

# COVID-19: What a Lender Can Do to Prepare for the Inevitable Defaults

CREDITORS' RIGHTS AND BANKRUPTCY | CORONAVIRUS | MARCH 19, 2020



**Donald R. Kirk**



**Alan M. Grunspan**



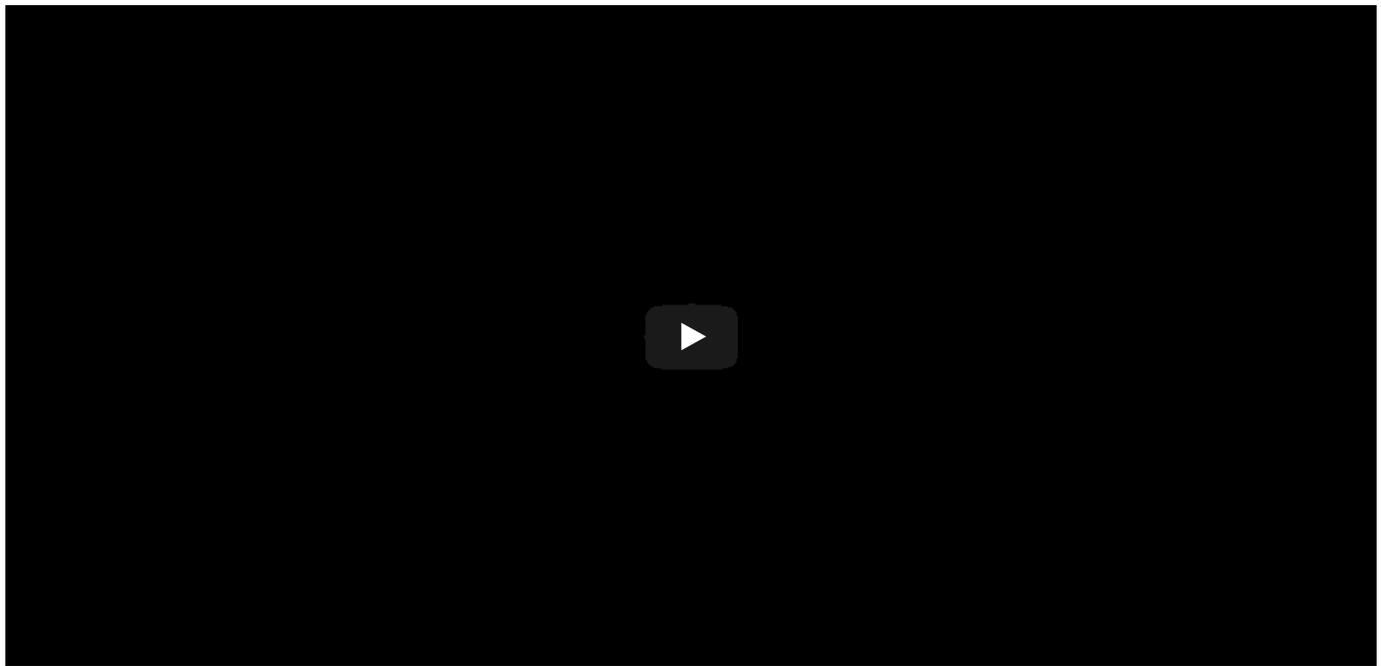
**Merrick L. Gross**



**Kathleen S. McLeroy**



**Alexandra D. Blye**



The Carlton Fields webinar “COVID-19: What a Lender Can Do to Prepare for the Inevitable Defaults” on March 19 covered a broad range of topics related to the coronavirus as it relates to the financial sector. If you were in attendance, we hope the program was both informational and helpful.

In this webinar, Carlton Fields attorneys are joined by David Harrison of Midland Loan Services to discuss issues facing the industry, including continuing advances on lines of credit, nonmonetary defaults, pre-and post-bankruptcy issues, force majeure, due diligence, forbearance issues, and foreclosure issues.

The webinar referenced several pertinent articles, which are listed below:

- Loan Restructuring and Forbearance Agreements in the Face of COVID-19 – The Lender’s Perspective
- Coronavirus (COVID-19) Issues for Real Estate Owners and Operators
- Coronavirus: The Latest Court Closures and Restrictions (Law360)
- Complying With WARN Act Requirements During the Coronavirus Pandemic (National Law Review)

## Transcript:

**Donald Kirk:** This is Donald Kirk. It is 1:02 and I know that there are still a couple of people joining, but we also know how busy everybody is. First, thank you for joining this call in these busy times. This is Donald Kirk with Carlton Fields and we're about to start our program.

So yesterday, I was walking by the television and the stock market pricing was on and it was falling. And the first thought I

had as I was walking by at that particular time was, "You know, I wonder what's going to happen with margin calls." I came back, sat down, and about 30 minutes later I got a phone call from a dear friend who was very concerned because her elderly parents were having margin calls happening in real time.

It reminded me of two things from 2007/2008. First, on the borrower side, there was just outright panic. But it also occurred to me that on the lender side there was just massive confusion in real time. Things were happening in real time. People didn't know what to do. And that there is significant reputational risk out there right now if you take some action.

So during the last week I think we've seen some rapid-fire news unlike we've seen since the Lehman Brothers AIG days 12/13 years ago. It's ravaged our financial markets, it's destroyed balance sheets, retirement plans, and it's put at risk massive entities like Boeing and American Air.

