

## Expiration and Extension of Federal and State Limits on Foreclosures in North Carolina

*UPDATE (August 31, 2020): The federal moratorium on foreclosures and evictions from properties subject to foreclosure is extended for many loans through December 31, 2020.*

- *The Federal Housing Finance Agency (FHFA) [announced](#) that Fannie Mae and Freddie Mac extended the moratorium on single-family foreclosures and real estate owned evictions through December 31, 2020.*
- *The U.S. Department of Housing and Urban Development through the Federal Housing Administration [announced](#) an extension of its foreclosure and eviction moratorium through December 31, 2020 for homeowners with “FHA-insured Title II Single Family forward and Home Equity Conversion (reverse) mortgages.”*
- *The Department of Veterans Affairs [announced](#) an extension of the foreclosure moratorium on VA-guaranteed loans through December 31, 2020.*
- *The U.S. Department of Agriculture [announced](#) an extension of the foreclosure and eviction moratorium for all USDA Single Family Housing Guaranteed Loan Program loans through December 31, 2020.*

*UPDATE (June 23, 2020):*

- *On June 17, 2020, the Federal Housing Finance Agency (FHFA) [announced](#) that Fannie Mae and Freddie Mac will extend their single-family moratorium on foreclosures through at least August 31, 2020.*
- *On June 17, 2020, the U.S. Department of Housing and Urban Development through the Federal Housing Administration [announced](#) an extension of its foreclosure moratorium through August 31, 2020 for homeowners with “FHA-insured Title II Single Family forward and Home Equity Conversion (reverse) mortgages.”*
- *On June 17, 2020, the Department of Veterans Affairs [announced](#) an extension of the foreclosure moratorium on VA-guaranteed loans through August 31, 2020.*
- *On June 19, 2020, the U.S. Department of Agriculture [announced](#) an extension of the foreclosure moratorium for all USDA Single Family Housing Guaranteed Loan Program loans through August 31, 2020.*

A colleague joked last week that you will get whiplash trying to track the federal and state limits imposed on foreclosures over the past few months. Honestly, I think you would get whiplash just reading the updates to my [prior blog post](#) on the topic. Instead of adding yet another update to that post, I thought I'd use this post to track where we are now – which protections have expired (or will soon expire) and which ones have been extended.

## Expired Protections

*State Law Protections.* The Chief Justice of the North Carolina Supreme Court has issued a [number of orders](#) since the start of the current public health crisis. Two orders issued in April 2020 impacted foreclosures.

- The [April 2nd](#) order directs all proceedings must be scheduled or rescheduled for a date no sooner than June 1, 2020 unless an exception applies. This includes hearings to obtain an order from the clerk authorizing a power of sale foreclosure under [G.S. 45-21.16](#); it did not bar foreclosure sales.
- The [April 13th](#) order provides that any documents due to be filed or acts due to be done on or after March 16, 2020 and before the close of business on June 1, 2020 are deemed to be timely if they are filed or done before the close of business on June 1. For example, this means that in the case of any foreclosure where an upset bid period expired between March 16 and June 1, inclusive of those dates, any person could file an upset bid through the close of business on June 1 and the filing would be deemed timely.

These orders have not been extended beyond June 1 by the Chief Justice. On [May 21, 2020](#), the Chief Justice issued an order that provides that pleadings and other documents delivered by the U.S. Postal Service to the clerk are timely filed if they are received by the clerk within five business days of the date the filing is due. Therefore, if a document such as an upset bid is due on June 1, it is timely filed if it is delivered by USPS and received by the clerk on or before June 8.

