

## Insights

# AUGUST 3, 2020 UPDATE: FORECLOSURE AND RECEIVER ISSUES IN THE UNITED STATES DURING COVID-19

Aug 04, 2020

## SUMMARY

The following memorandum provides an overview of the responses of courts and local and state governments of certain jurisdictions in the United States, as well as of the United States federal government, to the COVID-19 outbreak. The analysis has a particular focus on mortgage foreclosures and evictions. Effects on residential foreclosures and evictions have been included as governments have prioritized providing protection to residential properties and tenants while the effects on commercial foreclosures and evictions have been included where available.

In addition, we would also like to provide certain high-level thoughts on these matters:

- Most, if not all, of the higher populated states and/or major cities have instituted statewide or citywide moratoriums or limitations with respect to in-person or, in some instances, any state court hearings. While these moratoriums or limitations have, in some jurisdictions, begun to expire or be lifted they have tended to remain in place longer than in other jurisdictions.
- While this may not directly impact deed of trust/non-judicial foreclosure states, certain trustees and sheriffs required to conduct foreclosures sales have informed us that they need consents from borrowers/property owners to move forward with these processes in light of COVID-19.
- In addition, a foreclosure in a deed of trust state is arguably not complete unless and until the deed under power of sale is recorded in the public records. Several clerk's offices have informed us that they are accepting e-recording or recordation by mail or overnight courier.
- It is likely that recording will be delayed significantly. Title companies are exercising caution and, except in certain jurisdictions that permit electronic recording, are generally not providing gap coverage.

- As for court-based foreclosure processes, expect not only a delay on existing matters, but also issues on filing and obtaining an assignment of a judge in new matters. In certain jurisdictions, while electronic filing will result in a new case receiving a case number, there have been delays in having a judge assigned.
- With respect to requests for receivers, obtaining relief (either through a court hearing or on an *ex parte* basis)[1] will be (and will continue to be) difficult without an emergency basis for expedited relief. Other than health issues or significant property damage, a court's willingness to entertain receiver motion practice will be limited until the courts return to normal operation. Further, while some courts have begun transitioning to normal operations, they have tended to prioritize emergency or other sensitive or extraordinary matters and proceedings.
- These delays and limitations will likely apply equally to matters initiated in state or federal court – although we have seen federal judges being more responsive on certain matters pertaining to emergency requests for relief. As such, there may be circumstances where pursuing a new matter in federal court can be more effective from a timing perspective.
- Finally, title exams require examiners to be present at the clerk's office to search the physical records. Court closures may preclude or limit this ability. As a result, government closures have caused lenders to delay foreclosure proceedings because they cannot obtain minutes of foreclosure or similar title products.
- A mezzanine or other lender that obtained a pledge of ownership interests as security for its loan can still conduct a foreclosure sale under the Uniform Commercial Code (UCC) without the oversight of any court or other judicial body. However, the UCC requires that all aspects of these sales be conducted in a "commercially reasonable" manner, which may prove challenging or require a different approach than has been commonly utilized in the past. We may begin to see lenders pursue UCC sales and their related auctions (typically handled with a court reporter) via telephone and video conference software to allow these processes to move forward without large gatherings (particularly in states with restrictions on gatherings of more than 10 people).

We have highlighted certain major jurisdictions below, as well as jurisdictions for which information was readily available – analysis on other jurisdictions is available upon request. Note that the discussion below is based on current orders entered by federal and state courts and federal, state, and local governments as of August 3, 2020. These issues and orders are very fluid, and we continue to monitor the situation.

## **Federal Government Action**

- On March 18, the Department of Housing and Urban Development, the Federal Housing Administration, and the Federal Housing Finance Agency announced an immediate

moratorium on foreclosure and eviction actions for single family homeowners with FHA-insured mortgages for the next 60 days. This moratorium has since been extended through "at least" August 31. Further, on April 1, the Department of Housing and Urban Development announced that mortgage servicers must provide six months of forbearance to borrowers with a financial hardship that makes them unable to pay their mortgage due to the COVID-19 and must provide an additional six months of forbearance if requested by the borrower.

- The US Department of Agriculture, through its Rural Development program, has authorized lenders engaged in Business and Industry Loan Guarantees, Rural Energy for America Program Loan Guarantees, Community Facilities Loan Guarantees, and Water and Waste Disposal Loan Guarantees to provide 180-day loan payment deferrals without prior agency approval. This authorization is in effect until September 30.