But what we also learned a few years ago are things that we can do today, and that is in particular that while there is short-term hurt and short-term anxiety, there's going to be a future. There's going to be a tomorrow. And there will be a time when all of this passes and the markets return to some level of normalcy. 12/13 years ago, we learned something else important and that is early crisis planning can certainly help alleviate some of this, help you weather the storm in two fundamental ways. First, that early planning can have a material long-term impact on your portfolio. And second and maybe more important, that that type of planning can provide you with some level of calm disciplined structure to your team's approach which will give reassurance to your team. So those plans have to be, I think, measured, thoughtful, proactive, and if you implement them today, in 2, 3, 6 months you should have some dividends.

So, we designed today's call in reaction to emails and calls we started getting a few days ago from our clients looking for thoughts about how they plan to navigate these waters.

This program is designed to address some of the immediate emergency steps and issues that we're starting to see from our clients and we're hearing about. And while we recognize that this is fluid and evolving, we can only cover so much in this short amount of time. So, we're going to cover what we have heard initially is the biggest issues quickly, a broad overview today. We recognize we've already gotten some other questions and so we may have another one of these next week or so to address some additional concerns. So, with that, let's just jump in right away.

First of all, the overview, the rules: everybody should be on mute. If you want to unmute, you push ##1 on your phone. And then mute back on, ##1. This is being recorded for a potential podcast. If you have questions, please email Alexander Blye at [ablye@carltonfields.com](mailto:ablye@carltonfields.com). Please make the question, put your name. And at the end of this, we'll have a 15 minute Q&A and she'll discuss those then.

From a road mapping perspective, we're going to spend 20/25 minutes going through some initial substantive topics, which we'll get to right after this. And then we're going to have a 10 minute presentation by a client who's going to talk about what they're doing from their perspective in terms of logistics and everything else like that. We think that'll be very helpful for everybody.

Our team, quickly, is myself, Donald Kirk. I'm the head of our bankruptcy group which has about 15 professionals [inaudible] head of our business litigation group with about 75 professionals across the country at Carlton Fields. My co-head of business litigation, Rick Gross, who has a very special emphasis on special servicing. Kathy McLeroy who has vast bankruptcy and foreclosure experience. Alexander Blye, my West Palm Beach partner who straddles both sides of the real estate, transactional and bankruptcy side. Alan Grunspan who I would define as the quintessential bank lawyer. And then finally, last but not least, and we certainly thank him for his time, David Harrison, who is responsible for business development strategy and account management at Midland Loan Services, and he's also a member of that firm's senior leadership team.

So with that, let's jump to our substantive topics. The first one, Alan, will you talk briefly about two things: one, continuing advances on lines of credit? Do you do it? Do you not? And two, nonmonetary defaults, particularly with covenants probably in [inaudible] right now.

**Alan Grunspan:** Thank you, Donald. This feels eerily familiar to me. Although we've been here before but it feels somehow worse because I guess it's just begun. We've done some informal polling among lenders. Some banks are taking a pretty friendly, easy approach to the missed payments than others. Some are taking the position that if you raise your hand and say you need relief, you get an automatic 90-day deferral, no questions asked. Others are taking a more case-by-case approach depending on loan size and requiring updated financial information before making a decision. But the majority I find are simply granting a 90-day payment deferral and requiring updated financials from borrowers and guarantors within a few weeks or else they're going to pull the plug on the deferral. No one so far has said that they're completely waiving payments. It's simply a deferral at this point, but we're young in the day. But each approach raises its own issues of modification and waivers, so whichever approach you choose, we would recommend a short letter agreement that includes standard reservation of rights and non-waiver language because you've got the world of borrowers asking for payment deferrals. How are you going to address on top of payment deferrals requests for fresh advances on existing lines of credit in the middle of a worldwide crisis that affects nearly every sector and every business, which is the very definition of material adverse change?

In good times, we know from experience, that relying solely on a material adverse change or a MAC clause is not viewed well by judges. Now, when the world's in crisis relying solely on a MAC clause will be perceived as bullying and kicking someone when they're down when in fact the whole world is down, and eventually our decisions, these decisions, are going to be

measured and second guessed in the rearview mirror with the very unsympathetic benefit of hindsight.

But how do you advance on a line if a business owner has had to shut its doors or been ordered to shut its doors and had to lay off staff? And it's pretty hard to tell when and if they're going to reopen or if they intend to use the advance to keep employees intact or if they simply intend to use the money to pay down their own mortgage. They've got personal living expenses, mounting credit card bills, etc. And how can you know that when they tell you that they're only temporarily closed and they're trying to keep their business afloat in the breach? If you have a borrowing base loan, you could look to receivables, but if it's a regular line of credit, the bank has to make a pretty hard call. You've got borrowers who are a pretty nervous bunch right now. They're worried about the future of their business and availability of working capital. And you've got people looking for fresh advances in the middle of the worldwide crisis.

We're living in the world of material adverse change virtually everywhere. That's why many of the large sophisticated borrowers like Blackstone had all their portfolio companies draw down all available lines of credit in the last couple weeks. They borrowed money and parked the money in other banks waiting to deploy the money. They wanted to take that discretion away from banks. But discretion is what you now have. And you now have on top of decisions as to whether to determine whether somebody is in violation of material adverse change clause, who to fund and who to not fund. And that kind of discretion and that decision point is not one size fits all. Each situation is going to be fact and document specific. And there's going to be some clear situations that warrant no further advances, but in most cases we would not recommend stopping advances based on MAC clause alone because you have businesses that are in crisis mode and this is the time when they really need their available lines of credit. At the same time, you don't want to put good money after bad. And if the bank is inclined to put the brakes on, it should be based on what you can substantiate today.

