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A Lawyer's Perspective

Resolving the foreclosure conundrum

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I'm sure that you have already heard the joke about the airline pilot's announcement: "I've got good news and bad news. First the bad news: we're lost. Now the good news: we're making really good time." That's the current state of the foreclosure crisis, but it doesn't have to be that way.

Last week holders of mortgage-backed securities originated by the Bank of America's Countrywide subsidiary announced they may sue BOA over its agreement with a working group of state attorneys general. Yes, that's the agreement that we discussed a couple of weeks ago. The asset holders assert that the servicing agreement doesn't give BOA the right to modify their mortgage assets. This is a dramatic example of the critical role of servicing agreements in the mortgage funding process, as we discussed last week.

As last week's article was going to press, Bill Malamut, president of Atlantic Coast Mortgage, sent me an e-mail announcing that HUD had revised its mortgage modification program the day before. HUD did this because, as Bill had told me, the prior incarnation of the program did not satisfy the interests of the holders of the mortgage assets.

Several weeks ago, I pointed out that rubber-stamp appraisals were a major element in many of the mortgages now in foreclosure. Industry organizations have recently attempted to develop methodologies designed to avoid future problems. However, review of the Appraisal Institute's web site indicates that there are presently too many appraisal-revision proposals, at odds with one another, floating around Washington. There is no coherent "post-foreclosure conundrum" appraisal policy.

As a grunt in the trenches, please allow me to illustrate a solution by describing a process in which I participated during my last tour at HUD. A politically-appointed Deputy Assistant Housing Secretary had been barraged by calls from Capitol Hill regarding a particular program. He went to a capable career person and told her to fix the problem.

The go-to woman then hand-picked a HUD staff team from across the country, yours truly included, and convened a HUD-industry work group. When she faced bureaucratic fire, the Deputy Assistant Secretary provided cover. We HUD grunts created a draft, the industry folks beta-tested the product and within months (warp-time in DC) the new product was rolled out. That product met the needs of all involved in 2000 and is still going great guns, over eight years later.

So, why not do the same thing now with the mortgage foreclosure conundrum? Even though high-level Bush Administration appointees overseeing the remnants of Freddie and Fannie and the Bailout fund agreed this month on general mortgage modification guidelines, lower level appointees who will implement that policy are busy looking for a new job. Face it, high-octane political juice is the only thing that resolves the too-disparate interests of the parties to the foreclosure conundrum. Whatever juice the now-lame-duck Bush Administration ever had on this issue, it is now gone.

Watch how fast things would fall into place if President Elect Obama announced that, on Jan. 22, 2009, he will convene a meeting of the largest mortgage lenders and industry organizations in the Oval Office. He could say that he will ask those assembled to hold off on foreclosures for 90 days, to allow him time to come up with a solution that met the interests of all involved. And, that he will establish a major-league foreclosure interagency work group, with Vice President Biden as its Chairman and with the lenders actively participating in creating a workable solution for all concerned. He would tell the lenders that on April 21, 2009, he will meet with them once again in the Oval Office to announce the solution that the work group has created, with their generous help, for which they will be due the thanks of a grateful nation.

But why wait? State, county and large city governments should create working groups now to act as information conduits, and as the impetus, for such a forthcoming federal effort.

Government-industry work groups should include lenders, asset-holder representatives, capital and Main Street market experts, Realtors, appraisers, borrower advocates, legislators, executive branch officials and other stakeholders. The decision-makers in this array would make the decisions; the grunts, at all levels, would create the program details.

The alternative was framed by Keith Bonchi, of Goldenberg, Mackler, Sayegh, Mintz, Pfeffer, Bonchi & Gill, P.A. of Northfield and Atlantic City. He has represented lenders in foreclosure proceedings in Chancery Court and understands the issue and players.

As was suggested in the recent Press article on foreclosure, Keith agrees that almost all of the South Jersey borrowers facing foreclosure are in foreclosure because there is no other option. He believes most lenders are trying to do something to help borrowers, because the lenders really don't want to take the property back in the current market. Keith pointed out that there's just not much else that anyone can do right now.

Even though the foreclosure issue is square one in getting the nation back to economic stability, a solution will not take place before Jan. 21. The foreclosure conundrum will be resolved only when the legal and financial issues that transcend state, and even international boundaries, are addressed at the national level by the new president. State, county and city work groups can start now so that, when he does, we will be making good time and be going in the right direction.

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