



TEXAS A&M UNIVERSITY

School of Law

## **“TAMU Law Answers” CARES Act Webinar Series**

### **Webinar 4: CARES Act Implications for Housing, Commercial Real Estate, and Bankruptcy**

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#### **Texas A&M School of Law Presenters:**

- [Lisa Alexander](#), Professor of Law and Co-Director, Program in Real Estate and Community Development Law
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*While the panelists are all attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances.*

#### **TRANSCRIPT:**

- Howdy, and good afternoon to everyone. My name is Aric Short. I am on the faculty at Texas A&M University School of Law. It's my pleasure to welcome all of you to this webinar on the Coronavirus Aid Relief and Economic Security Act, known as the CARES Act. Specifically, this webinar is going to relate to how the CARES Act has implications in the areas of housing, commercial real estate, and bankruptcy.

Today's webinar is the fourth in a series of webinars produced by Texas A&M Law School that looks at various practical implications flowing from the CARES Act, and the government's response to the current pandemic.

In the first webinar, we looked at individual incentives under the CARES Act. The second webinar focused on small business incentives. And the third webinar focused on health care implications under the CARES Act. Now, all of these recorded webinars, as well as the transcripts and presenter slides from them, are available online at [TAMULawAnswers.info](#). That's [TAMULawAnswers.info](#).

In addition, the video and transcript and slides from today's webinar will be posted within a day, so you can get all of that information on our website. Today's webinar, as I said, will focus on three important topics addressed by the CARES Act that have been the subject of significant public interest and discussion-- residential housing, residential and commercial mortgages, and bankruptcy.

Now before I introduce our three panelists, I want to remind the audience of a few important points. Our panelists are all attorneys. And they will be discussing the law in general. However, nothing in this webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances, and receive legal advice.

And now, let me just introduce our three panelists, and then I'll tell you a little bit about how the webinar is going to be organized. And then we'll get started. So our three panelists are all faculty members of Texas A&M Law School. We have Lisa T. Alexander, professor and co-director of the program in real estate and community development law. We have Luz E. Herrera, professor and associate dean for experiential education. And finally, Wayne Barnes, a professor at the law school who teaches in the areas of bankruptcy, consumer law, and contracts.

Now, in terms of organization, we will start with allowing each of the panelists to talk a little bit about the CARES Act in their specific areas of expertise. Then, I will pose a few questions to the panelists for them to respond to and discuss as a group. And then finally, I will turn to any questions that have been submitted by the audience. And I will refer those out to the panelists to discuss.

We will finish right at 1 o'clock-- so that's my primary task, to make sure that we stay on time. But if you have questions, please feel free to submit them online, and we will get them forwarded to the panelists. All right, so first, we have Professor Alexander--

- Trying to find-- there we go. OK, so, thanks so much, Aric. Howdy, everyone. I'm going to talk about the housing and mortgage provisions of the CARES Act. And the CARES Act provides about \$6 trillion in indirect and direct support to either homeowners or renters for housing needs.

The first and most important thing to get across for homeowners is that the provisions of the CARES Act, with respect to mortgages, only apply to federally backed mortgages. And that raises the question, what is a federally backed mortgage? A federally backed mortgage is any mortgage or deed of trust that's secured by a first or subordinate lien, on residential real property that has been insured, guaranteed, made, purchased, or securitized, by one of the following federal agencies.

And I'll talk about what all those verbs mean, but here are some of the agencies that provide federally backed mortgages. One are the government sponsored enterprises, Fannie Mae, Freddie Mac, or Ginnie Mae. The Federal Housing Administration-- HUD, there's a number of HUD programs. The Veterans Administration, USDA, agriculture housing programs.

Now, the important thing to know is many people who have a private loan made by a private bank, such as Bank of America, your loans are federally backed, even though a private entity

made your mortgage. So they are usually-- those loans are usually backed by the FHA, meaning that if you can't make your payments to the bank, the federal government guarantees that the banker will get paid. And so, therefore your mortgage may be insured or guaranteed by one of these federal agencies.

About 50% of the mortgages in the United States are backed by Fannie Mae or Freddie Mac. And all told, probably about 70% of the mortgages in the United States are covered in some way by federal backing. However, if your loan is not federally backed, the provisions about which I'm speaking in the CARES Act do not apply to your loan, because these provisions do not apply to purely private mortgage loans.

So how do I know if my mortgage is federally backed? You have to call your mortgage servicer. And then you may think, well, who is that? What is a mortgage servicer? And so this graphic attempts to kind of explain how mortgage servicing works. When a bank makes a loan to a homeowner or a borrower, the bank, even if it's a private bank, or if it's a federal agency, usually doesn't keep the loan or hold onto the loan.

The bank usually sells the mortgage loan. Often, if it's a federally backed loan, to the government sponsored enterprises-- Fannie Mae, Freddie Mac, or Ginnie Mae. And those government sponsored entities buy the loan, and then they don't even hold onto it. They sell it to another buyer through the securitization process. So usually, a securitization trust will end up owning the original mortgage that the bank made to you.

Then, the securitization trust wraps up a bunch of different mortgages into something called a mortgage backed security. And then investors buy the security. And the investors are the ones who eventually receive your mortgage payments, your monthly mortgage payments. And that's the return on their investment.