So you want to rely on as many covenants as possible. For example, is the borrower currently violating a financial covenant ratio or are they past due in financial reporting? If they are, tell them and that will give you some time and cover to analyze things. And I would be prophylactically sending out notices for any past due financials. But, the paradox with that is that even if you have updated financials, you're operating under an information gap because there's a big lag between what's happening today in real time and the financial statements from the last quarter or even this quarter. And as this quarter ends you're not going to get financials for several weeks, and even that won't fully, truly reflect what's happened in just the last couple of weeks or what we know is likely to happen over the next few months. On top of that, a lot of your loan agreements don't require monthly financials or even quarterly, which puts you further in the dark.

So then the question comes up, what do you if the borrower is asking for payment relief and still wants to continue borrowing on their line? And some banks are saying you get a payment deferral and they're going to still make advances. And others are saying, no you get one or the other. But of course, you can use advances to make loan payments. One factor is if a borrower was in payment or covenant default before all of this started, or if they simply shut down the business, but again it's going to depend on your documents and if you previously noticed a default and if there's any cure period. Some lenders are saying that with a good customer, even if the business is down for now and there's a good indication it's going to reopen, and they're using advances to retain key employees, they're going to advance despite a MAC clause. Does the business have a plan in writing? Do the underlying assumptions make sense? And if you decide to advance, you absolutely need to include a reservation of rights and non-waiver letter because you may decide a month from now to stop advancing and you don't want to be deemed to have waived your rights having already advanced under similar conditions. In other words, don't turn a good thing that you did into a bad thing that a borrower can use against you later to claim waiver or estoppel because, you know, in desperate times no good turn goes unpunished.

The bottom line is, just be careful and deliberate. Substantiate and document. History is going to reward you for it, but just be careful about what you put in emails and texts, internal and external. If you're going to put the brakes on, use prior missed payments or financial ratios that you can substantiate today, not a standalone MAC clause unless of course the change to the business is so significant, so drastic that it's not going to recover. Most cases won't be that clear-cut because some of this is art, not just science. It's going to be case-by-case, so your decisions have to be based on what you can concretely substantiate. And be aware that you may find yourself in front of an unsympathetic judge down the road. And worse, if a business files for bankruptcy, there could be an adversary where the borrower is going to blame the bank for putting it under by failing to fund its line of credit when the business needed it most. You're going to have tough calls to make, and if you need to bounce it off of litigators or bankruptcy people, we can certainly help do that. Some of these decisions are going to require real trade craft and an extra set of experienced eyes and, of course, an ounce of prevention.

In terms of when to call covenant defaults, I think it's nearly universal right now that most customers have or will trigger financial covenants. It's going to be equally true that lenders are not going to be calling the loan because you would have to call almost every loan. But, you do want to send out at least a temporary waiver letter reservation of rights because, again, you don't want to turn a good thing into a bad thing that the borrower can use against you later to claim waiver or estoppel.

Lenders should also be looking to update their policies and procedures to recognize this crisis situation, as any other crisis situation, as one factor in the decision-making process.

Donald, did I leave anything out?

**Donald Kirk:** No, you didn't. But I did leave something out, Alan, and that is introducing Dan Weede who's our partner in Atlanta on the real estate transactional side. He is going to speak next on what is sort of the flip side of what Alan talked about, which is, alright, so you've got a default that's declared. You know we're going find some novel defenses come up.

Dan is an expert in some of these novel defenses in these particular circumstances. Dan, can you talk about some of these?

**Daniel Weede:** I can and I'm going to go quick because we're already I think kind of a little bit behind here. But, you've probably been getting a lot of emails on force majeure. What I want to sort of stress to everybody is force majeure, you know, that's not a common law principle. It is if it's not in the contract, there are no force majeure rights. I would go out on a limb here and say virtually there's probably no lender form documents in the country that would include force majeure. Now, maybe that's been negotiated away so that is probably not a significant risk. But there are two related concepts I want to touch on or just make you aware of very quickly, and that's the impossibility and impracticability, and frustration of purpose.

Now, impossibility and impracticability is generally the same thing. What is interesting and really unprecedented - there's so much unprecedented that we've been hearing about this week. Right? What is unprecedented is when we consider impossibility it's typically thought of in, like, you know, acts of God, nature, meteorological. You know, having a pandemic, there's just nothing really out there. And what triggers it is acts of God, an impossibility to perform, and illegal acts if it's illegal. Now, at the beginning Donald talked about there's new fresh rules in Miami. You know, in the coming days we're going to see more of that whether it rises to being illegal to come to work or illegal to do something. It's a very novel position to take. So it's something that everybody should be aware of. I think we probably will see borrowers raise it. Back to what Donald said in the very beginning, we kind of all are in this together. We have to work it out, so I don't think it's going to hinge on that, but it's certainly something you're going to want to be aware of. And it's certainly something that if you have any questions or if you have any follow-up questions regarding the specific elements or examples of either of those, you can just email us here [*inaudible*] primer on it.

Oh! One further issue. A lot of times you'll get as well, even if there is, typically, of course, you have a loan document and then the guarantee. You probably have language in your guarantee that says hey, even if there's a force majeure act of God or [*inaudible*] you, the guarantor, you're still on the line. So just because it does trigger, you are not, you know, it's not without hope and it's not without argument. You could also have some waiver language in the contract itself. So if you have language that says that you waive impossibility, you waive this, that would trump. But you may have some clever borrowers who are raising these issues, so just stand by.

**Donald Kirk:** Hey, Dan, thanks for that. This is an issue we're hearing from all the time. And so certainly if you have any follow-up questions, email us. You know, this is very state-specific, but it's certainly something we think we'll see quite a bit.

