

Possible Leniency for Commercial Tenants and Real Estate Borrowers in Ohio

By John Coyne & Brian Moore

Governor Mike DeWine issued Executive Order 2020-08D directed at two commercial real estate constituencies affected by the COVID-19 pandemic.

First, for the benefit of small business **commercial tenants** facing financial hardship due to the pandemic, the Governor “requests” leniency by landlords when dealing with small business commercial tenants in Ohio. Two specific requests are made: (1) that landlords suspend rent payments for at least 90 consecutive days, and (2) that landlords refrain from evicting tenants for at least 90 consecutive days.

In the rent suspension segment there is no reference to a deferral of rent as an option in lieu of an outright suspension. Whether there is a deliberate or meaningful distinction between suspension and deferral is unclear, but later in the order there is language that prevents construing the language to negate the obligation to pay rent or to prevent landlords from recovering rent as a future time.

The request to refrain from evicting small business commercial tenants for a term of at least 90 consecutive days is straightforward. The order does not include any predicate that the eviction be brought on by hardship caused by the pandemic. The request does not seem to have any application to a circumstance where a small commercial business tenant was in default well before the pandemic was impactful.

Because the language of the order is non-binding and aspirational in its phrasing, it could be concluded that landlords are simply being asked to draw on good faith when requested to suspend or defer rent or when deciding to forbear from pursuing eviction given the particular tenant’s hardship and the equities under the circumstances.

Second, for the benefit of **commercial real estate borrowers**, the order makes a single request; that the mortgage lender forbear from taking certain actions under the loan documents for at least 90 consecutive days where the lender might otherwise have the right. The particular actions requested include forbearing (in the case of monetary or non-monetary defaults) from (i) filing suit against the borrower (or any co-borrower or guarantor), (ii) filing a foreclosure or requesting a receiver, (iii) impounding accounts or reserve type funds or preventing the use of cash in the accounts or sweeping cash so the borrower cannot access it, (iii) requiring a “party” (presumably a borrower, co-borrower or guarantor) to waive legal rights or admit default. Supposedly these actions are under the order not to negate the obligations of a commercial real estate borrower, but are to allow for time to work out the loan with “sensible solutions.”

From a lender’s perspective, typically one of the early things a lender does before assisting a defaulting borrower by granting forbearance, is to require the borrower admit the default. Though the specific reference to not requiring admission of default is an indication that the order prefers the parties treat the forbearance as brought by unavoidable circumstances warranting something more than the usual.

Again, the most obvious point of the order is that at least to this point it is aspirational, not obligatory. Whether the Governor could or would issue a binding mandate will likely depend on how the facts develop as tenants and borrowers find themselves in financial straights as the pandemic wears on. Also, it is unclear from the Executive Order if the term rent includes the continued payment of common area maintenance fees and charges, or excludes late fees or other default interest and fees. The Executive Order made it clear that it does not negate a small business commercial tenant obligation to pay rent or restrict a landlord from recovering rent at a future time. Likewise, the Executive Order does not negate the obligations of a commercial real estate borrower, but provides a temporary pause for better solutions to be worked out between commercial real estate borrowers and lenders.

It appears that the best and most effective strategy would be to negotiate a payment plan that will work for the landlord, tenant and lender. Negotiating a payment plan is an option as is possibly enforcing the existing contract. We can agree that the landlord's, tenant's and lender's interests align in that all desire the continued success of the profitable relationship. However, as the nation continues to navigate uncharted territory, the failure to adjust during this short-term crisis will be utterly catastrophic to the long-term sustainability of all parties.

Please contact our real estate team for guidance on how to deal with commercial real estate tenants and lenders in solving issues related to the COVID-19 pandemic and this Executive Order.

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