



## **Legislative Updates Part Two**

*Tuesday, March 30, 2021*

*12:00 – 1:15 PM Central Time*

## Attendee Questions

If you have a question during the webinar today, you can type your question using the Questions feature of the GoToWebinar control panel. In the event we aren't able to get to all of your questions today, one of our presenters will be in touch with you in the next few days so that we can properly address any of your unanswered questions.



*Select the ? to type your question  
to our presenters*

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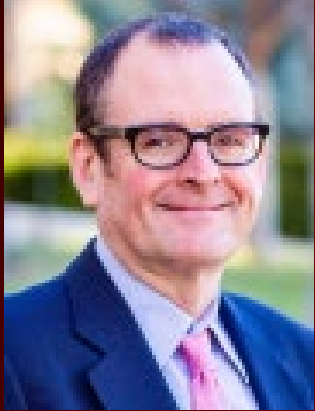
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# ALFN Webinar Presenters

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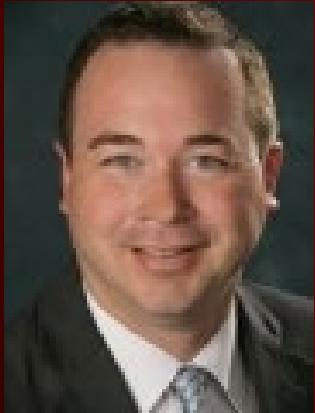
**Jim Timberlake, Esq.**  
*President*  
Baer Timberlake  
[jim@baer-timberlake.com](mailto:jim@baer-timberlake.com)

## SPEAKER



**John Crane, Esq.**  
*Partner, Managing Attorney*  
Robertson, Anschutz, Schneid, Crane & Partners, PLLC  
[jtc@raslg.com](mailto:jtc@raslg.com)

## SPEAKER



**Jeffrey Fleming, Esq.**  
*Partner/Shareholder*  
Barrett, Daffin, Frappier, Turner & Engel, LLP  
[JeffreyF@BDFgroup.com](mailto:JeffreyF@BDFgroup.com)

# Session Overview

**This panel will be addressing the following:**

- Session 1 recap
- What is a CARES forbearance claim and when should it be filed?
- Chapter 13 Post-Confirmation plan Modification to treat a Forbearance Claim
- Executory Contracts and Unexpired Leases in Subchapter V of Chapter 11
- Discuss the requirements to qualify for the new discharge provision of subsection (i) in 11 USC Â§ 1328
- Identify the intent and purpose of subsection (i)
- Address the unintended consequences of subsection (i) and its impact on secured and unsecured creditors
- The Consumer Bankruptcy Reform Act of 2020

## **BANKRUPTCY FORECAST 2021 AND STATISTICS/TRENDS**

TODAY, 1 IN 5 RENTERS IS BEHIND ON RENT AND MORE THAN 10 MILLION HOMEOWNERS ARE DELINQUENT ON THEIR LOANS. ALMOST 12% OF HOMEOWNERS WITH MORTGAGES ARE LATE ON THEIR PAYMENTS (CENSUS BUREAU FIGURES).



*"Research indicates there could be 10 or more bankruptcy cases for each additional 1,000 job losses"*