Next, I'm going to talk very quickly just about bankruptcy planning. I'll be quick. We don't anticipate bankruptcies immediately, but certainly when cash runs out, which is likely sometime this summer, we anticipate some uptick. And there's things that you can do now. First, of course, the obvious: scrub your files. Last go-around we saw significant issues with loan files, legal descriptions that were incorrect, liens that were not properly perfected or updated, crosses that don't exist that people thought there were. The bankruptcy courts are going to hold your feet to the fire on these. They're going to look for ways to let the borrower have some extra time, and if you have any issues with this, that's going to be a problem for you.

That's obvious, but, you know, fix them now because if you fix them now and in a 90-days run, which is likely, you could avoid some preference exposure too. You know, if you file litigation now, if you pursue litigation now you're going to face reputational risk. I mean, that is just a fact, and the courts are going to make you pay for it.

But there are certainly things you can do outside of litigation to prepare for the bankruptcy and that is basically bolstering your position through a forbearance, which Rick will talk about in a second. But in those forbearances from a bankruptcy perspective, you can certainly put things in like a waiver of claims. That is enforceable in bankruptcy. An automatic stay release, and while we don't know, you can certainly try to put that in, but generally speaking that is unenforceable practically because the bankruptcy courts are going to make you prove whether it was an overbearing provision at the time and that'll take just as long as a stay of relief process in terms of time and cost. However, you can try to get some letters of credit as collateral. That's certainly not stayed by the bankruptcy and that is a nice way to bolster your collateral package. And then finally, consider adding guarantees, other collateral to your forbearance package. While there might be some risk of avoidance in bankruptcy, at the end of the day, that's going to take an adversary proceeding, which is timely, costly, expensive, and that just means leverage for you in that situation. So, there are steps you can take. This is just a short list.

But I mentioned forbearance, and that is something that, you know, everyone should be thinking about having a form right now ready to go. Rick, can you talk about forbearance issues and what people can be doing now to get ready for this?

**Merrick Gross:** Absolutely, Donald. Thanks. To start off, I think we all have to understand that one size doesn't fit all circumstances. I think while there's probably a thought to give forbearance in many circumstances, you still got to look at this in a case-by-case basis. It depends on the sponsor, it depends on the asset type, it depends if the loan's already in default or if this is a request by the borrower which would be treated as an imminent default. It appears from discussions that 90-120 days seems to be the number, but that may not be it for all. I think when you're engaging in these kinds of communications with the borrower, you just got to be careful. Try to get your pre-negotiation letters in place. But in any communication that you have, you should include non-waiver of rights language. Any payments that are received, even partial payments, every one of them should have a reservation of rights letter go out upon receipt of payment.

For the P&A's I think there are a couple things that you want in there. You can't get everything, but you need to get the following: borrower has to acknowledge that the loan's in default, if that's applicable; the borrower should acknowledge the exact amounts owed; the borrower should acknowledge that the loan agreements are still in force and effect; and lastly but

most importantly, you need to determine who speaks for the borrower. There are a lot of occasions where we get borrowers' reps involved and the like and it's very difficult for the asset manager, the lender to be able to determine who they have to speak to. Those I think are key terms to get. Obviously, a lot of your pre-negotiation letters have more. Not all of that would be enforceable. It's a state-by-state issue.

A couple things just to follow up on what Donald said about reviewing the loan file. If you're talking about CNBS or CLO loans, make sure that the loan is properly assigned to the correct entity or trust. We saw a lot of that in the last downturn at the beginning, and with specifically hospitality assets, and there's a lot of that going on right now. Make sure you have a comfort letter in your loan file and make sure that comfort letter is in the name of the right entity because if you try to seek it now, it's going to be really hard to get that from a franchisor.

In terms of forbearance, basically there are two types of agreements. One where the lender sees little chance for the borrower to turn the property around. The restructure would simply delay the inevitable. Or, the lender believes that the property struggles are fairly short term or result from a broad systematic distribution, i.e., the coronavirus. And so I think you can look at it different ways. There are different types of agreements for different situations. I'm going to plug this. A bunch of us at Carlton Fields prepared an article on forbearance and things to do. We hope to have that out by the end of this call. If not, later this afternoon we'll blast it out via our email chain, social media, and the like. Dan authored it, I worked on it, others did as well. It'll have some sample forms. Again, you know, they're samples. You have to look at each circumstance, but I think it'll give some helpful hints on those sort of issues.

I want to just follow up what Donald said in terms of the forbearance. You can turn it into a full mod as well, but I think in this situation with what we're dealing with, keep your forbearance remedies in the Mod and even maybe call it a Mod Forbearance. A lot of that is done. It's something that the servicers don't always do. Lenders traditionally do that, but it's something to think about. But in the forbearance, make sure you get a release of all claims that the borrower has through the date that that forbearance is executed. Preserve all your rights and remedies, and go forward.

The other thing that I've been asked to address, and this came up on a number of communications that we had with you setting this up, is business interruption insurance. It's our perspective based on the policies we've looked at that it doesn't apply in this situation. Back in '06/'07 the carriers included a virus exclusion in all of the business interruption policies. It may not have been determined for this virus. It might have been thinking more about computer viruses, but it's there, it's applicable, and it's our belief that that's going to take coverage in this area at this point in time. We will say, however, that we've heard that a number of state legislatures are looking at that issue and are trying to work around the exclusion. I think that would interfere with the right to contract and the courts will ultimately decide that, but that's where things are from a business interruption insurance perspective. Donald?