*Federal Law Protections.* On March 27, 2020, President Trump signed the [Coronavirus Aid, Relief, and Economic Security Act \(“CARES Act”\)](#). Section 4022(c)(2) of the CARES Act provides that “a servicer of a Federally back mortgage loan may not initiate any judicial or non-judicial foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale for not less than the 60-day period beginning on March 18, 2020.” The protections in this subsection of the CARES Act expired on May 17, 2020 and as of the date of this post have not been extended.\*

## Extended Protections

On March 20, 2020, President Trump announced a moratorium on certain foreclosures. This moratorium was prior to and is different from the CARES Act moratorium. The moratorium was for 60 days (through May 17, 2020). It was implemented initially through the Department of Housing and Urban Development (HUD), Fannie Mae, and Freddie Mac to assist borrowers impacted by COVID-19. On May 14, 2020, each of these entities announced an extension of their respective foreclosure moratorium through June 30, 2020.

- The [HUD moratorium](#) applies to single family homeowners with certain Federal Housing Administration (FHA) insured mortgages. Specifically, it applies to homeowners with “FHA-

insured Title II Single Family forward and Home Equity Conversion (reverse) mortgages.” It directs mortgage servicers to halt all new foreclosure actions and suspend all foreclosure actions currently in progress. It does not apply to FHA-insured mortgages secured by vacant or abandoned properties.

- The [Fannie Mae](#) and [Freddie Mac](#) moratoriums are directed to their respective mortgage servicers. The guidance issued by these entities directs servicers to suspend all foreclosure actions and foreclosure-related activities, including foreclosure sales through June 30, 2020. The Freddie Mac bulletin notes this includes “initiation of any judicial or non-judicial foreclosure process, move for foreclosure judgment or order of sale.” The suspension does not apply to mortgages on properties that are vacant or abandoned.

On May 15, 2020, the U.S. Department of Veterans Affairs issued a [communication](#), dated May 14, 2020, extending the moratorium on properties secured by VA-guaranteed loans through June 30, 2020. The moratorium applies to the initiation of foreclosures and to the completion of the foreclosure process.

The United States Department of Agriculture (USDA) through the USDA Single Family Housing Guaranteed Loan Program also [announced](#) a foreclosure moratorium extension through June 30, 2020. The moratorium does not apply when the property is vacant or abandoned. (*Updated June 9, 2020.*)

### **Impact of the Extended Moratorium on Chapter 45 Foreclosure Proceedings Before the Clerk**

It is clear that as of June 1 certain foreclosure hearings may resume in North Carolina. Clerks may see trustees make a statement in the affidavits filed with the court or at the hearing that the underlying mortgage loan is not subject to a foreclosure moratorium.

If the trustee does not address the moratorium in the affidavits filed with the court or at the hearing, the clerk may inquire at the hearing as to whether or not the loan is subject any moratorium before entering the order authorizing sale. If the trustee is unaware of the moratorium or unsure whether it applies in that particular case, the clerk may continue the hearing to a later date so the trustee may confirm the loan status before proceeding. See G.S. 45-21.16C. However, there does not appear to be an affirmative obligation imposed on the clerk to make an inquiry specific to the foreclosure moratorium beyond what is generally required of the clerk in all foreclosure proceedings under [G.S. 45-21.16C](#) (requiring the clerk to (i) inquire whether the debtor occupies the property as a principal residence and about the efforts, if any, of the servicer, mortgagee, and trustee to communicate with the debtor and resolve the matter without foreclosure and (ii) grant a continuance if additional time or measures will likely result in a non-foreclosure resolution of the delinquency). If the clerk inquires about the foreclosure moratorium and the borrower raises it as a defense to the foreclosure (as opposed to asking for a continuance), it is not clear that the clerk has the jurisdiction to decide the issue if the defense is disputed by the party seeking the order authorizing

sale.