**Over 65M Have Filed for Initial Unemployment Since March 15, 2020**

**MarketWatch**

**'It's really a question of when.' The coronavirus pandemic is about to spawn a surge in bankruptcies, experts say**

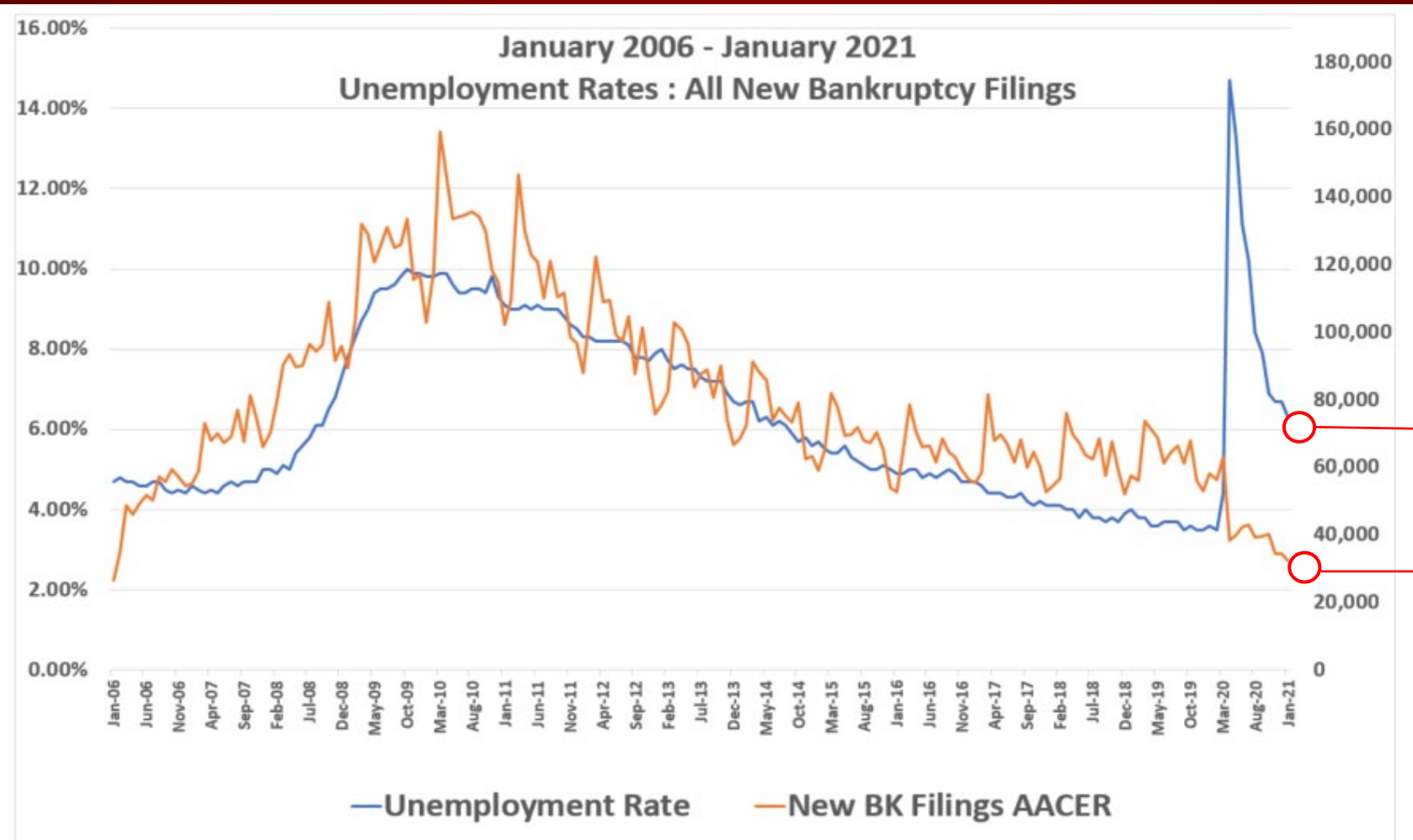
