WILES, BOYLE
BURKHOLDER & BRINGARDNER
Co., LPA
ATTORNEYS AT LAW

Courting Success.

Winter 2008

A quarterly publication of Wiles, Boyle, Burkholder & Bringardner, Attorneys at Law.

Located in the Arena District

300 Spruce Street
Columbus, Ohio
43215

614-221-5216
wileslaw.com

Litigation
Insurance Defense
Business
Real Estate
Estate Planning & Probate
Debtor-Creditor Law
Bankruptcy-Foreclosure
Restaurant & Hospitality
Trust Litigation & Tax
Lobbying
Municipal Law & Land Use

Topics this issue:

Mortgage Loan Crisis

Condominium Laws Present Challenges for Developers and Residents

Beware of Dog Owner Liability

Mortgage Loan Crisis

It's not just sub-prime loans – several factors have contributed to the increase in foreclosures

All everyone has heard about recently is the spike in delinquencies and defaults on sub-prime loans. True, the spike related to sub-prime loans is notably sharp, but delinquencies and defaults for alternative-A loans and to a lesser extent even for prime loans have increased as well. Can the current wave of foreclosures be tied to any one factor? No; however, three factors appear to have played a major role.

Loosened Underwriting Standards

As the housing and mortgage markets experienced substantial growth, the increased borrowing demand allowed existing mortgage lenders to expand their business and new lenders to enter the market. This eventually led to over capacity in the mortgage lending market as borrowing demand slowed.

When the market cooled, competition among lenders for the reduced pool of borrowers heated up. By 2003, many lenders – competing to grow their origination volumes – loosened their underwriting standards significantly.

Lenders lowered the minimum FICO[1] score required to qualify; raised allowable debt to income levels; expanded use of stated income or stated asset programs; provided loans to borrowers that have accumulated little or no borrower equity in the property; and provided loans for which payments would balloon over time (interest only and low initial fixed rate loans).

Borrowers who wouldn't have qualified for a loan to purchase a home a few years earlier qualified for one by 2006. Many prime lenders also stepped up originations of alternative – A loans (including loans with either reduced or no documentation).

Ultimately, the softer real estate markets and the weaker credit quality of the loans originated in 2006 were the main drivers of the increase and early payment default (EPD) levels. In addition, the limited borrow refinancing availability reduced the opportunities for cures and for loss-mitigated resolution of EPDs.

Wall Street

When the real estate boom began, investors wanted to get in on it and Wall Street had a vehicle that allowed them to do so. Investment firms purchased large volumes of ultra-risky second mortgages under subsidiaries and carved the mortgages into tranches, which is French for slices. The firms got more for the pieces than it would have for whole mortgages. Mortgages require maintenance. Securities are simpler to deal with and can be customized.

If an investor wanted a safe, relatively low-interest, short-term security they purchased an AAA-rated slice that got repaid quickly and was very unlikely to default. If an investor wanted a risky piece with a potentially very rich yield, an indefinite maturity and no credit rating at all, they purchased an X-rated tranche.

The idea behind these investments is that the interests rates tied to the loans provide a cushion to offset defaults by borrowers, as well as cover the collecting and handling costs. Securities losses are not shared equally by all investors. Losses first hit the lowest tranche and then work their way up.

Speculators

Several sunbelts states were magnets for real estate speculators during the home price boom. Borrowers were taking out typical 80% first mortgages and then taking out second mortgages with higher rate or adjusting rates and buying houses with essentially none of their own money at risk. If house prices rose they'd have a profit. If house prices fell and mortgage payments were missed they could walk away with nothing (or almost nothing out of pocket).

In Nevada, thirty-two percent (32%) of all prime mortgages were in default and twenty-four percent (24%) of sub-prime defaults were on non-owner occupied properties as of June 30, 2007. Numbers for Arizona were twenty-six percent (26%) prime and eighteen percent (18%) sub-prime. In California they were twenty-one percent (21%) and fifteen percent (15%) respectively.

In the rest of the nation, non-owners accounted for just thirteen percent (13%) of prime loan defaults and eleven percent (11%) of sub-prime.

Through the end of 2005, if debtors couldn't make payments they could sell or refinance. Once prices began stagnating or falling these options were no longer available and foreclosures began to rise.

By **Cris Phillips**

[1] FICO is a registered trademark of Fair Isaac Corporation and FICO scores measure a credit risk.

Wiles, Boyle, Burkholder & Bringardner, Attorneys at Law

DANIEL G. WILES
JAMES M. WILES
MARK J. SHERIFF
THOMAS E. BOYLE
MICHAEL L. CLOSE
RICHARD D. BRINGARDNER
DANIEL E. BRINGARDNER
STEVEN P. ELLIOTT
BRUCE H. BURKHOLDER
DALE D. COOK
MARY TEN EYCK TAYLOR
JAY B. EGGSPUEHLER
EUGENE L. HOLLINS
WILLIAM B. BENSON
SAMUEL M. PIPINO
C. WILLIAM KLAUSMAN
THOMAS L. HART
JAMES M. HUGHES
BRIAN M. ZETS
MARK C. MELKO
KERRY T. BOYLE
J. COREY COLOMBO
CHRISTOPHER G. PHILLIPS
LAUREN S. BRILL
NEIL C. SANDER
JENNIFER B. CASTO
ALICIA E. ZAMBELLI

WILES, BOYLE
BURKHOLDER &
BRINGARDNER
Co., LPA
ATTORNEYS AT LAW

Featured Attorneys

Thomas L. Hart

Tom recently joined the firm from Dominion Homes, Inc. where he has served as corporate officer and counsel. Prior to that he was executive director of the Building Industry Association of Central Ohio.

