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FORECLOSURE

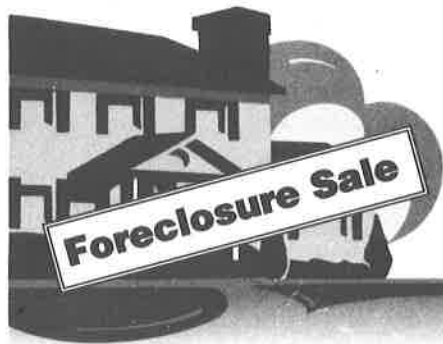
Beware Being Gracious To Borrowers

Lenders and Servicers Face Pitfalls in Loss Mitigation Efforts

BY BRUCE J. BERGMAN ©1999

Dealing with desperate (and wily) borrowers often has its pitfalls, but lenders understandably strive to do all that is possible to mitigate losses, even up to the moment of the foreclosure sale. But then, attorneys who prosecute foreclosures with regularity, probably have a jaundiced view of eleventh hour settlement overtures.

A borrower's zeal to save the property is understandable and usually sympathetic, but the paroxysms of assault on the foreclosure process by



desperate borrowers can quickly erode compassion. There may be limits to how many times counsel and their lender and servicer clients accept with equanimity orders to show cause averring no notices ever received and process service never made, multiple bankruptcy filings, complaints to governmental agencies, *ad nauseam*.

Dangers of amenability

Despite the attacks, and though they may be dismayed, lenders and servicers nevertheless usually remain amenable to settlement efforts. That such can present some danger, however, is underscored by this scenario in a recent New York case. Dime Sav. Bank of New York v. Zapala, A.D.2d, 680 N.Y.S.2d 665 (2d Dept. 1998). The

lender postponed foreclosure sales three times, in each instance to afford borrowers the chance to refinance.

Many will be familiar with such a scenario. As part of a contemplated fourth adjournment, a postponement agreement was sent to the borrowers. They didn't sign, so the sale was held. About a week after the sale, the borrowers obtained a new loan from another lender and sent the proceeds to the lender bank which just held the sale. The bank rejected the check and the now chagrined borrowers moved to vacate the sale.

Well, the lower court granted the motion on condition that the foreclosed mortgage be satisfied and that the sale purchasers be reimbursed. This was reversed on appeal, however, because the mistake was not on the part of the foreclosing lender, but was rather a miscommunication between the borrower and the rescue financier.

While the good guy (the foreclosing lender) ultimately won, it was at the cost of much delay and expense as a reward for its kindness. Might the cynical point to this be, invoking the old saw, "no good deed goes unpunished"? **SM**



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