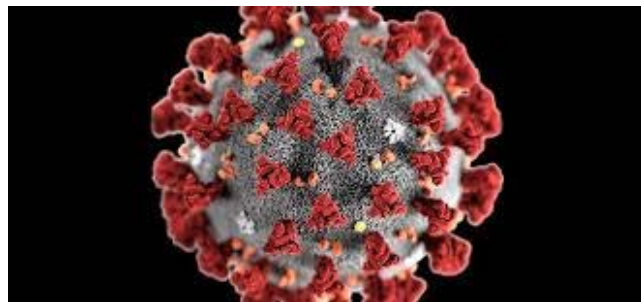


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CREDITORS RIGHTS & COVID-19

BANKRUPTCY AND CREDITOR'S RIGHTS PRACTICE GROUP

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ISSUES TO CONSIDER

- National and Statewide Moratoria on Foreclosures and Evictions
- Small Business Reorganization Act and Other Bankruptcy Changes
- Deadlines Tolled Statewide

FORECLOSURE MORATORIUM

- The CARES Act imposes a 60-day (beginning March 18, 2020) moratorium on foreclosures of federally-backed mortgages.
- “Federally backed” means *any* loan that is secured by first or subordinate liens on residential real property designed for occupancy by 1 to 4 families that is guaranteed, or insured, or, in some instances, made by the Federal Housing Administration, the Veterans Administration, the Department of Agriculture, or purchased or securitized by Fannie Mae or Freddie Mac.

AUTOMATIC FORBEARANCE

- Additionally, the CARES Act *requires* lenders of federally-backed loans to provide borrowers 180 days forbearance automatically upon attesting that they are experiencing COVID-19 related financial hardship.
- Lenders *must* grant an additional 180-day forbearance period, if later requested by the borrower – allowing for a total of 360 days forbearance.
- Importantly, *no fees, penalties, or interest may accrue* on the borrower's account during the forbearance period apart from those that would have accrued had the borrower made all contractually required payments.

POTENTIAL BORROWER TRAP: WHAT HAPPENS AFTER FORBEARANCE?

■ Freddie Mac Servicing Guideline § 9203.12

- At the end of the forbearance period, the Borrower must cure the Delinquency through one of the following options:
 - Full reinstatement of the Mortgage,
 - Partial reinstatement followed by a repayment plan,
 - Payment of the Mortgage in full,
 - A repayment plan,
 - A loan modification, or
 - Pay off the Mortgage through a short sale or deed-in-lieu of foreclosure.

■ Fannie Mae Servicing Guideline §D2-3.2-01

- Once the forbearance plan is complete, one of the following must occur:
 - The mortgage loan must be brought current through a reinstatement,
 - The borrower is approved for another workout option,
 - The mortgage loan is paid in full, or
 - The servicer refers the mortgage loan to foreclosure in accordance with applicable law.

CARES ACT EVICTION PROTECTIONS

- Applies to lease tenants of “covered property” (i.e., property that is financed by a federally-backed mortgage or a property participating in certain federal housing programs under the Violence Against Women’s Act or the rural housing voucher program).
- Cannot be evicted for non-payment of rent and no late fees can be charged for 120 days after enactment of CARES.

OHIO FORECLOSURE AND EVICTION CHANGES

- Legislation pending in Ohio statehouse (HB 562 and SB 297) would likewise limit ability of creditors to foreclose on property.
- If passed, all Ohio courts would be directed to cease:
 - all business pertaining to residential or commercial mortgage foreclosure activity including refusing to accept mortgage foreclosure filings;
 - staying all pending foreclosure actions;
 - refusing to accept all motions and writs pertaining to foreclosure matters;
 - staying all judicial sales, including those by private selling officers; and
 - deferring confirmation of sales that have already occurred.
- (There are some exceptions under the Senate Bill for those under civil or criminal protective orders).

OHIO FORECLOSURE AND EVICTION CHANGES

- Time by which borrower may exercise right to redeem would be tolled during the state of emergency.
- All applicable statutes of limitations pertinent to mortgage foreclosures during the state of emergency as well as those deadlines for conducting sales and seeking writs.
- *No eviction proceedings* could be filed during the state of emergency and landlords filing complaints for restitution prior to or during the state of emergency *would not* be entitled to recover unpaid rent that accrued during the state of emergency.
- All eviction and foreclosure proceedings filed within the 60 days after the declared end to the state of emergency that are based upon a default that occurred during the state of emergency, would be stayed and subjected to mandatory mediation at the court's cost with mediation concluding only at the discretion of the court.
- Lucas County has already administratively stayed all foreclosure proceedings for 60 days.

MICHIGAN FORECLOSURE AND EVICTION CHANGES

- Michigan Governor Gretchen Whitmer has issued Executive Order 2020-19 which restricts landlords from seeking to evict residential tenants, residential land contract vendees, and residential subtenants thereof except upon a showing of substantial risk to another person or an imminent and severe risk to property.

THE SMALL BUSINESS REORGANIZATION ACT

- Effective February 19, 2020, SBRA provides a new, streamlined, and less expensive Chapter 11 process (under Subchapter V) for small businesses, originally defined as businesses with less than \$2.7 million in debt.
 - Excludes owners of single asset real estate.
- The CARES Act raises the debt threshold to \$7.5 million – materially expanding SBRA eligibility.
 - While this expansion is limited for one year, presumably unlikely it will go back down. More likely, it will be expanded further.
 - Lenders must consider whether their borrower might seek Subchapter V treatment in evaluating collateral and guaranties.

SBRA HIGHLIGHTS

- The debtor always remains in possession of the business, unless ordered removed by the court.
- A trustee will always be appointed, but primarily to assist in the formulation of a consensual plan.
- *No U.S. Trustee fees* (the cost of which often make Chapter 11 unfeasible for small businesses).
- There will be no unsecured creditor's committee unless ordered, for cause, by the court.
- An expedited case schedule, including early status conference and plan submission deadlines.
- *Only* the debtor may propose a plan and no disclosure statement is required.
 - *Plan will generally be confirmed if debtor commits all disposable income to the plan for 3-5 years.*

SBRA HIGHLIGHTS

- The absolute priority rule – which typically requires consent to the plan or full payment to secured and unsecured creditors if the equity owner is to retain an interest in the business – *does not apply*.
- Potential modification of real property liens on the owner's personal residence, if the lien was generated for business purposes, rather than to acquire the property.
 - If combined with a Chapter 13, potential for guarantors to get off the hook.

SBRA HIGHLIGHTS

- SBRA also imposes a due diligence requirement for *all* preference actions, not just those filed under Subchapter V and claims under \$25,000 must be filed in defendant's home jurisdiction.
- Before commencing a preference action, a trustee is now obligated to undertake “reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses” prior to commencing a preference action.

OTHER BANKRUPTCY CHANGES

- The CARES Act impacts other parts of the Code.
- Current Chapter 13 plans can be modified and payments extended due to COVID-19 related financial hardship.
- Payments to debtor under CARES Act are not to be included as income in Chapter 7 or 13 cases.

TOLLING OF DEADLINES

- Commercial litigation, like all other litigation, is going to be even slower than usual.
- In Ohio, limitations periods and civil procedural deadlines are tolled between March 9, 2020 until state of emergency ends or July 30, 2020, *whichever is sooner*, by HB 157 and by an order from the Chief Justice.
- Michigan Supreme Court has issued an administrative order tolling deadline from March 24, 2020, until the expiration of the Governor's state of emergency order.
 - Unlike Ohio, legal services are not “essential” in Michigan and extensions are likely to be granted liberally.

QUESTIONS?

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