

Practice Update

Foreclosure Holds Impacting Statute of Limitations

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The COVID-19 crisis has led to foreclosure moratoriums at the regulatory, executive, and judicial level. Servicers should consider that compliance with these, regardless of level, may not protect them from later challenges to lien enforcement basing on statutes of limitations.

The Federal Housing Finance Agency (**FHFA**) imposed a 60-day moratorium on the commencement and prosecution of foreclosures for all loans owned by the Federal National Mortgage Association (**Fannie Mae**) and the Federal Home Loan Mortgage Corporation (**Freddie Mac**). The Department of Housing and Urban Development (**HUD**) likewise imposed a 60-day moratorium on the commencement and prosecution of foreclosures for all loans insured by the Federal Housing Administration. Governors have issued moratoriums through executive order (*e.g.*, Kansas, New Hampshire, and New York). In Texas, after its governor issued a disaster declaration, its supreme court entered an emergency order giving courts discretion to extend the limitations period for all actions until 30 days after the disaster declaration lifts.

In New York the governor issued an executive order suspending through April 19, 2020 “any specific time limit for the commencement, filing, or service of any

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legal action” and providing “[t]here shall be no enforcement of . . . a foreclosure of any residential . . . property for a period of ninety days.” In conjunction the New York Chief Administrative Judge issued an administrative order on March 22, 2020 directing all clerks and courts in New York to reject for filing all papers (*i.e.*, pleadings, motions, notices, etc.) in both paper and electronic format until further notice.

For in-flight foreclosures, *i.e.* post-acceleration loans, servicers should not assume moratorium compliance will toll limitations. This is particularly important for loans where limitations may otherwise expire during or shortly after this crisis. Beyond simply confirming a loan itself is subject to a moratorium—a Fannie Mae loan or a property in Kansas—servicers should assess their level of confidence a moratorium tolls limitations. If there is uncertainty, the servicer should consider deceleration without prejudice and/or defenses basing on tolling statutes, equitable tolling, or preemption.

Some states have tolling statutes that extend the statute of limitations when an action is stayed by statutory or injunctive prohibition. *See, e.g.*, Cal. Civ. Proc. Code § 356; D.C. Code § 12-304; Kan. Stat. Ann. § 60-519; Nev. Rev. Stat. § 11.350; N.Y.C.P.L.R. 204(a). In these states there is an argument limitations periods toll during certain moratoriums. When evaluating whether the moratorium is a statutory or injunctive prohibition, servicers should look closely at what the moratorium prohibits. If it only halts sales, servicers could face an argument the moratorium did not toll limitations because it did not prevent the filing of a foreclosure complaint. New York’s March 20, 2020 executive order tolls any statute of limitations through April 19, 2020.

In states without tolling statutes servicers may invoke the doctrine of equitable tolling. “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some

extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). This national emergency and the related moratoriums are strong evidence of an extraordinary circumstances.

Federal based moratoriums from the FHFA and the HUD may present a federal preemption argument. “[C]onflict pre-emption, [is] where compliance with both federal and state regulations is a physical impossibility . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992). The FHFA and HUD, pursuant to authority granted by federal statute, have imposed a foreclosure moratorium. A state limitations period requiring a servicer foreclose in violation of federal orders is inconsistent.

Servicers should consider reviewing in-flight foreclosure portfolios for loans facing near-term limitations issues to mitigate post-COVID-19 crisis limitations challenges.

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