So you may ask, well, what does that have to do with me and my servicer? Well, the homeowner makes their monthly payments to the mortgage servicer, which is a separate entity. It's usually a separate entity from the bank that made your loan. And it's usually a separate entity from the GSEs, the securitization trust, et cetera.

So what's important is the person you have to call, or the entity that you have to call, is the mortgage servicer to whom you make your monthly payments. That's usually a private bank. So for example, you might have a loan from Bank of America, but BB&T may be your servicer. They're the one who sends you your statements and-- who you make your monthly payments to online or offline..

The mortgage servicer will eventually give your mortgage payments to the securitization trust, with a fee that they take. But for your purposes, finding out whether or not your mortgage is federally backed means you have to talk to your mortgage servicer.

As I said, most of these loans are federally backed, but you can go to the Fannie Mae website, the Freddie Mac website, or the Mortgage Electronic Registration System, all of which I've put links in the PowerPoint to, to find out if your mortgage is federally backed-- meaning if your

servicer doesn't return your calls, they're getting a lot those calls right now from everyone, you could still look it up in these sources. And it will tell you if your loan is federally backed. The Consumer Financial Protection Bureau also has a lot of good information about this.

However, if your loan is federally backed, your mortgage is federally backed, then there's two types of relief that you can receive under the CARES Act-- a foreclosure moratorium, and a temporary right to forbearance for homeowners who cannot pay their mortgage due to a COVID-19 hardship. OK, so let's explain what that means, right?

The foreclosure moratorium means that your mortgage servicer-- neither your mortgage servicer nor your lender-- can foreclose on your mortgage for your failure to pay it for 60 days from March 18th 2020, ending on May 18th 2020. So they cannot initiate a foreclosure action, foreclose on your home, and kick you out of your home, for that 60 day period.

These provisions, however, don't apply to foreclosures that began before the creation of the Act, which was March 27th 2020-- or vacant or abandoned properties. But for everyone else, they cannot kick you out of your home for 60 days.

The other right that you have is that if you're an individual borrower with a federally backed mortgage experiencing a financial hardship, you may request a forbearance from your mortgage servicer or lender for up to 180 days. And then, you get an additional period of 180 days for a maximum of 360 days. You have to request this from your mortgage servicer.

And the proof that the mortgage servicer is going to look for is something like a letter from your employer that you have been laid off, the fact that you-- a doctor's note that says that you've been sick as a result of COVID-19. Apparently, they're not going to look for lots of hard proof, but they are going to look for something. And you have to ask for this, and you have to provide it to them.

And what that means is that they cannot charge you additional late fees, or penalties, or interest associated with your failure to pay your mortgage during the period of forbearance. So they can't charge additional fees or penalties, other than what they would normally charge if you had paid your loan on time during this period of forbearance.

Notably, this is not loan forgiveness. This does not mean that you do not have any obligation to pay your loan for the forbearance period. It simply suspends your need to pay during this period. So you will ultimately be responsible for the past due payments that you did not pay after the forbearance period ends. So it doesn't forgive your loan, it doesn't extinguish your obligation to pay. It simply just delays it for the forbearance period-- so, pay your mortgage if you can, because all those things will just accrue if you don't do it on time.

Second piece of protection is for renters-- landlords of covered properties are restricted from filing new evictions for your failure to pay your rent, or for non-payment of rent. And they cannot charge you late fees, penalties, or other charges relating to your non-payment of rent for 120 days from March 27th, which was when the Act was put in place, ending on July 25th 2020. So for 120 days, your landlord cannot evict you if you are in a covered property.

Also, even after the eviction moratorium period, in 120 days, ends, they still-- your landlord still cannot evict you after that period without sending you at least a 30 day notice, or giving you 30 days of notice. OK?

What's a covered property? There's all kinds of things. I encourage you to look at the Consumer Financial Protection Bureau website for this. But it's-- Violence Against Women Act covered programs, any HUD housing program. And here's a list of them-- section 8, public housing, project based housing, blah, blah, blah, any USDA housing programs, programs by the Department of Treasury, such as Low-Income Housing Tax Credit, the LIHTC.

Rural housing voucher programs, and properties with those federally backed mortgage we just talked about that have between one and four units, those properties are covered. And also, multifamily large, rental properties, with five or more units, if they are federally backed.

So how would you know, as a renter, if it's a federally backed property? Well, you should really call your landlord. They're supposed to tell you whether or not you have a federally backed rental agreement, and whether they're federally backed, or they have a federally backed mortgage. But that's who should be able to tell you. If not, you may be able to look it up on other sources.

Last provision that's important is multifamily borrowers with federally backed mortgages that are current as of February 1st and have a hardship due to COVID-19 can also ask forbearance. Their period's a little different. It's 30 days, and it can extend for two different 30 day periods, if made 15 days prior to the end of the first period. And so it's about 90 days for a multifamily borrower.

So if you know you're in a building where your borrower has some federal form of mortgage insurance, et cetera, then you would be covered. They can't evict you during this period of forbearance. Again, this is not rent forgiveness. It doesn't get rid of your obligation to pay rent. It only prevents landlords from evicting you during this period.

However, you're still responsible for all past due rent payments after the eviction moratorium period ends. And at that point, they can, with 30 days notice, evict you. So pay your rent if you can.

