



Financial Restructuring & Reorganization ADVISORY ■

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Protecting Recoveries in a Pandemic: What Creditors Can Do Right Now

by *[Diane Stanfield](#)* and *[Aimee Pickett Sanders](#)*

It is well known that the coronavirus (COVID-19) pandemic has resulted in tremendous financial upheaval across every segment of the economy. While creditors are in many respects (both legal and practical) constrained from aggressive collection activity while the crisis unfolds, there are some steps you can take right now to maximize recovery in the wake of COVID-19.

Stay in Touch

Staying front of mind while being sensitive to your debtor's situation may help keep you at the front of the line:

- Respond to debtors and borrowers who are reaching out to you, and reach out to them as appropriate and permissible.
- Provide continuity (and where possible, a single point) of contact to ensure delinquent debtors can easily obtain accurate information about payments, delinquencies, and loss-mitigation options.
- Ensure ongoing compliance with any statutory or regulatory requirements (e.g., mortgage periodic statements, notice to trustees of interest/payment changes).
- When you must make demands to preserve rights, review and adhere to contractual requirements for notice and other communications.

Exercise Discretion in Collection Efforts

Where possible, be open to accommodations requested by your borrowers—late payments are better than no payments. Also, be aware of federal, state, and local laws and other mandates that impact or restrict collection activities during the crisis:

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- Numerous states and cities have instituted moratoriums on foreclosures and evictions on residential and/or commercial properties.
- The federal Coronavirus Aid, Relief, and Economic Security (CARES) Act, enacted on March 27, 2020, prohibits a servicer of a federally backed mortgage loan (i.e., those purchased by Fannie Mae or Freddie Mac, insured by HUD, VA, or USDA, or directly made by USDA) from initiating foreclosure proceedings, moving for orders for foreclosure or sale, or executing on foreclosure-related evictions or sales until at least May 17, 2020.
- The pandemic has had an immediate effect on existing bankruptcy cases:
 - The CARES Act authorizes modification of a debtor’s confirmed plan based on a material financial hardship due to the coronavirus pandemic.
 - Economic relief funds will be excluded from the calculation of a debtor’s disposable income for purposes of meeting the means test and confirmation.
 - Section 341(a) meetings of creditors are being postponed routinely.
 - Courts may be inclined to grant requests for suspension of plan payments or other concessions—and may be inclined to punish creditors that do not work reasonably with their debtors.
- In addition to legal constraints, consider the practical. For example:
 - Numerous states have closed or limited access to courts for civil matters, making it difficult to pursue any but the most urgent legal remedies.
 - Taking possession of or title to property may be a failing proposition in a distressed market, where buyers and tenants are likely to be scarce.

Get Prepared to Ramp Back Up

Take this time to get your ducks in a row. Here are steps you can take now:

- Be sure documents relevant to the transaction are in order; confirm that security instruments have been duly filed or recorded to ensure secured status. Liens perfected by creditors within 90 days of a bankruptcy filing are subject to being voided, so get that clock running if it isn’t already.
- Secure your professional team—if you anticipate a need for multiple receivers in multiple jurisdictions, now may be the time to locate suitable candidates and negotiate your deals with them.
- Document all efforts to resolve defaults informally along with any forbearance, concessions, or other assistance to show state and federal compliance with any applicable servicing rules. Those efforts are required in some cases, and courts will look favorably on your reasonableness.

Have a System in Place to Respond to Bankruptcies

If you are already set up to handle incoming notices of bankruptcy before the wave hits, you may avoid making costly errors.

- Be sure you have systems in place to flag incoming notices of bankruptcy (or better yet, a service that flags them for you). The automatic stay is triggered immediately upon a bankruptcy filing and imposes an instant prohibition on collection activities. The consequences of violating the automatic stay can be dire, including actual damages, punitive damages, attorneys' fees, and costs. It's no excuse that the notice sat unopened in a stack of mail.
- Assign a dedicated team or person to handle incoming bankruptcy notices and be sure they are trained on what to do and what *not* to do. Now, when many offices are understaffed or unstaffed, creditors must make an extra effort to be sure bankruptcy notices are not missed—and staff should at all times be trained on what conduct violates the automatic stay.
- Solidify a system for calendaring deadlines in the case, such as deadlines to file proofs of claim, and for implementing changes to payments arising from confirmed or modified plans.

Find the Silver Linings

- The CARES Act provides financial relief in the form of loans, forgivable in large part, to small businesses, and makes modifications to tax laws that may result in unanticipated refunds. While you may not be paid quickly, working with your debtor while they wait for that relief may have its own rewards.
- Additionally, some lenders may find that there are increased opportunities as well. For example, pursuant to the CARES Act, an interim final rule has been issued temporarily lowering the community bank leverage ratio (CBLR) to 8 percent and giving a qualifying community bank that falls below that ratio a conditional, two-quarter grace period to return to compliance.

Conclusion

Planning, preparation, and knowledge are the best tools available for minimizing the impact of the pandemic on your collections. There is much that can and should be done while we wait for the crisis to ebb.

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Gerard S. Catalanello
212.210.9509
gerard.catalanello@alston.com

Diane C. Stanfield
213.576.1039
diane.stanfield@alston.com

Dennis J. Connolly
404.881.7269
212.905.9154
dennis.connolly@alston.com

William S. Sugden
404.881.4778
will.sugden@alston.com

Jonathan T. Edwards
404.881.4985
212.905.9126
jonathan.edwards@alston.com

James J. Vincequerra
212.210.9503
james.vincequerra@alston.com

William Hao
212.210.9417
william.hao@alston.com

John W. Weiss
212.210.9412
john.weiss@alston.com

Leib M. Lerner
213.576.1193
leib.lerner@alston.com

David A. Wender
404.881.7354
david.wender@alston.com

Aimee Pickett Sanders
404.881.7809
aimee.sanders@alston.com

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WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LONDON: 5th Floor, Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 950 Page Mill Road ■ Palo Alto, California, USA, 94304 ■ 650-838-2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333