**Donald Kirk:** Yeah. Thanks, Rick. So, assuming all of these things don't work out and you have to head to litigation, you know, one of the things we're thinking about is, you know, OK, so we're in foreclosure. What are the issues we need to be dealing with there and maybe more importantly, what is the state of the judicial system right now? We're getting a lot of that. Kathy McLeroy has been on top of just trying to keep up with what courts are doing and what a foreclosure might look like in this day and age. Kathy, can you talk to us about this?

**Kathleen McLeroy:** Yes. I think Rick is correct. Having talked in the last few days to a number of our lending clients, most of them are looking at very short term forbearances. But that just really pushes the problem a little farther down the road, and there may come a point in time where this could look again like 2007/2008 with respect to foreclosures. The sense is that right now that lenders are likely to work with borrowers who have equity in their property, but if the crisis continues to weaken the economy in general, will valuations change? I think that's one of the open issues. And if valuations do change, does that leave lenders with fewer and fewer options to work with borrowers?

We anticipate seeing, in addition to the types of things that you normally see in a foreclosure as far as defenses, maybe some novel defenses. Dan talked a little bit about force majeure impossibility and impracticability, frustration of purpose, and the need for in fact sometimes for there to be a violation of law in order for some of those defenses to come into place. You may want to think about in your local state that there may be laws that make it illegal to violation a public closure order or violation of a quarantine and they may be able to try to create that criminality necessary to get some sort of excuse-type defense. Given what we saw in 2007/2008, it's likely that if foreclosures start that the courts are going to be backlogged because the courts have been slowing down their processes because of the virus. So, again, in states that have judicial foreclosures vs. non-judicial foreclosures, you're likely to see maybe 2007/2008 all over again.

With respect to where the judiciary is and where the judicial system is, on the federal side the administrative office of the US courts put together a taskforce of judges and court officials to make sure that they balance the safety of courthouse employees, public health concerns, and the function of the judicial systems. On the state sides, we're seeing the same thing where the supreme courts or the other senior courts are trying to do the same thing.

There are a number of things to think about and look at with the court systems. First there's the access to the physical courthouse itself. And what we're seeing there is that in most locals there's some level of restriction. Those restrictions go all the way from the courthouses completely closed because we have an employee who's been infected to some level of slowing of activity because of that. You know, that hearings are being handled telephonically, that people are being invited in for certain essential functions, and only skeletal staff is in place. Those restrictions are rapidly changing and to the extent you believe you have a court proceeding that's going forward, it's important to check with the particular court.

With respect to filing, one of the bright spots in all of this is that states that have enacted electronic filing in the entire federal system, business as usual has gone on with respect to filing papers and motions with the exception of pro se parties. Courts are making exceptions for pro se filers, setting up drop boxes and doing things like that to allow people to continue to protect their rights without having to risk coming into a courthouse and putting themselves and the court staff at risk. The court filings appear to be basically continuing without interruption because of the ability to file electronically. That could change if there comes a time when courts are not able to maintain their electronic systems. Right now they're doing that remotely in a lot of locations and things seem to be holding up pretty well.

With respect to hearings, again we're seeing a little bit of everything. In a lot of places there have been changes; some places there have not. In almost every situation, essential and emergency hearings are going forward and they are usually defined and pretty limited to things like injunctions, domestic violence, mental health cases, key criminal proceedings, things like that. First appearances and criminal cases. Some courts are holding all hearings telephonically. Some courts are requiring hearings to be held in only in large courtrooms rather than in chambers or more small hearing rooms. Some courts are limiting hearings to just non-evidentiary hearings and they're being handled either telephonically or in courtrooms. Some are canceling all evidentiary hearings. Some are taking evidentiary hearings on a case-by-case basis. Some are encouraging parties to agree to continuances to dates down the road. So it's important if you've got hearings coming up to check with courts for the most recent guidance. But, I think the bottom line with all of this is that there's going to be backlogs of hearings and there's going to be a scramble to reschedule things that have been cancelled once the crisis passes.

With respect to deadlines, some courts are entering administrative orders extending deadlines. Some courts have not done that. We are cautioning our lawyers and clients to be very careful because there are some deadlines that are jurisdictional and cannot be extended. Those tend to be, and they vary by state, but things like motions for new trials, motion for rehearing or to amend a judgment, motions for relief under a judgment, notices of appeal, motions for a directed verdict, things like that. So, those types of things you need to be careful about because those deadlines can't be extended by agreement and probably can't be extended by administrative orders unless the statutes or court rules specifically provide for it. What we're cautioning our clients and our lawyers is that the administrative orders, although they're well intentioned, are often ambiguous and they were drafted in a hurry without a lot of thought to the parsing that may occur later. And because of that, there may be situations down the road where people try to use reliance on the extension of a deadline against the opposing party. So we're cautioning great care in determining whether or not deadlines need to be met.

The bankruptcy court has issued some blanket orders in most jurisdictions extending all of the deadlines that trigger off of 341 meetings because the 341 meetings have in fact been cancelled. So, you need to look out for that and make sure you're carefully paying attention to deadlines like 727 actions and 523 actions [*inaudible*] to discharge and dischargeability.

There's some moratoriums that are either being talked about or implemented. Because of the financial impact, shut downs, and the like, we expect to see moratoriums in a lot of jurisdictions of both evictions and foreclosures. And they could be on the residential and on the commercial side particularly because of the mandates to shut down certain types of businesses in the hospitality industry.

