



FORECLOSURE RISK MANAGEMENT FOR HOMEOWNER ASSOCIATIONS

by Marc D. Markel, esq.

There is no general rule of law regarding foreclosure that can be applied across jurisdictions. As a consequence, the requirements may vary from jurisdiction to jurisdiction. Consideration of some of the simple due diligence practices described below may save Associations later headaches and lead to greater satisfaction of the debt without the need for conclusion of the foreclosure process.

When a foreclosure sale is challenged, actual notice as opposed to constructive notice will aid an Association in proving proper compliance with the statutory notice requirements. One simple measure is to make certain that the owners are receiving the mail. Sending required notices certified mail return receipt requested as opposed to regular mail can help confirm that the mail is being received. It is important to carefully verify addresses so as not to inadvertently disclose a debt to a third party and violate any local or federal debt collection laws. When proper notice is provided be sure that the proper number of days notice as required by law is met. It is best to be conservative in your method of counting, not counting the day of mailing or day of receipt.

Obtaining a report from a title company will not only give an Association information regarding encumbrances on the property, but will also provide information on other factors important to foreclosure evaluation. It is important to obtain a title report or pre-foreclosure report in order to evaluate the property. A comprehensive report will cover the status of ad valorem taxes, tax suits or sales, mechanics liens, federal tax liens, franchise tax liens, foreclosure postings of prior liens, junior liens, abstracts of judgments, notices of bankruptcy, receiverships, probate and divorce proceedings among other things. A homeowner whose property is foreclosed who has equity in their property will not likely walk away from their property without a fight. In most jurisdictions, for a charge of \$75.00 to \$150.00 many title companies will issue a pre-foreclosure report which will detail the existing liens and encumbrances on the property. One can tell from these documents whether there is significant equity in the property. The title documents received in a pre-foreclosure report like a deed of trust will contain the amount of debt that was originally borrowed and the date of the documentation. Taxing authorities will generally have assigned a taxable value of the property that can be obtained through the internet for most counties. By looking at the title documents, the date of purchase and at least, the tax value of the property, some indication of the amount of equity can be obtained to determine the benefit vs. risk analysis.

If there is significant equity in the property, the risk of suit post foreclosure is greater as the homeowner will sue everyone involved when they realize how much of their wealth they have allowed to slip away, even if the foreclosure was performed flawlessly. Equity in the property will also draw third party purchaser interest who will also sue everyone involved in an effort to retain their perceived "profit" in their foreclosure purchase if a

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foreclosure sale is later set aside. Evaluation of the amount of taxes that the Association may be responsible for should be considered. The Association should understand the effect of its foreclosure on existing liens. In some states the senior lienholder must be paid with the proceeds from an Association foreclosure. Federal Internal Revenue Service ("I.R.S.") tax liens require notice to the I.R.S. of certain foreclosure information at least twenty-five (25) days prior to the foreclosure sale date. While this notice will not extinguish an I.R.S. lien, it gives the I.R.S. a right of redemption for 120 days following foreclosure sale. If proper notice has been given and the I.R.S. fails to redeem, the foreclosure purchaser takes property free of the I.R.S. lien.

Additionally, it is important to identify any divorce proceedings, or the appointment of a receiver. A receivership proceeding should be carefully examined by the Association's legal counsel as it may profoundly affect the ownership interest the Association is seeking to foreclose.

A clear distinction should be made as to which charges constitute the lien pursuant to the Association's governing documents, versus other fees or charges that may be added to a homeowner's assessment account. Depending upon the jurisdiction and the governing documents, late charges, interest, or attorneys fees may not be secured by the assessment lien. We are reminded that when commencing the foreclosure process we must first, determine which amounts are lienable pursuant to the governing documents; and second, make a distinction in our demands between liened versus non-liened charges.

In Association foreclosures, when the amount being collected pales in comparison to the value of the property it is always better to act slowly and double check all actions.

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