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Community Associations Newsletter

The Foreclosure Traffic Jam: Issues with Delays in Lender Foreclosures

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Although we may be through the worst of the “mortgage meltdown,” we are still suffering from its numerous effects. Typically, an owner who cannot afford a mortgage will not pay community association assessments either, but will continue to reside in the property. To make matters worse, the foreclosure may have been prompted by the owner having lost his or her job, and will likely have depleted his or her savings. As a result, these cases make it very difficult for a community association to collect the past due assessments, and often results in the community association desperately waiting for the lender to foreclose to stop the balance from continuing to increase. Frustratingly, the foreclosure process can take a very long time to begin, can be delayed multiple times throughout the course of the process, and can take years to complete.

The Feds Get Involved

One of the immediate results of the foreclosure boom that occurred in 2006 and 2007 was that mortgage servicers (the companies that receive and process mortgage payments on behalf of lenders) were soon overwhelmed by the sheer number of loans in default. Mortgage servicing

companies were forced to retrain and re-commit their staff to handle these non-performing loans. To use an analogy all too familiar, the lender’s offices turned into I-95 at rush hour – all of the traffic was headed in one direction, without enough lanes to handle the volume. As a result, borrowers could not get payoffs, resolve issues or sometimes even make payments.

In an attempt to remedy the issues mortgage servicers were facing, the Federal Government moved to stabilize the housing market by “reducing” the number of foreclosures. To do this, the Federal Government created programs to incentivize lenders to refinance or modify existing loans, or allow owners who met certain criteria to sell their homes for less than the balance due on the loan (known as a “short sale”). The Home Affordable Modification Program (HAMP), Home Affordable Refinance Program (HARP) and the Troubled Asset Relief Program (TARP – commonly referred to as the “Bailout”) are three of the most prominent examples of such legislation.

Unfortunately, these incentives essentially closed another lane of traffic - placing additional hurdles in place that had to be cleared by the

already overwhelmed servicing companies. Instead of foreclosing, the lenders were now bogged down in trying to funnel non-performing loans into these new programs. In debating the effectiveness of these programs, many have pointed out that these programs only delayed foreclosure that eventually happened later and did little to actually save homes. The reality is simple – there are simply too many owners who live in “underwater” properties with mortgage payments they cannot afford.

Problems with the Paperwork

You have probably read numerous stories about the “robo-signing” scandal, where employees at major banks were signing affidavits in support of foreclosure actions without having reviewed the actual loan documents. As a result, it called into question the accuracy of the loan documents and made the foreclosure process susceptible to challenge. As a result of this, many of the national banks called periodic “foreclosure moratoriums” in order to assess the extent of the problem and attempt to resolve it. While there may not be any moratoriums currently in effect, we do believe that there are a number of loans that are not being foreclosed simply because the lender knows there are issues with the loan documents.

In addition to the robo-signing scandal, we have also seen numerous other legal problems related to the title of foreclosure properties. Because of the previously booming real estate market, there was an incredible volume of sales and refinances. The settlement companies quickly became overwhelmed, and as a result, a number of problems arose: prior deeds of trust went unreleased, loan documents and even deeds were not recorded. Then, lenders could not find the actual promissory note, or the loan had been assigned to another servicer who didn’t even

know they held the loan. Many of these problems went undiscovered until the lender tried to foreclose, and sometimes even not until after the foreclosure took place. As a result, the lenders now proceed very cautiously through the foreclosure process, and we suspect that they proceed at a crawl when they believe there may be problems with the title.

The Lawyers Get Involved

The number of consumer protection lawsuits has exploded in recent years, much of which is a direct result of the increase in foreclosures. Lawyers have been filing suits against lenders in order to halt the foreclosure process – sometimes just to buy their clients more time, but sometimes because there are significant problems with the title or how the process has been handled by the lender. Again, this has resulted in the lenders proceeding more slowly and cautiously in foreclosing their loans.

In addition to suing the lender, a number of owners simply file for bankruptcy to halt the foreclosure process. As you are probably aware, all legal action against the owner must halt when he or she files for bankruptcy. Although the lender can easily obtain permission from the bankruptcy court to resume a foreclosure while the bankruptcy is active, our experience is that the lenders do not always pursue that permission and the foreclosure process is significantly delayed. We have seen lenders hold off on foreclosures for as much as 18 months after the completion of the owner’s bankruptcy case.

If your community is experiencing issues with properties relating to a foreclosure delay on a property, please contact us so that we discuss your association’s particular concerns and steps that the association can take to reduce the effects of these foreclosure delays