

Practice Update

The Impact of COVID-19 on Commercial Real Estate Foreclosures in California

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By William J. Bernfeld and Daphna Davidovits

As many people are aware, on March 16, 2020, Governor Newsom of California issued an executive order *requesting* that lenders forbear on both commercial and residential foreclosures and evictions as a result of COVID-19. The order provides:

Financial institutions holding home or commercial mortgages, including banks, credit unions, government-sponsored enterprises, and institutional investors, are requested to implement an immediate moratorium on foreclosures and related evictions when the foreclosure or foreclosure-related eviction arises out of a substantial decrease in household or business income, or substantial out-of-pocket medical expenses, which were caused by the COVID-19 pandemic, or by any local, state, or federal government response to COVID-19.

The order also authorizes local governments to enact restrictions on commercial and residential evictions and foreclosures. 74 cities in California have adopted eviction moratoriums for commercial and/or residential properties (including the cities of Los Angeles, San Francisco and San Diego) and there are 20 county-wide moratoriums (including Los Angeles, San Bernardino and Ventura counties).

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William J. Bernfeld
Daphna Davidovits

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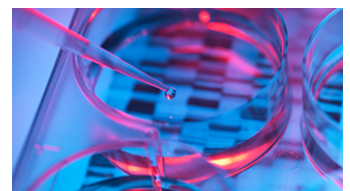
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On March 25, 2020, the Governor held a press conference and announced that a number of financial institutions (both commercial and residential lenders) had agreed to a 90-day mortgage payment relief during the COVID-19 crisis. This temporary relief was not mandated by state law, but was voluntarily agreed to by some of the country's largest banks, including Wells Fargo, Citigroup and JP Morgan Chase, as well as close to 200 state-chartered banks, credit unions and lenders. Various financial institutions have agreed that they will not "initiate foreclosure sales or evictions, consistent with applicable guidelines."

State Preemption of Eviction (But Not Foreclosure) Laws are Suspended

Executive Order N-28-20 from the Governor, dated March 16, 2020, and effective through May 31, 2020, suspends state preemption of local regulation of *evictions*, including post-foreclosure evictions, related to COVID-19 hardships, giving regulatory authority to local governments.

Foreclosure moratoriums do not seem to exist at the municipal level, presumably because the suspension of state pre-emption laws applies only to evictions. Moreover, municipalities are more focused on regulating evictions by local owners and the immediate welfare of local residents, as opposed to issuing moratoriums on state and federally charged lenders, though at least one Los Angeles City Councilman has spoken of the need for a foreclosure moratorium.

Judicial Foreclosures Have Been Suspended

Rule No. 2 of the Emergency Rules of California Rules of Court, dated April 6, 2020 stays all *judicial* proceedings to foreclose a mortgage or deed of trust, including any action for a deficiency. The periods for electing or exercising the right to redeem after foreclosure are tolled, as well as any period to petition a court regarding redemption

rights. Additionally, statutes of limitations on foreclosure actions are tolled.

These rules will remain in effect until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted, or until amended or repealed by the Judicial Counsel.

Even a lender who has foreclosed is prohibited by Emergency Rule 1 from obtaining issuance of a summons and complaint and entry of default judgment in an unlawful detainer action, except for limited health and safety reasons. Unlawful detainer trials are continued for 60 days.

Non-Judicial Foreclosures Can Proceed so Long as There is No Actual Sale

In California, a nonjudicial foreclosure is approximately a four-month process. There is no state law (and no local law that we are aware of), which prohibits the filing of a nonjudicial foreclosure or publication of a notice of sale. The actual foreclosure sale, however, which is a public sale, cannot occur. This is due to the fact that the state has mandated, and local governments have implemented, shelter in place orders, restrictions on business operations to essential businesses, and social distancing requirements. Even if the business of a foreclosure trustee were deemed “essential” under local ordinance, and such sales were to occur, the free and open environment which is meant to attract and encourage potential bidders and protect borrowers at a public auction is not present due to social distancing mandates. Importantly, no title company will insure the sale of a foreclosed property to a subsequent buyer, since questions could be raised as to whether it was conducted in a climate that chilled the bidding process.

In summary, no judicial foreclosure proceeding may be commenced, nor may nonjudicial foreclosure sales occur, until the applicable Emergency Rules and shelter in place orders expire.

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