PROGRAM MATERIALS
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Commercial Leasing and Real Estate Transactional Issues in the Time of COVID-19

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Commercial Leasing and Real Estate Transaction Issues In the Time of COVID 19

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Mandatory Disclaimer…

The purpose of this CLE is to identify select compliance issues that may be of interest to participants. The information contained herein is abridged and summarized from various sources, the accuracy and completeness of which cannot be assured. This update is not and should not be construed as legal advice or opinion, and is not a substitute for the advice of counsel.

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Agenda

1. Commercial leasing issues
2. Impact of bankruptcy on commercial leases
3. Real estate sales transactions
4. Return to work issues for building owners/tenants

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Commercial Leasing Issues

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Landlord-Tenant Relationships

- Various issues may impact the rights of a tenant to obtain rent relief include:
    1. Force Majeure Provision
    2. Doctrine of Impossibility/Impracticability
    3. Frustration of Purpose
    4. Condemnation Provision
    5. Co-tenancy Provision

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Force Majeure

- There must be a force-majeure provision in the lease.
- Force-majeure provision excuses a party's performance if an unforeseen event beyond its control has prevented performance.
- Must examine the particular examples of force majeure identified in the lease.
- Provisions often have catch all phrases that may cover pandemics or governmental actions.
- A recent lease generated after the advent of COVID 19, without "pandemic" in the force-majeure clause, may not qualify.

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Force Majeure

- Many force-majeure clauses specifically provide that payment of rent is not excused.
- Carefully review any notice provisions for timing and detail.

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Example Force-Majeure Clause

- Without limiting any other provisions of this Lease, if Landlord or Tenant fails to timely perform any of the terms, covenants and conditions of this Lease (including any exhibits attached hereto) on such party's part to be performed, other than the payment of money, and such failure is due in whole or in part to any strike, lockout, labor trouble, civil disorder, inability to procure or delay in procuring labor or materials, failure of power, restrictive governmental laws and regulations, riots, insurrections, war, terrorism, bioterrorism, shortages of fuel, equipment, labor or materials, accidents, casualties, acts of God, acts caused by the other party (or the other party's employees, agents, licensees, invitees or contractors) or any other cause beyond the reasonable control of such party other than the failure or inability to procure sufficient funds to so perform, then such party shall not be deemed in default under this Lease as a result of such failure and any date or period of time provided in this Lease for such party to perform such term, covenant or condition shall be extended for the amount of time such party is so delayed.

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Example Inability-to-Perform Clause

- Except as otherwise provided for in this lease, the obligation of Tenant to pay rent hereunder and perform all of the other covenants and agreements hereunder on part of Tenant to be performed shall in no wise be affected, impaired or excused because Landlord is unable to fulfill any of its obligations under this lease or to supply or is delayed in supplying any service expressly or impliedly to be supplied or is unable to make, or is delayed in making any repair, additions, alterations or decorations or is unable to supply or is delayed in supplying any equipment or fixtures if Landlord is prevented or delayed from so doing by reason of strike or labor troubles or any cause whatsoever beyond Landlord's reasonable control including, but not limited to, government preemption in connection with a National Emergency or by reason of any rule, order or regulation of any department or subdivision thereof of any government agency or by reason of the condition of supply and demand which have been or are affected by war or other emergency.

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Impossibility/Impracticability

- Common law doctrine of impossibility or impracticability may excuse non-performance:
  - Unanticipated change of circumstance that makes performance objectively impossible or impracticable.
  - Unanticipated event must be unforeseeable and could not have reasonably be expected to have been addressed in the lease.
- Financial difficulty and economic hardship have not generally excused performance where impossibility is required.
- Commercial impracticability requires showing of extreme and unreasonable difficulty, expense, injury or loss.

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Impossibility/Impracticability cont.

Restatement (Second) of Contracts Section 261.

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Uniform Commercial Code Section 2-615(a).

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

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Frustration of Purpose

- The event substantially frustrates the principal purpose of the contract.
- The event that caused the frustration must have been unforeseeable and the lack of the event occurring was an assumption of the contract.
- The event was not caused by the party asserting the defense.

See, e.g., *A&E Television Networks, LLC v. Wish Factory, Inc.*, 2016 WL H136110 (S.D.N.Y. March 11, 2016)

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Spanish Flu

- *Greg School Township v. Hinshaw,* 132 N.D. 586 (Ind. App. 1921)

Permitted school district to withhold teachers' salaries during school shutdown.

- *Phelps v. School District No. 109,* 134 N.D. 312 (Ill. 1922)

Rejected school district's claim that teachers' salaries did not have to be paid during school shutdown.

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Avian Flu

Egg farmer sought to cancel an order for egg producing machinery which was no longer needed due to destruction of over 200,000 chickens.

On summary judgment, court held that Force Majeure clause could not be invoked by the farmer since the clause was for the benefit of the equipment supplier who still able to perform.

But court permitted frustration of purpose defense to continue because there was an issue of fact – whether the intended increased egg production for a known third party was the purpose of the contract, which was frustrated due to the Avian Flu.

Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc., 2017 WL 3929308 (N.D. Iowa 2017).

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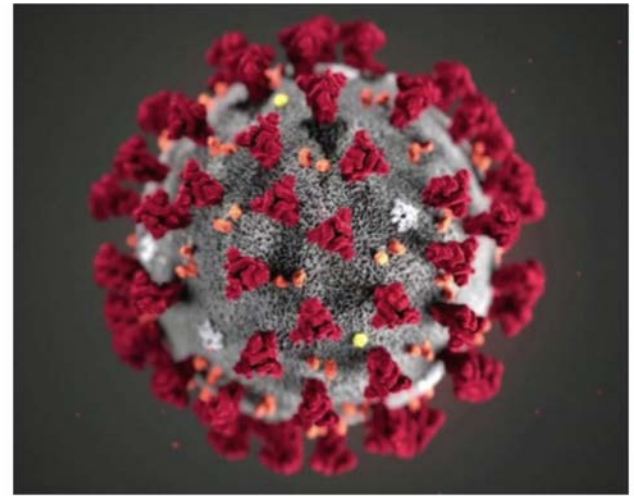
COVID-19

Restaurant in bankruptcy raised Force Majeure defense to Landlord's claim for unpaid rent due to the government ordered shutdown.

The Force Majeure clause provided:

> Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in the Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by … laws, governmental action or inaction, orders of government. Lack of money shall not be grounds for Force Majeure.

The government order permitted delivery and curb-side pickup.



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COVID – 19 Cont'd

- The court ruled, pending further hearings, that the restaurant's business was impacted by 75%, and excused payment of 75% of the rent.
- Analyzing the Force Majeure clause, the court held that the governmental order was the reason for non-payment, not the lack of money.

In re Hitz Restaurant Group, 20-B-05012, 2020 WL 2924523 (Bktcy. N.D. Ill. June 3, 2020)

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Condemnation

Potential argument that state stay at home orders may constitute a governmental taking.

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Co-Tenancy Provision

- Co-tenancy provides rent abatement/right to termination following specific loss of tenants in a shopping center.
- Issue – Can Landlord claim Force Majeure.
- Tenant may not be able to invoke co-tenancy rights if it is in default.

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Stays of Eviction

- Some states have imposed stays of eviction proceedings.
  - Many have limited the stays to residential eviction.

- In New York, there has been a stay of commencement of any eviction proceeding, residential or commercial, until August 20 against tenants who qualify for unemployment benefits or are experiencing “financial hardship” due to COVID-19.
- Stay of eviction proceedings does not stay the tenant’s obligation to pay rent or stay a landlord from sending a notice of default or notice of termination.
- Many landlords have been sending notices of default but have not terminated the lease.

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Stays of Eviction cont.

- The stay of eviction proceeding does not prohibit a landlord from the following, if permitted under the lease:
  - Apply the security deposit;
  - Sue tenant for unpaid rent (without being evicted);
  - Sue the guarantors of the lease
    - (note: New York City enacted a prohibition against suing individual guarantors of commercial leases for premises that were required to close or cease certain operations by governmental order.

- Blank Rome COVID-19 state law tracker: https://www.blankrome.com/special-topics/coronavirus-covid-19-task-force

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Conditional Limitation Provision

- Landlord may terminate the lease upon a tenant's failure to timely cure a default after receiving a notice of default and a notice to cure.
- Landlords are sending notices of default but are not terminating the lease.
- Case law is uncertain.
- Market rents may have decreased and it may be difficult to lease the space.
- State laws—must examine whether tenant has a right to cure a monetary default after termination, but before eviction order.
- Implication of terminated lease in the event that tenant files a bankruptcy petition.

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New York – Yellowstone Injunctions

- New York has a unique procedure – commonly called a Yellowstone injunction.
  - *First Nat'l Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630 (1968)
  - Held—if there is a conditional limitations clause in a lease, and the landlord has terminated the lease for failure to timely cure, the tenant may not later cure the default if the tenant loses at trial.

- New York courts require tenant to obtain injunction staying the landlord from terminating pending determination of whether the tenant is in default.

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Types of Accommodations

- Rent abatement -- generally rejected by landlords.
- Deferral of rent -- defer rent in whole or in part until the pandemic ends.

  Note – Lender consent may be required for an amendment.

- A landlord may demand:
  - Full releases for the period up to the amendment;
  - Confidentiality clause;
  - Use of PPP loan proceeds and any available business interruption insurance to pay rent (PPP for non-payroll has just been increased to up to 40%)
- A tenant may request:
  - Waiver of late charges and default remedies
- Consider future COVID clause protection.

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Conclusion

- Case law will develop on the open issues.
- But practical solutions make business sense.

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Impact of Bankruptcy on Commercial Leases

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Automatic Stay in Bankruptcy

- The automatic stay is imposed upon the filing of the bankruptcy and prohibits any actions by a creditor against the debtor in bankruptcy.
- This includes actions by a landlord against its debtor-tenant.
- Section 362 provides:
    1. Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—
    2. the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

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Automatic Stay in Bankruptcy

3. the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
4. any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
5. any act to create, perfect, or enforce any lien against property of the estate;
6. any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
7. any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
8. the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor;

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11 U.S.C. Section 362

- A lease that has not terminated prior to the bankruptcy filing is property of the bankruptcy estate pursuant to Section 541 of the Bankruptcy Code.
- This includes leases that are in default but not terminated.
  - Example: a landlord sends a default notice for nonpayment of rent on June 1. The lease provides a 10 day cure period. On June 9, tenant files bankruptcy. Landlord may not terminate the lease on June 10 because the lease is property of the bankruptcy estate and thus subject to the automatic stay.

