

BISNOW

Real Estate Facing 'Mayhem' In The Courts As Legal Backlog Balloons

*By Jarred Schenke
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The legal system is the unsung hero of the commercial real estate industry, especially in times of strife. Landlord-tenant disputes, foreclosures, contract disputes, tax appeals, partnership settlements — the everyday procedure of the way capital moves through the U.S. real estate industry relies on a functioning judiciary.

But just as the coronavirus pandemic has upended the way much of society functions, it has wreaked havoc on the courts. Many courts stopped functioning entirely for months, before adopting new technologies to move cases through, albeit fewer than before. All the while, cases have been piling up, leading to a backlog experts fear will take years to work through.

“Once that window opens up, it's just going to be mayhem,” said William Mack, a New York-based commercial litigator and arbitrator with Davidoff Hutcher & Citron.

Commercial real estate, facing potentially more litigation than ever once eviction and foreclosure moratoriums are lifted, is already feeling the impacts, either in slower resolutions or far more out-of-court settlements than before.

Over the past year, cases have taken nearly twice as long to make their way through the judicial system. Between 2019 and 2020, the median number of months that it took U.S. District Court judges to hear and terminate cases from

filing to pretrial jumped from 14 to 27 months, [according to data gathered by the Federal Judiciary](#).

The number of cases that were adjudicated and terminated during pretrial swelled from 33,000 in 2019 to 41,500 in 2020, according to the U.S. Courts, while the number of cases that saw a trial plummeted by nearly half during that same period, from 1,851 to 999.

“If you’re trying to get a trial at all, it’s taking longer than it was before Covid, and if you want a jury trial, it’s even slower,” said Joshua Bowman, a partner who heads up the hospitality practice at Boston-based law firm Sherin and Logden.

Before the pandemic, Bowman said getting to trial with a commercial lawsuit would rarely take much longer than a year. “With Covid, you’re talking years.”

Despite the delays, the pandemic is expected to cause more legal issues, not fewer. Once landlords and lenders lose their patience with tenants and borrowers behind on rent and debt collections, even though they may have worked together to Band-Aid Covid-related losses, they will eventually want to recoup their losses.

“When they get to the end of this Covid period, which, knock on wood, there will be an end sometime in 2021, landlords are going to be wanting to go back to full rent,” Bowman said. “I think landlords and tenants have been kicking the can down the road, knowingly. Even the lenders have been kicking the can down the road.”

Beyond federal courts, where more complex and expensive real estate litigation is typically heard, state and local courts have also been overwhelmed with a backlog of cases. The South Carolina Supreme Court recently [issued guidance to restart jury trials](#) in summary courts after a year of prohibiting them, and it is [now facing a massive backlog of cases](#). There have been similar reports of backlogs in [Kansas](#), [Texas](#) and [New Hampshire](#).

California courts resolved 1.4 million fewer cases between March and August of 2020 than they did in 2019, [according to a report by the state’s judicial branch](#). Atlanta’s local government has agreed to pump \$60M into the county’s

judicial system to break up a logjam of criminal cases and civil cases. Without it, experts say cases could take upward of three years to see any resolution, [The Atlanta Journal-Constitution reported last month](#).

“I think there's a huge delay in state courts with getting cases tried and heard. There's just delay, delay, delay,” said Corali Lopez-Castro, a bankruptcy and commercial litigation attorney with Kozyak Tropin & Throckmorton in Miami. “Eventually you will win in court. But until you do, your tenant will be in your space not paying rent.”

The time to get to trial for civil cases will likely lengthen once residential evictions are allowed to be enforced and when federal relief to backstop small businesses ends, Mack said. Some landlords are even filing eviction motions with the courts now — despite the moratorium, Mack said — in hopes of getting heard by judges before the flood of lawsuits when the ban on evictions lifts.

“There's going to be such a deluge and a backup of cases, it's going to take a much longer time to get through,” he said. “It's kind of like file it [now], get in line and wait.”

Courts have been attempting to [deal with the backlog in various ways](#). Some courts have been swift in adapting to using teleconferencing software to handle aspects of cases that don't require juries, such as motions and initial court appearances or traffic violations and small claims.

Courts in [Florida](#) and [Washington state](#) have begun to experiment with bench and jury trials using Zoom, although the practice has yet to become commonplace. The technology has helped courts expedite cases that otherwise would have wallowed longer in the system if they were relegated to in-person hearings, easing the backlog somewhat.

“There's something to be said about saving time and travel to courts versus doing it on Zoom,” said Daniel Lesser, the CEO of LW Hospitality Advisors who is frequently tapped as an expert witness on trials or to act as an arbitrator. “I would tell you going through 40-odd jurisdictions to get registered as a receiver was mind-numbing, but we got through it.”

Court congestion has commercial real estate owners looking to solve their disputes outside of the judicial system.

The Radco Cos., which owns 3,700 apartment units across eight states, was faced with a buyer who backed out of a deal last year, CEO Norman Radow told *Bisnow*. That buyer demanded back the earnest money, and at any other time, the dispute would have likely gone before a judge, Radow said.

Instead, the parties were forced to settle around a negotiation table in a single afternoon after they found out it could take up to three years before the case even went to trial.

“Mediators weren’t even available,” Radow said. “Their mediator had Covid, and then getting mediation was going to take a long time.”

While negotiations may result in smaller possible awards than if a case were to go before a judge or jury, the legal system’s mounting delays — and the extra costs that come along with them — are making settlements more appealing, said Roy Carrasquillo, a real estate attorney in New York and managing shareholder of Carrasquillo Law Group.

Landlords who might otherwise pursue lawsuits might also be more willing to settle now, knowing that not only would a trial take longer than normal, but their tenants are in worse financial shape.

“If you want to play hardball, now you’re just going to have an empty storefront because there is not someone to replace it,” said Bruce Percelay, the chairman of Boston-based real estate investor Mount Vernon Co. “The problem is you can’t get blood from a stone.”

Adam Ifshin, the CEO of DLC Management, which owns 85 open-air shopping centers across the country, said he is noticing judges attempting to compel parties to the negotiation table instead of pushing forward with a trial over the past year.

“Judges, in general, don’t want to try civil dispute cases. But they are using all of the tools at their disposal. Mediation, headbanging, hand-wringing, strident

language on status calls. They are definitely using this to keep their docket load down,” Ifshin said. “It's not like you can say this case was going to try in May, now it's going to try in August. You don't know when.”

But Ifshin also said the state of the judicial system, which is convincing real estate companies to pursue remedies outside of the courts, may not be a bad thing in the long run.

“At the end of the day, I view having to go to trial as a last resort. I'd rather reach a settlement,” he said. “Getting it over sooner, having to spend less; you may not feel you get what you deserve, but you get closure.”

Taking lawsuits to trial isn't just about maximizing return for many landlords and lenders, said Lopez-Castro, the Miami-based litigator. They can also be used to send a message to other tenants and borrowers about how serious the threat of a lawsuit really is.

“Landlords and bankers are very emotional people,” Lopez-Castro said. “If you represent the tenant or represent the borrower, you always want to stay on their good side.”

But settlements are likely to become more common going forward regardless, she said, since they offer a guaranteed resolution; in the aftermath of the pandemic, no one knows how long it will take for a case to go all the way to a trial. For business litigation, that means the potential for never-ending legal bills.

“Most business people are not professional litigators. They don't handle the highs and lows of litigating well,” Lopez-Castro said. “When they're litigating out of principle, that principle runs out after two invoices. Most people want certainty.”