

DAILY BUSINESS REVIEW

MIAMI

LAW ■ REAL ESTATE ■ FINANCE

\$2.00

MONDAY, OCTOBER 6, 2008

DailyBusinessReview.com

VOL. 83, NO 81 An incisivemedia publication

MONDAY, OCTOBER 6, 2008 • DAILY BUSINESS REVIEW • A5

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THE MONDAY PAGE

Commentary from the editors and guests

SOS condo associations: Who has the life preserver?

by Diana L. Fitzgerald

The mortgage industry meltdown has dramatically impacted financial giants, such as Fannie Mae, Freddie Mac and AIG, as well as millions of homeowners who confront sharp declines in home values, enormous losses in equity and foreclosures in unprecedented numbers. In response to the widespread suffering, the federal government is offering billions of taxpayer dollars to bail out these financial giants and provide relief for homeowners facing foreclosure.

Largely overlooked by governmental authorities in this unfolding saga, however, is the growing crisis for condominium associations, many of which are on the brink of financial disaster without the prospect of any government relief or reform. While federal and state governments neglect to sound the alarm for condominium associations, Florida's Legislature has effectively fueled the fire by essentially sabotaging the associations' ability to recoup unpaid assessments in foreclosures and short sales through a statutory provision known as the "lender cap"

The problem is particularly acute in South Florida, a leading locale of condominium living. It could translate into catastrophic consequences for thousands of homeowners that will inevitably result in steep further devaluation of property values, higher fees and lost equity.

Associations struggling with the epidemic of unit owners defaulting on assessments have collection remedies. However, these essential tools are seriously impaired in the present climate of increasing foreclosures and short sales. Typically, a condominium unit purchaser is liable for all of the previous owner's unpaid assessments that are due up until the time of transfer of title. Undermining this eminently reasonable outcome, the Florida Legislature passed a law favoring and protecting first mortgage lenders that foreclose and become new

owners. The lender cap limits the liability of these lenders to the lesser of six months of the former owner's outstanding assessments or 1 percent of the original mortgage amount.

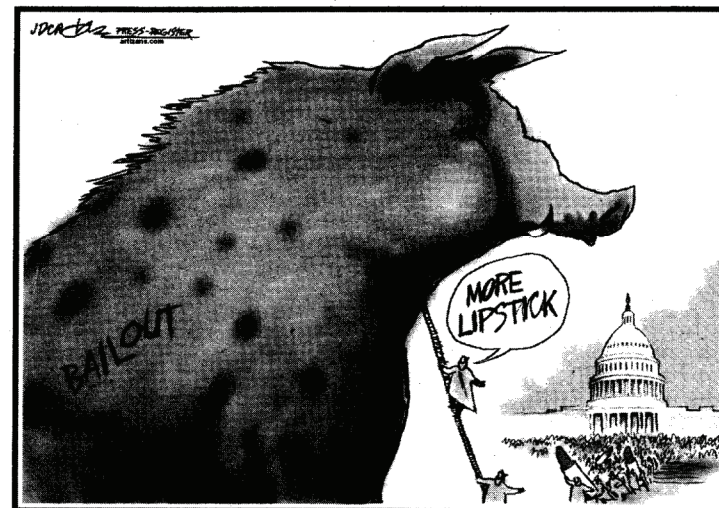
According to Valerie Crawford, executive business consultant to South Florida condominiums, "The lender cap is costing condominium associations millions of dollars at a time when they desperately need every cent to make it through this financial crisis."

Today's battered economy has tested and proven the lender cap to have devastating flaws. For instance, there are no time limitations as to when a first mortgagee must foreclose or as to the maximum longevity of a foreclosure action. Associations may go months far beyond the six-month limitation without getting paid assessments before the first mortgagee forecloses and imposes the lender cap.

Even more egregious, second and third position lenders are piggybacking this safe harbor by aggressively leveraging the system. In efforts to close on short sales, these parties demand associations take significant cuts on unpaid assessments. As leverage, they threaten the association with the Hobson's choice — comply with their demand or face foreclosure by the first mortgagee, thus invoking the lender cap. Associations are forced to accept the discounted assessments.

Stripped of these assessments, the association cannot provide the services residents expect from their communities ranging from basic functions including security, groundskeeping, building maintenance, waste management, cable television and even water to amenities such as pools and fitness facilities

Factors like the lender cap, which create severe financial burdens on associations, deepen the already formidable obstacles of revitalizing condominium sales. Judith Prado, a veteran real estate agent for Coldwell Banker in Miami indicates her clients are shying away from condo living because of the insecurities with



the associations. "Many would-be buyers are staying away because they fear the potential for unlimited and unpredictable assessments. In addition to high anxiety over future increases, buyers question whether associations can even maintain their current level of services. This chilling effect on sales makes it even harder to jump-start the condo market."

Despite the consequences of the current statutory scheme, intended or unintended, there is little indication the Florida Legislature will close the floodgates on its own initiative. As a result, today's crisis requires associations to change the way they traditionally operate by becoming more proactive and steadfast to ensure their continued existence.

First, many associations need to take an aggressive approach to collections because, in effect, they are up against the clock with the six-month limitation of the lender cap.

Second, if the unit owner has a tenant, the association should impose a rider to the lease agreement allowing the association the right to collect rental payments from the tenant should the unit owner default in paying assessments. This may avoid ever having to seek foreclo-

sure.

Third, in the event the association does not have rights against a tenant and the association is compelled to foreclose, the association should request a receiver or other court-appointed agent to collect the rent against unpaid assessments.

Fourth, even if the first mortgagee invokes the lender cap limits, the association has the right to seek a money judgment from the unit owner for the remaining balance. In most cases, delinquent owners often have large mortgages in comparison to their monthly assessments, which are affordable. Knowing there are consequences, owners may be deterred from walking away from their assessment responsibilities.

With no indication that Congress' billions in subsidies will reach associations and no reform of the lender cap in sight, associations must create their own life preservers to weather this economic storm that appears to have no end in sight. ■

Diana L. Fitzgerald is an attorney with the Miami law firm of Villanueva & Bajandas.