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Condo associations fear effect of foreclosure moratorium

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Just as condo associations began to see their finances stabilizing, a slowdown in foreclosure cases is sparking fear that the situation could worsen again.

With lenders and servicers putting the brakes on foreclosures amid concerns over faulty documents used to seize homes, condo associations are worried that delinquent units will remain in limbo and that their financial recovery will take longer.



Stuart Zoberg
Photo by Melanie Ball

For nearly three years, associations have been complaining that financial institutions have delayed taking title to troubled units in order to avoid paying condo fees that accrue during the foreclosure process.

Now the associations may be facing a longer wait after Bank of America, GMAC, JPMorgan Chase and other lenders announced they were temporarily suspending foreclosure sales in order to review the validity of paper work filed with the courts.

It is not clear when the lenders will lift the moratorium.

"It is definitely detrimental to cash-strapped associations, and definitely frustrating to associations struggling to pay their bills every month," said Bill Worrall, corporate vice president of client relations and development with The Continental Group in Hollywood, one of South Florida's largest property management companies.

As the foreclosure crisis has deepened, sales of foreclosed units have helped condo associations rid themselves of delinquent owners and attract buyers able to pay the condo dues.

"[Back then,] it wasn't atypical for an association to have a 50 percent delinquency rate, but because of the associations' ability to foreclose and force banks to take back the units, we have seen an improvement in their cash flow," Worrall said.

Today, some of the healthiest condo associations have 10 percent delinquency rates. The hardest hit associations are struggling with 30 percent delinquency rates, he added.

Worrall now fears their income will be hurt if big lenders and mortgage servicers suspend foreclosures for any significant length of time.

Associations recover some of the overdue condo fees when a financial institution completes a foreclosure. Lenders are required to pay either 12 months of back maintenance fees or 1 percent of the defaulted mortgage, whichever is less. After the financial institution takes title to the unit, it is responsible for paying the monthly condo dues.

Slow Process

The temporary moratorium promises to hurt a large number of condos entangled in the already slow-moving foreclosure process.

The financial institutions also are loan servicers that oversee foreclosures for note owners like government-sponsored Fannie Mae and Freddie Mac.

The loan servicers say they may have filed invalid court documents to repossess homes and are reviewing their procedures before moving forward with the cases. They are still filing new foreclosure actions.

In Washington, lawmakers are increasingly pushing for a nationwide moratorium on foreclosure sales.

There Is Hope

Jed Frankel, an attorney with Eisinger Brown Lewis Frankel Chalet & Krut in Hollywood, said there are some legal strategies that may help condo associations pressure loan servicers that have put foreclosure cases on hold.

Every time an association is named in a foreclosure lawsuit as a defendant — as in most cases — the association has the right to request a trial date, even if the financial institution has managed to put the case on hold.

"Because the association is a party to the case, it has an absolute right, as any of the other parties named in the lawsuit, to notice a case for trial," Frankel said, adding the strategy is useful only when the unit owner is not opposing the foreclosure.

By seeking a trial date, the association forces the financial institution to appear before a circuit court judge. At that time, the note holder has two choices: take title to the property or voluntarily dismiss the case.

Both outcomes, he argued, can benefit the association. "By speeding it up, the associations get the wheels moving."

If the note holder takes control of the property, it must pay the condo dues. Otherwise, the association can foreclose on the financial institution.

"The key is to get a new owner in the unit that will pay the maintenance fees," Frankel said.

If the note holder decides to dismiss the case voluntarily, rather than go to trial, the association can foreclose on the homeowner without the risk of the note holder undercutting its effort by foreclosing on the property almost simultaneously. The note owner's foreclosure takes priority over the association's.

Once the association becomes the owner of the unit, it can negotiate a short sale, in which the sale price is lower than the mortgage owed, with the financial institution.

Associations are increasingly involved in short sales, said attorney I. Barry Blaxberg, with Blaxberg Grayson & Kukoff in Miami.

They often foreclose on units whose owners had been in negotiations with note holders for short sales. The associations then become the short sellers when they inherit the short sale deals, he said.

"The association is happy to negotiate the deal," Blaxberg said. After foreclosing on a unit, the association may decide to rent out the unit until the note holder is ready to foreclose on the property.

Some associations in South Florida, one of the areas in the nation worst hit by foreclosures, are already using the rental approach.

"It has worked out well in buildings where the leases are in demand," Blaxberg said, adding that the rental rates often are below the market rate because the tenant may be asked to move out on short notice. "Anything [associations] get is better than what they have without a tenant."

Taking Control

Some lawyers for condo associations are exploring a new way to generate income from vacant units stuck in foreclosure limbo.

Stuart Zoberg, senior attorney with Katzman Garfinkel & Berger in Fort Lauderdale, recently had circuit judges in Lee and Orange counties agree to grant his two condo association clients access to all the abandoned units in their community so they could rent them out. The units had been vacant, unfurnished and delinquent for at least six months, he said.

It doesn't matter if the associations have been seeking to foreclose on those units or not, Zoberg added.

Unless it is an emergency, associations usually can't enter an owner's unit. But times have changed.

"Extraordinary times call for extraordinary measures," Lee Circuit Judge Michael McHugh wrote in his ruling.

Zoberg said he plans to use this strategy to help South Florida clients deal with the temporary moratoriums.

In another strategy, condo associations are suing note holders for inaction.

Community association attorney Ben Solomon, with the Association Law Group in Miami, said three of his condo association clients sued the note holders after taking title to the units. His clients claimed the financial institutions had abandoned their interest in the units by failing to foreclose on the defaulted mortgages and claimed the debt "unreasonably restricting" the associations' right as the new owner to sell the condos, Solomon said. In two cases, the note holders didn't react to the suit so the association won by default. In a third case, the note holder gave up the debt voluntary.

"We deferred our legal fees until the association sells the unit so it doesn't cost the association anything," said Solomon, who said his clients' goal initially was to force the note holder to take action, rather than getting the debt wiped out.

Those units are often badly damaged and it makes no sense for the association to fix them to rent them, according to Solomon. Instead, they sell them for enough money to cover the delinquent condo dues and legal fees, he said.

"This strategy is for extreme circumstance," he said. "But it goes to show that there are more things that associations can do."

Solomon said the temporary moratorium may be the push some condo associations need to become more assertive.

"Foreclosures may stall even further and take even longer [now] — which means associations have to be even more aggressive than ever," he said.

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