FHA has announced an immediate ban on foreclosures and evictions for single-family homes, for FHA-insured mortgages for the next 60 days. And they've directed servicers to halt all foreclosure actions and suspend all pending foreclosure proceedings. So even those who have not been impacted by the crisis, people who are already mid-foreclosure, are getting some relief at this point in time. And they've also directed that all evictions of any FHA-insured single-family property, that there be no evictions for the next 60 days. So even though there may be pre-crisis defaults, those evictions are being stopped as well. FHA is encouraging servicers to offer mitigation and other forbearance and loan modifications as necessary to minimize the financial impact upon the borrowers. We've not confirmed this, but it appears that both Fannie Mae and Freddie Mac are doing the same thing. So, in short, these things are also rapidly evolving, but before you make a final decision about an eviction or foreclosure, check about moratoriums in your local community. And, as I said, they in some jurisdictions are discussing them on the commercial side as well as the residential side.

**Donald Kirk:** Kathy, thanks. So, a couple of just high level points to wrap up what Kathy said. First, you know, in terms of deadlines particularly jurisdictional matters, you have to be very, very careful. Our general counsel is advising us to be extremely careful on these things because some of these orders that are being issued just might not apply. And so you just have to be careful on those things.

And then clearly from a court perspective, this mirrors, you know, '07/'08. You're just not going to get into court any time soon. And when you do, you're going to find some significant headwinds from a very lenient, overwhelmed court. And so to our points earlier, it's good right now to sort of just accept that and shore up whatever you can now in your papers to be ready for that so when the court does free up you can take advantage of that.

Next, we have the pleasure of having David Harrison, who I introduced earlier, talk about from the client's side. What are you doing, David, to prepare for this? I mean, these are at least in the last 13 years, unprecedented times. How are you, from a logistical perspective or otherwise, preparing your team for this?

**David Harrison:** Sure, thanks. Appreciate the opportunity to talk. Obviously what I say here is confined to Midland and what we're doing, but, you know, I would say anecdotally off the top that, you know, anyone who's heard me speak at a conference when we used to be able to be in front of each other recently, I would tell you that the state of servicing both master and

special has never been in better shape and has never had a more talented well-oriented and experienced group of professionals working in it. And it's time for that industry to prove its worth and to get out and do it. And I think we're fortunate that this is happening - well, we're not fortunate that it happened, clearly - but we're better situated to deal with it now as an industry than we have been in the past.

Clearly, there is a ton of panic. You're scared for your health, for your life, for your kids, for everything that's going on. Businesses are closing, hotels are shutting down, malls are shuttered. All this stuff is happening, and people are in a near full-on panic mode as it relates to finance, managing these investments, and managing these loans and properties. And what's important for us to do and remember in this instance is we have technology in the documents, we have process, and we have really smart women and men who have been preparing for this and working for this and who are ready to move forward with this. I don't mean to trivialize at all the volume and the scale of what's coming, but it is important, unless you want to get lost in panic and chaos, you have got to take a breath and step back and rely on the structure and the people that are in place to deal with the situations there.

That said, the stuff that's rolling in right now is hospitality. The numbers are mind-boggling. They're unprecedented. The amount of requests that we're getting coming in for forbearance, short-term modifications are over, you know, 150 before our gentleman who's running the mail box effort on the email platform went to bed at 2:00 in the morning this morning, and they keep coming in. There are hotels closing, there are real jobs being lost, there are facilities that are being shuttered.

You know, our job on forbearing or managing those is really twofold. As Rick had mentioned, you have to look and see what happens after this forbearance. Let's say you put in insert number of days - call it 90 - and assume that after 90 we're back to some form of semblance of normality, which I don't think will be the case. But let's pretend it is. What happens after that? Where is this borrower and this sponsor taking the property after that? If they're coming to Midland special and saying, "I've shut the property, I've fired the employees, and I need forbearance." Those three things don't go together. What you need is a quick trip to special servicing so that we can start managing what will be a very challenging recovery on that asset.

However, if a borrower and sponsor comes and says, "Listen, I've furloughed employees, I'm down to a skeleton staff. I'm looking for ways to fill the hotel with medical, with recovery, with doctors, with first responders. I'm asking for a forbearance that's consistent with what our brand standard is putting out, waiving FF&E, you know, further looking for some amortization relief or full payment relief." That is a party that needs a forbearance agreement.

Now, the problem is right now, most people are on the panic stage in their response except for the very large sophisticated sponsors and borrowers. They're just like you were, the random person I'm pointing to on the phone, when you saw that image of lined up at the door of Costco. You said, "I've got to get to Costco." People are doing the same thing here. We are the Costco. We are the provider of relief and most people are showing up with a hipshot panic, "I need help and I've shut the thing down." So we are dealing with a tremendous number of inquiries inbound and email and where the real problem comes - and I hate to sound insensitive on this - is phone calls. Borrowers want to talk - and I get it. I want to talk. I want to talk to everyone. I spend so much time on the phone because I want to hear a human, I want to know what's going on, and I want to hear what the answer sounds like and not just see it typed out. But we just can't talk to everyone right now. And if we do, it's at the expense of everyone else who's piled up before or after that. So, all the specials, all the masters are culling through this. Nobody is interested in racking up frictional costs, court time, legal fees, and transactional ogina over a loan that shouldn't be in specials. If there's a smart forbearance, as Rick said, not one size fits all, we will look at it, we will execute it, and we will move on to the next one. But if it needs to go into special servicing, it needs to go, and we have, as do the others, the best asset managers in the business ready to work it out. It's really just a volume game.

