

CAN YOU HAVE TOO MANY RIGHTS IN YOUR MORTGAGE?

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You would think that it is impossible to have too many rights. However, when it comes to sellers financed mortgages on buyer's homes, this is a very real possibility.

Most mortgages contain standard language identifying not only the property as collateral for the note, but also rents, profits, equipment, furniture, etc., as additional security for the debt. Although it would seem sensible to have as much security as possible listed in your mortgage to secure the debt owed to you, this practice could eventually cost you money if the mortgagor files bankruptcy.

As you may know, a mortgage on a "principal residence of the debtor" (the borrower's home) is normally protected under the bankruptcy code if the mortgagor files chapter 13 bankruptcy. However, this protection can be lost if the mortgage lists items other than debtor's principal residence. Generally, mortgages which take a security interest in property other than the residence (like a mortgage on investment property) are not protected from modification under the bankruptcy code. Sections 506 and 1322(b)(2) of the bankruptcy code entitle a lender with a mortgage on a principal residence of a debtor (also known as a secured lien) to full payment under of the money owed to them. However, the courts have held that to be protected by these sections, the mortgage may only grant an interest in the residence itself. No other interests can be listed, including those that are normally found in a form mortgage documents, such as rents, profits, equipment, furniture, etc.

The majority of bankruptcy and federal courts have agreed on this issue, including the Third Circuit courts, the Circuit Pittsburgh is part of. They agree that only the debtor's principal residence

can be listed in the mortgage. Anything else, including rents, profits, issues, easements, fixtures, appliances, and equipment, listed in the mortgage leave the mortgage vulnerable to modification by the debtor. From the language in most of the court decisions, it is obvious that there is no sympathy for the lender who includes these items in his mortgage, even if the rights listed in the mortgage are never enforced. It is up to the lender to know the law and not include such additional items in the mortgage.

If your mortgage contains security items other than the principal residence, the Bankruptcy Court will break your claim down into secured and unsecured portions. The court will normally hold a hearing to determine the value of the secured interest. The borrower will then be responsible to you for that portion of the debt which the court determines to be secured. However, it is not likely that you will get back any portion of the unsecured claim. This process will probably reduce the value of your mortgage by thousands dollars.

Unfortunately, the law appears clear on this subject. Listing any other security items in a mortgage on the borrower's principal residence makes the mortgage subject to modification by a borrower who files chapter 13 bankruptcy. Therefore, it is best to list only the borrower's principal residence in the mortgage.