

# Real Estate Industry Alerts Tracker - May 22, 2020 Issue

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Kelley Drye Real Estate  
INDUSTRY ALERTS

## New York Foreclosure Ban and Mezzanine Loans

Governor Andrew Cuomo's initial executive order issued on March 20, 2020, barred the "foreclosure of any residential or commercial property" for a period of ninety days. An updated executive order issued on May 7, 2020, more specifically applied to "foreclosure of any residential or commercial mortgage." While traditional mortgage loan foreclosures require judicial enforcement, mezzanine loan foreclosures do not. This distinction led most of the lending community to believe that mezzanine loan foreclosures would be exempt from Governor Cuomo's orders barring foreclosures. However, when the owner of a hotel project obtained a temporary restraining order preventing the mezzanine lender from holding a foreclosure action for the hotel owner's equity interest in the project, it raised concerns for the lending community. Those concerns appear to be alleviated, however, by a New York State Supreme Court order that vacated the restraining order. The court found that mezzanine loan foreclosures are exempt from the statewide ban on foreclosures because such foreclosure actions are not judicially-ordered. The court also rejected the notion that a mezzanine loan foreclosure should be considered "commercially unreasonable" during a pandemic. The borrower argued that the planned foreclosure was unreasonable because it would require potential bidders to "risk their own well-being and flout the legal restrictions" to attend an in-person foreclosure. As a result, the mezzanine lender would be the sole bidder at the auction. However, the court disagreed with the notion that holding a mezzanine foreclosure auction was, by definition, commercially unreasonable. Even though traditionally held in person, the Uniform Commercial Code permits foreclosure auctions to be conducted virtually. The judge's decision implied that the procedures prescribed by the lender to conduct the foreclosure auction were appropriate and commercially reasonable.

Additional information may be found [here](#).

## Federal Law Makers Seek to Provide Business Interruption Coverage for Future Pandemics

Federal lawmakers are proposing new legislation that would provide a federal backstop for insurance

industry losses resulting from future pandemics. The draft Pandemic Risk Insurance Act (PRIA), which has not yet been introduced in Congress, would be modeled after the Terrorism Risk Insurance Act (TRIA), which was passed in response to the September 11, 2001, attacks. It would provide a re-insurance program administered by the Department of Treasury. Once industry losses exceed \$250 million in the aggregate as a result of a single covered “public health emergency,” the government reinsurance coverage would kick in and cover losses of up to \$500 billion per calendar year.

To be part of the program, insurers would be required to provide business interruption coverage that does not “differ materially from the terms, amounts and other coverage limitations applicable to losses arising from events other than public health emergencies.” Insurers that elect to participate in the program would be required to pay an annual premium for reinsurance coverage and 95% of any losses in excess of an insurer’s deductible would be covered by the government.

Insurance groups, however, are not fans of the TRIA model and are developing proposals for alternative programs for lawmakers to consider. The American Academy of Actuaries sent a letter to federal lawmakers endorsing the TRIA-like idea of limiting insurers’ exposure to pandemic-related business interruption risk with a federal backstop to cover the extreme losses above a cap, but objected to having coverage for pandemic-related shutdowns incorporated into the business interruption section of insurance policies. It noted that pandemic-related losses are more similar to those losses covered by terrorism insurance and flood insurance than the risks normally insured by the commercial insurance market, and any new federal program should reflect that difference. The National Association of Mutual Insurance Companies and the American Property Casualty Insurance Association, two major property/casualty insurer trade organizations, also disagree on using TRIA as the model for a new plan to provide pandemic insurance. They believe that losses for future pandemics should be fully paid by the federal government and not backstopped as is proposed.

A copy of the draft bill may be found [here](#) and additional information may be found [here](#).

## Illinois Passes Rent Relief Act

The Illinois legislature recently passed the COVID-19 Emergency and Economic Recovery Renter and Homeowner Protection Act, which is awaiting approval by Governor J.B. Pritzker. The bill, if signed into law by the governor, would provide assistance to tenants, landlords, and homeowners impacted by the coronavirus pandemic. If passed, the law would be in effect until the state’s unemployment rate recovers to near pre-pandemic levels and the governor’s disaster proclamation has expired.

