



COVID-19 Restrictions and Borrower Defenses

*Tuesday, December 15, 2020
12:00 PM - 1:15 PM Central Time*

Presented By



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- Not having the physical note at trial or MSJ.
- Claims that the file should not proceed due to a “moratorium.”
- Courts not allowing for continuances.
- Additional affidavit requirements. Ie Broward/Pinellas
- Borrowers unable to leave after agreeing to a CFK.
- Objections by HOA/COA to files being continued if they are not under the current federal moratoriums.
- When there is a prior settlement and the servicer goes to cancel the sale, other parties may claim sanctions, even borrowers!

- Expect a rush to the courthouse when holds end.
 - Limited court resources
 - Defendants trying to further delay hearings
- Plan
 - Move forward on any loans that you can prior to proceeds.
 - Have a strategy for executing docs and providing information to firm.
 - Mediate or modify now not later.
- Prepare docs and strategy
 - We will need updated figures (payments made, changes to loan)
 - Execute discovery
 - Have live witnesses available to go to court where needed

Expect Defenses New and Unique to Post Covid Concerns

- HOAs being more aggressive to move foreclosures.
- Attacks on litigation that occurred during moratorium and method which hearings/trials/MSJs were heard.
- Discovery increased; looking at “government assistants to banks.”
- Desperate defenses; ie. FDCPA

As a result of Covid-19, we are anticipating more modifications.

- It is critical that these modifications are properly documented and recorded.
- If there is a default of the modification, notify the firm of the full history, and give to firm at referral so it can be included in the initial complaint.
- If payments are made, notify firm so they can update pleadings where needed.
- Be sure if you modify loan to dismiss any current proceedings.

Florida Judgment Interest Rates

Pursuant to Florida Statutes, Section 55.03(1), the Chief Financial Officer is required to set the rate of interest payable on judgments and decrees on December 1, March 1, June 1, and September 1 of each year for the following quarter. The new interest rate effective, October 1, 2020, 5.37%. The statutory interest has steadily declined in the past year.

Interest After Final Judgment

Under the doctrine of merger, when a valid and final judgment is rendered in favor of a Plaintiff, the original debt or cause of action upon which an adjudication is predicated merges into the final judgment. Accordingly, once final judgment has been entered in favor of the Plaintiff, the interest is calculated at the statutory rate.

- * This is utilized in two instances, **sale bid calculation** and **post-judgment payoff**.

Plaintiff's maximum bid at a foreclosure sale is:

Judgment amount + Interest (from date after judgment to date of sale) + any Costs.

- * For loans pending a foreclosure sale, especially in light of the Covid-19 pandemic moratorium, the interest amount is calculated based on the rate set forth by Florida Statute. The calculation is identified in Plaintiff's Sale Affidavit filed prior to the sale date.

If a defendant requests a post-judgment payoff, interest must be calculated and provided based on the statutory rate, rather than the rate of the contract.

For example, if the note had an interest rate of 8.0%, however, judgment was entered January 1, 2020, the interest from January 2, 2020 to the date of the payoff, must be calculated at the rate based on Florida Statute, which is lower than the contract rate.

- * Based on this, the post-judgment payoff interest will be lower than the contractual interest. It is imperative that the post-judgment interest rate set by statute be utilized in all instances.

- Covid Restrictions – Last executive order was signed on 12/3/20 was set to start 12/7/20 and set to finish on 1/7/21. There is a curfew from 9:00 pm to 5:00 am and a lockdown on Sundays.
- Defenses – If property to be foreclosed is the borrower's main residence, most cases need to go to compulsory mediation.
- Cases in which we need a CRIM (property taxes), are taking longer because appointments are backed up.
- Courts under phase 2, working with limited personnel. Execution of Sales Deed is by appointment only.
- Due to limited personnel every request takes longer. Judges are still working from home and going sporadically to court. From 12/21/20 to 1/8/21 court operations will be greatly reduced.
- Litigation – cases are being handled but at a very slow pace.



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Polling Question

Can you foreclose in New York State?