OK, and here's my last point. Texas also has some state laws with respect to eviction, basically preventing evictions from happening-- the state one's until April 30th. I anticipate that the Court will extend that. And I have a link to that. And as I said, you could look at the Consumer Financial Protection Bureau, the National Housing Law Project website, HUD, Texas Housers, for more information about whether or not you're covered and what to do.

Biggest point is, watch out for scams. There's a lot of groups and businesses that are trying to use this crisis as a way to say, hey, I can help you refinance your mortgage if you pay me. Or, I'm the only one that can help you take advantage of the CARES Act provisions, because-- to buy my product in order to take advantage. And those really all are scams. So just like there's people selling masks that no one can find on websites, there's people selling mortgage products that you don't want to buy and don't want to be in. So please be careful of scams. Thank you, and I look forward to questions.

- Thank you very much, Professor Alexander. Next, before we turn to our next panelist, I want to give you a little bit more information if you're in the audience. To submit a question electronically, there's a tab at the bottom of your screen that says Q&A. Just click on that, and it'll pull up the ability for you to type in a question.

So next, we're going to turn to Professor Herrera.

- Thank you, Professor Short. Well, the commercial leases is a whole other animal that we thought it was worth talking about, because while there are plenty of protections for residential lease holders, there is not a whole lot for commercial lease holders in the CARES Act. There are, obviously, provisions for businesses. And I will refer those of you who are commercial tenants, that have a business, to the webinar that was done specifically on some of the resources available for businesses. That was done on April 7th, also on the [TAMULawAnswers.info](http://TAMULawAnswers.info) website.

So one of the things that I should say about this particular presentation is that, because leases are governed by state law, if you're calling in or chiming in from another state, your particular state's laws might be different than what we're covering here in Texas. I will try to provide some broad overview of some of the theories that may govern your residential leases, but know that a lot of the orders with respect to commercial leases are very specific to the jurisdiction that you're in.

So Professor Alexander talked about eviction moratoria. And most of them do not explicitly include commercial tenants. However, there are exceptions. For example, in Collin County, here, locally, the order for evictions does explicitly include commercial leases, and that has been also stayed for a period of time. In most of these evictions, and throughout the state, we're probably not going to see a whole lot of action in them until May. And for some counties, that will be after May 7th, and for others, it might be even further. I believe Dallas County has an order that says something like the 24th of May.

And so every municipality has a different order. So you really want to look at what your county orders are. And so you do have a number of counties that don't explicitly, again, say, commercial tenants. But there are those that don't specifically also limit to residential, and so that's the case with a number of other counties-- Bexar County, for example. Travis County, for example, also had some very broad orders that don't necessarily not include commercial leases.

There are cities that are providing some additional recourse. The city of Austin, for example, has asked that-- or required that-- landlords that are planning to evict, that they give tenants 60 days notice. And that is both for residential and for commercial tenants. And so my understanding is that they need to provide that notice in addition to all the regular notices that you have to give during an eviction process, that they have to give that notice by May 7th or 8th.

So again, a lot of different rules and orders that are operating with respect to commercial tenants. But unless you have an order that explicitly says that there is a moratorium, you probably should assume that you should continue to pay your rent. Now, there is a practical issue which is that a lot of the Justice of the Peace Courts, or most of them, are not going forward with evictions at this time.

And so the Justice of the Peace Courts that hear the evictions are probably not going to be hearing anything until, probably, mid to late May. And if you have a jury trial request, that might even be pushed into June or July. So because there has been a suspension of jury trials, and there is a delay in terms of Supreme Court orders for going forward with jury trials-- and so again, depending on your jurisdiction, that really is going to determine when the moratorium will end.

As Professor Alexander also said, rental payments are still required. None of this forgives your rental payments. There are very few provisions in rental agreements that allow you to withhold rent. If you have the money, pay the rent, or at least hold onto it, so that you're able to make the payment as soon as possible after any moratorium is lifted, because generally, there are very few waivers. And the landlords can begin an eviction process for non-payment of rent as soon as the moratorium is over.

And actually, they could still probably file. It's just that the court won't take action on them. So if you have them-- if you don't have the money, you should also think about contacting your property manager or your landlord to request a forbearance or another accommodation.

So let me talk a little bit, just in general, about commercial leases. Because in addition to some of this court and government action that is stopping or delaying-- not stopping, but delaying, the process of an eviction. Usually, how you're going to handle this situation, if you're a commercial tenant, really is going to depend on your commercial lease and your relationship with your landlord.

So if you don't have a lease agreement, you can still be in a lease due to an oral agreement that you have that-- obviously, a lease agreement will provide more direction in terms of what you might expect a landlord to do. If you don't have anything in writing, you might think about definitely putting any agreement that you enter going forward into writing, even if that's an exchange of emails confirming the agreement.

And so it's really important that if a landlord is giving you an extension of time to pay, or is entering into a different type of arrangement with you as a commercial tenant, that you properly document those terms. So ultimately, whether you can continue to pay, your lease is going to be determined based on your own financial-- you and your business's own financial condition. And so we have some tips here about how to think about this.

Now, commercial leases are generally contracts. And in Texas, there are two clauses that folks have been citing to as possible areas that might provide some relief for commercial tenants. You know, they're not necessarily certain to provide you relief. But there are two theories. One is the doctrine of impossibility, which basically says that if you did not foresee an event at the time that your contract was entered into, then you might be able to excuse the performance of your obligation under that contract.