Among the protections afforded under the bill:

- Rent would be cancelled for tenants who (a) are diagnosed with COVID-19 or advised by a health care provider to self-quarantine; (b) have lost income through furloughs, layoffs or other employment interruption; or (c) are paying more for household expenses, childcare, or healthcare during the moratorium.
- Landlords and condominium associations would be barred from fining residents for missed payments or reporting them to a consumer reporting agency, tenant screening agency, or credit bureau during the pandemic.
- Landlords and mortgage lenders would be compensated for canceled rent payments through a newly created residential housing relief fund.
- Mortgage payments for landlords impacted by COVID-19 and homeowners would be suspended.

Homeowners would receive a 180-day forbearance on taxes, insurance, and association fees. Loan terms would be extended for the number of months of missed payments.

- A moratorium on foreclosures would be put in place and new eviction filings would be temporary barred, in addition to the existing moratorium on carrying out evictions. Tenants would also be given additional time to pay back late rent after the moratorium expires.

Additional information may be found [here](#).

## Heard Around the Industry

**Construction Loans in New York City During COVID-19:** In New York, in order for a lender's building loan mortgage to have priority over claims from contractors and building materials providers who file their own lien claims, a building loan agreement must first be filed before the construction loan mortgage is recorded. With on-going construction projects, the New York Lien Law requires that any modification of a building loan contract be filed within 10 days after execution of the modification along with an updated Section 22 Affidavit or the lender risks losing some or all of its priority against later filed mechanic's liens.

In most counties in New York State, where the building loan agreement and mortgage are both recorded in the county clerk's office, construction loan transactions may continue as long as the county clerk's office remains open for in-person or electronic filings. In New York City, it is a bit trickier given building loan agreements and mortgage documents are filed in two separate offices. In New York City, the building loan agreement is filed in the county clerk's office, while the building loan mortgage is recorded in the City Register's Office. The problem to date, is that while the City Register's Offices have been open for electronic recording in certain counties, the county clerk's offices have not. The five County Clerk's Offices in New York City are, however, now starting to operate. While the physical offices remain closed, they are accepting submissions by mail and are working to clear the backlog created since the March 20, 2020, shutdown. We hear that the County Clerk's Offices in New York and Kings counties are now accepting building loan agreements, amendments or modifications of building loan agreements and mechanic's liens for filing.

**Will Corporate Offices Survive COVID-19?** COVID-19 related stay-at-home orders forced many hesitant corporations to face the harsh reality of allowing their employees to work from home in order to keep business running during the pandemic. As America slowly begins to return to work, corporations with large offices in major cities are re-evaluating their long-term location strategies. Some are looking to set up offices in suburbs, where the density is not nearly as great, while others are debating permitting a continued work-from-home program once stay-at-home orders are rescinded (at least until a vaccine for COVID-19 is widely available). Other concerns for having offices in large cities for the foreseeable future relate to commuting issues and the risks of using public transportation once cities re-open.

**Real Estate Buyers Awaiting Deals:** Many real estate deals remain frozen for the time being, as the world's biggest investors are hoping for significant price discounts in the neighborhood of 20% off pre-COVID-19 prices, while sellers generally seem to be amenable to discounts in the range of 5%. As a result of the social distancing rules and travel restrictions instituted as part of the pandemic response, transactions have stalled amid speculation that prices will drop in coming months. Pricing deals for retail, office and hotel properties will be difficult until markets start to open up and buyers and sellers find some middle ground as to pricing. Pricing may also vary depending on geography and the speed and success of the economic recovery.

Additional information may be found [here](#).

## Return to Work Checklist

All 50 U.S. states have begun to reopen in some form. As employers plan for a safe return to work, there are several critical protocols and practices to consider. Kelley Drye's [Labor and Employment](#) team developed a [Return to Work \(RTW\) Checklist](#) to help guide employers and managers through the snares of legal, logistical and practical considerations of getting back to work effectively.

Click [here](#) for a PDF of the checklist.