

ANALYSIS OF OHIO'S EXECUTIVE ORDER ON COMMERCIAL TENANTS

IN RESPONSE TO COVID-19

Last week, Havens Limited updated you on Governor DeWine's April 1st Executive Order (2020-08D), targeting the foreclosure and eviction of commercial tenants. This latest On Tract is a follow-up to deeper dive into its provisions, context, and impact.

The Order

As a brief recap, the Order says:

1. Landlords should freeze tenant rent payments for at least 90 days.¹
2. Landlords should hold off on evictions for at least 90 days.
3. Lenders should work with their borrowers to forbear mortgage repayments for at least 90 days.

Who and What Does It Affect?

This Order is nuanced (and vague) in how/when it applies:

- It only covers "commercial" (not residential) tenants, landlords, and lenders.² Do the frozen "rent payments" include other fees/expenses/charges/interest/penalties? The Order doesn't say.
- It only covers "small" business tenants, not large ones. What is a "small" business? The Order doesn't say.

¹ From April 1, 2020 to June 20, 2020.

² Lieutenant Gov. Husted noted that foreclosures/evictions on residential mortgages are largely covered under already-issued Federal COVID-19 regulations.

- The rent-freeze only applies if the rent cannot be paid *because of* the impact of COVID-19. If the rent can't be paid for some other reason, the rent must still be paid.³
- The 90-day hold on evictions applies whether or not the reason is related to COVID-19.
- The mortgage forbearance request is just for an “opportunity” to enter in one.⁴ It is unclear what this opportunity must or should include.

Why Was This Done?

Governor DeWine and Lieutenant Governor Husted expressed their concern over the economic impact of failed business tenant rent repayments. The rent payment problem would trigger mortgage repayment problems for commercial landlords who have to pay their own mortgages, largely from the rent proceeds they collect. The potential foreclosure of those commercial mortgages would shut down those businesses, hurting those employees, making the payment of their own home mortgages/rent more difficult. The goal of this Order was to have each party in the chain—tenant, landlord, bank—all coordinate their efforts to work out sensible, if only temporary, accommodations.

³ California, for example, as part of its effort to free up its local governments to forestall evictions, required a showing that COVID-19 was the reason for the nonpayment. This means that a resident must show:

- The household experienced either a substantial decrease in income (e.g., due to a layoff or reduction in hours), or substantial out-of-pocket medical expenses; or
- The loss of income or medical expenses were caused by COVID-19 or the government's response to COVID-19, such as shelter-in-place or similar orders.

Similarly, a business must show:

- The business experienced a substantial decrease in income
- The loss of income was caused by COVID-19 or the government's response to COVID-19 (e.g., due to a reduction in hours of operation because of decreased consumer demand or closure due to government orders)

See Executive Order N-28-20; see also Executive Order N-37-20 (giving residential tenants a 60-day extension to deal with an eviction if proof of COVID-19's impact can be documented); see also Los Angeles March 27, 2020 Ordinance on residential and commercial evictions.

⁴ Its purpose, the Order says, is to “provide a pause and time for sensible solutions to be worked out among commercial real estate borrowers and lenders.”

It Mandatory?

No. In Governor DeWine's words—it's a "plea."⁵ The Order does not (ironically) "order" any of these actions; instead they are "requests."⁶ Yet the explanations by DeWine's office may be intentionally confusing so this "request" feels more like the Godfather making an "offer they can't refuse." When asked: "Can you clarify the small business order that you mentioned. Is it directing lenders to take 90 days or is it just asking them?," Governor DeWine answered "That was kind of both actually."⁷

The Order also went on to say that:

- Tenants and borrowers still owed all the rent/mortgage payments under its lease or mortgage.
- Landlords could still collect all the money it was owed (just at a later time)
- It did not override any Ohio or Federal law.

On one hand, these qualifications are all consistent with a simple request. Yet if this Order was purely voluntary, it would seem unnecessary to make disclaimers. These types of disclaimers are instead more typically used to show a *mandatory* law's narrowness in time or scope to avoid constitutional problems. Either way, the disclaimer language both clarifies and confuses.