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Unexpired Nonresidential Lease Treatment and Disposition Process

- A lease that has not expired or terminated prior to the bankruptcy filing is considered an “unexpired lease” under the Bankruptcy Code.

- Section 365 of the Bankruptcy Code sets forth the treatment of unexpired leases and their process for disposition in the bankruptcy case.

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Payment of Rent

- Section 365 provides the possibility of a 60 day respite from paying rent. Section 365(d0(3) provides: "The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period…."

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Lease Assumption (and Assignment)

- If the debtor-tenant desires to retain the leased premises, the tenant must “assume” the lease. Essentially, this reinstates the lease so that it rides through the bankruptcy. In addition, the tenant may assume and assign the lease to a third party, such as an asset purchaser. This requires the tenant to lease may be “assumed” (ratified) during the bankruptcy.

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Cure

- As a condition to assumption of the lease, the debtor-tenant must cure all economic defaults.
- Section 365(b)(1) of the Bankruptcy Code states:
  - "If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee … cures, or provides adequate assurance that the trustee will promptly cure, such default … and provides adequate assurance of future performance under such contract or lease." (Emphasis added).
- Section 365(b)(2) provides that the following defaults are not required to be cured: "(A) the insolvency or financial condition of the debtor at any time before the closing of the case; (B)the commencement of a case under this title…"

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Lease Rejection

- If the debtor-tenant does not desire to keep the lease or assign it to a buyer, the debtor-tenant will reject the lease.
- Rejection of a lease is the equivalent of a breach and is not a termination per se. This breach gives rise to a claim for an unsecured clam for lease rejection damages to be asserted in the bankruptcy case.
- A proof of claim form must be filed with the Bankruptcy Court pursuant to Federal Rule of Bankruptcy Procedure 3002, often within 30 days of rejection.

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Unexpired Nonresidential Lease Treatment and Disposition Process

- A lease must be assumed within 120 days of the bankruptcy filing or it will be deemed rejected pursuant to Section 365(d)(4).
- However, the Court may extend the period up to 90 days upon a showing of cause, similar to the treatment of the obligation to pay rent during the first 60 days of the case.

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Application to COVID-19 Bankruptcies

- A. In re Modell's, Case No. 20-14179 (D. N.J.)
- B. In re J. Crew, Case No. 20-32181 (E.D. Va.)
- C. In re Neiman Marcus, Case No. 20-32519 (S.D. Tex.)
- D. In re JC Penney, Case No. 20-20812 (S.D. Tex.)

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Summary/Conclusion

- A. “60-120-210 Rule”
- B. File a Claim

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Real Estate Sales Transactions

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Sales Transactions: Overview

- The impact of COVID-19 on buyers and sellers;
- Timing Considerations;
- Representations and Warranties;
- Condemnation;
- Closing Conditions;
- Remedies for Breach

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COVID-19 – Impact on Real Estate Sales and Leases

- Buyers and sellers of real estate are confronting a new reality.
- Buyers:
  - Property value decline;
  - Due diligence affected;
  - Leasing market affected.
- Sellers:
  - Need to protect sales price;
  - Need to preserve existing tenants;
  - Due diligence affected;
  - But motivated to close.

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Timing

- Impacted milestones include due diligence deadlines and closing date.
- What are the impediments?
  - Non-essential business closures;
  - Stay-at-home orders;
  - Protests.

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Timing

- Impact on Buyer's Due Diligence Efforts
- Request for an Extension of Due Diligence and Closing Dates
  - Seller may consider an extension, in exchange for an additional nonrefundable deposit.
  - Seller risk: Extending a closing can give rise to conditions to terminate a deal that would not occur on a shorter timeline, such as a 'material adverse change' related to tenant defaults.
  - Buyer risk: Closing without adequate due diligence.

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Timing – Negotiating an Extension

- If the parties are willing to negotiate longer due diligence and closing dates:
  - Buyer should consider requiring seller to make continued disclosures.
  - Obtain representations through tenant estoppels
  - Buyer negotiate extended estoppel period.

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Representations and Warranties

- Standard representations and warranties:
  - "No tenant default" clause;
  - "No adverse government action" clause;
  - "Material adverse change" clause.

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Representations and Warranties

- Impact of COVID-19:
  - Stay-at-home orders;
  - Closure of nonessential businesses;
  - Companies shifting to permanent or semi-permanent work-at-home arrangements;
  - Tenant requests for rent deferral or abatement;
  - Tenant notices of force majeure defenses.

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Representations and Warranties – Seller Updates

- In light of COVID-19 and related issues, Sellers should update their representations and warranties.
- Original representations have likely changed.
- Sellers should negotiate for rights to update representations that will not allow Buyers to terminate if they are unfavorable.

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Example: “Material Adverse Change” Clause

- **In the event a material change of circumstances occurs through no fault of Seller on or prior to the Closing Date which causes any of Seller’s representations or warranties set forth in subparagraph 8A above to become materially untrue or in the event of a breach or default by Seller which causes any of Seller’s covenants to be materially untrue (a “Change of Circumstances”), Seller will have a period of thirty (30) days from the date of the discovery by Seller of such Change of Circumstances to cure such untrue fact, condition or covenant (and the Closing Date will be extended to accommodate such cure period). In the event that Seller does not cure such Change of Circumstances within such thirty (30) day period, Buyer will have the right, as Buyer’s sole and exclusive remedy hereunder for such failure, either (a) to terminate this Agreement by written notice to Seller, in which case, this Agreement will be null and void and of no further force or effect and the parties hereto will have no further obligations to the other and the Deposit will be refunded to Buyer, or (b) to waive the foregoing right of termination and all other rights and remedies on account of such breach or default and to close the transaction contemplated by this Agreement.**

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Condemnation

- If the condemnation clause is triggered, the buyer may have a right of termination.
- COVID-19 orders/protest curfews.
- Not your typical condemnation.
  - E.g., 25-acre parcel where a municipality seeks to acquire 3 acres to expand a nearby highway

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Condemnation

- *De facto* takings case law – looks at the duration and extent that the use of the property is impaired
  - Buyers may find case law to support their right to terminate.
  - Sellers may find case law to support the premise that limited-duration “takings” are insufficient.

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Condemnation – Case Law

Examples of nonphysical takings:

- *Schiavone Construction Company v. Hackensack Meadowlands Development Commission*, 98 N.J. 258 (1985).
- *100 Paterson Realty, LLC v. City of Hoboken*, A-1016-12T2, (N.J. Super. Ct. App. Div. Nov. 6, 2013).
- *Conroy-Prugh Glass Company v. Commonwealth of Pennsylvania*, 456 Pa. 384 (1974).
- *City of Buffalo v. George Irish Paper Co.*, 31 A.D.2d 470 (N.Y. App. Div. 4th Dep't 1969).

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Condemnation – Case Law

- Speculative economic risk alone is not a taking.
  - *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984).
  - *Littman v. Gimello*, 115 N.J. 154 (1989).
- Temporary emergency closures are not a taking.
  - *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639 (2007).
  - *Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp.*, 784 P.2d 459 (Utah 1989).

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Closing Conditions

- Common closing conditions:
  - Clear title;
  - Financing (less common in commercial transactions);
  - Land use approvals.

- Government and business closure orders will have an obvious impact:
  - Delays in confirming clear title;
  - Delays in obtaining funds or wire transfers;
  - Delays in conducting due diligence for land use applications.

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Remedies for Breach

- Clearly, there are many pitfalls for buyers and sellers; and many opportunities for parties to terminate a deal in light of COVID-19 realities.
- Seller's remedies:
  - Actual damages
  - Liquidated damages
- Buyer's remedies:
  - Renegotiate the deal
  - Refund of deposit
  - Specific performance
  - Breach of the implied covenant of good faith and fair dealing

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Remedies for Breach – The Deposit

- Restatement (Second) of the Law of Contracts § 356(1).

  > "Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."

- Sophisticated entities may be presumed to have negotiated a reasonable amount of liquidated damages.

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Remedies for Breach – Is the Deposit the Exclusive Remedy?

- The contract may determine if the deposit is the seller's "sole" or "exclusive" remedy for the buyer's unexcused breach.
- Absent a contract provision, some states find sellers can seek actual damages:
  - *Phillips v. Gomez*, 405 P.3d 588 (Idaho 2017);
  - *McMaster v. McIlroy Bank*, 654 S.W.2d 591 (Ark. Ct. App. 1983);
  - *Noble v. Ogborn*, 717 P.2d 285 (Wash. Ct. App. 1986).
- Other states find sellers cannot seek actual damages if there is a liquidated damages provision:
  - *Lefemine v. Baron*, 573 So. 2d 326 (Fla. 1991);
  - *Grossinger Motorcorp, Inc. v. American Nat'l Bank & Trust Co.*, 607 N.E.2d 1337 (Ill. App. Ct. 1992);
  - *Sagatov Builders LLC v. Hunt*, 88 Va. Cir. 410 (2014).

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Remedies for Breach – Specific Performance

- Buyers can seek specific performance.
- There is a "virtual presumption" that land is unique and monetary remedies are inadequate to compensate for the loss of an interest in land. *Friendship Manor, Inc. v. Greiman*, 244 N.J. Super. 104, 113 (App. Div. 1990).
- The specific performance remedy is likely available for breach of the implied covenant of good faith and fair dealing.
- Is the seller performing its obligations in bad faith, such as refusing to negotiate extensions despite contractual discretion to do so? *See Wilson v. Amerada Hess Corp.*, 168 N.J. 236 (2001).

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Return to Work Issues for Building Owners/Tenants

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Relaunch: What Should You Be Doing

What actually is a Relaunch?

- **Reopening your building/business after shutdown**
- **Recalling furloughed, laid off and/or remote employees**

What should landlords/tenants be doing?