- A. Yes
- B. No
- C. Depends

Executive Orders and Their Implications

March 19, 2020 – Executive Order 106

- Governor Phil Murphy issued Executive Order 106, which immediately suspends eviction and foreclosure removals throughout the state. This is called an “eviction moratorium,” and it means that, except when a court determines that the interests of justice warrant eviction during the declared emergency, no homeowner may be removed from his or her home as a result of a foreclosure proceeding at this time. You cannot be removed even if a final judgment of foreclosure has been entered and a sheriff’s sale of your property has taken place.
- It will last until two months after Governor Murphy declares an end to the COVID-19 health crisis, unless the Governor issues another Executive Order to end it sooner.

Executive Orders and Their Implications

March 20, 2020 – Executive Order 202.8

- Governor Andrew Cuomo issued Order which included a 90-day moratorium on evictions for residential or commercial residential and commercial tenants, and foreclosures of any property. Meaning no one can be evicted in NYS until at least June 20, 2020.

May 7, 2020 – Executive Order 202.28

- Governor Cuomo issued Executive Order 202.28, which extended the moratorium until August 20, 2020 and prohibited the initiation of proceedings or enforcement of: A foreclosure of any **residential or commercial mortgage** for nonpayment of such mortgage where the property is owned or rented by someone that is eligible for unemployment insurance or other benefits under state or federal law, or facing financial hardship due to the COVID-19 pandemic.

June 30, 2020 – Tenant Safe Harbor Act

- Governor Cuomo signed the Tenant Safe Harbor Act, which only applies to residential tenants and residential mortgagors.

Executive Orders and Their Implications

July 6, 2020 – Executive Order 202.48

- This Order releases the prohibition of proceeding with a residential foreclosure as set forth in Executive Order 202.28. Executive Order 202.48 permits commencement and enforcement of Residential foreclosure matters as long as there is compliance with the requirements of Chapter 112, 126 and 127 of the Laws of 2020.

Highlights of Chapter 112

- Any qualified mortgager, residing in New York as a primary resident, who applied for loss mitigation or demonstrated hardship, is permitted to a forbearance of 180 days, with the option to extend an additional 180 days.
- Borrowers have numerous options to pay back the forbearance payments.

Adherence to Chapter 112 is a **condition precedent** to commencing a foreclosure action stemming from missed payments which would have otherwise been subject to this section. Accordingly, this has provided Defendants with an affirmative defense to a new foreclosure proceeding.

The above requirements do not apply to loans made, insured or securitized by any agency or instrumentality of the United States, any government sponsored enterprise, or a federal home loan bank.

Highlights of Chapter 126

- Chapter 126 provides that in the event a Lender cannot afford to approve a forbearance, the Lender must notify the department of finance within five (5) business days of making the determination.

ADMINISTRATIVE ORDERS

On July 24, Chief Administrative Judge Lawrence K. Marks released a memorandum lifting the stay on residential foreclosures and setting forth mandatory conferencing.

- The Court will initiate a status or settlement conference prior to any further proceedings in a foreclosure matter to address a “range of subjects related to the case and COVID-19 concerns.” After holding such a conference, the Court may address and any pending or future motion, and entertain other applications.

On October 22, a new Administrative Order was issued advising all foreclosure matters may resume statewide, with caveats.

Conferencing is required in all foreclosure matters (including where a judgment of foreclosure was granted or an auction was scheduled prior to March 17):

- (i) Conference Requirement for Vacant and Abandoned Property: No conference need be held in a foreclosure matter where the foreclosing lender submits an affirmation to the court averring that, following diligent inquiry, it knows the property at issue to be currently abandoned and vacant.
- (ii) Conference Requirement for In Rem Foreclosures: The conference requirement shall apply to in rem foreclosure proceedings only where the enforcing officer (e.g., the county attorney) deems such a conference to be in the public interest (likely to result in a settlement beneficial to all parties).