## **Court (Federal and State) and State and Local Government Action**

### **Alabama**

- State Courts: Jury trials are suspended until September 14.

### **Arizona**

- Federal Courts: The Flagstaff courthouse has been closed indefinitely and no jury trials will be held in that courthouse until further notice. Proceedings in the Yuma courthouse may only be held if they involve fewer than ten participants until further notice. Trials may be held in the Tucson and Phoenix courthouses.
- State and Local Government and Courts:
  - Jury trials may not resume until the state courts enter "Phase One" of their reopening. The presiding judge of each county has the ultimate authority to determine when jury trials may safely resume.
  - On July 16, the governor issued an executive order prohibiting certain residential evictions whose causes relate to COVID-19 until October 31.

### **Arkansas**

- Federal Courts: All trials scheduled to begin before September 8 are postponed indefinitely (W.D. Ark.).
- State Courts: The state Supreme Court imposed additional pleading requirements for commercial and residential eviction complaints or charges for failure to vacate.

## California

- Federal Courts:
  - Jury trials have been postponed until August 14 (S.D. Cal.), October 1 (N.D. Cal.), or further notice (E.D. Cal.), and no in-person hearings will be held except on an emergency basis (C.D. Cal.).
  - Through September 30, all civil matters in the Northern District will be decided on the papers unless the presiding judge believes a hearing is necessary, in which case the hearing will be held by video or telephone.
- State and Local Government and Courts:
  - The governor issued an order, in effect until September 30, giving local governments the authority to suspend or halt residential or commercial evictions. The order also requests financial institutions holding commercial or residential mortgages to implement a moratorium on all foreclosure and eviction proceedings and actions whose causes relate to COVID-19. Many financial institutions have agreed to suspend residential foreclosures.
  - Multiple pieces of legislation are pending that would: prohibit the eviction of tenants from commercial property; prohibit residential foreclosures through 15 days after the end of the state's state of emergency; and add additional requirements prior to foreclosure sales.
  - On April 6, the Judicial Council of California adopted a rule staying residential and commercial judicial foreclosures until 90 days after the governor ends the state of emergency related to COVID-19.

## Colorado

- Federal Courts: All trials scheduled to begin through September 4 are postponed indefinitely, except for "pilot trials" as authorized by the Chief Judge. Effective August 3, trials requiring a jury of 10 or more jurors may not be held in the Wayne Aspinall or Colorado Springs Courthouses.
- State and Local Government and Courts:
  - The Colorado Supreme Court has encouraged lower courts to postpone or hold telephonically all non-essential hearings. Each local jurisdiction is issuing its own guidance regarding operations during COVID-19.

- The governor issued an order extending the notice period for residential tenants to cure monetary defaults before their landlord can bring an eviction action, in effect through August 11.

## **Delaware**

- Federal Courts: All jury trials scheduled to begin before August 31 are postponed.
- State and Local Government and Courts:
  - Actions for residential evictions may be filed and certain hearings will be scheduled, but eviction orders remain stayed until the governor lifts the state of emergency, which is currently in effect until further notice.
  - On June 15, Delaware courts entered “Phase Two” of their reopening plan, allowing for, among other things, non-jury civil trials. A committee plans to make a recommendation in mid-August as to whether the courts should move to “Phase Three.” On July 6, the Chief Justice of the state Supreme Court extended the state’s judicial emergency until August 6.
  - Legislation is pending that would extend residential foreclosure protections until 60 days after the end of the state’s state of emergency.

## **Florida**

- Federal Courts: All jury trials are postponed until October 13 (S.D. Fla.). All jury trials scheduled to begin before August 31 in the Orlando and Fort Meyers Divisions are postponed (M.D. Fla.).
- State and Local Government and Courts:
  - The governor has issued a prohibition on residential and commercial foreclosures and residential evictions, which is in effect until September 1.
  - Jury trials shall remain suspended until 30 days after the applicable circuit court chief judge has determined that the circuit or a county within the circuit has transitioned to “Phase 2” of the court’s reopening plan.

## **Georgia**

- Federal Courts: No jury trials will be held until after August 30 (N.D. Ga.) or September 12 (M.D. Ga.).
- State Courts:

- On June 12 the state Supreme Court issued an order suspending jury trials and tolling related deadlines.
- The Supreme Court has also implemented additional pleading requirements for landlords seeking to bring residential eviction actions for nonpayment of rent, in effect through August 24.

