

# SECURING PAYMENT OR FORBEARANCE IN THE TIME OF COVID-19

*Hodgson Russ Business Litigation and Bankruptcy & Restructuring Alert*  
June 22, 2020

The lifeblood of any business is getting paid for the goods or services it provides. While the world economy has slowed to a crawl, now, more than ever, businesses are focused on converting the receivables they have issued into cash in the door. In addition to the business realities of the COVID-19 pandemic, additional challenges have been presented by Executive Orders amending or limiting legal courses of action. Thus, it is important to move carefully, whether collecting on receivables, negotiating with a vendor, or protecting your own credit or legal rights, to ensure that your business has complied with its contracts and the applicable law.

In New York, the Governor has acted by Executive Order to prohibit, limit, or delay certain payment and enforcement activities. For example, developers who own residential apartment buildings have been prevented from commencing or enforcing evictions until August 20, 2020. Executive Order 202.28. Similarly, they are prohibited from imposing a fee or late charge for rent that was not paid between March 20 and August 20. *Id.* Commercial developers are similarly hamstrung. But, the same Order limits commercial mortgage foreclosure actions through August 20, 2020: “There shall be no initiation of a proceeding or enforcement of . . . a foreclosure of any . . . commercial mortgage, for nonpayment of such mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020.” Lending giants Freddie Mac and Fannie Mae announced this week that they have extended the moratorium on foreclosures for their loans through August 31. Once the moratoriums are lifted, it is anticipated that there will be glut of eviction and foreclosure cases like there was when the housing bubble burst and the Great Recession hit. There will likely be specific rules and procedures implemented by the courts to process those matters effectively and efficiently.

Even if a business was not seeking an eviction or foreclosure, the courts were closed to non-essential matters for months, and re-opening has gone in fits and starts with commercial payment disputes taking a backseat to more pressing matters.

Whether you are the business seeking payment or the debtor seeking forbearance, early planning and communication are key. Many contracts contain notice provisions and require that the debtor be given an opportunity to cure their default

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before any action can be taken on the debt. Businesses seeking payment should review their contracts closely and be sure that they have satisfied any conditions precedent. If your business has not been paying its invoices, be aware of any such notice and cure requirements and taken action before the cure period expires. Practically speaking, even if your contract does not have a notice and cure period, the courts will want evidence that notice of the default was provided and some amount of time was given the debtor to cure it. Some courts have gone so far as to impose such obligations, even if the contract itself does not explicitly require it, based on the doctrine of good faith and fair dealing that is implied in every contract.

In conjunction with the legal requirements, business decisions must be made. For businesses with slow paying, or non-paying, customers, the question is, what is your goal? Is it to collect on that one invoice no matter what? Or is there a long term relationship with the customer such that you are willing to forebear on collecting immediately, but want security that it eventually will be paid? For those who need to take immediate action to collect, there are numerous ways to assert your rights through aggressive litigation, filing *lis pendens*, or enforcing your right to recover collateral or leased property. For those who have relationships that warrant a mutually beneficial path forward, forbearance agreements coupled with the necessary security to obtain future payment may be a safer path. Depending on the method chosen, the receivable may be converted into an instrument the creditor can use in its own financing.

For businesses on the receiving end of such threats or actions, understanding your rights in each situation is paramount. Evaluation of all circumstances is essential to potentially avoiding litigation, presenting the strongest defense, and negotiating terms reflective of your financial capabilities. It may be that reorganization options, including bankruptcy, provide the best path forward. As discussed in prior alerts, your contracts may provide defenses under the current circumstances (like force majeure clauses), your insurance may provide coverage for the subject losses (like business interruption coverage), or other business factors may enable you to negotiate a favorable resolution. To the extent circumstances lead to a bankruptcy, our attorneys can advise you regarding the protections afforded by a bankruptcy filing, creditor's rights, risks, and related costs.

Planning for the expiration of the moratoriums in August 2020 should be done now. Businesses do not have to accept the status quo, but being proactive is the best path toward a favorable outcome.

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Hodgson Russ's Business Litigation and Bankruptcy & Restructuring attorneys are here to help you turn your receivables into cash, or to negotiate a mutually beneficial path forward. Please contact Ryan Cummings (716.848.1665), Catherine Cooley (716.848.1456) or James Thoman (716.848.1361) if you have questions regarding this alert.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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