

The Post-Pandemic World of Foreclosure Litigation

These legal battles are likely to impact the housing market for years to come

By Brian D. Rich

In many parts of the U.S., the COVID-19 pandemic is subsiding. State and municipal governments are lifting restrictions (including the mandated wearing of masks), jury trials are resuming in local courts, and corporations both big and small are charting potential paths to return their employees to the office. There are clear signs that some form of normalcy is emerging after a long period of uncertainty caused by the global health crisis.

Yet amid the figurative spring blossoms, significant patches of snow remain at the intersection of the mortgage and legal worlds. Federal foreclosure and eviction moratoriums were extended to July 31, 2021, although the Consumer Financial Protection Bureau (CFPB) was working on a proposal that would delay many foreclosure scenarios into the foreseeable future. As of this past June, the agency was expected to create a proposal involving mortgage servicers in the coming weeks.

Of equal note, the CFPB warned servicers that it will exercise its oversight powers by monitoring borrower relief efforts. Specifically, the bureau will require servicers to evaluate and exhaust all potential avenues for relief. Once foreclosures actually resume, it remains likely that courts — particularly those in judicial-foreclosure states — will exercise their often considerable powers to right actual and perceived wrongs.

Early this past June, the Mortgage Bankers Association reported that the share of loans in forbearance had decreased to 4.04%, the 15th straight week of declines. Still, this represented nearly 2 million borrowers. Mortgage originators should pay attention to forbearance and foreclosure trends as these issues can impact their future book of business.

Clues revealed

Although attorneys who specialize in the litigation of creditors' rights are a bit out of practice, these cases will resume once the moratoriums end and court backlogs ease. When this happens, it seems naïve that the process will look anything like it did prior to the pandemic. In fact, a paradigm shift may already be underway for how these issues are viewed.

Previous financial crises are likely to contain some harbingers for what the post-pandemic litigation world may look like for the housing sector. During and after the Great Recession, claims related to creditors' legal standing in foreclosure actions skyrocketed. Purportedly lax lending practices, particularly in regard to subprime loans, led to the assertion of various debt-collection defenses and predatory lending claims.

There were many byproducts of the 2008-2009 financial crisis, including mandatory mediation

programs, loss-mitigation affidavits, and evolving case law related to foreclosure and debt-collection entitlements. Market stakeholders should expect additional attempts at reform due to the pandemic-induced downturn.

“Many signs point to a looming foreclosure threat, with varying prognostications as to whether it will involve a tsunami, a small wave or simply a trickle.”

Anyone who follows these issues has likely seen the seeds of foreclosure defenses being sown again. These include claims of vague and confusing guidance about forbearance programs and payments; the grilling of bank executives before Congress; the return of robust, court-sponsored mediation programs; and new requirements tied to foreclosure-moratorium affidavits. In fact, the unique nature of the pandemic in terms of its effects on individuals and sections of the population is likely to lead to more detailed discovery, or pretrial evidence gathering. Individual circumstances may be addressed in new ways.

Conflicts identified

Recent CFPB comments suggest that some of the same thorny factual claims that were the subjects of post-Great Recession foreclosure actions may be litigated again today. These include such things as delays and denials of loan modifications during a time of acute financial distress, as well as poor communication from loan servicers regarding loss-mitigation options (particularly well-intentioned but poorly documented forbearance agreements).

Issues tied to race and ethnicity also may plague the process. According to the CFPB, approximately

one-third of the borrowers who entered forbearance last year were Black or Hispanic, even though these groups constitute a much smaller share of the overall borrower population. The bureau further noted that mortgage delinquencies and foreclosures are significantly more common issues for communities of color.

These deep societal issues are likely to pervade public perceptions about the inherent fairness of the forbearance and foreclosure processes, as well as the public's reaction to debt-collection efforts. The presence of these issues in foreclosure and eviction cases is likely to impact the resolution of the cases that actually reach the trial stage.

The CFPB reported that consumers submitted more mortgage-related complaints in March 2021 than at any point since April 2018. Access to free, subsidized legal resources through state and local housing authorities are increasing, although they arguably remain woefully insufficient. There is every reason to expect that these complaints will become fodder for litigation going forward.

Years ago, a frustrated judge told two lawyers who could not find a way to settle a foreclosure dispute that “foreclosure cases don't go to trial.” Because these types of trials were relatively rare at that time, the judge had simply forgotten that they existed.



Many signs point to a looming foreclosure threat, with varying prognostications as to whether it will involve a tsunami, a small wave or simply a trickle. Whatever term that's used to describe it, creditors' rights attorneys will be reminding a judge or two in the coming years that foreclosure trials are a thing. Based on what may be litigated, and how fierce the litigation may be, this might be the easy part. ●



Brian D. Rich, Esq. is a partner with the law firm of Halloran Sage LLP in Hartford, Connecticut, where he practices commercial litigation, including the litigation of contested foreclosure cases, lender liability claims and consumer actions against financial institutions. Reach him at rich@halloransage.com or (860) 297-4698.