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Cover Your Bases



It's important, Marc H. Schneider, a partner at Schneider Mitola, says, to make sure the attorney handling an association's foreclosure is very familiar with the process "and not just pushing the thing through, but paying attention to the fine details so you can avail yourself of every possible opportunity to recover your funds."

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They call it foreclosure, but for condo associations, it's more like "threeclosure" - you're third in line to receive money from the sale of an apartment, after the mortgage and property taxes are paid. This often makes a board reticent about foreclosing on a unit in severe arrears, since it costs money to take legal action. If you'll never recoup unpaid common charges, let alone attorney fees, you might well wonder, why spend more?

But veteran real estate attorney Marc H. Schneider, a partner at Schneider Mitola, argues that "it is too expensive to do nothing." First, a condo association loses income every month while waiting for the bank to foreclose and get common charges and assessments flowing again. But less obviously and more importantly, condo associations have legal advantages over a lender that open up two significant options for not only stanching the loss of income from the unit, but even for recouping arrears and collecting late fees and legal costs.

How? By taking advantage of the fact that condo associations and homeowner associations can foreclose on units much more quickly than a lender can.

"Foreclosure actions for banks [and other mortgage lenders] take longer than they do for condominium associations," says Schneider, because lenders have many more legal and regulatory requirements to fulfill. There are notice requirements, mandatory foreclosure-settlement conferences, and other regulations that apply to lenders but not to condo associations. Likewise, there are defenses a homeowner can raise that don't apply to you.

For all these reasons, condo-association foreclosures can get to the finish line first. Now what?

First, contrary to popular belief, community associations probably don't have to worry about paying off property taxes since the bank likely will have been keeping them current, says Schneider. "Tax arrears are more the exception than not."

At this point, you can rent out the apartment almost certainly for far more than the common charges and any assessments would have been. Or - and here's the fun part - you can make a deal with the mortgage lender.

"We had a scenario where we were far ahead of the bank on a unit that was substantially underwater, [meaning] where the bank was owed substantially more than the value of the property. The association had foreclosed on the unit and was now the owner. We went to the bank and said, 'We can get a buyer for this property, but not if we have to pay you the balance of the remaining mortgage, since you're owed too much money [for us to pay]. You have a number of years left before you finish your foreclosure action, and you likely won't make enough money from the foreclosure to pay off the full amount of the loan. Wouldn't you be better off if we got a buyer now, [even if the buyer] paid less than you're owed?'"

As Schneider explains: "Let's say the condo is worth \$500,000 and the bank is owed \$700,000. You can't sell the condo for \$700,000, so you find a buyer for \$500,000 and tell the bank, 'We're owed \$40,000. You take \$460,000, since you're never going to get the full \$700,000 anyway.'" If the bank says no, "the condo association can say, 'OK, we'll rent it out. See you in three years.'"

An experienced attorney will also advise on whether to even go through with it, Schneider continues, based on "the estimated value of the property, the principal amount due, whether there's been a bankruptcy, if there are other liens out there, and at what stage the bank foreclosure is: If it's just at the summons-and-complaint stage, you have a significant amount of time. If the bank has made its motion for a judgment of foreclosure and sale, which is the end stage, then obviously a significantly less amount of time is available."

- Frank Lovace