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## Condo associations saddled with unpaid dues demand that banks stop delaying foreclosures

By Benny L. Kass

Foreclose - or else. That's a new message being sent to banks by a lawyer representing condo associations in Florida. Increasingly, the associations are stuck in unpaid-dues limbo when banks delay foreclosure on a unit owner, not wanting to assume the liability for unpaid condo dues and taxes. And this lawyer's strategy could have implications for troubled loans throughout the housing market.

Condominium associations face serious financial problems when unit owners stop paying their condo fees. Association budgets are established on a yearly basis and are based on the assumption that a large percentage of owners will be current with their payments. But as more owners are facing financial problems of their own, they opt not only to stop paying their mortgage but also to skip their condo fees.

When this happens, a condominium generally has a couple of alternative enforcement mechanisms. It can file a lien against the unit, it can demand the balance of the yearly assessment and file suit against the owner, or it can foreclose on the unit.

The first two options might not generate any money for the association. Filing a lien will only assure that if and when the unit is sold,

the association will be paid. But in today's market, if the unit is under water, (with the value less than the mortgage amount) there could be no equity in the property to allow the association to be paid.

A court judgment is often meaningless if the debtor does not have any money. There is no cash register at the back of the courthouse.

And if an association forecloses, that action does not eliminate any first mortgages that exist against the property. So the association will often end up owning the unit, since no one else wants to buy it and have to pay off the existing large mortgage.

So, a game of "who will blink first" is played. The mortgage lender does not want to foreclose because it might end up owning the unit - thereby having to pay condo fees, real estate taxes and insurance. And the condo is in the same position.

However, recent developments in Florida may be the solution to this dilemma. It is called "mortgage termination" or "reverse foreclosure."

Ben Solomon is a lawyer with the Association Law Group, and practices community association law in Florida. Through his firm's efforts, his association client fore-

closed on Otaime Paez, an owner who was delinquent on her condominium fees. Solomon then filed a lawsuit against Citibank, the lender who held the first mortgage on the Paez unit. The lawsuit basically told the bank "foreclose on the unit or abandon the mortgage."



Ben Solomon, Esq.  
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Solomon's lawsuit pointed out that the existence of the Citibank's mortgage was a restraint on alienation. In legal terms, alienation means the ability to sell or otherwise dispose of property, and restraint on alienation is a concept

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deeply ingrained in our legal system. This means that if a property cannot be sold because of some impediment, and there is no time limit on when the impediment will be removed, a court may determine that the impediment is an unreasonable restraint on the ability of the property owner to sell.

According to the Solomon complaint, since the mortgage exceeded the fair market value of the property, there were no bidders when the condo association foreclosed. Furthermore, according to the complaint filed in court, “no buyer will purchase the property from the Association with an outstanding first mortgage” held by Citibank. This, Solomon told the court, is unreasonable. “Florida courts have consistently held that the rule disfavoring unreasonable restraints on alienation is based on the principle that the free alienability of property promotes economic and commercial development.”

This, of course, raises a more basic issue involving our foreclosure crisis. Unlike the situation with condominiums, banks are often quick to foreclose on single family homes, but take a very long

time approving short sales. These delays often force potential home buyers to walk away from their purchase and cancel their real estate contract. Is this yet another example of a “restraint on alienation,” thereby impeding—rather than promoting—economic and commercial development?

Solomon and his law firm presented two alternatives to the court. First, they asked to court to remove Citibank’s mortgage from the records. Alternatively, they asked the court to force Citibank to foreclose, and in fact the association agreed to waive any and all defenses that could normally be raised against that foreclosure action.

Citi capitulated. It released its mortgage, which allowed the condo association to sell the property for whatever price it could get on the open market. Once a new buyer took title, that new owner would be responsible for paying condo fees and real estate taxes, instead of the association.

Solomon also filed a similar action against HSBC bank on behalf of another association client.

On Jan. 12, a judge in the

Eleventh Judicial Circuit of Florida, which covers Miami-Dade County, ordered that title to a condominium unit be turned over to the bank. In effect, this shortcut the foreclosure process, and the bank did not have to comply with the procedural steps normally required under Florida law.

Why is this significant? In the District of Columbia, if a lender forecloses, it has to pay the condominium association up to six months of condo fees that went unpaid before the foreclosure. But if the unit owner has not paid fees for more than six months, the condo will lose a significant amount of money. In Maryland and Virginia, lenders do not have to pay the association any unpaid condo fees.

Accordingly, the Solomon approach forces a lender to “put up or shut up.” Start the foreclosure now, or lose your mortgage. “Although this particular legal strategy is for extreme cases,” Solomon said, “it demonstrates there is more associations can be doing to collect past-due maintenance assessments from owners and lenders. Associations need to be more aggressive than ever during these difficult economic times, even when traditional collections methods have failed.”

This approach worked successfully in Florida, a state plagued with an unbelievable number of condominium foreclosures. If you are on the board of directors of your association, you should confer with your legal counsel to determine its validity in the Washington metropolitan area.