- **Develop RTW Plan**
- **Assemble Your Team**
- **Communicate with Tenants, Employees, Vendors and Contractors**
- **Stay Informed of the Evolving Laws & Guidelines**

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Where to Find Government Guidance and Mandates

Federal Requirements

- Centers for Disease Control ("CDC")
  - https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html
  - https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html
- Occupational Safety and Health Act ("OSHA")
  - https://www.osha.gov/SLTC/covid-19/
- Department of Labor ("DOL")
  - https://www.dol.gov/odep/return-to-work/
- Equal Employment Opportunity Commission ("EEOC")
  - https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act
- Environmental Protection Agency ("EPA")
  - https://www.epa.gov/newsreleases/epa-cdc-release-guidance-cleaning-and-disinfecting-spaces-where-americans-live-work-and
- White House Guidelines: "Opening Up America Again":
  - https://www.whitehouse.gov/openingamerica/
  - Broad non-binding federal guidelines

State and Local Requirements

- Departments of Health ("DOH")
  - NY DOH:
  - Tenants: https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/offices-interim-guidance.pdf
  - Landlords: https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/commercial-building-management-master-guidance.pdf
- Executive Orders from Governors

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OSHA Act Requirements

Employer Requirements

- Employees must use gloves, eye and face protection, and respiratory protection when job hazards warrant it.
- Employers must furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."

Recordable Illness:

- The case is a confirmed case of COVID-19 (see CDC information on persons under investigation and presumptive positive and laboratory-confirmed cases of COVID-19);
- The case is work-related (as defined by 29 CFR 1904.5); and
- The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g., medical treatment beyond first aid, days away from work).

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Lessons from Asia: Healthy Buildings

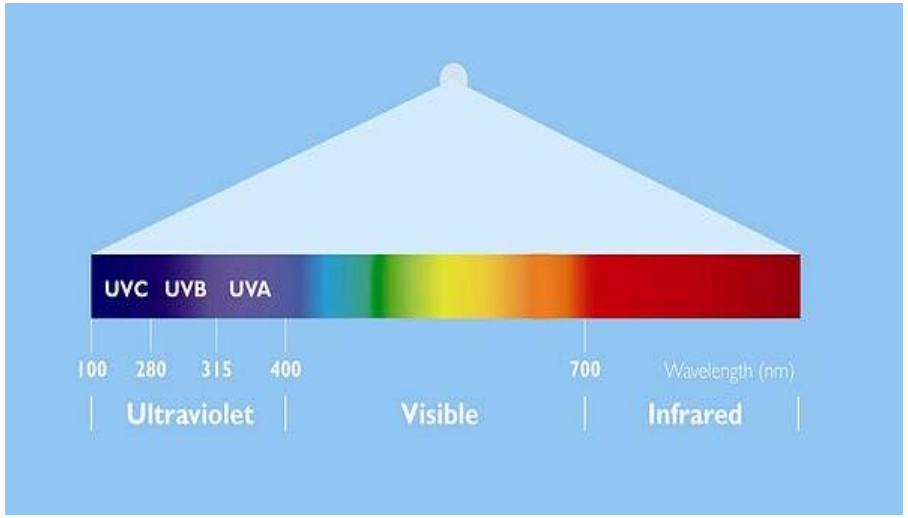
KEEP YOUR BUILDING WELL:

AIR QUALITY:

1. **Increase Ventilation**
2. **Filter Indoor Air**
3. **Maintain Optimal Humidity**

ULTRAVIOLET LIGHT

- UV light kills cells by damaging their DNA. Exposure to the electromagnetic radiation (light) at certain UV wavelengths modifies the genetic material of microorganisms and destroys their ability to reproduce.
- UV light with wavelengths less than 290nm are considered to have "germicidal" properties.
- Ultraviolet Germicidal Irradiation: (UVGI) is a method of sterilization tht uses UV Lighting and uses short-wavelength ultraviolet light to kill or deactivate microorganisms.



4. **Staggered RTW/Social Distancing**
5. **Sanitizing Stations/Hand Washing**
6. **Cleaning and Disinfecting Common Areas**

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- NEW YORK GUIDANCE:

Landlord/Owner Responsibility v. Tenant's Responsibility:
Cleaning and Disinfecting Common Areas v. Leased Spaces

Common Areas & Surfaces:

AREAS:

- Lobbies
- Corridors
- Elevators
- Escalators
- Security Desks and booths
- Concierge/Check In
- Gyms
- Restrooms

SURFACES:

- Door knobs and handles,
- Intercom systems,
- Security locks
- Bannisters and handrails
- Elevator buttons
- Furniture
- Toilets & Sinks
- Garages

Leased Spaces:

- Reception areas
- Individual offices/desks
- Kitchens
- Restrooms
- Conference rooms
- Reception areas
- Copy/fax machines

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General RTW Requirements

FOR SOCIAL DISTANCING:

- All persons, including employees, customers, and vendors should remain at least 6 feet apart to the greatest extent possible, both inside and outside workplaces.
- Any time individuals must come within six feet of another person, acceptable face coverings must be worn. Individuals must be prepared to don a face covering if another person unexpectedly comes within six feet. Implement training on proper use of PPE.
- Provide physical barriers (i.e., plexiglass) for necessary close contact interactions
- Appropriate signage for elevators and one-way travel

FOR HYGIENE:

- Provide hand-washing capabilities/sanitizing stations to ensure frequent cleaning/disinfecting by visitors/employees.
- Regularly clean/sanitize high touch areas, such as workstations, equipment, screens, doorknobs and restrooms throughout work site.

FOR PREVENTING/ADDRESSING COVID-19 EXPOSURE:

- Conduct a daily entry self-screening protocol for all employees or contractors entering the workplace, including, at a minimum, a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19.
- Employees who are displaying COVID-19-like symptoms must not report to work.

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Safety Protocols: Tenant Spaces

- Close lunch rooms or stagger lunch and break times;
- Remove chairs from conference rooms;
- Leave a buffer between scheduled meetings in conference or meeting rooms to avoid overlap between two groups and to allow time for cleanings;
- Install social distancing decals on the floors of any shared spaces in the workplace;
- Encourage employees with their own offices to stay in their offices as much as possible;
- Adopt videoconference guidelines or install video phones so that even when in the office, employees are discouraged from meeting in person;
- Restructure open floor layouts to ensure that employees can sit at least six feet away from each other and implement one-way traffic where feasible;
- Install barriers between workspaces and in reception areas;
- Deliveries through curbside pick-up or delivery or designated office.

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Safety Protocols: Third Party Vendors and Visitors

- Consider posting signs in parking areas and entrances that ask guests and visitors to phone from their cars to inform the administration or security when they reach the facility.
- Consider posting signs requiring visitors to wear cloth face coverings and to not enter the building if they are sick.
- Implement questionnaires for medical screening
- Have visitors sign in with contact information for contact tracing
- Set policy for delivery of packages and food to reduce traffic

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For Sale or Rent: Protocols for Showing Properties

- Thoroughly clean shown properties and disinfect commonly used surfaces including counters, door and cabinet handles, key lock boxes, keypads, toilets, sinks, light switches, etc. These surfaces must be cleaned and disinfected before and after each showing.
- During a showing, introduce fresh outside air, for example by opening doors/windows, weather permitting, and operating ventilation systems.
- Instruct employees to wipe down and disinfect equipment that passes between employees and customers, including clipboards and keys, after each use.
- Provide time for workers to implement cleaning practices at shown properties during their shift. Cleaning assignments should be assigned during working hours as part of the employee's job duties.
- Real estate licensees should ensure shown properties are equipped with proper sanitation products, including hand sanitizer and sanitizing wipes, for use by employees and clients as needed.
- Provide and strongly recommend clients, real estate licensees, and inspectors to use face coverings and hand sanitizer. Place these items at the property entrance so that people can put them on before entering. Ensure disposable covers are properly discarded after use, for example in a trash bag that is sealed prior to disposal.
- All people entering a property, including agents, brokers, inspectors, and clients, must wash hands with soap and water or use hand sanitizer immediately upon entry and before touring or inspecting the property.
- Adjust or modify showings to provide adequate time for proper cleaning and disinfecting. If the property is currently occupied, ensure adequate time to disinfect after occupants leave for showings and before and after clients view the property.

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The Redesigned Office

- The trend of the open workspace may be ending for good, and instead:

Home Office

Outdoor Office Space

Sanitizing UV Light

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Real Estate

MARCH 2020 • NO. 1

Coronavirus Guidance for the Real Estate Industry

This client alert is intended to highlight some issues facing landlords, tenants, lenders, borrowers, sellers, and buyers arising out of the coronavirus, known also as "COVID-19." The legal landscape will likely change as courts and governments create new "law" in response to the unprecedented consequences of COVID-19, and "pandemic" clauses are incorporated into contracts. For up-to-date advice on real estate issues regarding COVID-19, or how these issues would be resolved under the laws of a particular state, please ***contact us****.*

FORCE MAJEURE/COMMERCIAL FRUSTRATION/ IMPOSSIBILITY OR IMPRACTICABILITY OF PERFORMANCE

In General

In the current COVID-19 environment, a *force majeure* clause that expressly addresses circumstances, such as an "epidemic," "pandemic," "contagious disease," or other similar public health-related occurrence would likely provide the greatest protection for the contracting parties. The protections afforded by other circumstances frequently used in *force majeure* clauses, such as "Act of God," "disaster," or "emergency," are less clear as it relates to the effects of COVID-19.

Furthermore, some *force majeure* provisions may contain open-ended language, such as "including, but without limitation," "similar or dissimilar events," or "acts beyond their reasonable control"—language designed to capture the overall purpose of a force majeure clause, or stated differently, to protect an impacted party if an unforeseen harm outside of the party's control frustrates the party's performance. However, unless the parties make it clear that such phrases are intended to expand the possible circumstances justifying a force majeure event, courts may be required to construe such phrases narrowly, consistent with the otherwise enumerated events.

Common law doctrines, such as "commercial frustration" and "impossibility/impracticability," may also provide potential defenses to claims of nonperformance resulting from coronavirus-related disruptions. Commercial frustration provides that when the occurrence of an event substantially frustrates a contracting party's principal purpose, the party's remaining contractual duties are discharged, so long as (i) the non-performing party is not at fault; (ii) the non-occurrence of the event was a basic assumption on which

the contract was made; and (iii) the language of the contract or surrounding circumstances do not provide to the contrary. Importantly, frustration of purpose is a future-facing defense; it can only be used to excuse future performance.

