CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: Governor DeWine's Executive Order Recommends 90 Day Protections for Tenants and Borrowers

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On April 1, 2020, Governor Mike DeWine of Ohio issued Executive Order 2020-08D titled "Commercial Evictions and Foreclosures" (the "Order") that applies to commercial landlords and lenders.

Summary of the Order

As a result of the COVID-19 pandemic and forced temporary closures of non-essential businesses within the state of Ohio, many commercial businesses have been put in a position where they are unable to make full and timely payment of their monthly rent and/or loan obligations, either due to an obligation or election to close entirely or as a result of a decrease in customers and sales in connection with the stay at home order in Ohio. In response to their concerns, Governor DeWine issued the Order to provide some relief to commercial real estate owners and small commercial business owners. The Order includes the following three pertinent orders:

1. "Landlords are **requested** to suspend, for a term of at least ninety (90) consecutive days, rent payments for small business[1] commercial tenants in the State of Ohio that are facing financial hardship due to the COVID-19 pandemic"; and
2. "Landlords are **requested** to provide for a moratorium of evictions of small business commercial tenants for a term of at least ninety (90) consecutive days"; and
3. "Lenders are **requested** to provide commercial real estate borrowers with a commercial mortgage loan for a property located in the State of Ohio an opportunity for a forbearance of a term of at least ninety (90) consecutive days for said mortgage as a result of a financial hardship due to the COVID-19 pandemic."

Pursuant to the Order, a "Lender" is broadly defined to include "any banking organization, bank holding company, credit union, mortgage broker, mortgage loan servicer, master or special servicer, mortgage revenue bond issuer, mortgage revenue bond holder, mortgage loan originator, owning or holding any mortgage loan secured by property located in the State of Ohio, including commercial mortgage-back securities (CMBS) loans."

The term "forbearance," which is of particular importance to Lenders subject to the Order, is defined as an "agreement to forbear from (a) the enforcement of any remedies following any monetary or non-monetary defaults arising as a result of the COVID-19 pandemic, including the filing of suit

against any borrower, maker, co-maker or guarantor, the filing of foreclosure, appointment of a receiver, impounding of reserve or other funds deposited in accord with any loan or security documents, or termination of any license to use cash, or (b) sweeping and/or seizing any cash by reason of cash sweep trigger events regardless of a default or the existence of circumstances that may give rise to a cash sweep trigger event arising as a result of the COVID-19 pandemic, or (c) any requirement that a party waive any legal rights or admit any default arising as a result of the COVID-19 pandemic."

Legal Issues

The question of enforceability of the Order, and specifically what impact it will have on the behavior and actions of Landlords and Lenders, is complicated and involves intersecting aspects of constitutionality (both state and federal), contracts, and choice of law. On its face, however, the Order is drafted as a "request" as opposed to an outright mandate. In light of Governor DeWine's use of the word "shall" and other mandatory language in prior Executive Orders, it seems apparent that he deliberately chose the word "request" for purposes of issuing this Order. This suggests that the Administration is aware of the legal and jurisdictional impediments that a mandate could bring. Indeed, Governor DeWine called it a "plea" in his press conference announcing the Order on April 1, 2020. Lieutenant Governor Jon Husted, another key party in the drafting of the Order, similarly referred to it as an "ask."

Other states attempting similar measures through executive orders seem to have recognized similar limitations.. For example, the New York Department of Financial Services' guidance on Governor Andrew Cuomo's Order "urged" mortgagors to comply with its order to suspend mortgage payments and proactively contact borrowers regarding relief for COVID-19 related financial hardship.

By "requesting" that Landlords and Lenders comply with his Order, as opposed to mandating compliance, and stating that such Order does not suspend any federal or state law, Governor DeWine avoids a series of complex legal issues and challenges. If the Order were a mandate, whether it could be enforced as to out-of-state landlords or lenders (including REMIC Trusts with respect to CMBS loans) would be highly fact-dependent, based on the specific circumstances and contracts in question.

Key Provisions Impacting Commercial Real Estate Parties

- **The Order is a "request" not a "mandate" to suspend (not waive) payment obligations, evictions and foreclosures**.

It is important to note that although the Order requests a suspension of rent payments, a moratorium on evictions, and a forbearance on mortgages for a term of at least ninety (90) consecutive days, **this does not mean that the obligation to make rent or loan payments is negated or that landlords and lenders will be unable to collect the amounts otherwise owed for the months that payment is suspended and not made**. Rather, as stated in the Order, this is a request for a suspension of payment obligations and remedies in connection with a failure to pay as otherwise required. The Order contemplates that the tenant or mortgagee would remain liable for all payments during the 90 day period, and would be obligated to pay the same at a future time. The Order does

not go into detail on timing as to when the deferred payments would be due, however, presumably Landlords and Lenders could take action to obtain payment immediately after the expiration of the 90 day period. In short, the Order contemplates that all payments will be owed and can be sought and recovered at a later time.

- **Communication as to requested relief among tenants, landlords, lenders and loan servicers is key**.

Although the Order does not mandate compliance or other rules upon Landlords and Lenders, it is important that all those who believe this Order applies to them reach out to their tenants and/or borrowers, especially those who demonstrate financial hardship due to COVID-19, to assess their current and future financial circumstances and how best to proceed.

For Landlords that are borrowers under CMBS loans, the process may prove more difficult. Under CMBS loans, borrowers will need to initially reach out to a master servicer regarding the request. However, to make any headway in connection with entering into a forbearance agreement or loan modification, the master servicer will need to pull in the special servicer. While special servicers are typically not involved until an actual default is called, we are hearing that servicers are allocating significantly more resources in an effort to more efficiently and timely deal with what is expected to be a wave of requests from commercial borrowers dealing with the repercussions of the COVID-19 epidemic.

Finally, notwithstanding and apart from the Order, certain multifamily borrowers (this would include traditional multifamily, student housing and senior housing) under a “federally backed multifamily mortgage loan” (i.e., Fannie Mae, Freddie Mac and HUD loans) that were current on their payments as of February 1, 2020 can request up to a 90-day forbearance (one initial 30-day term and two possible 30-day extensions) under Section 4023 of the CARES Act. The request can be made orally or in writing to the borrower’s servicer.

- **The Order urges compliance - and all parties should act reasonably and in good faith, entering into lease amendments, forbearance agreements or loan modifications where appropriate.**

While not a mandate, the language within the Order strongly urges compliance and references providing a pause and time for sensible solutions to be worked out. It recognizes that all parties in the borrower/lender chain must make compromises to head off inevitable disputes based on financial hardships imposed by COVID-19. The aim is to help stabilize local economies while allowing for the future viability and success of all parties. Based on these conversations, Landlords and Lenders should evaluate on a case by case basis whether they should elect to suspend rent and loan payment obligations and evictions as requested in the Order, whether through a lease amendment, forbearance agreement or loan modification.

Careful consideration should be given to the drafting of any such agreements, and close attention should be paid to language regarding the admission of defaults, dealing with guarantor covenants that are no longer being met, and how deferred payment obligations are dealt with, to name a few. The parties should also be realistic when entering into any such agreements. For example, in the

context of a loan, a loan modification may be more appropriate to document a realistic plan going forward to keep a loan from default as opposed to simply deferring payment for 90 days, after which the parties may be in the same position.

Tenants, Landlords and Lenders who have questions about the Order should contact their counsel. For more information regarding the Order, please contact a member of the Benesch Real Estate and Environmental Practice Group. We will keep you apprised as more information becomes available.

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Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.



[1] The Order does not define "small business" - however, for context, the CARES Act generally (although there are caveats) defines small business as a business with not more than 500 employees.