ADMINISTRATIVE ORDERS

Foreclosure auctions are to be conducted pursuant to the judicial district auction plans developed pursuant to AO/157/20, and must comply with the Court System's COVID-19 mitigation protocols: social distancing, wearing masks, and screening practices (including temperature checks) if conducted indoors. No auction may be conducted that does not comply with these protocols. Finally, foreclosure plans within the City of New York should provide for both indoor and outdoor auctions, as circumstances require.

Potential Issues

- How do New York's 62 Counties handle conferencing and sales. Some counties began conferencing in August and September and some counties have not begun conferencing.
- Some counties have provided memorandum regarding sales, while others have not addressed it.

Defenses

- Borrowers will allege they never received notice of conferencing.
- Borrowers will claim they were affected by Covid and should have been provided forbearance.
- Banking Law 9-x → This gives the defendant an affirmative defense if the bank did not offer them forbearance when they can show they were a qualified mortgagor. However, the borrower was to request forbearance.



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Ohio COVID-19 Restrictions

March 9 - Ohio Supreme Court Administrative Action

- Establishing temporary measures statewide
- Civil Procedure timelines tolled
- In-person requirements waived
- Eviction proceedings, scheduled move-outs, and foreclosure sales temporarily continued

NOTE: Court's action and guidance did not order or recommend the staying foreclosure filings and pending foreclosures.

However, we did see variances at the local level. Most notably foreclosure stays in counties such as **Cuyahoga, Lucas, Stark, and Adams.**

July 30 - Expiration of Administrative Action

- Statewide restrictions no longer in place
- Currently a few remaining counties with pending foreclosure stays
- These remaining stays have presented minimal disruption to continuing proceedings.

Ohio COVID-19 Restrictions

February - County by County Restrictions Arise

- Counties implemented local court restrictions & closures
- However, counties began to re-open as safety measures were established
- Cook County remained shut down even as other counties re-opened

March - Governor's Statewide Eviction Moratorium

- Order staying all eviction actions
- Moratorium has continued to be extended every 30 days
Parameters have been added protecting occupants with income less than \$99,000 individually or \$199,000 jointly

November - Cook County Re-Opens

- Cook County court re-opens under restrictions
Foreclosures filing, service & judgment can proceed
Sales and confirmation of sale is stayed
- However, borrowers with income less than \$99,000 individually or \$199,000 jointly are protected from foreclosure
- Vacant properties can proceed based on inspection report or compelling evidence provided to the Court

Ohio Borrower Defenses

- We have not yet seen Covid-19 specific borrower defenses.
- **Equity of Foreclosure:** The Court must decide if the equities weigh in favor of foreclosure regardless of the Plaintiff having proven the elements of foreclosure. This is the strongest borrower defense in Ohio and most likely to be associated with Covid. Hold tight for allegations regarding failed forbearances or improper activities related to post forbearance modifications, etc.
- **FHA Face to Face Requirements:** Failure of conditions precedent are still common, especially for alleged failures to meet the FHA Face to Face requirements.
- **Court Fatigue:** This is a growing issue in Ohio. Courts are becoming impatient with delays and extensions related to Covid holds. The Courts want to see cases proceeding within the timeframe contemplated by the Ohio Rules of Superintendence (i.e. 12 months for foreclosures). We are seeing cases getting dismissed due to protracted moratorium holds and expect to see more now that the federally backed moratorium is extended.

OHIO	1st Legal	Service	Judgment	Sale Held	Referral to Sale Held
Jan. - Mar. 2020 Timeline (days)	23	11	77	92	203
Sep.-Nov. 2020 Timeline (days)	44	25	185	171	417
Anticipated Timeline - 90 days Post Moratorium	16	28	180	180	404

Ohio Borrower Defenses

- We have not yet seen Covid-19 specific borrower defenses.
- **FHA Face to Face Requirements:** The FHA Face to Face defense remains prevalent in Illinois.
- **Common Delay Tactics:** Illinois Courts tend to be borrower friendly and entertain a variety of *common delay tactics such as...*
 - *Discovery requests* (typically no affirmative defenses)
 - *Motion practice* (it can be 2 to 5 months before motions are briefed and heard)
 - *Procedural errors* (i.e. forgetting courtesy copies)
 - *Emergency motions to stay sale* (usually a claim that there is a full debt buyer)