And here, your contract is the lease. Texas courts have interpreted this doctrine of impossibility to require more than just a difficulty, an economic difficulty, or an economic hardship, or expense, so it's not necessarily a low bar. As a tenant, you would have to prove that you can no

longer comply with the terms of your lease. And it is up to you, as a tenant, to make the case that it is impossible to go forward.

Ultimately, you have to make reasonable efforts to make sure that you can still perform. And so if you're able to operate your business online, a landlord, and probably a court, will expect you to do that as a way to generate income.

In terms of additional theories, force majeure theory is another commonly used. Basically, it means there's a superior force, there's a chance occurrence that really interfered in your contract with your ability to perform-- basically, that something was unavoidable. In Texas, the force majeure clauses are construed narrowly, which means that if you have a force majeure clause, you need to make sure that-- it would have to say there is-- a force majeure is usually defined. And very commonly, it's defined to include things like tornadoes, in Texas, or other issues that might come up, that might prevent a business from operating.

But I don't know that there's going to be a whole lot of force majeure clauses that are going to specifically list a pandemic. And so, most likely, your lease does not include any provision for you to excuse the payment of rent through this clause. However, there might be broad terms that could excuse you. So maybe something like-- something I have here on the PowerPoint, or such other events that are beyond the reasonable control of tenant.

So I think those are the two areas and two provisions that you might look to in your lease that may provide some relief, but they are not necessarily foolproof. Regardless of whether this is in your contract or not, and if it allows you to get out of this lease, landlords, you should know, generally can charge late fees and penalties if the lease provides for them to do so. And unless there's an order limiting them to charge late fees or penalties, you should expect that to accrue if you've decided to not pay your rent until the moratorium is lifted.

So I have here an example of a county, Dallas County, order that was issued on April 6th, that says landlords should cap late fees for delayed payment of rent at \$15 per month. Again, I added the italics there on the should, because it's not mandatory. It's up to the landlord if they want to do that. And I'm not sure that if I was a landlord, I wouldn't necessarily be jumping at the opportunity to delay any fees if I'm also strapped for cash during this time.

So there are also opportunities for landlords under our Texas property code to lock you out of your business if you did not pay rent. And so that's something else that-- I know that there have been a number of businesses here in Fort Worth who are dealing with this issue. If the landlord does shut you out because you did not pay your rent, you must-- the landlord must.

The landlord-- and I say landlord, it could also be the property manager, could be the landlord's agent-- must place a written notice on the tenant's front door stating the name of the person and the address or number where you can contact either an individual or the property management company that would allow you a key-- a new key, if they changed the lock-- to be able to go in to your business and get whatever you need to.



So the new key is only going to be required to be provided during the tenant's regular business hours, and if the tenant pays the delinquent rent. So if you didn't pay your rent, and you're not prepared to pay your rent, it's going to be hard to get back in. So there are obviously provisions that are in the law. If you pay your rent, or are offering to pay the rent, and the landlord still doesn't accept it, you could request a writ of reentry to go back in. But it's probably going to require that you pay some rent.

If a landlord locks you out and does so after you've paid rent, you have some ability to either terminate the lease or to receive some damages for that lockout, which could be a month's rent and reasonable attorney's fees, and other things that you might be eligible for under the property code.

So lots to think about there. I mean, this is really an overview of landlord tenant law for commercial properties. Ultimately, what's really going to make sense is probably to stay out of court, because the courts are going to delay the process, and ultimately sour any existing good relationship that you might have with your landlord. So you might think about negotiating with your landlord.

And I've posted here some tips or some ideas about what a landlord might consider, and a tenant might consider, when they're going into a negotiation to restructure a lease or rethink about it. Most landlords will want to keep a tenant, because hard times are around for everyone, not just the small business, but also the larger ones. And so it's going to be important for them to work with you.

They will probably require that you provide more financial information to make sure that any promise of future payment is actually secure, so don't be surprised if you enter into an agreement with a landlord, and the landlord asks for more-- either financial information, or other guarantees to your lease, if you're intending to contribute.

Obviously, some things to think about as you're deciding whether it makes sense for you to terminate your lease, or negotiate a lump sum payment, or a payment plan, or anything else, is how much you've already invested in that space. Have you put in a lot of money and tenant improvements? And if that's the case, you might want to figure out how to add whatever delinquent rent is available at a later time.

So just some tips on how to negotiate-- unfortunately, I'm running out of time here, so I'm not going to go through every single point. I will say that, in terms of an eviction process, a lot of people, once they get a notice of eviction, they think they have to move out immediately. And that's not necessarily the case. After you get a notice of eviction, you have at least three days before the landlord will file an eviction in court. And then, you would have an opportunity to go before a judge. Again, this is what's been postponed until May. And the date of when in May depends on your jurisdiction.

Ultimately, if the landlord does get a writ of possession, which basically means an order for them to take over the property, if you don't move within the time permitted to you by the court, a constable can come in, give you notice. And within 24 hours, they could remove your belongings

from the location where you're at. You have five days to appeal that decision. And ultimately, if you're not successful, this goes down to debt collection.

