioned three lawyers for their actions in working with a company. Foreclosure Solutions advertised itself as helping people threatened with losing their homes through foreclosure and solicited defendants listed on court foreclosure dockets. For a fee, it promised to negotiate with the lender and, if necessary, a lawyer and legal services would be provided as part of the fee. Negotiations rarely were successful, and the company eventually referred more than 2,000 clients to the lawyers, who were paid \$150 per client from the fee paid initially to Foreclosure Solutions. The lawyers then filed standard-form pleadings designed to delay the foreclosure process and, when foreclosure became inevitable, they sent the client a form-letter notification of the foreclosure date and suggested he seek the services of a bankruptcy lawyer.

The court noted that it was Foreclosure Solutions that hired the lawyers and that the clients had no choice in the selection process. The company's agreement with customers did not identify any lawyer who would be used, when the lawyer was to be hired, or the fee amount.² The court found that Foreclosure Solutions continued to deal with the lenders after the lawyers were hired and that the lawyers rarely, if ever, communicated with clients except through standardized form letters, which the lawyers had no indication the clients understood.

The court found a number of ethical violations, the chief of which I have translated to conform to Arizona's Rules of Professional Conduct:³

- BR 5.3 (Responsibilities Regarding Nonlawyer Assistants) requires lawyers to ensure that people working for them, even independent contractors,⁴ conduct themselves in a fashion compatible with the professional obligations of the lawyer. By allowing Foreclosure Solutions to be the clients' only representative vis-à-vis the lenders after they were hired, and by failing to supervise what was done or said by the company after the lawyers were hired, the lawyers violated this rule.
- BR 5.4(a) (Professional Independence of a Lawyer) prohibits fee sharing with nonlawyers.
- BR 5.4(b) (Professional Independence of a Lawyer) prohibits a lawyer from forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. In Arizona, the negotiation of contract rights constitutes the practice of law.⁵
- BR 5.5 (Unauthorized Practice of Law) prohibits a lawyer from assisting another person in UPL. In Arizona, we have opinions and guidance on how lawyers may associate with legal service providers, including eviction services,⁶ insurance adjusters,⁷ medical benefit processors⁸ and credit consulting services.⁹
- BR 1.2(a) (Scope of Representation and Allocation of

Authority between Client and Lawyer) requires a lawyer to abide by the client's decisions concerning the objectives of the representation and to consult with the client concerning them.

- BR 1.1 (Competence) requires a lawyer to provide competent representation through skill, thoroughness and preparation reasonably necessary for the representation.

There's nothing inherently unethical about accepting referrals from a foreclosure prevention service. But as the lawyer, you need to make sure you, not the referring agency, are the one exercising the independent legal judgment necessary on behalf of your client, and don't accept any part of the referring agency's charges as your fee.

One last admonition: Watch out for what the referring source is saying in its advertising and how it solicits customers. ER 8.4(a) prohibits a lawyer from doing through the acts of another what she cannot do herself. BR 7.1 prohibits false or misleading communications about the lawyer or the lawyer's services. BR 7.3 prohibits direct solicitation of a prospective client unless certain conditions are met. Ensure your referring source isn't simply a glorified lawyer referral service. ■

Ethics Opinions and the Rules of Professional Conduct are available at www.myazbar.org/Ethics



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Endnotes

1. *Cincinnati Bar Association v. Mullaney*, 119 Ohio St. 3d 42 (2008). See also *Disciplinary Council v. Willard*, 123 Ohio St. 3d 15 (2009).
2. Ohio had not adopted the Model Rules of Professional Conduct at the time the events in *Mullaney* occurred, and the lawyers probably violated Arizona BR 1.5(b)'s requirements of a written fee agreement setting forth the rate of the fee and the scope of the representation.
3. Rule 42, Ariz. R.S.G.
4. See Comment [1] to BR 5.3.
5. *In re Retchman*, 938 P.2d 563 (Ariz. 1997).
6. Ariz. Ethics Op. 93-01 (Feb. 18, 1993).
7. Ariz. Ethics Op. 99-07 (June 1999).
8. Ariz. Ethics Op. 01-11 (Nov. 2001).
9. *In re Galbaini*, 786 P.2d 971 (Ariz. 1990).