Logistically, a snapshot of what we're doing in Midland, we have the ability to double our capacity of loans right now without hiring a single other asset manager. A lot of stuff that our special servicing women and men were doing before this started is gone in terms of supporting fires on different types of assets and doing underwriting, so we have the ability to double our capacity right now. We have, you know, we're part of a 55,000 person bank. There's quite a few able-bodied men and women in there that we have reach to. And if we need to, I'm pretty confident we could hire right now. There's obviously a logistical challenge of wearing a hazmat suit when we welcome them into the office, but there's a lot of women and men who need jobs right now so we can hire and get them.

You can hear the edge in the pace of my tone and my voice. Part of that is because I want to make sure we leave time for Q&A, but part of it is, you know, we, everyone, everyone at Midland, everyone at the other masters and specials - the past two weeks have been unlike any other two weeks we've had. And the strain and the stress is there. And people are working very hard and they're also taking care of their families and their friends and their groceries and trying to have a cocktail on the driveway 10 feet away from their next door neighbor. So the world is at a stressed, high-friction point and we are doing the absolute best that we can to help manage through that with great partners like our host here today, with receivers, brokers, all the resources that we need, but we just have to take a breath while the tide keeps coming in and know that we have the ability to manage it. One thing my mom always said, "Even on your darkest day, the sun always rises." It always rises, it always sets. Let's stay focused, let's work on what we know, and let's do it the way we know how to do it, and we can get this done as an industry.

**Donald Kirk:** David, thank you. You know, from my perspective, I had spent the last week thinking about staffing and in particular just trying to build a platform in the event this thing goes south. And so I think it is important because most doubts I think have been leaned up over the last several years. This is unanticipated, so certainly some thought should be given to

that.

Alexander, have we received any questions by email? And if not, we can certainly open it up for questions.

**Keith Hodeg:** I have a couple questions, if you don't mind.

**Donald Kirk:** Yeah! Who's this?

**Keith Hodeg:** This is Keith Hodeg [SP] from Pacific Life. How are you?

**Donald Kirk:** Hey, good. How are you?

**Keith Hodeg:** Good.

**Donald Kirk:** Hey, Keith. Good to hear from you.

**Keith Hodeg:** Hey, guys. Quickly, on people shuttering up facilities like hotels and other things, I'm mindful of the WARN Act where you're supposed to give people, you know 60 days' notice and that type of thing. Is there an exemption for when you're shutting because of this type of emergency for one? And then two, we're getting obviously calls from retail landlords that their tenants are trying to exercise their force majeure clauses and say, "Oh, it's impossibility of performance. I can't keep paying your rent." And obviously that blows up. So just would love to get your viewpoint on those two items if possible. Thank you.

**Daniel Weede:** This is Dan Weede. I'm a real estate, hotel real estate attorney with some passing familiarity with WARN. And as you know, WARN has some safe harbors, so you would have to have, I believe, it's over 100 employees to trigger it. If you're over that, if you have a big property, I don't know of any - and it's a good question - it's designed for, you know, the big manufacturers. Think car plants and think Detroit and mass layoffs. But, it can be applied in the hospitality arena. I do not know of any exemption because it wouldn't be a mass layoff. Right? We were full capacity a week ago. Now we're at, you know, less than 5%. So, that's to say that's a novel question and I believe if you have a really large property and you let them all go, you ought to probably reach out to legal counsel.

The second question was force majeure. What was it? I'm sorry. What was the specific about force majeure and impossibility in a restaurant context? Is that what it was?

**Keith Hodeg:** It's actually a mall context where the owner of the mall who's the borrower is contacting us. You know, they're temporarily shut down, but they're saying their tenants notified the mall owner that they're not going to keep paying because of their force majeure clauses in their underlying leases. But, you know [*simultaneous speaking*] get involved.

**Daniel Weede:** Yeah, I would be surprised if they had force majeure. I'm not looking at it, but I would be surprised if a sophisticated landlord like a mall landlord had force majeure to allow a tenant not to pay on force majeure. They probably have just been saying, "I can't do it." I mean, force majeure or no, it doesn't really matter. Right? If you can't make a payment, it doesn't really matter if you're pointing to force majeure and they can't make a payment. That gets back to what we were originally talking about earlier and it's we're just going to have to, you know, kind of both sides will have to work together. But I don't think, you know, tenants are going to be successful in force majeure. If the government said it is now against the law to congregate in groups greater than 50 or 100 and you have to shut down these establishments kind of like northern Italy was doing that, and of course we saw that in China, then if it's illegal then you could have that. That would be strong evidence of impossibility. So I think it is something that is out there. I don't think a lot of this is going to turn on that and in loan documents, if you really drill down in your loan document, a lot of that is waived. Most of [*inaudible*] have that waived in their form document.

**Donald Kirk:** Yeah. And this is Donald. You know, I think from the tenant raising that issue perspective, it doesn't really I think change much. I mean, the standards are the same. Dan set them out earlier, which is very difficult, unlikely to apply. But I think there's a pragmatic side of it, which is courts are going to, you know, be a little gun shy. The landlord can't evict anyways. It's going to take some time. And so there's the practical impact of that. And if they're telling you about it, I think you just tell them, "Look. It is what it is." We haven't looked at your documents, generally speaking this is, you know, the way it looks like. But, I mean, they've got to wrestle with that themselves that the provisions are unlikely to provide a payment defense. But it's certainly going to cause some delays. There's no question.

In terms of the WARN Act, we will get you an answer. I think that there is an exception for natural disasters. It's unclear if that applies to viruses, but there are things such as unforeseen business circumstances. That is an exception. You know, that applies. If there's closings and layoffs that are caused by business circumstances that are not reasonably foreseeable at a time when the notice would otherwise have been required. This seems like it would fit within that, but, you know, this is unprecedented and so it's hard to say if that exception would stick. But, you know, if you email one of us, we'll certainly look into that.