⁵ "I'm issuing a plea, a plea to the lenders, and a plea to the landlords across Ohio to work with their small businesses and suspend payments for at least 90 days."

⁶ Lieutenant Gov. Husted then added: "[W]e want to avoid foreclosures for the next 90 days. And we cite in there the authority in which we believe the governor has the ability to order that. But we are requesting the remedies that are in there under the order. So the requesting part, this is very consistent with what New York and California did. . . . Although obviously, that will ultimately be up to the lender and the person who has the mortgage to work that out."

⁷ Another example of this confusion: "[W]hat kind of consequences do lenders face if they don't follow the order?" Lieutenant Governor Husted answered: "Well, you would have to go through the courts. The courts where most of these foreclosure consequences occur, court would uphold our order as we see it." This is confusing at best for a non-mandatory request.

All that said and to be clear, neither the public statements nor the qualifications change the fact that the Order only makes requests on lenders and landlords to consider; it does not make demands.

Three Types of Government Response

In response to COVID-19, states have enacted a wide variety of responses to deal with the housing/economic fallout. When it comes to banks and landlords enforcing their rights to foreclose and evict, states have generally looked to three types of cures:

1. Prevent evictions and foreclosure for a short time but the debt still accrues and the full amount must be paid someday.
2. Suspend rent or mortgage payments for a short time, but the debt still accrues, and the full amount must be paid someday.
3. Permanently waive rent or mortgage payments for a short time so a lesser amount must be repaid someday.

Let's take a look at some examples of each type.

Preventing Evictions/Foreclosures

Eviction or foreclosure freezes are common, both for residential and commercial tenants. And while Ohio has been relatively progressive and proactive in response to COVID-19, it has been surprisingly conservative in this area, choosing not to follow the paths laid down by New

York⁸ and many other states in this regard.⁹ Rather, like California¹⁰ did initially, it has left the matter to the court system and local governments to impose their own solutions.¹¹

Ohio's Supreme Court has advised to "temporarily continue eviction filings, pending eviction proceedings, scheduled move-outs, and the execution of foreclosure judgments. . . ." ¹² Courts in Franklin County¹³ and Cleveland,¹⁴ for example, have also imposed their own eviction limitations with more specificity. To accommodate these types of initiatives, both the Ohio Supreme Court and its legislature have kicked-out statutory and court-rule deadlines that would

⁸ See March 20, 2020 Executive Order 202.8 (supplementing prior March 15th and 22nd indefinite bans issued by New York's court system on all current evictions/foreclosures—residential and commercial—by issuing its own 90-day moratorium).

⁹ The legislature may step in before all this is over. HB 562 is current pending, which attempts to stop foreclosures and evictions until the COVID-19 emergency is over.

¹⁰ See March 16, 2020 Executive Order N-28-20 (allowing its political subdivisions to freeze residential and commercial evictions if the non-payment of rent is related to COVID-19 through May 31, 2020). It also requested, but did not force, lenders to similarly freeze foreclosures if the non-payment of the mortgage is related to COVID-19. Governor Newsom later issued Executive Order N-37-20 on March 27th that gives residential tenants a 60-day extension to deal with an eviction if proof of COVID-19's impact can be documented.

¹¹ California's court system stepped into this gap on March 20 and imposed a 60-day suspension for most court hearings; this was extended on April 6th. Cities also stepped up. On March 23, for example, San Francisco issued an Ordinance prohibiting residential evictions until June 21. And on March 27, Los Angeles issued its own Ordinance protecting most residential and some (smaller) commercial tenants from eviction (because of COVID-19) for as long as the Mayor declares an emergency. Many banks also voluntarily-agreed not to foreclose on residential mortgages for 60 days as a part of its mortgage deferral program.

¹² See The Supreme Court of Ohio's March 30, 2020 "Guidance to Local Courts: COVID-19 Public Health Emergency." To the extent this guidance might expire, the Court has also advised courts to consider HB 197 (dealing with statutes of limitations) as well as the Coronavirus Aid, Relief, and Economic Security Act. See its March 27, 2020 FAQ.

¹³ Franklin County Administrative Order 05-2020 (3/17/20) (ordering, among other things, an 8-week continuance of pending evictions).