**THE WALL STREET JOURNAL.**

English Edition | May 4, 2020 | Print Edition | Video

**Bankruptcy Lawyers Gear Up for Surge in Filings Due to Coronavirus Fallout**



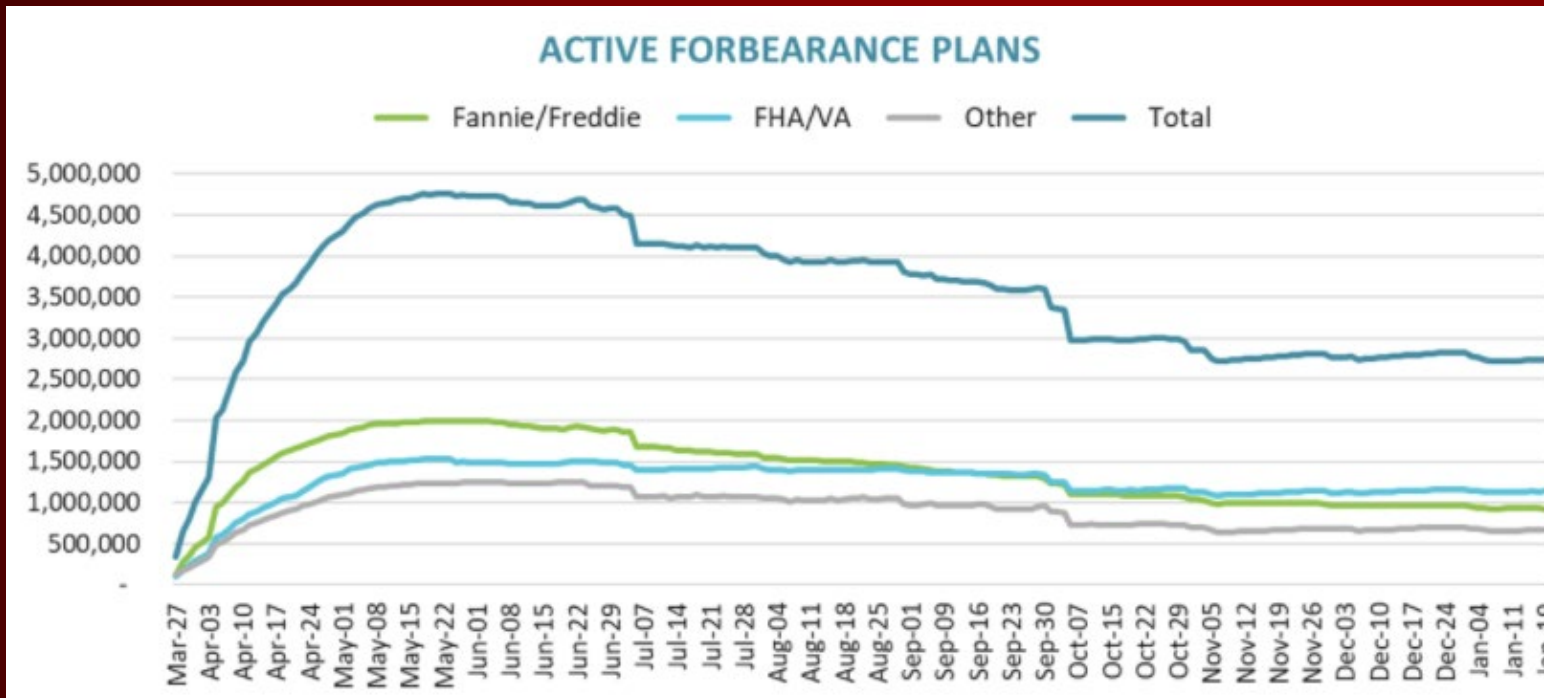
# ALL BANKRUPTCY FILINGS AND UNEMPLOYMENT