ILLINOIS	1st Legal	Service	Judgment	Sale Held	Referral to Sale Held
Jan. - Mar. 2020 Timeline (days)	12	10	109	111	242
Sep.-Nov. 2020 Timeline (days)	165	21	265	107	424
Anticipated Timeline - 90 days Post Moratorium	18	24	240	150	432

Notes: Cook Co. courts just opened back up in November. Since 50% of the referral volume is in this county, this will have a large impact on timeline growth now that many old files are starting to hit milestones.



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Virginia Covid-19 Implications - Expressed

- Federally-backed mortgage foreclosures and evictions on occupied properties (CARES Act) - on hold until January 31, 2021 (at least)
- Virginia only enacted a moratorium on evictions for renters, and the legislature declined to extend.
 - Must consider if a property is known to be a rental
- Virginia Rent and Mortgage Relief Program (RMRP) is designed to support and ensure housing stability across the Commonwealth during the coronavirus pandemic – homeowners can apply for funds, but there is no state moratorium on foreclosures or post-foreclosure evictions.

Virginia Covid-19 Implications – HB 340

Emergency laws; civil relief; citizens of the Commonwealth furloughed or otherwise not receiving wages or payments due to closure of the federal government or declaration of Emergency by the Governor:

Provides a ...30-day stay of foreclosure proceedings for homeowners and *owners who rent to a tenant...* [who] request [a] stay of foreclosure proceedings within 90 days of [being] affected by the novel coronavirus (COVID-19) pandemic public health crisis during the period for which the Governor has declared a state of emergency (the Emergency).

Same as the protection afforded during the Government shut down in 2019 – exists until 90 days after the Emergency ends. Does not apply to homeowners / renters who qualify for other (federal) relief.

Virginia Covid-19 Implications – Implied

- State shelter in place or stay at home orders.
- Delays in title (NOS implications)
- Ethical implications of keeping staff / attorneys moving btwn jurisdictions to call sales, when counties have differing positivity rates.

Polling Question

If a court is closed to the public and is only holding telephonic hearings, would your firm continue to hold in-person sales

- Yes
- No

Post – Crosby Implications:

- Virginia Supreme Court has imposed increasing duties as part of a substitute trustee's fiduciary duty to all parties to a foreclosure, including the borrower.
- Can we get the best price possible, if investors are not appearing at sales?
- Do we have a duty to confirm the borrower has somewhere else to live?
- Does a borrower's specific high risk characteristics matter?

Borrower Defenses:

- Right now, this is new. No one wants to be the test case.
- Consumer counsel will certainly argue that if a loan originated as federally-backed, even if it no longer is, that borrower has CARES Act Protections.
- If borrower reaches out, or if no one shows up to a sale for a property with equity in a normally “high traffic” area, consider stopping a sale or seeking post-sale approval from the Court.
- Talk with your attorneys and know the political (sorry) and judicial atmosphere in which the Property is located, and just be consistent.

Borrower Defenses:

- Important to note that Crosby goes back to trial in March, so this could provide further guidance from the judiciary.
- Once federally-backed mortgages go back to sale, make sure servicers know the modifications and exceptions to rules on Hud regs (Face-to-Face meetings, etc.)
- BWW recently (12/10/2020) had a favorable decision handed down from Virginia's Supreme Court that seems to have righted the trend toward requiring trustees to favor the debtor over the creditor.



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Review of the current Texas Supreme Court Orders still in effect.

- Texas Attorney General Ken Paxton's Informal Foreclosure Moratorium Guidance
- Specifics to how Eviction Suits are handled in light of COVID-19.
- How Courts are handling proceedings in light of COVID-19.

