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Updates from Federal Court in Oregon: Oregon Bankers Association, et al. v. State of Oregon, et. al. –and Axos Bank vs. Ellen Rosenblum as Attorney General of the State of Oregon

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For those of you following the saga of foreclosure legislation in Oregon, I thought I'd provide an update to the two cases that were filed in late 2020 as a reaction to HB 4204, June 2020 legislation that provided a blanket moratorium on all foreclosures (commercial, residential, vacant, occupied, federally and non-federally backed alike) retroactively from March 8, 2020 through December 31, 2020.

The **first** case was filed in August 2020 by the Oregon Bankers Association, Lewis and Clark Bank, Bank of Eastern Oregon, and the People's Bank of Commerce. The defendants were the state of Oregon, the Oregon Attorney General (Ellen Rosenblum), and the Director of the Oregon Department of Consumer and Business Services.

This group of plaintiffs included causes of action for injunctive relief, declaratory relief and sought to declare HB 4204 unconstitutional because the statute violated the due process and takings clauses of the U.S. Constitution. The lawsuit called out the fact that the emergency legislation was retroactive declaring foreclosures that occurred prior to its late June enactment invalid if they were held or started after the emergency period defined to commence on March 8, 2020.

After the case was filed and served, the first motion to dismiss was filed by the Defendants. The motion argued that there was a lack of jurisdiction by the federal court over the claims and that the Oregon Banker's Association did not have standing to bring claims on behalf of its members. Also, the defendants argue that the state is protected by the doctrine of sovereign immunity contained with the 11th Amendment of the U.S. Constitution. In challenging the claims of Lewis & Clark and People's Bank of Commerce, defendants pointed out that that these two banks failed to demonstrate injury traceable to the allegedly unlawful conduct since they didn't plead that they had foreclosure judgments entered or that they lost fee income as a result of the prohibition on late fees.

Oral argument was held on the initial motions on February 4th and the parties were allowed to provide supplemental briefing to cover the impact of a ruling from the second case that was filed by a bank against the state Attorney General.

The **second** case was filed in October 2020 by Axos Bank against the State of Oregon and the Oregon Attorney General, also in Federal District Court in Oregon. Axos Bank sued because HB 4204 impacted its ability to foreclose on a commercial loan granted to Shilo Inn, the default occurring on March 1, 2020. The bank granted a forbearance until June 1, 2020 but wants to enforce its loan documentation and was barred by doing it under the law enacted as HB 4204.



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Axos Bank filed the action alleging the same constitutionality issues as the first case. It also cites the Contracts clause and the due process clauses of the U.S. Constitution. Axos Bank filed a motion for a restraining order, which was argued on December 9, 2020. The state of Oregon and the Attorney General quickly sought dismissal of the claims on the basis of standing and sovereign immunity. That motion was successful, and on December 10th, the Oregon District Court, Judge Marco Hernandez dismissed the case citing that the attorney general has no ability to enforce HB 4204, because the statute only included a private right of action.

Considering this Axos Bank case outcome, one could predict that the Oregon Banker's Association case might be doomed. However, Plaintiffs in the Oregon Bankers Association case are arguing that the Judge Hernandez opinion was wrong because HB 4204 has a direct injurious impact on lenders because it rewrites contracts and the Attorney General does have the power to enforce the law against bank and other institutions bound by its requirements and prohibitions. The briefing in the Oregon Banker's cites to specific state statutes where the attorney general has the specific power to enforce any state law against a banking institution or a non-Oregon institution. It also cites to other consumer protection laws including the unlawful and unfair and deceptive conduct prohibitions that exist in Oregon, which can be used to enforce HB 4204 as well. Judge Ann L. Aiken is presiding over the Oregon Banker's Association case, we will see if she decides to rule ahead of the 9th circuit on the standing issue and if the outcome will be the same.

We will continue to track these cases and monitor them for applicability to our industry.