January  
6.3%

32,307  
BK's

New Bankruptcy Filings Source: Epiq AACER



## ACTIVE MORTGAGE FORBEARANCE PLANS

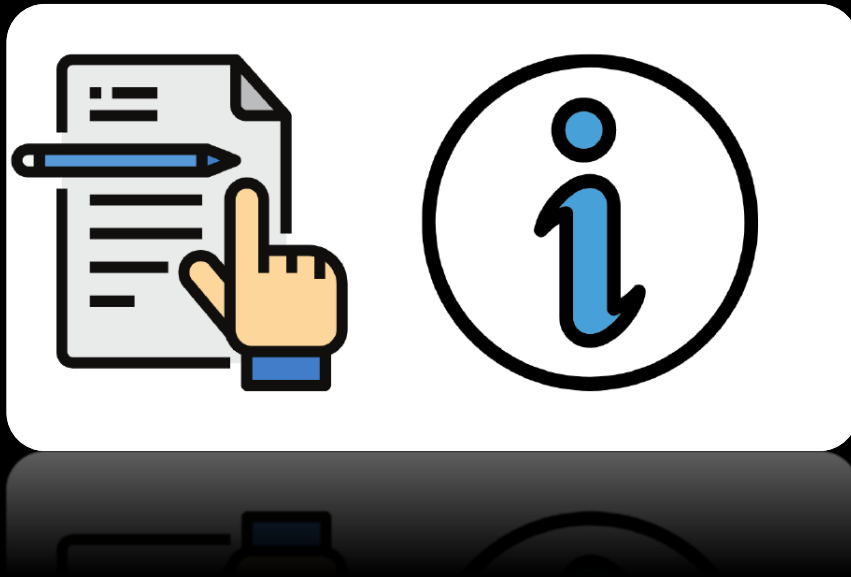
Source: ABI <https://www.abi.org/newsroom/chart-of-the-day/active-mortgage-forbearance-plans-increase-slightly-in-latest-week>



# Polling Question

When you can finally travel and don't have to think about Bankruptcy changes, where is your ideal destination?

- a. The Beach
- b. The Mountains
- c. Anywhere but here!



## ANTICIPATED IMPACTS ON SERVICERS

## WHAT IS A CARES FORBEARANCE CLAIM?

A Secured Creditor with a Federally backed mortgage loan that was granted forbearance or modified under the CARES Act may file a supplemental proof of claim within 120 days after the expiration of the forbearance period.

The proof of claim must include:

1. The relevant terms of the modification or deferral;
  2. A copy of the modification or deferral (if in writing); and
  3. A description of the payments to be deferred until the mortgage maturity date
- The Act omits any consequence of an untimely filed supplemental claim. However, an untimely supplemental claim likely risks non-payment to the Secured Creditor
  - The law will Sunset one year from the enactment date of ~~December 27, 2020~~, March 27, 2022.

Form 4100S

## Supplemental Proof of Claim for CARES Forbearance Claim

02/21

This Supplemental Proof of Claim is filed in compliance with the requirements of 11 U.S.C. § 501(f)(1) as the Debtor was granted a forbearance under the CARES Act (15 U.S.C. § 9056 or 9057). "Creditor" in this form means "eligible creditor" under 11 U.S.C. § 501(f). File this form as a supplement to your proof of claim.

Name of creditor: \_\_\_\_\_

Court claim no. (if known): \_\_\_\_\_

Last 4 digits of any number you use to identify the debtor's account: \_\_\_\_\_

### Part 1:

#### Amount of Loan That Was Not Received During Forbearance Period

List of payments not received during forbearance period:

Date: \_\_\_\_\_

Amount: \_\_\_\_\_

Date: \_\_\_\_\_

Amount: \_\_\_\_\_

Date: \_\_\_\_\_

Amount: \_\_\_\_\_

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Date: \_\_\_\_\_

Amount: \_\_\_\_\_

Date: \_\_\_\_\_

Amount: \_\_\_\_\_

Date: \_\_\_\_\_

Amount: \_\_\_\_\_

Total of payments due under the forbearance: \_\_\_\_\_

# CHAPTER 13 POST-CONFIRMATION PLAN MODIFICATION

- The Debtor may modify their plan to provide for a Secured Creditor's supplemental claim within 30 days of the claim filing date
- If the Debtor fails to timely modify their plan, then the Trustee or any interested party may request plan modification
- ~~The law will Sunset one year from the enactment date of December 27, 2020~~
  - As of March 27, 2021, the law will Sunset on March 27, 2022.