## **Illinois**

- Federal Courts: Jury trials may resume as of July 20 (C.D. Ill.) or July 31 (East St. Louis and Benton courthouses (SD. Ill.)).
- State and Local Government and Courts:
  - On April 23, the governor issued an order prohibiting certain residential evictions and directing law enforcement officers to cease enforcing certain orders for evictions of non-residential tenants. The governor has subsequently extended the order until August 22.
  - The state Supreme Court imposed additional pleading requirements for eviction actions involving residential tenants until August 24.

## **Indiana**

- Federal Courts: In-person civil proceedings, including jury trials, will resume starting August 17 (S.D. Ind.).

## **Iowa**

- Federal Courts: All jury trials scheduled through August 10 (S.D. Iowa) are postponed. Jury trials resumed on June 1, but parties may request continuance of trials because of continuing public health concerns (N.D. Iowa).
- State Courts: Jury trials scheduled through September 13 are postponed.

## **Kansas**

- Federal Courts: Presiding judges have discretion to conduct in-person hearings.
- State Courts: The state Supreme Court indefinitely suspended all statutes of limitation and statutory time standards or deadlines. Jury trials may only be held in limited circumstances.

## **Louisiana**

- Federal Courts: All jury trials scheduled to begin before October 5 (E.D. La.) are postponed. Jury trials may resume on September 14 (W.D. La.).

## **Maryland**

- Federal Courts:
  - As of July 1, some jury trials will be allowed to resume, but the court has not yet set guidance as to when all jury trials will resume.
  - On June 22 the Court moved into “Phase Two” of its recovery plan, which includes the resumption of certain additional operations.
- State and Local Government and Courts:
  - All statutes of limitations and deadlines are tolled by the number of days that the relevant court was closed to the public.
  - Jury trials may not be held prior to October 5.
  - On July 20 the state court system moved to “Phase Three” of its reopening plan, which allows for additional in-person proceedings and the scheduling (but not the commencement) of trials.
  - The governor issued executive orders prohibiting foreclosures of residential property and evictions of residential, commercial, or industrial tenants during the pendency of the state’s state of emergency and catastrophic health emergency, which were renewed on July 30.

## **Massachusetts**

- Federal Courts: All jury trials scheduled to begin through September 8 are postponed. On July 15, the court begin holding limited in-person, non-jury trials.
- State and Local Government and Courts:
  - On April 20, a law passed prohibiting certain residential and small business evictions and residential foreclosures. Such prohibitions will last until the earlier of 120 days after the passage of the act (August 18) or 45 days after the lifting of the state’s COVID-19 emergency declaration. The COVID-19 emergency declaration and corresponding state of emergency are in effect until further notice, and the governor has not indicated when they will be lifted.
  - All jury trials scheduled to commence before September 8 are postponed.

## Michigan

- Federal Courts: Under the Court's recently adopted Recovery Plan, jury trials will resume at a date to be announced, but no earlier than November (E.D. Mich.).
- State and Local Government and Courts:
  - Legislation is pending that would prohibit certain residential foreclosures and evictions during states of emergency.
  - Courts that have progressed to "Phase Three" of the reopening guidelines may hold jury trials while those that have not may only hold jury trials upon approval from the State Court Administrative Office.

## Minnesota

- Federal Courts: The Court is planning on resuming jury trials after July 6, but has not yet released guidance as to whether it will.
- State and Local Government and Courts:
  - On March 24, the governor issued an order halting eviction proceedings on residential property until the end of the state's peacetime emergency, which is set to expire on August 12. On July 14 he issued a subsequent order similarly prohibiting certain residential evictions. Legislation is currently pending that would further delay residential evictions and foreclosures.
  - Jury trials will not be held before September 1, except for limited "pilot trials."

## Missouri

- Federal Courts: As of July 30, a "very limited number" of jury trials may commence (E.D. Mo.).
- State Courts: Courts may not resume jury trials until they have entered "Phase Three" of their reopening. The status varies by county, although most courts have entered Phase Two or Phase Three.

## Nevada

- Federal Courts: All trials are indefinitely suspended.
- State Courts:



- All oral arguments are postponed indefinitely.
- The governor issued a proclamation on June 25 encouraging residential and commercial landlords to enter into voluntary repayment agreements with their tenants. Commercial eviction proceedings may resume as of June 30, residential eviction proceedings based on nonmonetary issues may resume on July 31, and residential eviction proceedings based on monetary issues may resume on August 30.

