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More Mold Suits in West

BY JENNIFER HARMON

IRVINE, CA—Mold-related litigation is growing when it comes to dealing with new construction in the western area of the country, according to Stuart Wolfe, a partner with Wolfe & Wyman LLP here.

But mold is becoming a nationwide problem and many states such as California hold developers and contractors responsible for structural defects within the first 10 years of occupancy.

For the past six years, Wolfe & Wyman has defended those same trade workers in construction-defect lawsuits brought by homeowners who claim to have mold in their properties. Only recently have lenders become involved and concerned with the issue, said Mr. Wolfe, who represents mortgage bankers in many of these mold cases.

"Lenders didn't understand the problem. Now, some of our clients get us involved the minute they hear about mold. They might spend a little more, but the matter is probably resolved more quickly," he said.

"Other clients ignore it, pretend it doesn't exist. They only get involved when the borrower stops paying on the loan and has moved out of the property. Then, the lender is subpoenaed for the trial. Unless it comes to them, they bury their head in the sand. By then, it may be too late."

If a lender has a loan and the secured property has mold, the most important thing for a lender to consider is the likelihood the lien will be impaired, according to Mr. Wolfe.

Mr. Wolfe has talked to lenders on environmental property risks and servicing associated with mold. At a Mortgage Bankers Association conference, he went through a "best practices" analysis of what lenders should consider if a secured property has mold.

If a lender is pulled into a construction defect case, Mr. Wolfe suggests that the lender should commission its own investigative team to see if there are genuine defects to the property. Not all mold is unhealthy, he said, and in certain instances, it can be cleaned up and eliminated.

"With a problem like this, you want to aggressively go out there and have your people look at the problem and come back to you. If there is a real problem, figure out how expensive it will be to fix."

Next, the lender should take that information and review the loan contract carefully. The lender should note the deed of trust and study other factors, including the likelihood that the borrower will fix the

property and pay the remainder of the loan balance, Mr. Wolfe said.

"The point is, whenever a property is secured by a deed of trust to secure the loan, the lender needs to make a conscious decision as to how much they want to get involved. Under a standard mortgage loan agreement, the lender has the right to do whatever is necessary in order to protect its interests. Look at the present loan balance, the fair market value in the alleged defective condition, the remaining terms of the loan and the past payment history of the borrower"

If the mold allegations are curable, and the borrower has had the loan for 10 years and never missed a payment or been late on a payment, there is a good chance he or she will not want to leave the property and default on the loan, according to Mr. Wolfe.

In this case, the lender does not have to directly intervene in the lawsuit. All they need to do is "lightly monitor the case, remediate the mold and fix the property," he said.

If it's a brand new loan, and the home is "slipping on a hillside," and the borrower does not have a great record of paying on time, there is a higher likelihood that the lender will never see a dime of the money, Mr. Wolfe added.

If lien impairment is likely, the lender should heavily monitor the case or even force itself in as a defendant. "You want to make sure when the borrower settles the case, he or she takes the proceeds to reduce the loan or uses the money to improve the property."

The problem is those borrowers who fall somewhere in the middle, and if the alleged defect makes the property worth less than the payoff balance. "Then it's more of a close call, because you also run the risk of health problems," he said.

The economic reality to litigate these cases is a lot of trouble for consumers. Most want to see some money and not use every dime for reducing payments and fixing homes, according to Mr. Wolfe.

"Many of these mold cases are settled with borrowers. But by the time attorneys get contingency fees, there is often not enough money left over to do the necessary repairs," he said. "That is why lenders need to make a conscious decision of how much to get involved."

The overriding goal is for the lender to work with the borrower, concluded Mr. Wolfe. "Unless they are trying to rip you off, most borrowers want to work with you," he said. **Q**