And obviously, any eviction-- any record of an eviction on your record will prevent you from possibly getting a new lease. And so those are all considerations for you.

There are a number of other issues that come up when we deal with commercial leases. Generally, there's been some support and funding to help residential tenants with paying their utilities. I have not seen anything that says that commercial tenants have the same opportunities. You want to consider whether you or somebody else-- a family member or anybody else in your business-- has a personal guarantee that might be at risk here when you are leaving a lease.

If you have business interruption insurance, you want to make sure you call your agent. A lot of folks don't, but if you're-- the bigger the landlord, the most likely they are to require it. So you want to make sure you put in a call to your insurance agent if you have business interruption insurance. And really, this is going to give you an opportunity, unfortunately, to think about whether it makes sense to either sell or transfer your business to somebody who might have more liquidity than you to be able to sustain this time.

And so obviously, that might lead you to recovery, if you're able to have enough cash flow to hold on during this period. And if not, you might have to consider bankruptcy options, which my colleague Professor Wayne Barnes will talk about. Again, I refer to the CARES Act resources for small business that was discussed on April 7th, in our webinar, you can find on our website.

If you have other questions, the Texas Law Help website has some specific information that gives you more details about the specific orders and the moratoriums. Thank you.

- All right, thank you very much. So we have about 25 minutes left in our webinar today. So we're going to hear from Professor Wayne Barnes next, about bankruptcy issues. And we have questions that are now coming in on our Q&A. We're going to turn to those right after Professor Barnes.

- All right, thank you, Professor Short. Let me pull up my PowerPoint. And given the nature of the hour, I will try to be quick. And I'm going to talk about the bankruptcy related provisions of the CARES Act.

One obvious question-- I suspect a lot of our audience, from the questions we've seen thus far, I'm suspecting that a lot of our audience is dealing with this from the residential sides. You're worrying about your home or your apartment. And so I suspect we're going to talk a lot about that.

To set the stage and the context for that, I do want to actually talk about what the CARES Act does with respect to bankruptcy, because-- spoiler alert, the CARES Act doesn't really change some of the normal bankruptcy provisions that you might want to utilize in the coming days if you want to file for bankruptcy. But I do want to just set the stage, talk a little bit about what basic bankruptcy options there are, as far as what chapters to file.

I'll talk briefly about what the CARES Act does to bankruptcy. And then I suspect we can talk about typical options in the Q&A. So just real quickly, type of bankruptcy cases, there's really three-- really, almost only two that most individuals would worry about. And the first one is Chapter 7. So you file Chapter 7 bankruptcy, that's known as a straight liquidation. You're basically giving up all of your non-exempt assets, and saying, here's what's available for my creditors.

You get to keep your future income. So your paycheck, going forward, you don't have to use any of that going forward after you file bankruptcy. The good news is that most-- many, at least-- ordinary folks and debtors that want to file bankruptcy, who are consumers, don't have any non-exempt assets. Because as you may be aware, in Texas, your homestead is exempt in an unlimited dollar amount, one car for every licensed driver in the household, a certain amount of personal furnishings, your retirement, all that kind of stuff.

And so that's usually, a lot of times, all most folks have. So you don't really have to give up anything. The bankruptcy court just gives you a discharge, and you get rid of all of your obligation on debts.

For some folks, though, Chapter 13 is an option. And what Chapter 13 sets up is basically a five year, or maybe only a three year, payment plan, where you pay your creditors what you can. The good news of that is you don't have to give up any of your assets. You don't have to liquidate anything. You just commit your future income. And the idea is that most folks file Chapter 13 have some income over and above their living expenses.

Then, of course, for businesses there is also the option of Chapter 11. A normal Chapter 11 case was contemplated for a large corporations-- you know, American Airlines files Chapter 11 bankruptcy, for instance. And that is an enormously complex and expensive process, lots of lawyers involved, lots of constituencies are represented, from the debtor, to a large creditors committee, to the trustee.

And that is out of reach for many, many, if not the vast majority, of the small businesses in the United States. What's interesting, and it's just kind of fortuitous, that there just happened to be a new small business reorganization subchapter that was just enacted last year, and only became effective about a month ago. It's hardly been used yet. And so I'll talk about that more in just a second.

So to get to the CARES Act-- really quickly, and then I want to get to the Q&A. The CARES Act just has a handful of provisions that affect bankruptcy, both for businesses and for individuals. So I'm going to talk about businesses first. The small business debtor reorganization chapter that I just talked about, it just became effective about a month and a half ago-- two months ago, almost.

The good news is it's almost like Chapter 13 for larger businesses, or rather, larger than individuals-- so small to medium sized businesses. And so it's simple, it's fast, there's no voting process. There's not a lot of the complexities that are involved in a typical more large, corporate Chapter 11. So it's very, very attractive, but we really don't know a lot about how it's playing out,

because it really just became effective in late February. And of course now, we know the world completely changed.

The thing that frustrates some about the new small business debtor reorganization act was that they limited it to, as you can see, businesses that only had total debt of \$2.7 million or so or less. A lot of businesses have more debt than that, so they're not eligible to file for this simple, faster Chapter 11. That brings me to the first of the CARES Act provisions, though. For one year, starting from the effective date of the Act-- and I don't have that date in front of me, I want to say it's late March-- they decided to temporarily raise the debt limit for eligible businesses to file this new smaller, faster chapter 11, if you have up to \$7.5 million in debt.