## **New Hampshire**

- Federal Court: All jury trials scheduled before October 1 are postponed and judges have the discretion to remotely hold other civil hearings during this period.
- State and Local Government and Courts: All in-person proceedings in the Circuit, Superior, and Supreme Courts are suspended through August 17 and/or the last day of the state of emergency, which is set to expire on August 7.

## **New Jersey**

- Federal Courts: All trials scheduled before August 31 are postponed.
- State and Local Government and Courts:
  - On March 19, the governor prohibited all residential evictions and foreclosures. Landlords and creditors can still initiate such proceedings, but they cannot carry out removal until after the prohibition is lifted. This prohibition will remain in place no longer than two months following the end of the state's state of emergency, which is currently set to expire on August 31.
  - Several pieces of legislation are pending that would: empower the governor to suspend residential evictions and foreclosures during the pendency of certain emergency circumstances; require creditors to grant temporary mortgage forbearances to residential borrowers upon request in certain circumstances; and suspend certain residential evictions during the pendency of a public emergency.
  - On June 22, the state courts entered "Phase Two" of their reopening, which means, in part, that jury trials may resume upon the agreement of all parties and the approval of the Chief Justice.

## **New York**

- Federal Courts:

- Trials in the Southern District have been delayed indefinitely. Jury trials scheduled to commence before August 11 (N.D.N.Y.) or September 14 are postponed (E.D.N.Y.).
  - Compliance with trial-specific deadlines shall be at the discretion of the presiding judge and no in-person bench trials may be held without consultation with the Chief Judge (E.D.N.Y.).
  - Case by case exceptions to the postponement of jury trials may be ordered at the discretion of the presiding judge after consultation with counsel (N.D.N.Y.).
  - As of July 6, the Southern District entered “Phase II” of its Phased Re-Entry Plan, during which jury trials remain suspended.
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- State and Local Government and Courts:
    - The governor issued a moratorium on foreclosure and eviction actions against residential and commercial mortgages and tolled all limitations period. This moratorium is in effect until August 20.
    - The New York Department of Financial Services has issued industry guidance urging, but not mandating, lenders it regulates to support adversely affected residential and small business borrowers. It is unclear when this guidance will expire, but it will likely remain effective at least through the state’s state of emergency, which is in effect until September 7.
    - Legislation is pending that would prohibit certain foreclosures and evictions of residential and commercial property until 365 days after the all counties have entered “Phase Three” of the governor’s reopening plan.
    - A law was enacted that prohibits evictions or judgments of possession against residential tenants who have suffered certain financial hardships as a result of COVID-19. Additional legislation is pending that would extend similar protections to commercial tenants.
    - The Chief Administrative Judge of the Courts suspended foreclosure actions unless all parties are represented by counsel, in which case the parties may be eligible for virtual settlement conferences. This suspension was reaffirmed on July 7 and is currently in effect until further order of the court.

## **North Carolina**

- Federal Courts: All jury trials scheduled before October 5 (M.D.N.C.) are postponed indefinitely.
- State Courts:

- Jury trials are suspended through August 19. The Chief Justice of the state Supreme Court issued an order authorizing local judicial officials to determine when jury trials in their jurisdiction resume, although it is the Chief Justice's intention that jury trials will remain suspended through the end of September.
- The state Supreme Court imposed additional pleading requirements for actions to evict residential or commercial tenants, in effect until August 23.

## Ohio

- Federal Courts: No jury trials will be held before August 31 (S.D. Ohio) or September 21 (N.D. Ohio). The Northern District will reevaluate this date no later than August 24.
- State and Local Government: Legislation is currently pending that would temporarily prohibit the initiation of certain residential foreclosures and delay certain ongoing residential foreclosures.

## Oregon

- State and Local Government and Courts:
  - Court operations began resuming on June 1 based upon such court's re-opening status.
  - Legislation was enacted that prohibits residential and commercial evictions for nonpayment of rent through September 30.

