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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
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Protecting Recoveries in a Pandemic: What Creditors Can Do Right Now

*By Diane C. Stanfield and Aimee Pickett Sanders**

The authors review proactive steps creditors can take now to prepare as the world economy continues to navigate the coronavirus pandemic.

It is well known that the coronavirus 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 the coronavirus and 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:

- Numerous states and cities have instituted moratoriums on foreclosures and evictions on residential and/or commercial properties.

* Diane C. Stanfield is senior counsel in the Los Angeles office of Alston & Bird LLP. Aimee Pickett Sanders is an associate in the firm's Atlanta office. The authors may be contacted at diane.stanfield@alston.com and aimee.sanders@alston.com, respectively.

- The federal Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), enacted on March 27, 2020, prohibited a servicer of a federally backed mortgage loan (that is, those purchased by Fannie Mae or Freddie Mac, insured by the U.S. Department of Housing and Urban Development (“HUD”), the U.S. Department of Veterans Affairs (“VA”), or the U.S. Department of Agriculture (“USDA”), or directly made by the USDA) from initiating foreclosure proceedings, moving for orders for foreclosure or sale, or executing on foreclosure-related evictions or sales until at least July 25, 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.
 - Meetings of creditors under Section 341(a) of the federal Bankruptcy Code 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 is 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 eight percent and giving a qualifying community bank that falls below that ratio a conditional, reasonable

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. In summary, these steps include:

- Stay in touch with your debtors and exercise discretion;
- Know the impact of emergency laws and other mandates;
- Have systems in place for when you ramp back up; and
- Watch for opportunities: the CARES Act provides relief for borrowers and flexibility for lenders.