Texas Governor Greg Abbott's Executive Order GA-28

- On July 2, 2020, Governor Abbott amended the June 26, 2020 Executive Order to include the following:
 - “For any outdoor gathering in excess of 10 people, other than those set forth above in paragraph numbers 1, 2, or 4, the gathering is prohibited unless the mayor of the city in which the gathering is held, or the county judge in the case of a gathering in an unincorporated area, approves of the gathering, and such approval can be made subject to certain conditions or restrictions not inconsistent with this executive order.”
 - “...people shall not be in groups larger than 10 and shall maintain six feet of social distancing from those not in their group[.]”

- On August 1, 2020, Ryan Bangert, Deputy First Assistant Attorney General wrote to Senator Bryan Hughes regarding the foreclosure moratorium in Texas.
 - "... an outdoor foreclosure sale may not proceed with more than 10 persons in attendance unless approved by the mayor in whose jurisdiction the sale occurs, or if in an unincorporated area, the county judge. However, to the extent a sale is so limited, and willing bidders who wish to attend are not allowed to do so as a result, the sale should not proceed as it may not constitute a 'public sale' as required by the Texas Property Code."
 - "If a foreclosure sale is subject to, and not exempted from, the 10-person attendance limit imposed in Executive Order GA-28, it should not proceed if one or more willing bidders are unable to participate because of the attendance limit."

Emergency Order #25 – September 17, 2020

- In any action for eviction of residential property under Chapter 24 of the Texas Property Code and Rule 510 of the Texas Rules of Civil Procedure, a petition must state:
 - Whether or not the premises is a “covered dwelling” subject to Section 4024 of the CARES Act;
 - Whether or not the plaintiff is a “multifamily borrower” under forbearance subject to Section 4023 of the CARES Act;
 - Whether or not Plaintiff has provided Defendant(s) with 30 days’ notice to vacate under Sections 4024(c) and 4023 of the CARES Act; and
 - Whether or not Defendant has provided Plaintiff with a declaration under the CDC’s September 4, 2020 Order.

Emergency Order #25 – September 17, 2020 – continued

- In addition to the contents required by TRCP 510.4(a), the citation must include:
 - The Following Statement: “The Centers for Disease Control issued an order stopping some evictions. You may be able to stop your eviction if you sign the attached Declaration under Penalty of Perjury for the Centers for Disease Control and Prevention’s Temporary Halt in Evictions to Prevent Further Spread of COVID-19 and provide it to your landlord and the court. Before signing the Declaration, read it carefully and make sure all the statements are true. The Declaration is sworn, meaning you can be prosecuted, go to jail, or pay a fine if any of the statements are not true. Find out more about the order at TexasLawHelp.org.”; and
 - A copy of the declaration form, titled Declaration under Penalty of Perjury for the Centers for Disease Control and Prevention’s Temporary Halt in Evictions to Prevent Further Spread of COVID-19, that is attached to the CDC’s Order or a similar declaration form.

Emergency Order #25 – September 17, 2020 – continued

- A judge continues to have authority under TRCP 500.6 to develop facts of the case and authority to question:
 - Whether the premises is a “covered dwelling” and the plaintiff is a “multifamily borrower; or
 - Whether the Defendant(s) is/are aware of the CDC Order and has/have had an opportunity to complete the CDC Declaration of similar declaration.
- If Defendant(s) provide(s) the CDC Declaration after a petition is filed,
 - Defendant(s) must file the declaration with the Court and serve a copy to Plaintiff; and
 - The Court must abate the eviction action including issuance and execution of any writ of possession under TRCP 510.8(d)

Emergency Order #25 – September 17, 2020 – continued

- After the CDC Order is filed/served to Plaintiff, the eviction action may proceed only if:
 - Plaintiff contests Defendant's declaration or the CDC Order;
 - The judge holds a hearing to determine whether the action should proceed; and
 - The judge determines the action should proceed and signs a written order stating the reasons for the determination that the action should proceed and procedures for the action to proceed.

