Philip Narotzky - Lets close this deal! Thoughts on the state of the current real estate foreclosure situation

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Let's face it. The state of residential real estate foreclosures, whether in New York state or most other states in this great union, is a royal mess. Our newspapers, blogs and conversations are filled with the laments from real estate professionals, brokers, bankers, attorneys, title professionals and homeowners alike. Although each group may have its own particular complaints, essentially we all agree that we are stuck, bogged down in a morass of foreclosed properties, eviction proceedings, short sales, abandoned houses, displaced homeowners and ruined credit. The harder we work at extricating ourselves from this mess, the worse it gets.

"Let's close this deal" is the unofficial mantra in our profession. As with many other professions, real estate brokers and mortgage brokers alike get paid only when there is a successful closing. Title professionals, to which group I belong, rely on the closing to earn our keep as well. The pittance of charges which we bill if a pending deal fails to close hardly covers our search expenses and work charges, if and when we may collect them. Attorneys get paid at the closing, sellers receive their proceeds, mortgage loans are paid off, and new loans, with their associated fees and charges, are created if and when, and only when, a deal proceeds to a successful closing.

How we arrived at this point is currently the topic of hot debate and the subject of congressional "fact finding" missions, with the opinions, and resultant finger pointing, neatly aligned with each individuals predetermined political sentiments and ideological predisposition. No one is at fault, yet everyone is at fault all at the same time. Many profited, yet the losses to our society as a whole, when measured by lost property values and persistent unemployment, far exceed those bonuses and commissions which made some quite well off in the short term. One can only hope that our children will learn from our many mistakes and not repeat them.

After prolonged and intense lobbying by banks and financial institutions, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Some researchers credit this act with precipitating the housing crisis and the foreclosure mess, but I believe that this gives the act far too much credit. What it did, however, is to tilt the playing field away from the debtor and towards the lender, stripping away certain debtor protections and enhancing lender's ability to collect. As a result, it made it more expensive for debtors to access the Bankruptcy Courts, and more difficult for many borrowers to walk away from their debt.

In New York state, a series of state laws have since added layers of protection for individual homeowners, complicating the residential mortgage foreclosure process. HETPA, the 2006 Home Equity Theft Protection Act which went in effect February 2007, sought to protect homeowners from scammers who would target innocent homeowners, seeking to steal their homes, or their equity in those homes, via staged 'refinances.' It established a 2-year right of rescission for 'duped' homeowners, in addition to making the foreclosure process more complex and filled with procedural pitfalls.

As a result of the unfolding housing and foreclosure crisis, the New York State legislature passed a series supplemental laws affecting the foreclosure process, in the form of amendments to HETPA as well as amendments to other foreclosure statutes. New York state foreclosures now require special foreclosure notices on brightly colored paper, wait periods before the foreclosure process may proceed, mandatory settlement conferences and much more.

Not to be left out, New York's judges have further influenced the foreclosure process. In decision after decision, these judges have strictly applied procedural requirements, examined mortgage assignments for proper execution and timely delivery, and demanded the production of the original loan documents as a condition precedent for a lender to be allowed to continue its foreclosure.

At this time there are more than 200,000 homes in New York state either in severe default or already in the foreclosure process. At the current pace of foreclosures the New York Courts, it would take lenders 62 years to foreclose on, and reposess these homes. (New York Times, June 19, 2011) Other states have better statistics, but the trend lines are clear. Foreclosure is a time consuming, cumbersome, expensive and far from certain remedy. Even if grossly exaggerated, it is clear that the current system does not work, but merely contributes to market and transactional uncertainty. The resultant malaise is reflected in stagnant and sinking home values, while simultaneously disqualifying potential home purchasers by ruining their credit. It is time to re-think and re-engineer the process.

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