Similarly, the defense of impracticability/impossibility requires a party to demonstrate (i) the occurrence of an event, the nonoccurrence of which was a basic assumption of the contract; (ii) that continued performance is not commercially practicable; and (iii) that the party invoking the defense did not expressly or impliedly agree to perform notwithstanding the impracticability. Applied here, if a party is prevented from providing contractually required services or goods due to a supply chain disruption or because a quarantine blocks access to a particular source of materials, "commercial frustration" and/or "impossibility/impracticability" could be viable defenses to a claim of breach for nonperformance.

Leases

Most leases contain a fairly typical *force majeure* provision. To the extent the parties are delayed in performing obligations under the lease due to COVID-19 (*e.g.*, obtain permits, complete construction, commence business operations, provide building services, continuously operate, etc.), the *force majeure* clause may excuse these delays to the extent they are legitimately related to the pandemic (particularly during governmental states of emergency). However, most *force majeure* clauses expressly exclude relief for payment obligations. Moreover, some clauses cap the length of time for which a party may claim a delay, or condition the time extension on the other party's receipt of timely notice of the *force majeure* event. In all instances, it is essential to review the specific language in the lease to determine whether, and to what extent, performance is excused as a result of COVID-19 issues.

Purchase and Sale Agreements

While most purchase and sale agreements do not contain general *force majeur*e provisions (and instead rely on casualty and condemnation provisions), it would be advisable to incorporate "pandemic" *force majeure* provisions benefitting sellers and purchasers, carefully drafted so that time extensions are only granted for those obligations directly impacted by the pandemic. For example, a *force majeure* provision may benefit a seller who is otherwise unable (or determines it is imprudent) to continue the property's normal business operations, or a purchaser by extending the due diligence period if they or their lender are unable to access the property within the prescribed timeframe. Also, the *force majeure* provision can allow an extension of the closing date due to a seller's or purchaser's inability to obtain and deliver original notarized signatures or record deeds or mortgages as a result of closures of clerks' offices.

Construction Contracts

As with all agreements, the question as to whether COVID-19 would constitute a *force majeure* event depends upon the specific language employed. However, even where COVID-19 is determined to be a *force majeure* event, if there is an attenuated connection between COVID-19 and the claimed delay, the contractor may not be entitled to a time extension. For example, while construction delays caused by governmental orders related to COVID-19 or supply chain problems attributable to COVID-19 would likely entitle the contractor to a time extension, it is not certain that the contractor would be so entitled if a construction delay occurred by reason of: (i) a subcontractor advising laborers to stay home; (ii) a labor shortage resulting from a large number of laborers contracting the virus; or (iii) laborers refusing to work until prophylactic measures are implemented by the contractor or subcontractors in order to mitigate the risk of contracting the virus.

As discussed above, in the *In General* paragraph, if the COVID-19 pandemic made performance of the contractor's obligations illegal, impossible or radically different, then the contractor may be entitled to relief under the common law doctrines of "commercial frustration" or "impossibility/impracticability" (for example, the government imposes a quarantine on the area where the project site is located, prohibiting or materially impeding the movement of people or construction materials in or out of the area for an extended period of time).

Loan Agreements

Most *force majeure* provisions used in loan documents will not excuse borrowers from payment obligations, but they may allow for a time extension for certain of the borrower's performance obligations. They are particularly important in construction loans, especially with respect to completion milestones and other performance covenants. Most *force majeure* provisions in loan documents do not include "pandemics," "epidemics," or "diseases." However, they

often include such clauses as "acts of God" or "government restrictions," which may or may not be broad enough to cover pandemics such as COVID-19.

LEASES

Except as may otherwise be indicated, the below discussion pertains to commercial leases.

Access

Whether a landlord can limit a tenant's access to the building, or otherwise condition access on some form of screening test for the virus, will most likely be determined by the building rules and regulations. A comprehensive and well-crafted set of rules and regulations will generally permit the landlord to do so, particularly in light of the recent governmental emergency declarations. However, a tenant may seek redress in court under common law principles (see the discussion below, under *Rent Payment Obligations*).

Rent Payment Obligations

As discussed above, under the Leases paragraph in the section captioned, *Force Majeure/Commercial Frustration/Impossibility or Impracticability of Performance,* even if COVID-19 is considered to be a *force majeure* event, most *force majeure* clauses expressly exclude relief from rent payment obligations. Furthermore, this exclusion applies even if the tenant is forced by the government to close their business. Nonetheless, such tenants may cease paying rent, relying upon the "commercial frustration" doctrine (see the discussion above, under the section captioned, *Force Majeure/Commercial Frustration/Impossibility or Impracticability of Performance*). This is a very aggressive stance, but in light of the exigencies surrounding COVID-19, it is conceivable that a court may exercise its equitable powers to grant this extraordinary relief.

If there is no government mandate, but the tenant elects to close its business due to the consequences of COVID-19, they will likely try to claim "commercial frustration" as the reason for withholding rent; however, they will be less likely to succeed than if there had been a government mandate.

In some leases being negotiated now, landlords are acceding to requests by tenants for rent relief if the tenant is unable to perform construction work or open for business due to circumstances related to COVID-19.

Reporting COVID-19 Cases

Pursuant to the typical building rules and regulations, a landlord would be permitted to require that tenants self-report known cases of COVID-19, and bar entry to a tenant's employee who is symptomatic.

Whether the landlord is obligated to report known cases may depend on applicable governmental requirements or guidelines. Yet even if not legally mandated, it may be prudent business practice for the landlord to report cases to other building tenants, especially those occupying premises on the same floor or using the same elevator bank (without identifying the person).

Force Majeure

Please see the discussion above, under the Leases paragraph in the section captioned, *Force Majeure/Commercial Frustration/Impossibility or Impracticability of Performance.*

FINANCING

Material Adverse Effect

A loan agreement may permit the lender to default the borrower, or not disburse funds or release escrowed monies, if a "material adverse effect" (or "material adverse change") occurs. The term "material adverse effect" (or "material adverse change") generally means a material adverse effect on (or change upon) (i) the condition, operations, business, assets or prospects of a borrower or guarantor, (ii) the ability of the borrower to perform their obligations under the loan documents, (iii) the rights or remedies of lender, or (iv) the ability to operate the real property securing the loan.

To preempt the lender from enforcing its rights to default the borrower or withhold funds based on the general economic impact of pandemics, a borrower should attempt to exclude such an impact, and its effect on the borrower, from the definition of "material adverse effect." Even without such an exclusion, the lender may be reluctant to rely solely on these rights because they will need to overcome a high burden of proof and may subject themselves to a lender liability claim. Though the economic impact of COVID-19 is in its nascent stages, the severity and duration of this may strengthen a lender's ability to invoke these rights. However, lenders need to consider the potential reputational risk in the marketplace, and the corresponding impact when the economic environment resulting from COVID-19 improves.

Anti-hoarding
Anti-hoarding provisions in loan agreements limit how much cash a borrower can hold or receive as an advance, and require loan paydowns if cash held by the borrower exceeds a certain amount over a designated period. Borrowers facing a liquidity shortage may pull down more cash than presently needed in order to satisfy future obligations, and anti-hoarding provisions are designed to curtail that behavior. These provisions have not often been used, but based on the current actions of borrowers, who are withdrawing cash in reaction to the COVID-19 crisis, lenders will likely start incorporating them in their loan agreements or amendments thereto.

Title Insurance
Lenders and borrowers should consult with their title companies on potential delays in conducting title searches, UCC searches, and the like, and regarding local rules governing electronic signatures, electronic filing, electronic notarizing and insuring over the gap period between closing and recording, especially when a recording office is not currently operating.

Force Majeure
Please see the discussion above, under the Loan Agreements paragraph in the section captioned, *Force Majeure/Commercial Frustration/Impossibility or Impracticability of Performance*.

PURCHASE AND SALE AGREEMENTS

Risk of Loss Doctrine
The risk of loss doctrine governs whether the seller or the purchaser assumes the risk of the property being damaged or destroyed between contract execution and closing. Most state statutes place the risk of destruction or material damage squarely on the seller, except in instances where the purchaser acquires possession of the property prior to the closing or is otherwise at fault. In addition, the parties can agree in the contract to a different allocation of the risk, but most purchase and sale agreements conform generally to the statutory allocation scheme. With COVID-19, since there has been no destruction of any part of the building, the risk of loss provision does not entitle the purchaser to terminate their contract. In anticipation of future pandemics (or even potential additional effects of COVID-19), purchasers may request that sellers expand these provisions to include specified material adverse impacts of a pandemic.

Access for Due Diligence
A purchaser's due diligence involves inspecting properties and meeting with tenants. The due diligence access provisions in purchase and sale agreement typically allow the purchaser "reasonable" access to the property, subject to the rights of tenants. In the post-COVID-19 world, sellers should include in these provisions sole discretion approval rights over whether, and to what extent, the purchaser can gain access to the property, especially tenant-occupied areas. Sellers should also consider imposing new access protocols to protect against COVID-19 transmission, and requiring appropriate insurance coverage to the extent available. Access rights are a particular issue with multi-family properties because sellers are now less inclined to allow purchasers access to inspect individual units. From the purchaser's perspective, they will be reluctant to have their employees travel to the properties or meet with tenants in person. In an effort to address the current access challenges, some sellers are providing representations not ordinarily given regarding the physical state of the property.

Operating in the Ordinary Course
Many purchase and sale agreements include covenants requiring the seller to operate the property in accordance with a particular standard. The standard can vary, but generally most sellers will agree to operate in the ordinary course, consistent with past practices, subject to casualties and ordinary wear and tear. Even this low standard, however, can be difficult to meet at this time, with on-site leasing offices closing and routine building services being delayed or curtailed due to government mandate or otherwise at the discretion of the seller or service provider. Sellers will likely want to modify this standard to address these issues; purchasers, on the other hand, may want to incorporate requirements intended to mitigate potential contamination from a pandemic.

Financing Contingencies
Purchasers may be concerned about obtaining financing during this time, with lenders becoming more conservative given market uncertainties. Despite financing contingencies

generally being disfavored by sellers, they may not resist as strenuously given the current extraordinary circumstances. Yet purchasers, depending on the asset class, purchase price, and available cash, may want to consider whether it is appropriate to request a financing contingency, or even a funding contingency.