## Pennsylvania

- Federal Courts:
  - All jury trials scheduled to commence through August 16 (M.D. Pa.), August 31 (E.D. Pa.), or September 8 (W.D. Pa.) are postponed.
  - On June 17, the Middle District issued its COVID-19 recovery guidelines, which indicate that jury trials will not commence until the District enters "Phase Three" of its recovery. The District entered "Phase Two" on July 1 and will be evaluating its status every fifteen days.
- State and Local Government and Courts:
  - The governor issued an order suspending the commencement of residential foreclosures, including single-family and certain multifamily dwellings, which is in effect until August 31.

- Legislation is pending that would prohibit commercial evictions and foreclosures during the pendency of the state's disaster emergency, and for 90 days thereafter.
- Jury trials are indefinitely suspended.

## **South Carolina**

- Federal Courts: All jury trials scheduled to commence through September 1 are postponed.
- State and Local Government and Courts:
  - Legislation is pending that would delay commencement of residential evictions.
  - The state Supreme Court requires additional information to be submitted with any foreclosure or eviction actions to ensure compliance with the Coronavirus Aid, Relief, and Economic Security Act.
  - Jury trials are postponed indefinitely.

## **Tennessee**

- Federal Courts: All jury trials scheduled to commence through August 28 are postponed (W.D. Tenn.). In the Middle District, jury trials scheduled through August 31 will proceed as scheduled, barring an order to the contrary from the presiding judge, and the District recommends that parties prepare for jury trials as scheduled.

## **Texas**

- Federal Courts: All trials scheduled to commence through August 31 (W.D. Tex.) have been postponed. Certain Divisions of the Southern District have postponed jury trials through August 31 (Corpus Christi) and September 7 (Houston, Galveston, and McAllen).
- State Courts:
  - Jury trials may not be held prior to September 1 except in limited circumstances at the request of the presiding judge.
  - The Supreme Court has implemented additional pleading requirements for residential eviction proceedings filed through August 24.

## **Virginia**

- Federal Courts: Jury trials will not be held until August 31 (W.D. Va.) or further notice (E.D. Va.).
- State and Local Government and Courts:
  - The state government enacted legislation staying residential eviction proceedings and foreclosure proceedings related to homeowners and landlords owning one to four family residential units affected by COVID-19 for the duration of the state's state of emergency. The governor issued an executive order on May 26 declaring that the state of emergency remains ongoing and will remain in effect indefinitely.
  - On June 22 the state Supreme Court issued an order allowing unlawful detainer and eviction actions unrelated to the failure to pay rent to proceed.
  - All jury trials scheduled through August 9 are postponed, although courts may hold jury trials sooner if they have submitted a plan for restarting trials that a panel of Supreme Court Justices has approved.

## **Washington (State)**

- Federal Courts: All in-person hearings and jury trials scheduled before September 1 (E.D. Wash.) or September 5 (W.D. Wash.) are postponed.
- State and Local Government: The governor issued a proclamation prohibiting residential and commercial evictions through October 15.

## **Washington, D.C.**

- Federal Courts:
  - All jury trials scheduled to commence before September 8 are postponed. Other civil proceedings scheduled to occur before August 17 are postponed.
  - As of July 14, the Court remains in "Phase One" of its reopening plan, during which jury trials remain suspended.
- Local Government and Courts:
  - On March 13, the Superior Court suspended all residential evictions and foreclosures.
  - The Superior Court will not conduct jury trials until further notice but may conduct bench trials remotely. It will also conduct remote hearings in some landlord/tenant proceedings not involving non-payment of rent and some foreclosure proceedings not involving owner-occupied residential homes.

- On April 7, the Washington, D.C. Council passed a bill that requires mortgage servicers holding servicing rights to residential or commercial mortgage loans to, among other things (a) develop and offer a program that includes mortgage payment deferment of at least 90 days and waives any fees the borrower has incurred during the District's public health emergency and (b) extend, until as late as the maturity of the loan, the repayment period of any principal deferred under such plan. Any mortgagor-landlords receiving the benefit of such a plan must, in turn, reduce rent for its tenants at the effected property.
- Legislation was enacted that prohibits certain residential foreclosures during the pendency of a public health emergency.

## Wisconsin

- State Courts: Jury trials may only resume in each court once that jurisdiction has submitted a plan regarding the resumption of in-person proceedings and that plan has been approved by the chief judge of the governing judicial district.

[Read the July 2020 update](#)

[1] The method for obtaining relief will differ based on jurisdiction and circumstances.

## RELATED PRACTICE AREAS

- Restructuring & Insolvency/Special Situations
- Finance
- Real Estate Finance
- Structured Finance
- Real Estate

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