So that vastly expands the amount of small to medium sized businesses that can take advantage of this very, very effective, simple, efficient Chapter 11 process. I don't know if there's a lot in our audience that are going to be interested in a business bankruptcy, but that's one of the things they did. And it's going to be very helpful for the undoubted wave of bankruptcy filings of a lot of small to medium businesses that are coming in the coming months.

Then, how about for individuals-- I suspect, most of our audience. Well, before I tell you what the Act does for individuals, and this is fairly minor-- well, it's not minor, but it's a fairly modest addition to the bankruptcy, but it is helpful. But before I explain it to you, I'm going to have to explain to you a little bit about the so-called "means" test in bankruptcy, and how disposable income works.

So we talked a while ago about Chapter 7, which is, you don't have to pay any income in the future. You just give up your assets. A lot of times, you don't have any assets, so it's sort of a zero asset bankruptcy-- so you essentially give up nothing, and your debt is wiped out-- as opposed to Chapter 13, where you're required or you contemplate paying payments over a three to five year period.

Well, there is this "means" test that Congress enacted about 15 years ago. And what they look at-- the short version of it is this. If you have enough means, enough income, they want you to file Chapter 13. They want you to use that means and that income to pay your creditors as much as you can over five years. If you don't have enough means, then you don't have to do that. That's sort of the real simplified version.

So the way the bankruptcy code does that is it looks at your current monthly income. That's a six month average leading up to before the bankruptcy filing. And they look at what the relevant median income-- so if you're a single male living in Tarrant County, they say, what is the median income of a single male, or a single family person household in Tarrant County? And if you're under that, then you can file Chapter 7, no problem.

If your current monthly income-- say you're single. Or let's say you're a family of five that lives in Dallas County, and then you compare that to the relevant median income of a family of five in Dallas County, if you're over that. Then, not so fast. Maybe you can file Chapter 7, maybe not. Then, we further look at how much disposable income you have. So what the court does is it looks at your gross monthly income-- your paycheck, typically, minus certain allowed living

expenses. So, what you've got to pay for rent, or your mortgage, what you got to pay in taxes, health care, groceries, utilities, car expenses, et cetera.

And then they look at that leftover, you what you normally use to buy luxury items with, or go to the movies maybe once or twice more, back when people did that. And that leftover money, after your bare living expenses, is called your disposable-- kind of leftover-- income. And they look at that and they say, OK, this is what this person has left over to apply to their debt. And then they essentially say-- and it's a complex formula. I don't nearly have enough time to get into it right now.

But suffice it to say, it's roughly targeted to if you can pay at least 25% of your overall unsecured debt, like credit card or medical bills. And it says if you can pay at least some amount of, this percentage of it, then, you know what? You're required to file Chapter 13. You have to commit all of your disposable income for the next five years, or possibly three years.

But if, you know what, you barely have a little bit of disposable income, it's only a few dollars a month. Then, it's probably not going to be enough. And they say, you know what, you have a little bit of extra disposable income, but we're not going to make you file Chapter 13. You can just file Chapter 7. Chapter 7, you get in and out within a matter of weeks, if not two or three months.

So that-- OK, so that's the backdrop. And with that, I'm almost done. What the CARES Act does for individuals is this. You all-- hopefully, some of you have already received your stimulus payments and other funds from the CARES Act. The standard was \$1,200 per adult. And perhaps, depending on who you are, there's other funds available. But the bankruptcy debtors get to keep these stimulus payments from the CARES Act-- either current people that are already filing bankruptcy, or that are thinking and contemplating filing it. You get to keep it.

So under those income tests I just told you about, it's not included. So you don't have to say, oh, wow, I suddenly got a pay bump from this federal stimulus check. You don't have to count that in making these various calculations as to whether you make enough, and whether you have to commit that income. So short answer, payments don't go to the creditors. Debtors get to keep that money. And it's not held against you for purposes of whether Chapter 7 or 13.

*\*Professor Barnes provided the following clarification after the webinar:*

The CARES Act explicitly states that Chapter 13 debtors should generally be able to keep their CARES Act stimulus checks (by virtue of removing such funds from the definition of “disposable income”). On the other hand, the Act does not explicitly provide that those who file Chapter 7 after receiving the stimulus money get to keep it rather than be required to surrender it to creditors (if not spent yet). However, on April 8 the United States Trustee’s office issued a statement that Chapter 7 debtors should generally be allowed to keep stimulus payments free of creditors as well, as this is consistent with the intention and policy behind the Act ([https://www.justice.gov/ust/file/cares\\_act\\_recovery\\_rebate\\_notice.pdf/download](https://www.justice.gov/ust/file/cares_act_recovery_rebate_notice.pdf/download)).

The other thing-- and this is really a very narrow segment of my audience. I don't know if any of you are currently in a Chapter 13 case. But if you already are in a Chapter 13 case. And say, you're under a five year plan. And then, suddenly this disaster has happened. What Congress did is realize, wow, there's going to be some extenuating circumstances.

Normally, Chapter 13 plans can only go for five years. But there is a provision Act that explicitly authorizes the court, for this time duration, to extend plans for seven years, or whatever, when you get back on their feet. And again, this is very narrow-- only if you're currently in a Chapter 13. But that's the other thing that the CARES Act does.