Title Insurance

Purchasers and sellers should consult with their title companies on potential delays in conducting title searches, UCC searches, and the like, and regarding local rules governing electronic signatures, electronic filing, electronic notarizing and insuring over the gap period between closing and recording, especially when a recording office is not currently operating.

Force Majeure

Please see the discussion above, under the Purchase and Sale Agreements paragraph in the section captioned, *Force Majeure/Commercial Frustration/Impossibility or Impracticability of Performance.*

Blank Rome's COVID-19 Task Force is continuing to monitor the COVID-19 crisis and will provide further updates for the real estate industry as they become available.

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Real Estate

MARCH 2020 • NO. 2

How to Address Coronavirus-Related Landlord-Tenant Issues

This client alert provides some concrete advice to landlords, building owners, and management companies of both commercial and residential buildings dealing with issues surrounding the coronavirus.

Q: Should I circulate a memo to tenants/residents about the Coronavirus?

A: Yes. You should advise your tenants that you are monitoring the situation and asking them to report to you any confirmed case of COVID-19 (the disease caused by the present strand of coronavirus) affecting any occupant (or employee/visitor of any occupant). In addition, you should provide basic guidelines and protocols recommended by the Centers for Disease Control ("CDC") and the World Health Organizations ("WHO") with regard to the risk to others.

Q: Should I be taking any additional precautions with building staff?

A: Most employers are allowing employees to work remotely if that is an option. For those employees who are manual laborers, it is recommended that you provide personal protective equipment, such as latex gloves, and try to limit their physical contact with others, such as reducing the delivery of packages and non-essential repairs.

Q: What restrictions should I impose on tenants in commercial buildings?

A: You should ensure that tenants have been advised (and they have advised their employees) not to come to work if they are experiencing acute respiratory illness (cough, shortness of breath, or difficulty breathing) and that they are required to stay home and not come to work until they are free of fever (100.4° F [37.8° C] or greater using an oral thermometer), signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (*e.g.,* Tylenol, Advil, cough suppressants, etc.).

Q: What restrictions should I impose on residents in my residential buildings?

A: You should advise residents to contact a health professional and not leave their apartment if they are experiencing acute respiratory illness (cough, shortness of breath, or difficulty breathing) are required to stay home and not come to work until they are free of fever (100.4° F [37.8° C] or greater using an oral thermometer), signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (*e.g.*, Tylenol, Advil, cough suppressants, etc.).

Q: What legal obligations do I have if I learn that a resident or tenant has been diagnosed with COVID-19?

A: While the terms of the applicable leases, and the CDC, WHO, and other government and health department guidelines may determine your legal obligations, adhering to prudent business practices determines whether disclosure should be made even if not necessarily legally required. To that end, we recommend Providing as much information to the other occupants of the building, including the floor on which the occupant resides or leases space, the specific elevator bank that services that floor, and the last time the infected individual was in any of the common areas of the building. Do not identify the person by name.

Q: Can I limit non-essential services in my building?

A: While the leases govern what services are to be provided, consider the health and safety of your occupants in reducing or eliminating non-essential services. For example, if your building has a gym, consider closing the gym or reducing the number of people who can use the gym at a given time. Consider closing common conference or meeting rooms, especially if this is an accommodation you provide to your residents/tenants and not something required by your lease.

THINKING AHEAD…

In preparing for the possibility down the road (which may not be so far away) that your building may be short staffed as a result of employees calling in sick, it is wise to devise a contingency plan now. Provided these recommendations are not inconsistent with any applicable collective bargaining agreements, you may want to consider alternatives now as to reduce the spread of infection, such as:

- staggering work schedules so as to have fewer employees working at the same time;
- having your employees train one another regarding their essential functions; and
- putting together a list of people in the building willing to volunteer to provide essential services that do not pose any dangers.

Blank Rome's Coronavirus ("COVID-19") Task Force is continuing to monitor the COVID-19 crisis and will provide further updates for landlords, building owners, and management companies as they become available.

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When Things Are Not “Business as Usual”: COVID-19 and Contract Defenses

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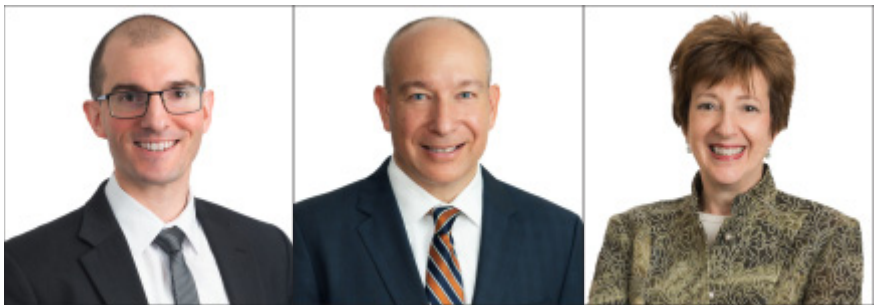

The coronavirus COVID-19 health crisis has interfered with ongoing and future business arrangements throughout New Jersey. As a result, New Jersey businesses that are parties to existing contracts may have rights in the event that they, or their counterparty, are unable to meet their obligations due to COVID-19. There are several legal doctrines that New Jersey businesses may look to in these situations, including impossibility, impracticability, frustration of purpose, and force majeure.

Generally, contract liability is strict liability. This means that a party who breaches a contract is liable for damages even without fault. *See* Restatement (Second) of Contracts, ch. 11, Introductory Note. However, a party may be able to invoke impossibility, impracticability, frustration of purpose, or force majeure to excuse its failure to perform its contract obligations based on an unforeseen supervening event.

Impossibility, Impracticability, and Frustration

These related doctrines rely on the principle that parties make contracts with certain fundamental conditions in mind. *See JB Pool Mgmt, LLC v. Four Seasons at Smithville Homeowners Ass'n, Inc.*, 431 N.J. Super. 233, 245 (App. Div. 2013). The fundamental conditions must be reasonably within the parties' minds when the contract was made but need not be expressed in the contract. *See Petrozzi v. City of Ocean City*, 433 N.J. Super. 290, 302 (App. Div. 2013).

A party can invoke the doctrines of impossibility, impracticability, or frustration to excuse or mitigate non-performance because of a supervening event, "the non-occurrence of which was a basic assumption on which the contract was made." *M.J. Paquet, Inc. v. N.J. Dep't of Transp.*, 171 N.J. 378, 391 (2002). The supervening event must be unexpected when the contract was created, and it must fundamentally alter the parties' relationship. *See JB Pool Mgmt*, 431 N.J. Super. at 233.

The difference between impossibility, impracticability, and frustration is a matter of degree. A party can invoke impossibility when the supervening event makes performance objectively impossible. *See Duff v. Trenton Bev. Co.*, 4 N.J. 595 (1950). The impracticability defense arises when performance is not

impossible but becomes inordinately more difficult because of the supervening event. *JB Pool Mgmt*, 431 N.J. Super. at 246.

Frustration of purpose occurs if performance can still occur but the supervening event "fundamentally has changed the nature of the parties' overall bargain." *JB Pool Mgmt*, 431 N.J. Super. at 246. The disruption must be significant; it cannot be a risk reasonably assumed under the contract. *Capparelli v. Lopatin*, 459 N.J. Super. 584, 606-07 (App. Div. 2019). In *Tilcon N.Y., Inc. v. Morris Cnty. Cooperative Pricing Council*, for example, the court concluded that an increase in the price of raw materials did not allow the plaintiff to increase the price of a fixed-price contract for asphalt and paving services, under a frustration of purpose theory. The court explained than an increase in the price of raw materials is "the sort of risk that a fixed-price contract is intended to cover." 2014 N.J. Super. Unpub. LEXIS 449, **51-53 (N.J. App. Div. Mar. 5, 2014) (quoting Restatement (Second) of Contracts § 261, cmt. d)).

> Importantly, being forced to comply with a government order may provide a basis for the defenses of impossibility or impracticability. According to Section 264 of the Restatement (Second) of Contracts:
>
> > *If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.*

Thus, in *M.J. Paquet, Inc.*, the parties entered into a contract for highway rehabilitation services, which included bridge painting. After the contract was made, OSHA revised its regulations on painting bridges

containing lead-based paint. As a result, the contractor was required to perform a set of entirely new tasks to comply with the law. The parties attempted to negotiate a price for these new tasks but were unsuccessful. Ultimately, the New Jersey Department of Transportation ("NJDOT") deleted the bridge painting services from the contract. The original contractor sued and the NJDOT successfully asserted the defense of impracticability based on the supervening OSHA regulations. 171 N.J. 378, 391 (2002).

Force Majeure

Unlike impossibility, impracticability, and frustration of purpose, which are created by common law, the defense of force majeure is created by contract. A force majeure provision "provides a means by which the parties may anticipate in advance a condition that will make performance impracticable." *Facto v. Pantagis*, 390 N.J. Super. 227, 231 (App. Div. 2007).

However, case law shows that courts interpret force majeure clauses narrowly. Therefore, acts constituting force majeure should be explicitly set forth in the contract. In *Facto*, the parties contracted to host a wedding at a banquet hall. The contract contained a force majeure clause, which stated:

Snuffy's will be excused from performance under this contract if it is prevented from doing so by an act of God (*e.g.*, flood, power failure, etc.), or other unforeseen events or circumstances.

The banquet hall experienced a power failure 45 minutes into the wedding. Although the parties attempted to perform the contract, the wedding did not go as intended (e.g., there was no air conditioning in 90-degree humid weather; the band refused to play; and the police were called). The

host sued the banquet hall for breach of contract and the banquet hall asserted a force majeure defense. The Appellate Division agreed with the banquet hall. It concluded that the power failure fell within the force majeure provision as either an "act of God" or "other unforeseen event." Indeed, the court observed that the force majeure provision referenced "power failure" as an example of an "act of God." Although the banquet hall was required to refund the host's deposit for the wedding, the host was required to pay for the reasonable value of services that were actually provided. 390 N.J. Super. at 229-34.