¹⁴ The Cleveland Municipal Housing Court suspended its civil cases for 30 days and would not accept new cases until April 20.

otherwise force court action.¹⁵ And in searching for a uniform and longer-lasting fix, several House Representatives are offering up their own legislative solutions.¹⁶

Rent and Mortgage Forbearance

Regulation of *rent* or *mortgage* payments, as opposed to foreclosures/evictions, is more rare. So it's useful to examine New York's journey down this path.¹⁷ Like Ohio has done in this Order, Governor Cuomo initially asked banks to *voluntarily*¹⁸ freeze mortgage repayments. California did the same thing, and like Ohio, made a "request" to banks to hold off on its foreclosures and evictions for COVID-19 related defaults.¹⁹

¹⁵ See The Supreme Court of Ohio's Tolling Order (2020-Ohio-1166) entered on March 27, 2020 and its accompanying FAQ as well as HB 197, signed by Governor DeWine on that same day.

¹⁶ See, for example, House Bill 562.

¹⁷ See March 21, 2020 Executive Order 202.9 (declaring it an unsafe and unsound business practice for any bank regulated by New York not to grant a forbearance to any person or business suffering a financial hardship as a result of COVID-19 if "reasonable and prudent" to do so).

¹⁸ As clarified on March 19 in a press release by the New York State Department of Financial Services.

¹⁹ See March 16, 2020 Executive Order N-28-20 ("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.")

But these requests had little impact. So New York’s bank regulator and its member banks reached an agreement to put their own program together by consent, not coercion.²⁰ This program is narrow, however; it only applies to *residential* mortgages (not insured or securitized by the United States) issued by New York banks (not federal-chartered).²¹ A COVID-19 excuse for nonpayment must still be established to qualify.

On March 27, California accomplished something similar, brokering an agreement with the banks to accomplish a 90-day delay on mortgage payments and a 60-day delay on foreclosures.²² Like New York, this only covers residential mortgages. If Ohio was going to make mortgage forbearance mandatory, we would expect it to follow New York and California’s model.²³

This pattern of request and voluntary compliance is not surprising. Absent consent, required rent or mortgage forbearance could run headlong into constitutional hurdles, namely the Contracts Clause, which generally prohibits altering the terms of private contracts. See Home Building & Loan Association v. Blaisdell (1934), 290 U.S. 398 (upholding a Depression-era moratorium on mortgage foreclosures as a temporary measure in a national emergency).

Rent Payment Cancellation

Recognizing that rent deferral simply “kicks the can down the road” (the rent payments are still owed in full once the freeze is lifted) other states are looking to do even more. The New York legislature, for example, has proposed a Senate bill²⁴ to stop the debt from piling up. This way tenants won’t immediately have to cough-up 3 months of back rent when the rent freeze is

²⁰ New York State Department of Financial Services New Part 119 to 3 NYCRR (“Emergency Relief for New Yorkers Who Can Demonstrate Financial Hardship as a Result of COVID-19”) (March 24, 2020). Even so, forgiveness is not mandated if ordinary financial safety and soundness requirements would otherwise not permit it.

²¹ As clarified in regulations issued on March 24 by the New York State Department of Financial Services.

²² See Executive Order N-37-20.

²³ Mandatory *rent* forbearance may be more difficult to impose because State’s have a natural regulatory role for banks, but not for private landlords.

²⁴ Led by Senator Michael Gianaris, who noted, “The eviction moratorium, while good, does not solve the problem that is going to crash over us in three months time. That’s all the moratorium does; it pushes back the date but does not stop the financial obligation from accruing. The only way to really deal with this is to actually forgive the rent payments.”

over; rather, they would start fresh. And the landlords would then be able to offset these losses from their own respective mortgage payments. This type of response, however, would likely raise the same constitutional concerns noted above.

We will continue to monitor the developments surrounding these rapidly-evolving issues and will keep clients and friends of Havens Limited informed in the future.

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Please note that this On Tract is based on publicly-available information as of its expressed date of publication. However, because COVID-19's status and its related updates are ongoing, we recommend real-time review of guidance distributed by the United States, Governor DeWine, and other Ohio agencies, political subdivisions, and courts.

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