The clerk's jurisdiction in the context of a power of sale foreclosure is limited. [In re Vogler Realty, Inc., 365 N.C. 389, 395 \(2012\)](#). If the court finds the existence of six elements set forth in [G.S. 45-21.16\(d\)](#), the court authorizes the trustee to proceed with the foreclosure sale under the deed of trust. The court may only consider legal defenses to these elements raised by a party in making a decision whether or not to authorize the sale. The court has no equitable jurisdiction, meaning that the court is not able to consider defenses based on general fairness. *In re Helms*, 55 N.C. App. 68, 71-72 (1981). Furthermore, the court has no jurisdiction to consider legal defenses beyond those related to the six elements. The court must decline to address any party's request for equitable relief or relief on the basis of some other legal defense even if the parties stipulate that an equitable or other legal issue is properly before the court. See [Mosler ex rel. Simon v. Druid Hills Land Co., Inc.](#), 199 N.C. App. 293, 298 (2009).

It is unclear whether the determination that a mortgage servicer is subject to or in violation of policies communicated in letters to the servicer from HUD, Fannie Mae, Freddie Mac, and the VA falls within the jurisdiction of the clerk at a power of sale foreclosure hearing. In a 2013 case, a borrower argued that the lender's compliance with HUD regulations incorporated in the terms of the deed of trust by reference were contractual conditions precedent to the lender's right to foreclose under the deed of trust (one of the six elements the clerk must find under [G.S. 45-21.16\(d\)](#)). [In re Foreclosure of Raynor](#), 229 N.C. App. 12, 15-16 (2013). Despite the borrower's arguments, the clerk entered the order authorizing sale as did the superior court on appeal *de novo* from the clerk. The superior court judge determined that the court lacked subject matter jurisdiction to consider the borrower's defense because it fell outside the scope of review permitted under [GS 45-21.16](#). *Id.* The borrower then appealed to the NC Court of Appeals. Unfortunately for all of us given the present circumstances, the NC Court of Appeals did not squarely address this issue and affirmed the trial court on other grounds. *Id.* at 17.

In another case published by the NC Court of Appeals, the court held that a borrower's defense under the Truth in Lending Act, a federal law, constituted an equitable defense outside of the clerk's jurisdiction. [In re Foreclosure of David A. Simpson, P.C.](#), 211 N.C. App. 483, 488-89 (2011). The defense was based on the right to rescind, which is a traditional equitable doctrine. Therefore, it is not clear what the court would hold if the borrower raised a legal defense under the TILA that specifically related to one of the six elements in [G.S. 45-21.16](#). However, the court emphasized that a power of sale foreclosure before the clerk is not intended to settle all matters in controversy between the borrower and the lender. *Id.* The proper channel for the borrower to raise *equitable and other legal defenses* to the foreclosure is by filing a civil action in superior court to enjoin the foreclosure sale under [G.S. 45-21.34](#). *Id.*

If the moratorium becomes a disputed issue at the foreclosure hearing, the clerk will have to decide whether the issue falls under the clerk's limited jurisdiction set out in [G.S. 45-21.16](#). As of today, the moratorium runs through June 30.

*\* In addition to the foreclosure moratorium, the CARES Act established forbearance protections under [Section 4022\(b\)](#). Pursuant to that subsection, a borrower with a federally backed mortgage loan experiencing a financial hardship due, directly or indirectly, to the COVID-19 emergency may request a forbearance regardless of the delinquency status of the loan. A large percentage of mortgage loans likely fall under the definition of “federally backed mortgage loan” set out in the CARES Act Section 4022(a)(2). By [some estimates](#), approximately 70 percent of mortgages in the current market are federally backed. Under Section 4022(b) of the CARES Act, a borrower submits a request for a forbearance to the borrower's servicer together with an affirmation that the borrower is experiencing a financial hardship during the COVID-19 emergency. Upon a request by a borrower for a forbearance, the forbearance "shall be granted for up to 180 days, and shall be extended for an additional period of up to 180 days at the request of the borrower." Section 4022(b)(2). The forbearance protections, unlike the foreclosure moratorium under Section 4022(c), do not have a specific time limit of 60 days. The borrower's request for a forbearance may be made during "the covered period," a term that is not defined in Section 4022 of the CARES Act. (Updated June 9, 2020.)*