

# Chicago Tribune

November 29, 2010

## Strapped associations can fight back

By Lew Sichelman

A legal tactic that forces lenders to either pay up or get out of communities governed by a homeowner association has been sanctioned by three courts in Florida.

And it couldn't come any sooner for the millions of associations struggling with the impact that non-dues-paying owners are having on their communities.

The strategy, which has national implications because it is not based on state law, has become necessary because financially strapped owners aren't the only ones who are failing to pay their fair share of the cost of running their communities. So are lenders, which either won't exercise their right to foreclose, so they can avoid paying dues and property taxes, or simply refuse to pay once they become the legal owner of distressed properties.

According to a study by the Alexandria, Va.-based Community Associations Institute, more than seven of every 10 bank-owned houses and apartments are not making regular assessment payments to the government-like boards that operate the projects in which the properties are located.

The inability to collect dues is placing a big financial strain on associations and the people who reside in the communities they operate.

Associations rely on dues to fund such services as utilities, trash

pickup, snow removal, landscaping and road and building maintenance. Assessments also fund a wide variety of amenities, like swimming pools and playgrounds.

When the association doesn't collect enough money to pay the bills, one of two things happen: Either the residents take up the slack or the association curtails services.

Nationally, some 62 million people live in an estimated 310,000 housing communities governed by homeowner, condominium or cooperative associations. And the associations institute, an organization dedicated to fostering the success of these mini-governments, says that more than half are having a tough time dealing with the effects of the economic downturn in general and the foreclosure crisis in particular.

In a September survey of 1,500 member association managers, more than half said their client associations don't have enough funds to carry out their responsibilities. Forty-five percent said their clients face "serious" problems, while 9 percent described the impact as "severe." The remainder said the issue was just a nuisance or non-existent.

In addition, a quarter of the association managers said more than 5 percent of their units are vacant, due either to foreclosures, the inability of absentee owners to sell or rent their properties, or owners

who simply walk away from their mortgages and their homes.

Moreover, assessment delinquency rates have more than doubled since 2005, the height of the housing market frenzy. Back then, 19 percent of associations had delinquency rates exceeding 5 percent. Now, 65 percent report late rates above 5 percent. Worse, 30 percent have delinquency rates exceeding 10 percent. And for one in 10, or nearly 30,000 associations nationwide, the rate is above 20 percent.

Though there aren't any state-by-state statistics, the problem is particularly acute in Florida, a state practically overrun by foreclosures. One in every 56 houses in the Sunshine State received a foreclosure filing in the third quarter, according to RealtyTrac. That's the third-highest foreclosure rate in the country, behind only Nevada and Arizona.

Enter the Association Law Group, a Miami Beach, Fla., firm that has come up with a strategy that associations can use against nonpaying lender-owners. The ploy, dubbed the "mortgage terminator" by partner Ben Solomon, won't solve all an association's money woes, but it will at least force a lender's hands.

In too many cases, lenders are failing to foreclose on troubled assets, no matter who owns them, whether a troubled borrower or a secondary lien holder. In many

# Chicago Tribune

cases, they are either waiting for the market to clear so they can sell the distressed assets at a better price or they don't want to pay the dues and/or assessments owners are required to pay.

Whatever the reason, lenders that drag their feet are leaving associations in the lurch. But with the mortgage terminator maneuver, said Solomon, associations can take the title to the property and then force the primary lien holder to initiate its own foreclosure proceeding or release its mortgage so the association can sell the unit to cover what it is owed.

Three times now, Florida courts have confirmed the tactic, which Solomon calls "a legal strategy that finally gives banks a legal ultimatum."

In the first case, Citibank agreed to release its mortgage on a Miami-Dade County property. And now, the strategy has worked

in adjacent Broward County, where final judgments have been entered against Wells Fargo and Deutsche banks.

In the Wells Fargo case, the Palm Aire Gardens Condominium Association had foreclosed on the property and taken title to it in late December. But even though its borrower had been dispossessed from ownership, Wells, the first lien holder, was not foreclosing on the property.

On behalf of the association, ALG sued the lender to force it to either initiate foreclosure proceedings or give up its ownership rights. And when Wells Fargo failed to act in defense of the suit, Judge Dale Ross entered a default final judgment in favor of Palm Aire.

Among other things, the judgment provides that the lender "is declared to have abandoned its mortgage and any claims it may have on the property" and that "it

has no estate, right, title or interest in the property."

ALG's mortgage terminator strategy is a "quiet title action" that requires a lender to prove it owns a property free and clear by foreclosing or give up its lien. And since there is little equity left in these distressed properties, it often makes more financial sense for banks to walk away than it does for them to take the title.

Solomon believes the tactic has widespread application, especially in states like Florida, where lenders are liable for at least a portion of past-due assessments and real estate taxes plus dues and taxes going forward.

"It may not work every time," the attorney says. "But at least it's certainly better than sitting there doing nothing. And if the association is successful, it helps stop the hemorrhaging."

