

Consider Filing Suit On The Note

Although a foreclosure action usually gets the rapt attention of borrowers, there are times when lenders are better served taking a different tack.

BY BRUCE J. BERGMAN

When a loan is hopelessly in default, the prevailing wisdom is that the lender or servicer must begin a mortgage foreclosure action. Yes, of course, there is the alternative of loss mitigation.

But assume that, for whatever reasons, the case is just not right for a loan modification, forbearance agreement or deed in lieu of foreclosure. Then, foreclosure is the almost inevitable path, and mindful that the borrower stands ultimately to lose his property, the action is a mighty potent weapon.

Foreclosure is the method

Then, too - loss mitigation aside - servicers are trained to understand and pursue collection via mortgage foreclosure. This tends to be easier in the nonjudicial deed of trust states

and harder - often much harder - in states that use judicial foreclosure. But foreclosure is the methodology.

Still further, staff is set up and allocated for this process. Of course, the computer software is likewise keyed to this approach. That is the way it is, and most of the time that is the very best way to proceed.

That said, there nonetheless exists the oft-forgotten suit on the note to consider. Highlighting that sometimes helpful alternative is the purpose here.

First, it is obvious that most often foreclosure is indeed the strongest approach. On occasion, though, foreclosure is either unavailable or otherwise a less efficient method.

In a nutshell, here are the circumstances that may make suing on the monetary obligation a good idea:

■ Where some fraud results in a

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closing of other access points to the interior dramatically reduces the likelihood that vandals, drug dealers, gangs and others can use the home illegally. In many metropolitan cities, preservation work can help protect the home from the city wrecking ball.

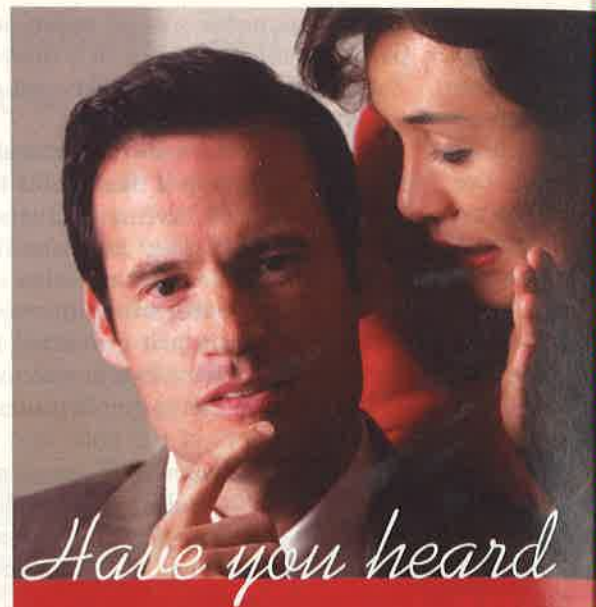
The charge for the demolition itself may outweigh the dollars that would have been spent to preserve the home.

Without a field service company to perform these property preservation tasks, the mortgage servicer is at the mercy of a more expensive city or local contractor. Most services would require specialized individ-

to hire lower-cost providers to perform these services, he would likely find that these contractors are not bonded or insured. By serving as a central source for inspections and preservation, field service providers help servicers remove the administrative and logistical burden of finding individual agents throughout the United States.

In addition, most nationwide field service providers have strict insurance requirements for contractors. Thus, field service companies remove this liability from the mortgage servicer by offering insured work.

The factors covered here must be considered when a mortgage servicer takes into account the dollars



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property worth much less than the sum due on the mortgage. Although perhaps frequently associated with subprime loans, phony appraisals or flip schemes can result in very little value in the property. Suit on the note could then be a better choice than foreclosure.

■ Yes, in most states a deficiency judgment would be available after the foreclosure, but if that foreclosure will yield little, there may not be enough value in spending the time to first go through it.

■ Where insurance has lapsed unbeknownst to the servicer followed by a fire loss (or other hazard). The improvements are gone, and the land has minimal value.

■ There are serious defenses to foreclosure - including title issues not covered by title insurance. Suit on the note might not suffer from the same defenses.

■ In a judicial foreclosure state, the borrower finds ways to interminably delay the foreclosure. Suit on the note could be faster.

■ A senior mortgagee has foreclosed. The property is now gone, so suit on the note is the only remedy available.

■ The taxing authority has taken the property for neglect to pay taxes, thereby extinguishing your mortgage. It can happen if an assignment to you was never recorded - so no one knew

to give you notice - or an errant employee buried the notice in a drawer. This is another instance where suit on the note is the *sole* remedy.

Of course, suit on the note ultimately has meaning only if those liable for the mortgage debt have assets that are reachable. If all they had was the house, there may not be any other assets. But before discarding the newfound enthusiasm just generated by this discussion, take a look at who may be liable for the mortgage obligation:

■ All signers of the note, and in many states, all signers of the mortgage as well. (Consult your counsel in each state.) While typically this means "the borrowers," there may have been some accommodation signers.

■ Guarantors. Some underwriting programs require guarantors as a condition of the loan.

■ Original mortgagors who sold the property but were not released from liability for the debt. Even if the new owners assumed the mortgage, that doesn't necessarily mean that the original obligors were *released* from liability. It depends on how the documents were written.

Also, there are scenarios in which those liable for the mortgage debt really do have available assets. For example:

■ The borrower was a speculator who bought a number of houses or condo units to either resell or rent. It didn't work out as planned, but he

has plenty of other assets.

■ The mortgage wasn't paid because the husband and wife borrowers were locked in a bitter matrimonial action. All their energy was devoted to battling each other instead of taking care of the mortgage, but each still has assets.

■ Similarly, business partners who bought some properties had an acrimonious falling out. They could not agree about paying the mortgage, but they possess independent assets.

While certainly true that an action upon the debt will be an option in only a minor percentage of cases, it should be apparent for those special instances that it can be quite helpful - even indispensable. In any event, it is meaningful to be aware of the availability of the choice. **SM**



Bruce J. Bergman, author of the three-volume treatise "Bergman on New York Mortgage Foreclosures," Matthew Bender & Co. Inc. (revised, 2001), is a partner with

Certilman Balin Adler & Hyman in East Meadow, N.Y., and an adjunct associate professor of real estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course. He is also a member of the USFN, the American College of Real Estate Lawyers and on the faculty of the Mortgage Bankers Association of America School of Mortgage Banking.

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