By contrast, in *Seitz v. Mark-O-Lite Sign Contractors, Inc.*, the contract was not as explicit. In that case, the parties made a contract to restore a theater's neon sign. The contract stated:

> *The Company shall not be liable for any failure in the performance of its obligation under this agreement which may result from strikes or acts of labor union, fires, floods, earthquakes, or acts of God, or other conditions or contingencies beyond its control.*

The company's only worker capable of doing the work was admitted to the hospital, causing the company to breach its obligation to restore the sign. The theater hired a new contractor, who charged a higher price. The theater then sued the company for the difference between its contract price and the new contract price. The company asserted a defense based on the force majeure clause. The court rejected this defense. It observed that the worker's hospitalization did not meet the definition of the defined acts of "force majeure." The court also refused to interpret "other conditions or contingencies beyond its control" broadly to include the hospitalization. 210 N.J. Super. 646, 648-50 (Law Div. 1986).

To avoid litigating whether an issue is within the scope of a force majeure clause, parties may contract for an absolute obligation to perform. In *476 Grand, LLC v. Dodge of Englewood, Inc.*, the parties contracted to lease a car showroom for five years. At the time of contracting, the tenant had a dealership agreement with Chrysler, LLC. During the lease term, the tenant's dealership agreement was terminated as part of Chrysler's bankruptcy proceedings. After the dealership agreement was terminated, the tenant purported to terminate the lease and vacated the premises. The landlord declared the tenant in default and sued for unpaid rent. The tenant asserted a force majeure defense based on the lease. The Appellate Division rejected that defense, however, because the force majeure clause stated: "Nothing herein shall be deemed to relieve Tenant of its obligation to pay rent when due." The court concluded that "defendant agreed to pay rent regardless of circumstances beyond its control." Thus, the parties negotiated an absolute obligation for the tenant to pay rent, and the court upheld that provision. 2012 WL 670020, at **1-2, 4 (N.J. App. Div. Mar. 2, 2012).

Conclusion

The COVID-19 crisis is a unique event that is affecting business and public life in many unforeseen ways. It is critical for New Jersey businesses to understand their rights and obligations during these uncertain times, as the defenses of impossibility, impracticability, frustration, and force majeure may impact how those businesses respond to, and recover from, the COVID-19 crisis.

Blank Rome's Princeton office and **Coronavirus ("COVID-19") Task Force** are monitoring this ever-changing situation and are here to help. Please contact us if you have any questions about contract compliance during the COVID-19 crisis or any other related commercial issues.

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Can the Risk of Loss Doctrine Get You out of a Building Purchase?

GlobeSt
April 9, 2020

A commercial purchaser should incorporate in the contract's risk of loss clause the specific consequences of a pandemic.

For real estate purchasers and sellers, the risk of loss doctrine governs whether the seller or the purchaser assumes the risk of the property being damaged or destroyed between contract execution and closing.

In New York, for example, this doctrine is embodied in Section 5-1311 of the General Obligations Law (the "New York Risk Act"), which places the risk of destruction or material damage squarely on the seller, except in instances where the purchaser acquires possession of the property prior to the closing or is otherwise at fault. The parties can agree in the contract to a different allocation of the risk, but most sales contracts for properties in New York conform generally to the allocation scheme provided in the New York Risk Act (i.e., they also impose the risk of loss on the seller in the event that the property suffers destruction or material damage).

Pandemic Risks Not Covered

For commercial real estate purchasers, in particular, the fact that the risk of loss doctrine only pertains to physical damage to the property precludes them from utilizing this doctrine when the property suffers the consequences of a pandemic. So, for example, the creation of a containment zone, promulgation of shelter-in-place rules, or the curtailment of public transportation—any of which can severely impact access to the property or rent revenues—would not entitle the purchaser to terminate a contract executed prior to the onset of the pandemic. Yet this outcome is inconsistent with the principal tenet of the New York Risk Act (i.e., preserving the benefit of the purchaser's bargain).

The New York Risk Act was created in 1936 with the adoption of the Uniform Vendor and Purchaser Risk Act published by the National Conference of Commissioners on Uniform State Laws (the "Uniform Risk Act"). The Uniform Risk Act was inspired by the scholarly work of Professor Samuel Williston, who promoted the use of contract law in analyzing risk of loss issues, specifically the "implied condition" principle. Applying this principle to risk of loss theory, Williston posited that if the risk were placed on the purchaser and a fire destroyed a material part of the property, the purchaser would be required to perform its promise—payment of the full purchase price—whereas the seller's promise (implicit, if not expressed), to convey the property in substantially the same condition bargained for when the contract was executed, would not be fulfilled. This imbalance would constitute a failure of consideration, frustrating the purpose of the contract. Williston concluded that placing the risk of loss on the seller would rectify this imbalance and preserve for the purchaser the benefit of its bargain.

Expansion of Risk of Loss Contract Provision

In order to preserve the benefit of its bargain, a commercial purchaser should incorporate in the contract's risk of loss clause the specific consequences of a pandemic, including, among others, the ones referenced earlier in this article. If the seller is amenable to such an expansion, it will likely want to impose qualifications, such as the duration of the event and the extent of the event's impact on access, rent revenues, or the purchaser's ability to conduct its business in the property. Before entering into negotiations, both parties should examine the tenants' leases to determine if and to what extent the tenants have rent abatement or lease cancellation rights in the event they are required to shut down their businesses or vacate their premises, or their employees or customers are prohibited from gaining access to the building. The seller should also investigate whether its business interruption or other insurance policies cover the effects of a pandemic, and, if so, whether the insurance proceeds are assignable to the purchaser.

If the seller refuses to expand the risk of loss clause on the grounds that the duration of the triggering event, or its impact on access, revenue, or utility, may be difficult to measure, the purchaser should consider proposing a valuation condition, such that if the pandemic's aftermath results in a reduction in the fair market value of the property below a designated percentage of the purchase price, the purchaser can terminate the contract. In addition to negotiating that percentage, the parties will, of course, have to agree upon the method for determining the property's fair market value, as well as the definition of "pandemic."

Commercial real estate purchasers and sellers need to contemplate how to incorporate the effects of a pandemic in the risk of loss provision, in a way that is fair to both parties while honoring one of the principal tenets of the doctrine—preserving the benefit of the bargain.

"Can the Risk of Loss Doctrine Get You out of a Building Purchase?" by Michael A. Scheffler was published in GlobeSt on April 9, 2020.

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New York Risk of Loss Doctrine after the Coronavirus

New York Law Journal
April 9, 2020

The risk of loss doctrine has evolved over the centuries, reflecting changes in corresponding legal theories. The doctrine needs to continue its evolution, this time to reflect the "new" risks of our post-coronavirus world.

The unimaginable has happened: the "coronavirus," a worldwide pandemic.

Transactional lawyers try to anticipate all likely scenarios that might impact a particular transaction. Yet no one could have anticipated that this contagion would cause such a cataclysmic disruption to our lives, businesses, institutions and public transportation, partly due to governmental measures implemented in order to stem the spread of the virus.

However, now that the coronavirus contagion has occurred, and there is an increased likelihood of more pandemics, it is incumbent upon lawyers to analyze the legal ramifications and safeguard their clients appropriately.

Real estate lawyers, in particular, need to examine whether the current contractual and statutory schemes for allocating the risk of loss in real property sales transactions are adequate to address pandemics and their aftermath—the "new" risks in our post-coronavirus world. This article is intended to guide lawyers and their clients as they navigate this new terrain.

Risk of Loss Doctrine

The risk of loss doctrine governs whether the seller or the purchaser assumes the risk of the property being damaged or destroyed between contract execution and closing. In New York, this doctrine is embodied in §5-1311 of the General Obligations Law (the New York Risk Act), which places the risk of destruction or material damage squarely on the vendor (seller), except in instances where the purchaser acquires possession of the property prior to the closing or is otherwise at fault. The pertinent language in the statute is:

… When neither the legal title nor the possession of the subject matter of the contract has been transferred to the purchaser: (1) if all or a material part thereof is destroyed without fault of the purchaser … the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid … (2) if any immaterial part thereof is destroyed without fault of the purchaser … neither the vendor nor the purchaser is thereby deprived of the right to enforce the contract; but there shall be, to the extent of the destruction … an abatement of the purchase price… .

The parties can agree in the contract to a different allocation of the risk, but most sales contracts for properties in New York conform generally to the allocation scheme provided in the New York Risk Act, i.e., they also impose the risk of loss on the seller in the event that the property suffers destruction or material damage.

The Imaginable

Now imagine the following:

A pandemic strikes again, affecting the following properties as described below, and each property is being sold under a contract executed prior to the onset of the pandemic:

- "Property 1": A manufacturing facility is being purchased by a company to conduct its operations, and the facility is located in a "containment zone," thereby drastically reducing access for supplies and labor.
- "Property 2": An office building whose tenants, all deemed "non-essential" businesses, are mandated by the city to close for an indeterminate period, and many of them stop paying rent.
- "Property 3": A downtown retail complex whose customers and workers live on the city's outskirts or in surrounding suburbs, many of whom rely upon public transportation to reach the complex, and the city suspends the operation of all public transportation (except for emergencies).
- "Property 4": An apartment building in which many individuals have tested positive for the virus, and all tenants, required by the city to vacate the building pending a major decontamination and testing program, have stopped paying rent.

Each building suffers a precipitous drop in revenue (or utility in the case of the manufacturing facility) because of the foregoing consequences of the pandemic, and a concomitant sharp decline in value.

Each purchaser wants to terminate its contract, but the risk of loss clause only permits termination if the building is physically damaged or destroyed, and there are no contract provisions entitling the purchaser to terminate due to a reduction in rental income, or a material adverse change in the financial condition or utility of the property.

Purchasers Are Not Entitled To Terminate

Since none of the hypothetical properties has been physically damaged or destroyed, the risk of loss provision does not entitle the purchaser to terminate its contract. Yet this result is inconsistent with one of the principal legal theories that spawned the modern risk of loss doctrine, i.e., preserving the benefit of the purchaser's bargain.