So I wanted to make it short and sweet. The summary recap, those are the three things-- increases the debt amount for small business or organizations of Chapter 11 to \$7.5 million. That's for one year. CARES Act payments are not included in income, or disposable income, for purposes of individual bankruptcies. And if you happen to be an existing Chapter 13 debtor, you can extend your plan for up to seven years. And these provisions will sunset-- that is, they will go away-- after one year from the effective date, so next March, 2021. Unless they're extended, which, of course, in the current flux, anything is possible.

But that's what Congress has done at this moment. So with that, I want to leave the rest of the time for our questions from our moderator and our audience. And I look forward to them.

- Fantastic, thank you very much, Professor Barnes. OK, so I'm going to go through and pull out a couple of questions that have been asked so far. And we have about 14 minutes left on the webinar, so I ask our panelists if we could keep our answers as direct and to the point as we can, so we can try to get through a number of questions. So first, for Professor Alexander, we have received a couple of questions related to landlords who typically have college students as tenants.

So I'm going to read you a couple of these questions. As a landlord, college students are not wanting to sign a lease because they're not sure if they will be in town for part or all of the fall or spring this coming year. What support is there for landlords who are not able to rent their properties? Many students are not renewing leases because they're not sure if they will have classes in the fall. We, as landlords, may lose out on renting our units. What support does the CARES Act have to assist landlords?

- So the provisions that I was talking about mainly apply to individuals. And there are some provisions for landlords who receive some sort-- their mortgages [INAUDIBLE] supported. So if, for example, you're a landlord and you're receiving something from the university, the Department of Education, perhaps you would qualify as a multifamily landlord. And you can request forbearance if you meet the definition of a multi-family federally backed landlord. You can request that 90 day period of forbearance. But the other provisions that really pertain to landlords, I think are in some of the other sections of the CARES Act, the sections that pertain to small businesses. And we had a webinar, so I would look at that. Those are more what to do if you're a business that's failing. The provisions that I was talking about are more to do if you're a tenant or a mortgage holder that can't pay your mortgage.

- Fantastic. Thank you. And just as a reminder to our-- oh, I'm sorry.

- I was just going to say, and with respect to students, yeah if you're going to be around, you--  
--you know, you have about 120 days to not be evicted until you can figure out your next step.

- Thank you very much. For Professor Herrera-- lease and rent for our business. This is a question about lease and rent for a business that has been completely shut down. What are our rights and best way to manage with no revenue coming in? We own a banquet hall and most of our business is wedding receptions.

And then, I know that you talked a little bit about this, but I don't know if you want to add any detail-- the Texas Supreme Court order prohibiting residential evictions. Do local governments have the power to expand that to commercial tenancies? And I guess I'd add onto that, do you know how widespread that is in Texas, beyond Tarrant County?

- Well, again, I think local municipalities do have the ability to extend. And we've seen it, again, in Collin County, explicitly. And there are cities-- like I mentioned, the city of Austin has added some provisions that include notice for additional time, so that people can prepare and understand whether they're going to be evicted. So there is that.

In terms of not having your business shut down, honestly, what you're going to do with it really depends on how much liquidity, how much savings you have, if you're able to ride the storm out or not. And if you're not able to get a loan-- and I understand that there's been a number of federal programs that have already run out of funding-- you might also consider contacting your local Chamber of Commerce and community development departments for the county and the city that you live in, to ask if there is any additional funds that are going to be made available for small businesses.

So talking to local lenders about your situation is probably the best way. I'd also reach out to some of your business counselors. Individuals and organizations such as SCORE have individuals that might be able to walk you through your plan.

But for some people, unfortunately, the answer might not be that you have any good recourse. I do think it's important to talk with your landlord, and see if they will provide some accommodation for you. And I would start there. And if they do not, then I think you need to consider other options. And for some, bankruptcy might be a solution.

- Thank you. And just as a reminder to everybody, we do have our prior webinars and transcripts, videos available online. And there's great information there, in particular, as our panelists said, about small businesses. So Professor Barnes, do homeowners or tenants have any options to deal with past due payments in bankruptcy?

- Yeah, so that's probably the number one question on a lot of people's minds. And the answer is yes. I can tell you there are those of you that-- one thing about Chapter 13 versus chapter 7. There's some there are some requirements for Chapter 13 that I didn't mention. And one of them

is that you have to have so-called regular income. So the general thought is that you've got a job, and you get a regular paycheck.

It doesn't have to be a paycheck and a regular job. You know, if you're an independent contractor, or a gig worker, that's probably sufficient. But the idea is that you have some income coming in with regularity. Now, I know there's a lot of unfortunate folks out there right now that have been laid off. And so that's not you at the moment. And so chapter 13 probably is not an immediate option.

For those of you that have regular income, though, Chapter 13 is actually rather an amazing tool for dealing with that. So for those of you with mortgages-- we've talked a lot about these, and Professor Alexander and Professor Herrera both mentioned that these moratoria and forbearance-- you don't have to pay your payments for a while, whether it's two months or four months. But that's not going away. So you do have those arrearages, or those past due payments.

