

Mortgage Foreclosure Moratorium in Oregon

What you Need to Know

Oregon Restaurant and Lodging Association

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Presented by

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HB 4204 Overview

- Prohibits lenders from declaring a default for non-payment during the “emergency period” provided that the borrower has notified the lender of its inability to pay.
- Requires commercial borrowers to provide financial statements or other evidence showing loss of income during the COVID-19 pandemic and disclose any PPP funds received.
- All amounts due, unless otherwise agreed, must be allowed to be deferred and are not due until loan maturity.
- Lenders may not impose charges, penalties, fees, default interest rates, etc. or declare a default based on the inability to maintain loan covenants.
- Foreclosures started before the emergency period are stayed and deadlines for further action are tolled.
- A violation by lender of the statute entitles a borrower to recover damages, court costs and attorney fees.

Legislature's "Findings"

- Legislature recognized that HB 4204 may be challenged on state and federal constitutional grounds:
 - Oregon Constitution, Article 1, Section 22: “No ... law impairing the obligation of contracts shall ever be passed...”
 - US Constitution, Article 1, Section 10: “No State shall ... pass any ... law impairing the obligation of contracts...”
- Legislature “found” that:
 - Interference/impairment is not “substantial” since it is limited in scope and duration and therefore does not, in fact, undermine the parties’ contract rights and obligations
 - Even if the law does have the effect of undermining the contract between the parties, Legislature found that the law was nevertheless “**appropriate and reasonable as a means by which to implement the significant and legitimate public purpose of responding to the declaration of a state of emergency issue by the Governor.**”

Pending Oregon Litigation

- Oregon Bankers Association filed suit in federal court challenging HB 4204 on August 17.
- Axos Bank filed a separate suit on October 2.
- Both suits include similar claims:
 - Violation of Contracts Clause
 - Preemption by the CARES Act in that the CARES Act already provided housing-related relief and HB 4204 conflicts with that relief.
 - HB 4204 constitutes a “taking” and violates due process due to the retroactive application of the law.

Key Definitions

- “Borrower” – Pretty much anyone with a loan secured by real property.
- “Lender” – Pretty much anyone who has loaned money to a borrower secured by real property.
 - At least one out of state insurance company that provided a loan secured by real property in Oregon has claimed not to be subject to HB 4204 since company is not registered in Oregon and not a state regulated bank.
 - Company’s argument ignores language stating that lender includes a beneficiary under a trust deed and Company’s loan is secured by a trust deed in which it is the beneficiary.
- “Financing Agreement” – Pretty much any contract where a borrower has agreed to make payments to a lender on a loan secured by real property.

Key Definitions

- “Emergency Period” means the period from March 8, 2020, ending on September 30, 2020.
 - Governor exercised her right to extend on August 31, 2020, pursuant to Executive Order 20-37. Extended through December 31, 2020.
 - Statute does not allow for another unilateral extension so Legislature will presumably need to pass a law to extend the Emergency Period past the end of the year.
 - Commencement of the Emergency Period was retroactive from the June 30 effective date of HB 4204.

Lenders May Not Declare a Default

- “During the Emergency Period, a lender may not treat as a default a borrower’s failure to make a periodic installment payment or to pay any other amount that is due to the lender on or in connection with an obligation that is subject to a financing agreement...”
- Questions arise about the effect of the retroactive nature of the law and missed payments prior to June 30.
- Many borrowers had already entered into forbearance or “change in terms” agreements with lenders prior to June 30.

Borrower Notice Requirements

- Borrowers are obligated to notify lenders of their inability to make payments as a condition to getting relief from default.
- Only one notice required. No need to provide ongoing periodic notice to lenders.
 - But may need to update financial information.
- For residential property, borrower must simply attest to inability to pay due to COVID-19.

Borrower Notice Requirements

- For commercial property and residential property with four or more dwelling units, the notice must include:
 - Financial statements or other evidence **demonstrating loss of income relating to the pandemic**
 - Disclosure of any funds received under the **Paycheck Protection Program**.
 - Commercial loan agreements often prohibit obtaining subordinate financing without prior lender approval. Lenders may consider this a default.

Lender Notice Requirement

- Lenders were required to provide notice on or before August 30 to borrowers of a borrower's rights to accommodation under HB 4204.
 - Lenders were required to include a copy of the new law.
 - The notices I saw were very limited and looked like junk mail.

Lender Deferral Requirements

- Must defer from collecting periodic installment payments during the Emergency Period.
- Must allow borrower to pay amounts owed by borrower to lender as a result of deferral **at the scheduled or anticipated date on which full performance of the obligation is due.**
 - Due date for performance under a promissory note is the **maturity date.**
 - Should include both deferred interest and principal payments.
 - Unclear on whether interest will accrue on unpaid principal, but, at minimum, interest should not accrue on unpaid interest.

Pre-Foreclosure Lender Restrictions

- Lender may not impose or charges, fees, penalties, attorney fees, or other amounts that lender would otherwise charge for a failure to make periodic payments.
- Lender may not impose a default rate of interest that lender would otherwise charge for failing to make periodic payments.
- Lender cannot require or charge for an inspection, appraisal or broker opinion of value not otherwise permitted in the absence of a default.
- Lender cannot initiate cash management, lock box procedures, or take control of operating revenue that was not already in existing or started prior to June 30.
- Lender cannot declare default based on the failure to meet **financial covenants** due to inadequate operating revenue resulting from COVID-19.

Lender Foreclosure Restrictions

- Lenders may not commence new foreclosure proceedings upon real property during the emergency period (with limited exceptions).
- For foreclosures commenced prior to June 30 on property that would otherwise be protected from foreclosure under HB 4204, those foreclosures were stayed and time periods applicable to the foreclosure were tolled.
- Courts were also directed not to enter judgments or writs of execution relating to foreclosures during the emergency period.
- Once the emergency period ends, foreclosures can start back up.

Lender Liability for Violating HB 4204

- Borrowers can sue lenders for violations of HB 4204
- If a borrower prevails, borrower can recover damages, costs and attorney fees.

Important Reminders

- Lender and Borrower are allowed to agree to terms that conflict with HB 4204.
 - Agreements entered into prior to June 30 are likely binding.
- Borrower is not relieved of any payment obligations permanently. All amounts deferred ultimately must be paid.

HB 4213 – Eviction Moratorium

- Legislature passed law in June imposing eviction moratorium for nonpayment of rent for residential and commercial tenancies.
- Moratorium expired on September 30 for commercial tenancies
- Governor by order extended moratorium on residential tenancies. Unlike HB 4204, this authority was not granted in the law.
- Tenants have until March 31, 2021, to pay deferred rent.
- This moratorium will apply to lodging properties in Oregon where tenants are not longer deemed transient occupants.
- Washington Governor's proclamation expressly included transient occupants in lodging facilities in the moratorium. Oregon's law and orders have not.

Any Questions?



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