

Session 3: The New Eviction Landscape
2:00pm – 2:45pm CT

Welcome by Moderator (Justin Ortega – McCalla Raymer Leibert Pierce, LLC)

1. Welcome guests
2. Introduce the subject matter
3. Introduce panelists

CFPB rule changes and pandemic moratoria (Hillary McCormack – Lundberg and Associates, PC and Shevon Elam – The Money Source)

1. We've been sitting on hold for a long time. It's a good idea for agent or property preservation to keep an eye on occupancy, code violations, whether property is secured, etc.
2. CFPB Rule re: FDCPA/debt collectors sending notice
 - a. Notice requirements
 - b. In light of *Obduskey v. McCarthy & Holthus*, are we debt collectors if we're evicting following a non-judicial foreclosure?
 - c. Complicated due to references to CDC eviction moratorium, which was extended multiple times through October 3 before being struck down in August.
 - i. Is this even applicable anymore?
 - ii. Has this been superseded by foreclosure servicing rule delaying most foreclosures until after January 1, 2022?
 - d. No one wants to get sued or be the guinea pig. Best practice is probably just to comply anyway even if we believe it's inapplicable or no longer in effect.
3. Investor eviction moratoria—supposed to expire on September 30, 2021 (at the time this outline was created).
4. CFPB Foreclosure Servicing Rule
 - a. Initial requirements – review for loss mitigation
 - b. Exceptions to rule
 - c. Seeing many servicers act (understandably) cautiously and conservatively
 - d. Fewer foreclosures mean fewer evictions
5. Investor perspective on how these changes have affected their business and how they're navigating the changes
6. Determine which departments are directly impacted
 - a. Identify possible gaps that can arise once implemented
 - b. What controls are needed
7. Confirming communication from borrower
 - a. Vendors, registered agent, emails, firms
8. New letters, new/different comment codes for COVID calls, exception reporting
 - a. Why you should distinguish these calls/letters from regular contact attempts and letters
 - b. Does this require additional staffing or re-allocation of staff to address implementation of these items?
9. Updated referral checklists/reduction in foreclosure referrals
 - a. Are new demands required after additional calls made?

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10. New training for all departments and new regulations
 - a. Determine which departments need more in depth training vs. overall training of the requirements

Affirmative defenses to eviction and challenges to foreclosure that could be raised in an eviction (Hillary McCormack – Lundberg and Associates, PC)

1. PTFA—bona fide tenant and bona fide lease
 - a. Applies after both a judicial and non-judicial foreclosure
 - b. Arms-length transaction
 - c. Not borrower's spouse, parent, or child
 - d. Not paying substantially less than fair market rent unless subsidized by government
 - e. 90 days' notice to vacate or until end of bona fide lease
 - f. Does not protect commercial tenants, squatters, or non-bona fide tenants and leases
2. SCRA
 - a. Does not come up often, but severe consequences for violation
 - b. Definition of servicemember
 - c. Definition of military service
 - d. Eviction protections
 - e. Default protections
3. Traditional landlord/tenant defenses
 - a. Usually don't apply
 - b. Rent control
 - c. Habitability
 - d. Retaliation
 - e. Depends on existence of lease—don't become an unwitting landlord (rent acceptance)
 - f. Can implicate PTFA if there is a lease
4. Challenges to foreclosure
 - a. Generally, only arise following a non-judicial foreclosure, because there is typically estoppel/res judicata case law requiring foreclosure challenges to be asserted in a judicial foreclosure
 - b. Many states also have statutory provision for finality of non-judicial sales, with a high bar for setting aside a completed sale
 - c. Could be nothing, or could be devastating to eviction, forcing sale or entire foreclosure to be done over again
 - d. Defective notice
 - e. Standing
 - f. Unfair bidding/price
5. Improper notice/service in eviction
 - a. In many states, post-foreclosure eviction/unlawful detainer is a summary proceeding meant to operate swiftly. The trade-off is that the noticing of service requirements is strictly construed.
 - b. If notice/service challenged, court may feel it's relatively low stakes to force the plaintiff to do it over again.