His areas of specialization include zoning, land development and entitlements; construction contracting; association law and management consulting; and government relations.

Brian M. Zets

Brian has joined the firm's municipal law and litigation practice groups and is providing counsel in a wide range of legal matters.

As a litigator he has tried more than a dozen jury trials to verdict, and presented oral arguments before the Sixth Circuit and Tenth District Courts of Appeals, as well as, the Ohio Supreme Court.

Alicia E. Zambelli

Alicia was an intern with us while studying law at Ohio State. She came on staff as an attorney when she was admitted to the Ohio bar this fall.

Her practice areas include litigation, real estate, construction, corporate and hospitality law.

Condominium Laws Present Challenges for Developers and Residents

Current market conditions, customer expectations, and changes in state condominium laws are all combining to provide a potentially difficult set of challenges for condominium developers, builders, association boards and resident unit owners.

Based on current market conditions, many condominium communities remain unfinished and partially sold. Budgets for these communities are also somewhat "frozen-in-time", with assumptions set during the higher absorption rate period that has slowed significantly.

Despite these conditions, the expectations of condominium purchasers relative to the amenities and appreciation remain at high levels. In many cases, condominium developers and boards, property managers and building owners are being challenged to meet these high expectations, without the support of current cash flow from ongoing, healthy sales.

At the same time, the changes in Ohio condominium law require condominium boards to monitor communities and adjust budgets more carefully based on ongoing needs. The new law also provides condominium owners more specific rights to pursue civil actions and even class actions against the developer in certain circumstances (ORC 5311.23).

In the face of these trends, there are practical steps to take to avoid legal action or other negative situations that can diminish the chance for sales and the image of the community. These include:

- **Follow your own rules** – One quick way to earn liability under the new condominium law is for a board or a developer to deviate from self-established instruments, bylaws, rules and documents that govern the condominium.
- **Keep excellent records** – This is a specific duty under ORC 5311.09. Remember, condominium records are subject to examination by owners and must be turned over to the resident board. The developer controlled board's records should include documenting all board decisions, votes, minutes, and budget approvals.
- **Keep records of management company interaction** – This should include contracts, maintenance protocols, collection efforts and payment histories. Management companies often transition from working with the developer to working with resident-led boards. Get the paperwork right from the start.
- **Document all maintenance and repair of common elements** – Many disputes arise after developer turnover about the maintenance performed during developer control. Boards should take pictures, keep invoices, and perform engineering studies to document efforts to maintain amenities, infrastructure and common elements. It is also critical to track the two-year warranty period for common elements, as required under the law, both before and after developer control.

The developer's, owner's or condo association board's best defensive strategies are to follow the law, stick to the rules and document your efforts to build and maintain the condominium in accordance with good construction practice. Residents, on the other hand, can utilize and cite these same rules to hold a developer accountable, as well as keep all parties focused on the best interest of the community as a whole. This in fact is the purpose of Ohio Condominium Law and the reason Ohio has adopted a Condominium statute.

By **Tom Hart**

Beware of Dog Owner Liability

A few years ago I represented an elderly lady whose dog bit a meter reader. My client was shocked to find out that she was potentially liable for the meter reader's injuries. By statute, Ohio dog owners are strictly liable for damages to person or property caused by their dogs except in a few limited situations – where the dog bites someone who,

1) was trespassing or committing some other criminal offense on the property of the owner

2) was committing a criminal offense against any person, or,

3) was teasing, tormenting or abusing the dog on the owner's property.

Strict liability attaches to keepers and harborers of dogs, too. A keeper is one who has physical charge or care of a dog. Kennel volunteers, veterinarians and even dog-sitters are examples of persons who can be considered keepers. A harborer is one who has possession and control of the premises where the dog lives and silently acquiesces to the dog's presence. Typically, landlords are not harborers of their tenants' dogs as long as the dogs are kept in areas that are controlled by the tenants. However, landlords can be harborers when dogs cause damage in common areas, e.g., at a playground at an apartment complex.

In addition to statutory liability, a dog owner or harborer can also be liable under the common law if his dog is vicious, he knew of his dog's viciousness and he was negligent in keeping the dog. Viciousness can be demonstrated by prior incidents involving the dog.

Given the foregoing, the obvious rule is dog owners need to ensure the protection of others and their property. If you have a dog with vicious tendencies or that has been involved in prior incidents, you need to take additional safety measures, including but not limited to, installing a fence, using a leash or chain, using a muzzle, posting a "Beware of dog" sign, consulting a dog trainer, obtaining insurance on the dog or even getting rid of the dog. If you are a landlord, at the time of leasing, you might want to request information regarding the dog's breed, training and past incidents. Thereafter, you should remain vigilant of the dog's actions and ensure that the owner maintains insurance on the dog.

By **Mark Melko**

Board of Editors

KERRY T. BOYLE .... *REAL ESTATE, BUSINESS*
MARK C. MELKO...................... *LITIGATION*
MARY TEN EYCK TAYLOR .... *ESTATE PLANNING, PROBATE, TRUST LITIGATION & TAX*
CHRISTOPHER G. PHILLIPS...... *BANKRUPTCY, DEBTOR-CREDITOR LAW*
J. COREY COLOMBO .... *MUNICIPAL LAW, LAND USE*

This newsletter is designed for general information only. The information presented should not be construed to be formal legal advice or the formation of a lawyer/client relationship.