At its inception, in early Roman law, the risk of loss doctrine imposed the risk on the purchaser, yet around the 13th century, English law shifted the risk of loss to the seller (see Samuel Williston, "Williston on Contracts" §933A (3d ed. 1963)). However, in 1801, *Paine v. Meller*, 31 Eng. Rep. 1088 (Ch. 1801), applied the "equitable conversion" theory (i.e., equitable title passes to the purchaser upon contract execution, with seller retaining legal title only to secure payment of the purchase price) in establishing a new risk of loss rule under English law, placing the risk on the purchaser because it was deemed to be the "owner" upon execution of the contract. American courts adopted the English rule in the late 19th century, and it soon became the "majority rule" in America, followed by many states, including New York.

One of the leading opponents of the majority rule was Prof. Samuel Williston. Williston promoted the use of contract law in analyzing risk of loss issues, and believed, in particular, that the "implied condition" principle should be applied to this analysis. This principle dictates that a party's promise to fulfill its contractual obligation is conditioned upon the other party's performance of its promised obligation, resting on the fact that the first party had bargained for the other party's promise in exchange for its own. Applying this principle to risk of loss theory, Williston posited that if the risk were placed on the purchaser and a fire or other casualty destroyed a material part of the property, the purchaser would be required to perform its promise—payment of the full purchase price—whereas the seller's promise (implicit if not expressed), to convey the property in substantially the same condition bargained for when the contract was executed, would not be fulfilled. This imbalance would constitute a failure of

consideration, frustrating the purpose of the contract. Williston concluded that placing the risk of loss on the seller would rectify this imbalance and preserve for the purchaser the benefit of its bargain.

Williston's scholarly work formed the basis for the Uniform Vendor and Purchaser Risk Act by the National Conference of Commissioners on Uniform State Laws (the Uniform Risk Act), which was adopted in 1935, and enacted by New York in 1936 as the New York Risk Act.

Purchaser's Position

By adopting the Uniform Risk Act, the New York state legislature endorsed its main premise, that the purchaser should not be deprived of the benefit of its bargain, which principle also forms the basis for the standard contractual risk of loss provision. There is no question that each purchaser in the four scenarios depicted above understood that it would assume certain risks, such as, for example, deterioration of the property's condition through normal wear and tear, a general economic downturn, and tenant defaults. It is very unlikely, however, that any of the purchasers expected to assume the risk of a sudden, severe and potentially long-lasting reduction in the value or utility of the building due to a pandemic.

Lawyers representing purchasers, in an effort to preserve the benefit of their client's bargain in the event of a pandemic, should consider expanding the risk of loss provision to afford the purchaser a termination right when faced with circumstances similar to those confronting the purchasers described in this article. So, for example, events triggering the termination right might include the creation of a "containment zone" over an area in which the building is situated, government-mandated closings of retail businesses, the long-term suspension of public transportation, or the "contamination" of the building requiring all tenants to vacate for an extended period of time.

Seller's Position

Lawyers representing sellers should advise their clients how to respond to such a proposed expansion of the typical risk of loss provision. Matters that may shape the response include: (1) if and to what extent the tenants have rent abatement or lease cancellation rights in the event they are required to shut down their businesses or vacate their premises, or their employees or customers are prohibited or inhibited from gaining access to the building; (2) if the seller has insurance coverage for the effects of a pandemic, and the insurance policy or proceeds are assignable to the purchaser; or (3) if the contract contains other provisions protecting the purchaser, such as a closing condition that there shall have been no material adverse change in the financial condition of the property.

Negotiation

Sellers willing to accept such an expansion will likely want to impose qualifications, such as the duration of the triggering event or the extent of the event's impact on access, rent revenues or the purchaser's ability to conduct its business in the property.

Some sellers, however, may refuse to expand the risk of loss provision, on the grounds that the duration of the triggering event, or its impact on access, revenue or utility, may be difficult to measure. In that event, the purchaser should consider proposing a valuation condition, such that if the pandemic's aftermath results in a reduction in the fair market value of the property below a designated percentage of the purchase price, the purchaser can terminate the contract. In addition to negotiating that percentage, the parties will, of course, have to agree upon the method for determining the property's fair market value, as well as the definition of "pandemic" (including whether the pandemic must be global or just national).

Conclusion

The risk of loss doctrine has evolved over the centuries, reflecting changes in corresponding legal theories. The doctrine needs to continue its evolution, this time to reflect the "new" risks of our post-coronavirus world. The operative terms used in the New York Risk Act, and the standard risk of loss clause, i.e., "destruction" or "damage," do not encompass the dire effects of a

pandemic, such as a material diminution in the value or utility of the property. Purchasers and sellers need to contemplate how to incorporate the effects of a pandemic in the risk of loss provision, in a way that is fair to both parties while honoring one of the principal tenets of the doctrine—preserving the benefit of the bargain.

"New York Risk of Loss Doctrine after the Coronavirus," by Michael A. Scheffler was published in the New York Law Journal on April 9, 2020.

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APRIL 10, 2020 • NO. 1

COVID-19 Effect on Commercial Landlord-Tenant Law: A 50 State Review and Practical Guide to Negotiating Lease Modifications

The widespread impact of the COVID-19 pandemic on the ability of businesses to continue operations in leased spaces should prompt landlords and tenants to have an open dialogue toward practical solutions. Because no current federal legislation can be directly applied to commercial leases, a review of common contractual provisions and defenses, bankruptcy issues, and updated legal frameworks in jurisdictions across the country is vital for landlords and tenants seeking to find a path forward.

Few tenants and landlords are weathering the COVID-19 pandemic without significant—if not total—lost revenue. More than 16 million people are out of work, and while labor costs may be mitigated by furloughs or layoffs, real estate costs, typically a company's second highest expense, is a contractual obligation that is commonly accompanied by personal or corporate guarantees, letters of credit, or cash deposits. Some states have issued executive orders temporarily prohibiting tenant evictions and mortgage foreclosures, but such short-term relief may not be enough to help the tenant's business to survive.

Landlords and tenants starting to visit lease accommodations should consider a practical approach aimed at achieving a long-term solution that allows the tenant's business and the landlord's income stream to return to pre-pandemic levels and preserves the landlord-tenant relationship. Open and frank communication is important, allowing landlords and tenants to understand the business and economic conditions each face. While lawyer letters are the common means of landlord-tenant discourse, a tenant directly phoning the landlord to explain the reasons for lease accommodations may be more productive. And in negotiating with landlords, tenants should recognize that landlords may need lender consent to modify a lease and that reduced rent can impact a landlord in many ways, including affecting its ability to pay the mortgage.

Similarly, it is important for landlords to recognize that many tenants may not survive months of negative revenue. Landlords must be flexible when receiving lease accommodation requests from tenants, especially given that lease

payments may be the business cost causing a tenant bankruptcy. And since bankruptcy may cause the leasehold to remain unoccupied for months or longer with no rent being paid, and new tenants difficult to find, landlords may consider alternatives to demanding strict rent payment under the existing lease.

LEGAL FRAMEWORK

There is no federal legislation affecting commercial leases, and any future state action offering the equivalent of landlord-funded rent rebates, as many commentators hope, may be subject to constitutional challenge. But Congress may in a follow-up stimulus round extend financial support for businesses most severely impacted by the closures, such as hotel operators, restaurants, entertainment venues, and other retail establishments.

Current state legislation and executive orders are described in a chart at the end of this advisory. For landlords who also have multifamily housing, we include legislation and orders that affect residential units. Note that none of the legislation prevents landlords from calling guarantees, drawing down letters of credit, or applying deposits to rent defaults.

LEGAL AND CONTRACTUAL ISSUES

Leases are contracts that include terms and conditions that will be enforced by courts, but several defenses may be available:

- Most leases include force majeure clauses that generally provide for the postponement or suspension of performance due to circumstances beyond party control. Force majeure clauses typically protect against extreme weather, unavailability of utilities, government actions, riots, war, labor strikes and embargos, and similar events. Since the 2003 SARS epidemic, many force majeure clauses specifically refer to viruses, and the World Health Organization's classification of COVID-19 as a pandemic is important for force majeure clauses that expressly account for pandemics or similar events. But note that many commercial leases exclude the payment of rent from force majeure clauses, meaning a tenant may still be required to pay rent even during a force majeure event.

- Some leases have rent relief clauses tied to government-issued directives (often located in civil disobedience language) or closures not attributed to the tenant, including temporary condemnation by the government. Some well-heeled tenants may test claims against the government for inverse condemnation arising from directives to close all non-essential businesses and failure to provide just compensation as required by the Fifth Amendment of the Constitution.

- Some leases have expanded covenant of quiet enjoyment provisions that may be invoked if the landlord has enacted impediments to entry or contractual use, no matter the reason.

- Lease casualty clauses usually provide tenants and landlords the option to terminate or require a landlord to offer rent abatement in the event the property is substantially damaged. While a tenant's ability to operate has been disrupted by the pandemic, casualty clauses typically cover fire, floods, explosions, or similar occurrences that degrade the premises' physical or structural integrity. Depending upon the lease language, tenants may assert that government shelter directions prevent productive use of the space, rendering the tenant unable to physically use the space.

- There may also be non-contractual legal arguments that tenants may raise such as impossibility of performance or the doctrine of impracticability. Nonperformance may be grounded in these doctrines under the premise that the parties did not—and could not—have foreseen the unexpected intervening event of COVID-19, which materially impacts both parties performing under the lease, rendering such performance impossible or impracticable. Similarly, the doctrine of frustration of purpose focuses on whether an intervening event destroys the purpose of the contract rather than merely frustrating a party's contractual performance. The doctrine assumes the event frustrating performance was not a basic assumption of the contract, and queries whether the purpose of the contract was obviated.

BANKRUPTCY

The filing of a bankruptcy petition by a tenant creates an "automatic stay" that precludes landlords from attempting to collect rent or seeking to evict the tenant. A landlord may, however, seek to enforce a guarantee or call down a letter of credit to pay for past due rent, but cannot apply a security deposit. The proper procedure for asserting a claim for pre-petition arrearages is through the filing of a proof of claim with the Bankruptcy Court.