And I've seen some questions in the Q&A about, surely, they're going to work with us on that. And I think the answer is the vast majority of banks will. But to bankruptcy-- Chapter 13 has the ability-- say you're five months behind. You can file Chapter 13, and say you file on May 20th. You can make your June 1st mortgage payment, and keep current going forward. And you can pay those four or five-- you don't even have to negotiate this with your bank.

You can package those four or five past due payments and pay them out over the five year life of your plan, and then break them up. And so that alone is a really huge, valuable tool that you have in Chapter 13. Chapter 7, it's more subject to-- you can keep your mortgage, but you'll basically be subject to having to negotiate the terms of that with your mortgage lender. In normal times, we say, as long as you're not in default, you can probably just reaffirm it and carry it forward. And I suspect a lot of that will happen as well, in Chapter 7.

But the good news is, you can take care of those past due payments in Chapter 13, so that may be one way that a lot of folks who are taking advantage of not paying may go into bankruptcy, and then just kind of take care of it that way. Of course, you can always try to negotiate. And I suspect banks will work with people, because they realize people aren't going to magically have six months of payments, or four months of payments when all this smoke clears.

- Thank you very much. And to follow up on what Professor Barnes was just saying, we have a couple of questions in the Q&A about payments following the forbearance period, and concern that folks have lost their jobs and trying to come up with a lump sum after the forbearance period is over is going to be nearly impossible. And clearly, anxiety about that potential. So I wonder if Professor Alexander or Professor Herrera could speak to that.

- So one thing-- the provisions that I talked about, about the CARES Act, applied to federally backed mortgages and federally covered tenants. But even if you're in a private tenant situation, or you have a privately owned mortgage, you should still call your mortgage servicer, your lender-- try to have a loan mitigation or a work out.



Also, by the CARES Act provisions, you already know based on your situation that [INAUDIBLE] is not going to be enough. You're still not going to be able to make payments after that. You should contact your landlord, your mortgage lender, or servicer, and try to work out negotiated terms. So for example, if you know it's going to be hard to pay after the forbearance period, your lender may have different options. They may be able to spread out your payments over a certain period of time. They may be able to renegotiate some of the terms of your loan, so you don't own as much.

And so it's important to communicate early in the process with your servicer or lender to figure out what work-outs you can have. Notably, in 2008, when we had another kind of financial economic crisis-- that was a financial crisis, but it wasn't a public health crisis as well. And it wasn't even as bad as it was, on the same scale, of what we're dealing with now. So I think landlords and lenders and servicers have incentives to try to work things out, because they have so many people who aren't going to make payments.

They have incentives to do that, so you should ask for that, even to see what you can negotiate and to see what you can do. As Professor Herrera had also said with respect to commercial tenants, it's the same thing. You should try to work out what you can. But that having been said, one other point I wanted to make is that although the CARES Act says specifically what landlords cannot do, and what servicers and lenders cannot do, it doesn't mean everyone's going to follow those rules.

And so there may be landlords who kind of send you a letter saying, hey, we're ready to evict you, and [INAUDIBLE] give you misinformation in terms of what they're legally allowed to do. But they still may send you that information. And so you need to be very careful about calling your servicer, calling your lender, making sure that they are following the rules, and not sending you letters saying, you have to get out in 20 days when you actually have other rights.

- Thank you very much. We have one question. If eviction proceedings commence, would it be a good strategy to request a jury trial to give us time to get back on our feet? Professor Herrera, you want to take a shot at that one?

- Yeah, I mean, generally, the answer is yes, even if we don't have a pandemic, because it could take a little bit longer. And particularly now, when you have jury trials that were suspended in all civil matters, I think it could actually buy quite a bit of time. How much depends on every court's docket, but it's possible that if you are requesting a jury trial, and evictions don't begin again until early May, it's possible that a jury trial could delay it until June or even July in some jurisdictions.

- So I want to make sure that the audience sees that in the Q&A, our panelists have been hard at work, behind the scenes, answering questions. And so if we don't talk here in the video about your question, you should look online at the transcript, and the Q&A, to find those answers. We have just a few remaining open questions. And we have 2 minutes. And my one job is to make sure we stop at 1:00, so I'm going to shut you all down in two minutes.

But can we get quick answers on these? First, to be clear, we can't be evicted until that court proceeding occurs, correct?

- Yes, correct. Had to unmute.

- Fantastic, OK. So we have a couple of questions about a GSA, and those questions have not been answered. I don't know that our panelists have much expertise in that area. And so I don't want to force them into this, but do we know anything about the GSA's ability to pay rent or meet lease obligations, or whether they're sheltered in any way under the CARES Act?

- I don't, I'm sorry.

- The GSA is confusing. I can't really see the question, so about the government--

- The General Services Administration, so the government as a tenant--

- Whether they can--

- Whether there's-- is there anything in the Act that we're aware of that covers the government as a tenant--

- Oh, the government as a tenant. No, not that I'm aware of.

- OK. All right, well, thank you all so much for being with us today. It has been a pleasure. And thank you very much to our three panelists for their time and their expertise. I want to remind everybody that this webinar will be available in about a day, but our prior three webinars related to the CARES Act are all available at [TAMULawAnswers.info](https://tamulawanswers.info)-- the video, the transcript, and all the presenters' slides. Thank you all for being with us. I hope you're all healthy and staying safe. Have a good afternoon.

*While the panelists are all attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances.*

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