

Accepting the Challenge

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COVID-19 Update: Oregon Law Prohibits Foreclosures During COVID Emergency



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On June 30, 2020, Oregon Governor Kate Brown signed House Bill 4204 entitled “Relating to strategies to protect Oregonians from the effects of the COVID-19 pandemic; and declaring an emergency” (the “Oregon Statute”). In response to the COVID-19 pandemic, the Oregon Statute establishes temporary limitations on lenders’ ability to enforce default remedies during the period of time beginning on March 8, 2020 and ending on September 30, 2020 (which may be extended by executive order no later than September 1, 2020) (the “Emergency Period”).

Specifically, during the Emergency Period, a lender may not default a borrower for failure to make a payment on a mortgage loan if at any time during the Emergency Period, the borrower notifies the lender that the borrower will not be able to make such payment. Unless the lender and borrower otherwise agree to modify, defer or otherwise mitigate a loan, the lender must: (a) defer from collecting the payment during the Emergency Period; and (b) permit the borrower to pay the deferred amount on the maturity date. A borrower does not need to notify the lender of its inability to pay more than once. If the mortgaged property is commercial property, or residential property with more than four dwelling units, the notice must include financial statements or other evidence that shows a loss of income related to the COVID-19 pandemic. The notice must also disclose any funds the borrower received under the Paycheck Protection Program or other state or federal relief programs.

Additionally, the Oregon Statute prohibits the lender from taking any of the following actions during the Emergency Period: (a) imposing or collecting charges, fees, penalties, attorneys’ fees or other amounts in connection with the borrower’s failure to make a payment; (b) imposing a default rate of interest for failure to make a payment; (c) treating the borrower’s failure to make a payment as an ineligibility for a foreclosure avoidance measure; (d) requiring or charging for an inspection, appraisal or broker opinion of value, not otherwise permitted in the absence of a default; (e) initiating cash management or implementing lockbox procedures not already in existence before June 30, 2020; (f) taking control of the operating revenue from the mortgaged property unless the control was established before June 30, 2020; or (g) declaring a default based on a borrower’s failure to meet financial covenants due to inadequate operating revenue resulting from the COVID-19 pandemic. The lender is further prohibited from foreclosing by advertisement and sale, bringing an action or suit to foreclose a mortgage, enforcing a forfeiture remedy, or bringing an action or suit to foreclose a lien or other security interest on the mortgaged property.

If a lender takes any of the foregoing prohibited actions, and as a result the borrower suffers an ascertainable loss of money or property, the Oregon Statute permits the borrower to bring an action to recover its actual damages. A borrower who prevails in the action may also recover the borrower’s court costs and attorney fees. **Within 60 days after June 30, 2020 (i.e., before August 29, 2020), each lender authorized to do business in Oregon must provide written notice to all of its borrowers of a borrower’s rights under the Oregon Statute.** Note, however, that the Oregon Statute does not apply to judgments of foreclosure that: (a) were issued before the Emergency Period

began; (b) occur in connection with a tax foreclosure proceeding; or (c) occur after a person has recorded a notice of intent to abandon real property or a judicial order that authorizes an abandonment of real property.

The Oregon Statute is not the first measure that a state government has taken to limit a lenders' default remedies in light of the COVID-19 pandemic, and it likely will not be the last. For example, New York's Executive Order No. 202.28, as extended by Executive Order No. 202.45, prohibits, until August 19, 2020, the initiation or enforcement of: (a) foreclosure of any commercial mortgage for nonpayment of a mortgage; and (b) the initiation of a proceeding or enforcement of eviction for failure to pay rent for commercial tenants, in each case where the property is owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law, or is otherwise facing financial hardship due to the COVID-19 pandemic. The State of Ohio introduced Senate Bill 297 on March 25, 2020 (referred to committee on May 6, 2020), which would mandate a stay of foreclosure filings and proceedings during the state of emergency declared due to the COVID-19 pandemic. After the termination of the state of emergency, any foreclosure proceedings initiated due to a default during the state of emergency and 60 days thereafter would be stayed and referred to mediation.

We recommend that all lenders with borrowers in Oregon send the required notice described above as soon as possible. In addition, since the Oregon Statute allows borrowers and lenders to make other arrangements with respect to their loans, lenders should consider working out more favorable terms with their borrowers to avoid the statutory outcome. Lenders may also consider prohibiting or penalizing a borrower for invoking the statute, but it is currently unclear if such agreements would be enforceable.

We will continue to provide any new information on the Oregon Statute or any similar measures taken in other states as the country grapples with this unprecedented crisis.