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6. Lack of standing/real party in interest
 - a. Generally easy to overcome
 - b. Make sure you're in contact with whomever completed foreclosure
 - c. Certified copies of sale deed/certificate, deed of trust, note, assignments, judgment, etc.
7. Violation of COVID-19 protections
 - a. CDC moratorium—unsure if this will matter given it was struck down and has expired anyway
 - b. Investor moratoriums on both evictions and foreclosure (with exceptions)
 - c. State/local moratoriums on both evictions and foreclosures—usually for evictions they are addressing non-payment of rent cases, but check with local counsel
 - d. CFPB rules re: both eviction and foreclosures

Property preservation challenges while files are on hold for various reasons such as pandemic moratoria, FEMA disaster holds, holiday moratoria (Daniel Barbagelata – Aldridge Pite LLP)

1. Preserving REO properties while evictions are on hold.
 - a. As the eviction industry regains momentum, occupants residing in REO properties will inevitably be evicted if they fail to voluntarily vacate. For this reason, an occupant facing unavoidable eviction has little to no incentive to maintain the condition of the property.
 - b. Unmaintained and dilapidated conditions can lead to a number of negative consequences including, but not limited to, depreciation, diminished marketability, code enforcement violations, HOA penalties/fines, neighborhood blight, and potential liability for injuries caused by dangerous or hazardous conditions existing on the premises.
 - c. Vacant properties are susceptible to criminal activity and squatters.
 - d. Overgrown vegetation (grass, brush, weeds, etc.), especially in dryer regions, is a fire hazard and presents liability risk.
 - e. Code violations may be costly if not resolved. Typically, the enforcing agency will issue a citation requiring specific maintenance be completed. Failure to complete the maintenance may result in assessed penalties/fines and, in extreme cases, declaring the property a nuisance and/or condemning or demolishing the property.
 - f. Many cities allow criminal charges to be filed if property owner failed to cure violation after having been provided repeated notice and a reasonable opportunity to cure.
2. Limiting/avoiding liability
 - a. Conduct regular external visual inspections.
 - b. Any unsafe or unmaintained conditions apparent at the premises should be addressed as soon as possible.
 - i. Notice of entry should be served in accordance with applicable law before accessing the premises.
 - ii. Servicers/vendors should consult with local counsel to determine applicable notice requirements and method of service.
 - c. Cure noticed code violations as soon as possible.

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- i. Contact the handling enforcement officer, if possible.
- ii. Enforcement officers are generally willing to allow additional time to cure noticed violations if requested.
- iii. Enforcement officer may have information useful to the eviction

Best practices for prioritizing and triaging files as holds are released and referrals resume (Camille Hawk - Valentine O'Toole)

1. Release the kraken – evictions are off hold
2. Servicer considerations
 - a. Hiring
 - b. Education/re-education
 - i. New staff vs. seasoned staff
 - ii. Impact of the moving target (morale/organizational exhaustion)
 - iii. Process flow – people who know, but have been away
 - c. Facilities/space/technology – Is there enough?
 - d. Systems/processes
 - i. Remove holds – automatic or manual – review practical needs
 - ii. Organization of matters/prioritization
 1. Age of file
 2. Investor needs/claims
 3. Condition of property
 4. Recheck occupancy – vacant? Only personal property remaining?
 5. Re-review with local counsel:
 - a. Local law changes
 - b. Abandoned/vacant definitions
 - c. PTFA apply?
 6. Vacant property registration required?
3. Practical needs – servicers and attorneys
 - a. Facilities/space/technology – Is there enough?
 - b. Refresh on foreclosure file aspects/issues to prepare for eviction referral/re-referral
 - c. Referrals before COVID hold – Restart? Fees? Claims?
 - d. Alternative options – re-visit CFK

Alternative, non-litigation strategies for obtaining possession and vacancy (Daniel Barbagelata – Aldridge Pite LLP)

1. Cash for Keys (“CFK”) / relocation agreements / buyout agreements
 - a. Occupant agrees to vacate the property by a mutually agreeable date in exchange for cash payment.
 - b. Generally, payment conditioned upon occupant timely vacating → incentivizes compliance.
 - c. Highly encouraged during COVID-19 era.
 - d. Offers should be conveyed at earliest opportunity to expedite potential resolution.
 - e. All agreements should contain personal property release and waiver.
 - f. Must be aware of specific jurisdictional requirements.
 - i. Specific notice requirements may apply (ex: San Francisco).

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- ii. Specific payment amounts may be required (ex: Los Angeles and Oakland).
- iii. Cooling-off period – some jurisdictions allow occupants to rescind agreement within a specified period (ex: San Francisco).
- g. Because specific jurisdictional requirements may apply, all offers should be analyzed and approved by local counsel.
- h. If eviction action is pending, consider whether requiring defendant to stipulate to entry of judgment. If defendant stipulates to entry of judgment and fails to vacate in accordance with the parties' agreement, plaintiff may seek execution of judgment.

Question and Answers

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