# CHAPTER 13 CASE TIMELINE

Forbearance  
entered into  
between Debtor  
and Creditor



Notice of  
forbearance filed in  
Chapter 13 Case



Debtor's chapter 13  
plan is confirmed

Creditor has 120 days  
from forbearance or  
modification  
expiration to file their  
Forbearance claim



Debtor has 30 days to  
modify their Plan and  
treat the Forbearance  
Claim



Debtor's chapter 13  
plan is confirmed



# REVIEWING CHAPTER 13 PLANS

- Modifying the Plan for Supplemental & Forbearance Claims
- The Consolidated Appropriations Act amends 11 U.S.C. § 1329 to allow modification of a Chapter 13 plan to account for creditor CARES Forbearance Claims.
- This in in addition to the previously allowed plan extension to 84 months.
- HOWEVER, this provision will sunset on ~~December 27, 2021~~ March 27, 2022.
- If the Debtor fails to modify the plan 30 days after the date on which a creditor files a forbearance claim, any party in interest may request a modification of the plan to provide for the proof of claim.

# EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN

## SUBCHAPTER V OF CHAPTER 11

- The obligation to perform under an unexpired lease of non-residential real property may be extended by the Court if the Debtor is experiencing or has experienced a material financial hardship directly or indirectly due to COVID-19
- The deadline may be extended until the earlier of:
  - the date that is 60 days after the date of the order for relief, which may be extended an additional 60 days if the Court determines the debtor will continue to experience a material financial hardship due to COVID-19; or
  - the date on which the lease is assumed or rejected

# Polling Question

As One Million seconds passed away 12 days ago, how long ago was One Trillion seconds?

- a. March, 2020
- b. 1989
- c. 29,680 B.C.



# THE UNINTENDED CONSEQUENCES

# DISCHARGED DEBTS UNDER NEW SUBSECTION (I) OF 11 USC § 1328

## WHAT IS SUBSECTION (I)?

The Court may grant a discharge under subsection (a) to a Debtor that has not completed payments to the Trustee or a Creditor with an interest in the principal residence of the Debtor if:

1. The Debtor's default on a residential mortgage is three or less monthly payments caused, directly or indirectly, by a COVID-19 material financial hardship; or
2. The plan provides for the cure of a default and maintenance of payments on a residential mortgage under section 1322(b)(5); and the Debtor entered into a forbearance agreement or loan modification agreement with the Creditor.

This law will Sunset one year from the enactment date. Consolidated Appropriations Act, 2021, HR 133, 116th Cong. (2020). *Emphasis added*

## WHAT IS THE PURPOSE OF SUBSECTION (I)?

**Allow debtors to obtain a discharge and “fresh start” in a Chapter 13 case if they fell behind on their residential mortgage obligations due to a COVID-19 related material financial hardship.**



## THE PROBLEM LANGUAGE (CARES 2)

Subject to subsection (d), after notice and a hearing, the court may grant a **discharge under subsection (a)** to a debtor who has not completed payments to the trustee or a creditor holding a security interest in the principal residence of the debtor if—“(1) the debtor defaults on not more than 3monthly payments due on a residential mortgage under section 1322(b)(5) on or after March 13,2020, to the trustee or creditor caused by a material financial hardship due, directly or indirectly, by the coronavirus disease 2019 (COVID-19) pandemic; or

“(2)(A) the plan provides for the curing of a default and maintenance of payments on a residential mortgage under section 1322(b)(5); and“(B) **the debtor has entered into a forbearance agreement or loan modification agreement with the holder or servicer** (as defined in section 6(i) of the Real Estate Settlement Procedures Act of 1974 (12U.S.C. 2605(i)) of the mortgage described in subparagraph (A)).”

(2) SUNSET.—Effective on the date that is 1year after the date of enactment of this Act, section1328 of title 11, United States Code, is amended by striking subsection (i)

### QUESTIONS:

1. Will courts hold that the debtor must complete all other payments under the plan in order to get this “early” discharge?
2. Does the forbearance agreement or loan modification agreement need to be in relation to the CARES Act?



