



McCalla Raymer Leibert Pierce, LLC

1 N. Dearborn, Suite 1200
Chicago, IL 60602
T. (312) 346-9088

www.mccalla.com

Office Hours: Monday - Friday 9am - 5pm (Central)

ALABAMA	NEW JERSEY
CALIFORNIA	NEVADA
CONNECTICUT	NEW YORK
FLORIDA	OREGON
GEORGIA	TEXAS
ILLINOIS	WASHINGTON
MISSISSIPPI	

Foreclosure Moratoria: Key Factors for a Continuance

The COVID-19 health pandemic has had a drastic effect on the country and the world as a whole. Equally as world shifting as COVID-19 pandemic has been, the legislation passed to address Covid-19, such the CARES ACT, has upended financial services litigation. There is a very real concern of a future logjam in the courts. One of the biggest challenges servicers now face is staying in compliance with mortgage moratoria on federally related loans. The moratoria have been extended several times and may be extended into the second or third quarters of 2021. Currently, the moratoria extension on government backed loans including FHA, VA, USDA, Federal National Mortgage Association (“Fannie Mae”), and Federal Home Loan Mortgage Corporation (Freddie Mac) run through the end of March 31, 2021.

Of the restrictions imposed by the GSE moratoria, one of hardest difficulties is ensuring that final judgments are not entered as that is not entirely within the control of servicers. To ensure compliance, loan servicers are often at the mercy of the court. Judges, particularly those who remember the backlog of foreclosure cases following the 2008 Housing Crash, are especially skeptical of delaying foreclosure cases. Judges are well aware there will be another backlog in the future as trials were suspended in the early months of the Covid-19 pandemic and continue to be suspended in some counties. Due to the backlog and to move their docket, some judges in FL are sending Notices of Trial without consulting any party to the case. This is forcing foreclosure counsel to file motions to continue the trial; many times, both the servicer and the borrower do not want to proceed to trial. Once the motion is filed, Judges have been treating motions to continue wildly different from each other, so there is no uniform consistency, even within the same judicial circuit.

It is critical that servicers and their respective counsel are aware of how their presiding judges are handling the requests for continuance based on the moratoria holds and tailor motions to continue based on the judges’ approach to these holds. Fortunately, some judges have been very deferential to the moratorium holds and granted continuances upon request from the Plaintiff without much resistance. Other judges in Florida have requested more information and asked lender’s counsel to identify the type of loan and whether the loan type falls under the CARES ACT or other moratoria holds. While this means that FHA, HUD, VA, USDA, Fannie Mae and Freddie Mac loans may be granted continuances more frequently, servicers who have established internal holds for conventional loans, that mirror the federal loan moratoria, will be left in a difficult position when seeking to continue the trial. This approach by Judges has created the most trouble, as internal holds that mirror federal loan moratoria have not been as persuasive. Finally, some judges in Florida have been skeptical of the federal moratoria as whole and have resisted continuing trials even if the loan is one of the federally related



McCalla Raymer Leibert Pierce, LLC

1 N. Dearborn, Suite 1200
Chicago, IL 60602
T. (312) 346-9088

www.mccalla.com

Office Hours: Monday - Friday 9am - 5pm (Central)

ALABAMA	NEW JERSEY
CALIFORNIA	NEVADA
CONNECTICUT	NEW YORK
FLORIDA	OREGON
GEORGIA	TEXAS
ILLINOIS	WASHINGTON
MISSISSIPPI	

mortgages. Judges who have taken this approach have requested that lenders confirm the occupancy status of the property before granting any continuance. If vacant, the Judge will want to move forward.

When seeking to continue a trial due to Covid-19 federal moratoria, it is important to remember a several key factors that will potentially help convince a judge that is skeptical on continuing the trial. First, always identify what type of loan it is, whether it is a government back loan or a conventional loan. Secondly, in the motion to continue, the new expiration date of the moratorium should be identified. This will allow the judge to reset the case for a trial date after the end of the moratorium. Thirdly, include as an exhibit the latest mortgagee letter or press release government sponsored entities that has announced an extension of the moratorium as an exhibit. While this is not needed for a motion to continue, some Florida judges have been receptive of these document as it gives them a guideline and update for when the moratorium is expected to end instead of relying solely on representations of counsel.

Another consideration for a motion to continue is to frame the moratorium hold not as a regulation that requires the Court to stop from proceeding such as a bankruptcy stay, but rather as a federal department or Regulatory Agency mandate the servicer must comply with or face potential liability. Judges can be territorial and fiercely protective of the separation of powers. Framing the motion to continue as something the Court must do will only make the judge more resistant to granting the continuance. Asking the Court to continue as trial due to the respective moratorium, so that the servicer is not prejudiced, has been more persuasive to judges. Finally, pursuant to Florida Rule of Civil Procedure 1.460, attaching a short statement of the lender's consent to continuance on basis of the moratorium hold as part of the motion to continue is another best practice to consider. This short-signed statement will help to convince a cynical judge that the lender is seeking continuance based on the moratorium rather than potential unreadiness of counsel.

If the COVID-19 moratoria on foreclosures continue for longer than a year, the Judges will become impatient in granting continuances of foreclosure trials. Many Florida judges are already handling trials on remote platforms moving their dockets forward. In the future, as Judges become more reluctant to continuances, servicers will need to be ready to move forward to judgment, settle the case or dismiss the case. Many times, none of these options will be favorable and some will not be a viable option. Judges, when reviewing the motions, will be more likely to grant the continuance if the servicers counsel includes the key factors giving the Judge many bases to rule in favor of the servicer.