If the tenant is reorganizing, it has up to seven months to decide whether to continue with the lease or terminate it. During this period, the tenant is required to timely make rent payments. Recently, however, a number of tenants have filed motions seeking to suspend their bankruptcy cases during the pandemic and not pay creditors, including landlords. And at least two bankruptcy courts issued orders permitting tenants to remain in premises without paying rent due to the COVID-19 pandemic. But under the Bankruptcy Code, in order to assume a lease, a debtor must pay outstanding rent or provide "adequate assurance" that it will be paid "promptly" and provide "adequate assurance" that future rent will be paid. If rent it not timely paid, the landlord may ask the Bankruptcy Court to evict the tenant, a process that can take months. A tenant may decide to leave the premises and reject the lease. The rejection of a lease is not a termination of the lease, but rather is treated as a pre-petition breach of the lease. The landlord will have an unsecured claim for damages arising as a result of the rejection, i.e., for unpaid rent both pre-and post-petition. If the tenant liquidates, the landlord will retrieve the space, but may find it difficult to locate a substitute tenant.

SBA LOANS AND INSURANCE

While beyond the scope of this advisory, landlords should keep in mind that SBA loans are available for small businesses, which can be used to pay rent, and tenants should consider whether business interruption or other insurance is available to offset rent payments and other obligations (for further information, see Blank Rome's advisories on the SBA 7(a) loan program and insurance guidance for losses related to the coronavirus).

EFFECT OF NON-PAYMENT

Rent often is backed by personal or corporate guarantees, letters of credit, and/or security deposits. If you do not pay rent, a landlord may call the personal guarantee, draw on the letter of credit, or apply the deposit. Landlords must recognize the affect this will have on the tenant or the guarantor, as well as the fact that it is likely to result in prolonged litigation.

- Seeking to enforce a personal guarantee will no doubt gain the tenant's attention because the guarantor's assets are at risk. While this often results in the tenant paying rent, it also can result in a time consuming and costly legal battle and will not foster a healthy landlord-tenant relationship. Similarly, enforcing a corporate guarantee, usually given by a parent company, is likely to result in litigation.

- If the landlord draws a letter of credit, the tenant will have to repay the issuing bank. And if the letter of credit is issued as part of a working capital credit facility or as part of a corporate revolver, the draw will accrue interest and possibly trigger a covenant default, further increasing the economic impact on the tenant.

- Applying a cash deposit will not directly affect the tenant, though it cannot be done if the tenant files for bankruptcy protection.

At the same time, tenants must recognize that landlords have financial obligations tied to tenant performance, such as mortgage payments, the absence of which may lead to foreclosure. In addition, landlords often must satisfy covenants in a credit facility, and typically non-payment of rent constitutes a material adverse event or default. Negotiating rent abatement or deferral is not as simple as the landlord agreeing to waive or defer rent, because such waiver often causes the landlord to default on concomitant financial obligations, especially if there are numerous investors in the property, each of whom may have their own obligations dependent on receiving monthly rent payments.

PRACTICAL GUIDANCE

The following guidance assumes that the landlord would like to the tenant to remain in the premises. If not, then the landlord should take contractually required steps, such as proper notice, drawing down and deposits, and calling guarantees, followed by eviction proceedings.

Tenants in jurisdictions that have enacted delays in enforcing rent defaults generally have the luxury of remaining in the premises for a limited period without the threat of eviction. New York may be an exception as leases often give landlords the right to terminate a lease for non-payment after notice and courts are unavailable to issue "Yellowstone" injunctions prohibiting termination until final determination. Also, the legislation does not prevent the landlord from enforcing guarantees, drawing down letters of credit or taking deposits. It also burdens tenants with paying several months' past rent after the safe period ends. Accordingly, it may be productive to enter negotiations now.

- Tenants should undertake a deep financial dive and determine how much rent, if any, they can pay during the pandemic. Approaching a landlord with a plan informs the landlord that you are being candid, have thought through the financial issues, and are doing what you can to work towards a mutually beneficial solution. Where possible, offer to pay part of the rent on an ongoing basis and defer part. Merely deferring rent will leave the tenant with increased rent later, making it more difficult to survive. Alternatives include (i) tying rent to revenue such that the landlord is invested in your success; (ii) agreeing to percentage rent with certain steps and thresholds as the economy returns; and (iii) for tenants with numerous leases with the same landlord, agreeing to pay more rent for successful locations spaces to make up for less successful ones.
- Given the environment—for instance, some estimate that more than 50 percent of restaurants will fail—combined with changes in consumer brick-and-mortar shopping behavior reinforced by months of online purchasing, and the realization that business can work remotely, demand for retail locations, and office space likely will be reduced, landlords should consider taking steps to keep important tenants to ensure future prosperity. At the same time as giving concessions, landlords may want to consider asking the tenant to share in the upside if the tenant succeeds.

50 STATE REVIEW

A 50 state review of landlord/tenant implications, including state executive orders and judicial rules, is available at Blank Rome's COVID-19 State Impact Tracker.

Ken Bressler *and* ***Sam Levy*** *are litigation partners in Blank Rome's New York office and handle commercial disputes across the country. The authors would like to thank* ***Scott Smith*** *for his input on the financial impact of drawing down a letter of credit,* ***Evan Zucker*** *for his input on bankruptcy issues, and* ***Jacob Kearney*** *for his 50 state review.*

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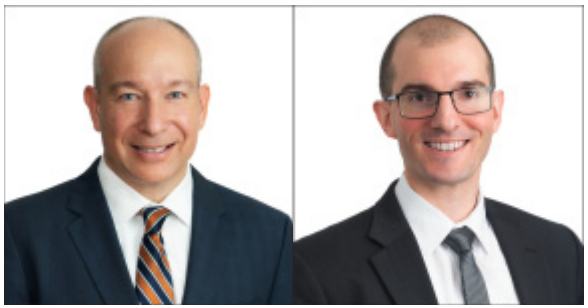
New Jersey Halts All Non-Essential Construction after 8:00 P.M. on April 10, 2020

Jonathan M. Korn and Michael R. Darbee



On April 8, 2020, New Jersey Governor Phil Murphy signed Executive Order 122 (2020) ("EO 122"). EO 122 requires that the physical operation of all non-essential construction projects must cease by 8:00 p.m. on Friday, April 10, 2020. Only work on "essential construction projects" may continue to operate physically after that time.

EO 122 defines 14 categories of construction projects that are considered essential. Under EO 122, essential construction relates to the following areas:

1. "[T]he delivery of health care services," such as hospitals;
2. "Transportation projects," such as roads and bridges;
3. "Utility projects," such as projects necessary to produce and transmit electricity;
4. "Residential projects" if they are exclusively designated as affordable housing;
5. "Pre-K–12 schools";
6. "Projects already underway" on a single-family home or occupied apartment unit, but only if the construction crew has five or fewer individuals;
7. "Projects already underway" on a residential unit, where the work must proceed in order for the unit to be occupied by the date set in a legally binding agreement;
8. Projects involving facilities that manufacture, distribute, store, or service goods or products that are sold online or by essential retail businesses, as defined by Executive Order No. 107 (2020);
9. "[D]ata centers or facilities that are critical to a business' ability to function";
10. "[T]he delivery of essential social services," such as homeless shelters;
11. First responders, such as police and fire departments, related to their response to the coronavirus emergency;
12. A contract with the federal, state, county, or municipal government;
13. Securing or abating any hazards on a non-essential construction project site; and
14. "[E]mergency repairs necessary to ensure the health and safety of residents."

If a business is engaged in an essential construction project, it must adopt certain policies designed to mitigate the spread of the coronavirus COVID-19. Those policies are generally designed to encourage social distancing and other hygienic practices that reduce the spread of the virus. In addition,

businesses engaged in essential construction projects must send home workers with symptoms of COVID-19, must notify its workers of any known exposure to COVID-19 at the worksite without violating their employees' privacy rights, and must disinfect the worksite when a worker at the site has been diagnosed with the illness.

EO 122 will remain in effect until Governor Murphy revokes or modifies it. Unlike the Commonwealth of Pennsylvania, there does not appear to be a formal waiver process. The full text of EO 122 can be found on the State of New Jersey website here.

Blank Rome's Princeton office and **Coronavirus ("COVID-19") Task Force** are monitoring this ever-changing situation and are here to help. Please contact us if you have any questions about contract compliance during the COVID-19 crisis or any other related commercial issues.

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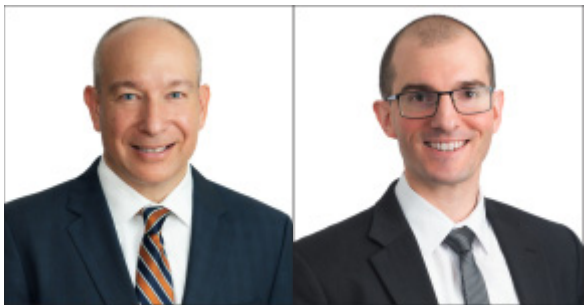
Governor Murphy Allows Nonessential Construction to Resume

Jonathan M. Korn and Michael R. Darbee



On May 13, 2020, Governor Phil Murphy signed Executive Order 142 ("EO 142"). Under EO 142, all "nonessential" construction projects, as defined in EO 122, "are permitted to resume" as of 6:00 a.m. on Monday, May 18, 2020.

The order requires contractors who will resume work to adopt social mitigation and infection control policies designed to stop the spread of the coronavirus. For example, EO 142 bans nonessential visitors from entering the job site; requires at least six feet of social

distancing; prohibits meetings of 10 or more people; requires staggering work times and break times; and requires contractors to identify and control access to "high-risk areas," such as bathrooms.

Also, under EO 142 businesses must require workers and visitors to wear cloth face coverings (or a more protective covering, such as a surgical mask) and must require workers to wear gloves. Every business must provide masks and gloves to its employees at its own expense. Moreover, businesses must deny access to a person who refuses to wear a face covering for non-medical reasons. However, if a person refuses to wear a face covering for medical reasons, the business and its staff cannot demand proof of the stated condition.

Finally, businesses must maintain other infection control practices. For example, business must implement policies regarding hand washing, coughing and sneezing etiquette, and proper tissue disposal. If there is no running water at the job site, businesses must provide portable washing stations with soap or hand sanitizer (containing at least 60 percent ethanol or 70 percent isopropanol). Moreover, "high touch" areas, such as bathrooms and equipment, must be regularly sanitized.

The policies are detailed in the text of EO 142 and must be displayed "in conspicuous signage" at the entrances and throughout the worksite. If you intend to commence nonessential construction, you should carefully review the text of EO 142 and implement appropriate workplace policies.

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