Texas Eviction Diversion Program

- In any eviction action to recover possession of residential property based, in whole or in part, on the nonpayment of rent:
 - in addition to the contents required by TRCP 502.2 and 510.3, a sworn original, amended, or supplemental petition must state that the plaintiff has reviewed the information about the Texas Eviction Diversion Program available at www.txcourts.gov/eviction-diversion/.
- In addition to the contents required by TRCP 510.4(a), the citation must include:
 - the following statement: “You may be able to stop your eviction if you and your landlord agree to participate in the Texas Eviction Diversion Program. At your trial, the court will tell you about the Program and ask if you are interested in participating. Find out more about the Program in the attached brochure, titled State of Texas Eviction Diversion Program, and at www.txcourts.gov/evictiondiversion/.”; and
 - a copy of the informational brochure, titled State of Texas Eviction Diversion Program, prepared by the Texas Department of Housing and Community Affairs.

Emergency Order #28 – November 9, 2020 - continued

- At the trial required by TRCP 510.6 and 510.7, the judge must:
 - Discuss the Texas Eviction Diversion Program with the Plaintiff and Defendant; and ask the Plaintiff and Defendant whether they are interested in the Texas Eviction Diversion Program.
- If the Plaintiff and Defendant both express an interest in participating,
 - The judge abates the eviction action for 60 days and makes all court records, files, and information relating to the eviction action confidential to prohibit disclosure to the public; and informs the parties of the reinstatement and dismissal procedures.

Emergency Order #28 – November 9, 2020 - continued

- To reinstate an eviction action, the Plaintiff must file a Motion to Reinstate with the Court within the 60-day abatement period and serve a copy of the motion on the defendant.
- Upon the filing and service of the motion, the judge must serve a written order that
 - Reinstates the eviction action;
 - Sets the eviction action for trial ASAP, but no later than 21 days after the date the order is signed;
 - States the procedures for the action to proceed; and
 - Makes all court records, files, and information relating to the eviction action non-confidential to allow disclosure to the public.
- If Plaintiff does not serve a motion to reinstate within the 60-day abatement period, the judge must dismiss the action including any claims that do not involve the nonpayment of rent, **WITH PREJUDICE**. The court records, files, and information relating to the eviction are to remain confidential. However, Plaintiff is not prohibited from filing an eviction based on future events that are an independent basis for eviction.

Emergency Order #28 – November 9, 2020 - continued

- Texas Counties Currently Participating in the Texas Eviction Diversion Program:
 - Bee, Bexar, Brazos, Chambers, Deaf Smith, El Paso, Erath, Fannin, Grayson, Harris, Jim Wells, Kleberg, Montgomery, Palo Pinto, Parker, Potter, Randall, San Patricio, Wise
- All remaining Texas Counties will start participating in the Texas Eviction Diversion Program beginning January 1, 2021.

Emergency Order #29 – November 11, 2020

- All courts in Texas may in any case, civil or criminal, modify or suspend any and all deadlines and procedures, whether prescribed by state, rule, or order, for a stated period ending no later than February 1, 2021.
- Allow or require anyone involved in any hearing, deposition, and other proceeding of any kind to participate remotely through teleconferencing, videoconferencing, or other means.
- Consider as evidence sworn statement made out of court or sworn testimony given remotely, out of court, or through teleconferencing, videoconferencing, or other means.
- Conduct proceedings away from the court's usual location with reasonable notice and access to the participants and public.
- Require every participant in a proceedings to alert the Court if they have COVID symptoms or were exposed to anyone with COVID symptoms.

- Bexar County-
 - Foreclosure sales should be scheduled for a date following public health official's determination that a foreclosure sale with a large crowd will not result in a threat to the health and safety of those in attendance due to Covid-19.
XIV. EXECUTIVE ORDER NW-18 OF COUNTY JUDGE NELSON W. WOLFF issued December 8, 2020.
 - As of right now, no foreclosures are taking place due to COVID cases rising. Seemingly, no foreclosures will take place until COVID cases drop in Bexar County.

Polling Question

Should governors have statewide restrictions on foreclosures or leave the decision to the counties on whether to allow FC Sales?

- Yes, Governors should have statewide restrictions
- No, the decision should reside with the Counties

Webinar Wrap-Up

Questions

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