## SOLUTIONS (EXISTING BANKRUPTCY CODE)

### 1328(a)(1)

(a)Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt-- (1) provided for under section 1322(b)(5)

### 1322(b)(5)

(b)Subject to subsections (a) and (c) of this section, the plan may—(5)notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due

# WHAT ARGUMENTS DO CREDITORS HAVE TO PROTECT THEIR INTERESTS AS TO EARLY DISCHARGES?

1. The Act requires payments to be made under 1328(a) that were already scheduled
2. The Act requires payments to be made under 1328(a) that were already scheduled
3. Equity Provision under Section 105 - “no provision of [the bankruptcy code] . . . shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process”

# POTENTIAL IMPACTS (WORST – CASE SCENARIOS)

TYPE OF DEBT	DOOMSDAY RESULT	DOES LIEN SURVIVE AFTER BANKRUPTCY DISCHARGE?
Unsecured Debts	Any amounts not paid would be discharged.	N/A
Principal Residence Mortgage – Pre-Petition Arrearage	Any amounts not paid would be discharged. Post-Petition payments would survive and lien would remain post-discharge.	Yes
Principal Residence Mortgage Total Debt Claim	Any amounts not paid would be discharged.	No
Auto Debt – Paid Through Plan	Any amounts not paid would be discharged.	No

## RECOMMENDED NEXT STEPS

1. Work with in-house legal counsel to develop a strategy.
2. Determine whether your organization wants to file forbearance claims
3. Monitor dockets closely for amended plans, motions to modify plan, motions for discharge under the Act and other related filings
4. Object to any motion that proposes to discharge any mortgage payments that weren't paid
5. Stay informed as to new developments.
6. Engage your government relations department.

# THE CONSUMER BANKRUPTCY REFORM ACT OF 2020

- Replaces chapter 7 and chapter 13 with chapter 10, a new consumer bankruptcy chapter, and provides two routes for individuals to file for bankruptcy:
- **Route 1: No-payment discharge.** For low-income/low-asset filers with no minimum payment obligation, this option wipes out all unsecured debt except for certain categories of debt, such as child support or debts incurred by fraud. A minimum payment obligation arises for debtors with valuable assets available to pay creditors or with an annual income over 135% of the median income for the state and household size. Discharge has no impact on liens on property.
- **Route 2: Debt-specific plans.** Creates bankruptcy plans that allow individuals to resolve the debts that are specific to them. Individuals can file one or more plans, and collection of debts are paused while the filer remains current on a plan



# THE CONSUMER BANKRUPTCY REFORM ACT OF 2020

- Ends the 910 day rule for valuation of vehicles for personal use and takes the time to 90 days before filing
- Removes the provision that makes private and federal student loans nondischargeable, allowing these loans to be treated like most forms of consumer debt
- Discharge available at Confirmation
- Maximum 36 month plan
- Debtor pays all secured loans direct
- Trustee only pays unsecured debts
- Amount to unsecureds will be determined by a formula and will only be required if a specific percentage above state's median income
- Allows for modification of mortgage debts on principal residence through a pre-packaged modification process (potentially market value at fixed interest rate)
- End “Zombie Mortgages” and allows for sale of encumbered property free and clear of any liens if the first lienholder refuses to take tender of the property, subject to junior liens.



# What's happened since I went to bed?

- **3/27/21 - President Biden signs COVID-19 Bankruptcy Relief Extension Act**
  - CARES Act relief provisions extended to March 27, 2022.
- **3/29/21 – CDC extends eviction moratorium until June 30, 2021**

## **Webinar Wrap-Up**

### **Questions**

If you have a question regarding today's presentation, please contact the ALFN or any of the presenters directly.

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## **Chapter 13 Best Practices (Including PPFN, Notice of Final Cure & POC)**

*Wednesday, April 7, 2021*

12-1:15 Central Time (10-11:15 Pacific, 11-12:15 Mountain, 1-2:15 Eastern)

## **Chapter 11 Basics for the Mortgage Lender**

*Friday, April 9, 2021*

12:00-1:15 PM Central Time (10:00-11:15 AM Pacific, 11:00-12:15 PM Mountain, 1:00-2:15 PM Eastern)

**Register at [alfn.org/bkintwebinars2021](https://alfn.org/bkintwebinars2021)**

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