Are there any other questions? You can hit ##1.

**Donald Kirk:** [*inaudible*] I've actually got a question here. We're seeing the potential for federal relief for the hospitality industry. Right? And, frankly, as we discussed [*inaudible*] for those of you who were on the [*inaudible*] call earlier this morning, there's the potential for federal relief for every major industry. The question is, how do we need to think about, and admittedly it might be too soon because we don't even know what the relief is, but let's assume that there is relief passed for the hotel industry. How do we need to layer that in to thinking about approaching special servicing and, you know, maybe

less so forbearance, but just dealing with borrowers. I.e., if we throw someone is special on Monday and on Friday they get relief, you know, any thoughts from the attorneys or practitioners on the phone on how to manage that?

**Donald Kirk:** You know - this is Donald - I will say one thing and that is the timing to get the relief through the government I think is going to be long. You know, as history shows there's a lot of bureaucracy, the government's not ready for this. And the timing to get material assets, funds, relief beyond just \$1,000 or \$2,000 for a family is going to take some time. And so I think how long that is, it's hard to say, but I can't imagine it would be days. I think it would probably be in the form of weeks if not several weeks or months. And while that comes, you know, it is just I would imagine some sort of, unless there's a moratorium on foreclosure, unless there's a moratorium on taking it back, I mean, you're just talking about a borrower that's going to get some funds. And I think you would need to look at it from a case-by-case perspective in terms of OK, you know, are we willing to wait that long? I mean, you're probably going to be willing to wait some period of time just because of the state of affairs right now, but are you going to be willing to wait that long for some funds? And if so, does that fix any fundamental issues that the [inaudible] had to begin with setting aside the coronavirus? So that would be my initial thought. I hope that helps at all. Anybody else have any thoughts on that question?

**Daniel Weede:** This is Dan. I mean, I don't know that there's going to be, I imagine [inaudible] you're going to have to give the deferrals. Right? I mean, that's just reality. There's no one in these hotels. They can't make payments. So if they did, if [inaudible] some deferral it's linking that to say if federal legislation comes and sort of makes you whole, if there is something that addresses it, we should be able to get some of that or sort of talk about that up front of what that - because right now usually you give something to get something. Well, now you're just giving something and you're getting nothing. So, if there is something at the end of that because of the federal government, I think that's fair to discuss with the borrower what, you know, how much of that should come to the lender to make you whole.

**Donald Kirk:** Yeah.

**Kathleen McLeroy:** One other thought is that the legislation isn't in place yet but it may have policy that requires the money to be used for certain things and it may or may not include or exclude lenders, particularly if they're trying to get it in the hands of employers to give to employees to lessen the human impact of everything.

**Donald Kirk:** Yeah. OK. It is 1:55. We have time for one more question. We got an email. Here's the question: What are your thoughts on using DocuSign for the execution of the FBA or loan mods during this time? Will they still be enforceable without a wet signature? Rick, I think you've looked at this issue before. Do you want to briefly address it before I wrap things up?

**Merrick Gross:** Sure, sure. I think it's going to be state-specific. You know, certain states allow e-signatures with electronic notarization. I think each state will look at it differently. I think the lenders will make a determination whether they're going to accept it or not. I don't think there's a clear answer. But, you know, every business is looking at how they're going to allow this. We [inaudible] went around our firm today in terms of, you know, allowing disbursements from trust and how we're going to do it. So I think it's going to be case-by-case, state by state.

**Donald Kirk:** Yup.

**David Harrison:** Rick, it's Dave Harrison. Real quick here on that. I actually was pounding on [inaudible]'s door earlier this week specifically with the reps that we have up on the hill on this issue as were other servicers. And, as of yesterday, our good friend Senator Cramer from North Dakota introduced legislation that will allow remote online notarization nationally and provide for interstate recognition of it as well. So, if we can get that through, which seems to me like a no-brainer, but you should never say that when you're talking about the hill, that would be a great positive step in solving what is a lot of firm's one of their issues with getting 100% work from home is the need to, you know, sit and have a notary and three witnesses who don't know what they're signing or what it's about sign things and notarize things. So that could be a big pop.

**Daniel Weede:** Absolutely. That's why, again, it's been state by state. If it was federally mandated it would make life a lot easier for the entire industry and for a lot of industries.

**David Harrison:** For the record, I will take complete and full credit for that. Thank you.

**Donald Kirk:** Well, thanks for both of those comments. We're butting up on the 2:00 hour and I know we've been receiving some questions by email and we promise we'll get back to you offline. So, look, we hope that this has been helpful for everybody. The next couple of months are going to be crazy. But it's not unprecedented. This resembles, you know '07 and '08. I mean, it just does. And that, I think that experience that you should have, your team should have will bring some measure of calm.

I do have a couple final wrap-up points. First, we may have another one of these next week to address, you know, one-off topics that we're getting. For instance, yesterday I was asked questions about governmental taking. What are the remedies in that circumstance if your borrower's assets are taking for government uses. And in fact, during this call I got an email about a California bankruptcy where the hospitals that are closed are being potentially resurrected by the California government for corona uses, so that might be an issue. But, if there is an appetite for another one of these calls next week, we're happy to do it. And what we would ask you to do is just to email us and let us know if there is such an appetite and if so what some of those topics are. So please do that.

Second, look, this is happening at lightning speed. We're doing this on the fly. You know, we would also ask for your

feedback, good or bad, so please email with that and any other questions you have. So, with that I thank everybody's time and effort for participating and listening. We hope you found it helpful and we wish you the best of luck in the coming weeks. Thanks.

©2020 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.