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Laws That Fail to Protect Homeowners Add to Foreclosure Crisis

By Benny L. Kass
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When the national numbers from 2008 are tallied, they're expected to show that more than 3,700 foreclosures took place every business day.

And that was last year.

What's worrying policymakers -- and homeowners -- is that the situation could get even worse. For those who get caught up in the foreclosure wave, "antiquated state laws in some ways afford fewer protections to homeowners than to renters," concludes a report issued Thursday by the National Consumer Law Center, an advocacy group based in Boston.

What is a foreclosure, and how does it work? When you buy your house in the Washington area, you sign a promissory note and a deed of trust. The note is a legal IOU. If you do not comply with the terms and conditions of the note, your lender can sue you.

But litigation is time-consuming, expensive and always uncertain. Thus, the lender also requires that you sign a deed of trust. This is a lengthy document that is recorded among the land records where your property is.

I doubt that most homeowners have ever read this document. If they did, they would learn that by signing it, they conveyed their property -- in trust -- to a trustee or trustees selected by the bank. They would also learn that they have provided the trustees the "power to sell" the property in the event of a default.

A default can be non-payment of money. But there are other kinds of default, such as failure to pay the real estate tax, failure to maintain adequate insurance and, in some cases, even the failure to properly maintain the house.

When the homeowner is in default, there are two ways that the lender can foreclose: judicially -- go to court and ask a judge for authority -- or non-judicially -- don't go to court. From my experience, almost all foreclosures in the D.C. area are non-judicial.

This means that the lender and its attorneys follow the minimal legal requirements in the jurisdiction, and the foreclosure takes place either at an auctioneer's office, on the courthouse steps or in front of the property. These are "trustee sales."

There is a basic concept of due process built into the American legal system. Generally, before your property can be taken away, you have the right to be informed of the pending procedure, and the right to go to court to challenge it.

If you owe money to a credit card company, for example, that company must file a suit against you and get a legal judgment before it can take any collection action. If a local government wants to sell your property at a tax sale because you failed to pay your real estate taxes, you must be provided with notice of the tax sale. You also have the right to redeem your delinquency and save your house -- both before the sale and even for several months thereafter.

In a foreclosure, however, due process often receives only lip service. According to the Consumer Law Center report, which surveyed foreclosure laws in all 50 states, "in 35 states and the District of Columbia, there is no requirement that homeowners be personally served with a foreclosure notice or legal documents that start a court foreclosure case."

Virginia is one of those 35. In Maryland, however, the law now requires that mortgage holders serve the notice of a non-judicial sale personally on the homeowner.

In the District, while notice is required, it has only to be delivered by certified mail, return receipt requested, at the last known address of the property owner. While such notice complies with the legal requirements, it is a known fact that it often does not actually reach the homeowner.

The Consumer Law Center report covers many aspects of the foreclosure process. Among them:

-- *Right to cure.* When a lender is about to institute foreclosure or has started the process, what rights does the homeowner have to cure the default? According to the report, Virginia law does not assist the homeowner in any way. In the District, homeowners have up to five days before to the sale to bring themselves current; however, this right cannot be exercised more than once every two years. In Maryland, the homeowner has the right to reinstate the loan up to one day before the sale.

Even though these seem like some element of protection for the homeowner, in reality they are not. D.C. homeowners, for example, are often not able to find out the exact amount needed to reinstate, because the lender's attorney does not always have accurate information. Additionally, D.C. law permits the lender to require that homeowners pay -- in addition to the delinquent payments -- such expenses as "advertising fees, trustees fees, and reasonable attorney's fees." When a homeowner has trouble just making the monthly mortgage, these additional fees become prohibitive.

-- *Deficiency judgments.* This area adds insult to injury.

According to the Consumer Law Center: "The dream of homeownership ends in eviction, forced relocation, and the loss of the family's most significant investment. Yet this may not be the end of the hardships. Months or years later, after sustaining these losses, the former homeowners may encounter what seems like the ultimate cruelty. They discover that the mortgage holder is suing them to recover a substantial money judgment . . . to recover the difference between the price the home sold for at the foreclosure sale and the total debt that was due under the mortgage and note at the time of the foreclosure."

This is known as a deficiency judgment. While 45 states have enacted laws to limit or prohibit such actions, the District, Maryland and Virginia permit the lender to pursue a deficiency judgment.

The Consumer Law Center report, available at http://www.nclc.org, deserves reading by everyone, especially our elected legislators. Maryland in the past year has strengthened some of the consumer protections in the foreclosure law. In the District, the Council held hearings last year on a bill called the Fairness in Foreclosure Act. However, it died in committee and has not been introduced again this year. And Virginia remains a lender-oriented state.