

COVID-19

CORONAVIRUS: UPDATE ON GUIDANCE REGARDING COMMERCIAL AND RESIDENTIAL EVICTIONS AND FORECLOSURES

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Foulston has produced a series of issue alerts as we continue to monitor the evolving COVID-19 situation and provide additional guidance. Please find all updates and our latest resources available [here](#).

On March 23, 2020, Kansas Gov. Laura Kelly issued Executive Order 20-10, rescinding and replacing Executive Order 20-06. Executive Order 20-10 is primarily focused on prohibiting foreclosures on residential property and eviction of residential tenants who are suffering a “financial hardship resulting from the COVID-19 pandemic.” In this use, financial hardship resulting from the COVID-19 pandemic is defined as an individual or family suffering a significant loss of income, significant increase in necessary expenses, or inability to work as a direct or indirect result of the COVID-19 pandemic, **AND** the individual's or family's financial resources are depleted to the extent that paying rent or mortgage payments would leave them unable to purchase necessary food, medicine, goods, supplies, or services.

However, the Executive Order does not go so far as to relieve borrowers or tenants who are **not** suffering financial hardship resulting from the COVID-19 pandemic from timely paying their rent or mortgage payments; nor does it prohibit foreclosures or evictions for defaults that are unrelated to a financial hardship resulting from the COVID-19 pandemic. It is also worth noting that the order **burdens the person or entity initiating the foreclosure or eviction proceedings with pleading and proving that the foreclosure or eviction is not being initiated solely because of defaults substantially caused by financial hardship resulting from the COVID-19 pandemic.** This new order applies to **all** landlords renting to residential tenants; however, only banks and financial lending entities are prohibited from foreclosing on residential property.

There are several exceptions to this Executive Order. Any judicial eviction or judicial foreclosure proceeding filed before March 23, 2020, can continue, although with Kansas courts currently shut down except for emergencies, the usefulness of this exception is rather limited. Additionally, foreclosures initiated by the United States Government

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are expressly exempted. Seller financing is not mentioned or discussed in the order, so presumably judicial foreclosures of seller-financed property, residential and commercial, are allowed.

This order does not appear to be intended to prohibit most foreclosures or evictions related to commercial property, provided that such foreclosures or evictions do not result in the eviction of residential tenants. The recitals to Executive Order 20-10 make it clear that the intent of the order is to prevent housing disruptions in Kansas. Paragraph 6 of the order requires any bank, financial lending entity, or landlord initiating judicial foreclosure or judicial eviction proceedings to plead and prove that the proceeding “is not being initiated solely because of default or violations of the mortgage or rental agreement substantially caused by a financial hardship resulting from the COVID-19 pandemic.” This language appears to require pleading and proving these facts even for commercial foreclosure and evictions. As the definition of “financial hardship resulting from the COVID-19 pandemic” is tied to an individual or family suffering a significant loss of income, it should be possible to argue that many commercial mortgagors and tenants would not qualify as suffering financial hardship resulting from the COVID-19 pandemic. However, the burden of proving that certain small businesses and family-owned businesses are unable to pay rent on their commercial leases or mortgage payments on the commercial property due to a financial hardship resulting from the COVID-19 pandemic may be more problematic.

Finally, Executive Order 20-10 encourages but does not require that after the financial hardships resulting from the COVID-19 pandemic abate, lenders, borrowers, landlords, and tenants work together to negotiate payment plans or other agreements to address missed rent and mortgage payments substantially caused by financial hardship resulting from the COVID-19 pandemic.

Unless earlier rescinded, Executive Order 20-10 is in force until the earlier of May 1, 2020 or the statewide State of Disaster Emergency related to COVID-19 expires. The full text of Executive Order No. 20-10 may be found [here](#).

FOR MORE INFORMATION

If you have questions or want more information regarding how COVID-19 may affect your commercial leases or other commercial real estate projects, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. Foulston's commercial real estate lawyers and litigators maintain a high level of expertise regarding federal, state, and local regulations affecting the real estate industry. At the same time, our commercial real estate practice group's relationship with Foulston's other practice groups, including the construction, taxation, general business, labor and employment, and commercial litigation groups, enhances our ability to consider the legal ramifications of these situations. For more information, contact **Robert Smith** at 316.291.9779 or rsmith@foulston.com, or **Scott Nehrbass** at 913.253.2144 or snehrbass@foulston.com. For more information on the firm, please visit our website at www.foulston.com.

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