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**PROGRAM MATERIALS**  
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**When Three C's Collide:  
Covid, Commercial Leasing, and  
Chapter 11**

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**5255 North Federal Highway, Suite 310, Boca Raton, FL 33487**  
**Phone 561-241-1919      Fax 561-241-1969**

# Bankruptcy and Commercial Lease Issues in a COVID-19 Disrupted World

Jonathan T. Koevary, Esq.

Robert C. Gagne, Esq.

Olshan Frome Wolosky LLP

## Chapter 11 Basics

- Breathing spell that halts all pending actions against a debtor and brings those actions and related issues to be dealt with in federal bankruptcy court.
- In commercial real estate context, chapter 11 petition of a tenant-debtor halts:
  - Court cases
  - Evictions
  - Other non-judicial actions

## Chapter 11 Basics (cont.)

- A chapter 11 debtor acts as a “debtor in possession” pursuant to 11 U.S.C. §1107, meaning existing officers and directors maintain control of the company during the process.
- Chapter 11 differs from chapter 7, where the debtor “surrenders the company keys” to the trustee on day 1, who sets out to liquidate.
- Theory behind chapter 11 is that a salvaged business could be worth more to creditors than a dead one and that keeping the business as a going-concern has societal benefits such as delivery of a product to the market and retention of employees.
- Chapter 11 process can mean:
  - Traditional reorganization through a chapter 11 plan voted on by creditors.
  - “Section 363 sale” of a “CleanCo” business, free and clear of liabilities.
  - Controlled liquidation through planned Going Out of Business sales.

## Planning a Consensual Process

- While chapter 11 often provides the best tools for an effective outcome, it can be an expensive and uncertain process that invites scrutiny of past and present practices as well as future plans.
- The chances for a successful chapter 11 process drastically increase to the extent a debtor negotiates an agreed strategy for both its stay in bankruptcy and a consensual exit transaction or series of transactions with its secured lender – prior to the Petition Date.
  - A filing without an exit strategy is commonly referred to as a “free fall.”
- A well crafted process and exit strategy takes into account the Bankruptcy Code and Rules, the court practices, the debtor’s business and balance sheet, commercial real estate, contracts and major stakeholder constituencies.

## Planning a Consensual Process (cont.)

- General Backdrop: To what extent is the debtor's process being run for the benefit of the lender alone as opposed to all constituencies?
  - For example, if all of the debtor's product is subject to lender's security interest, that calls into question who - other than the lender - benefits from chapter 11 Going Out of Business sales using leased retail space?
- Covid-19 Backdrop: Covid-19 first disrupted and later altered the process and exit strategy that had in most cases been negotiated between the debtor and its secured lender.
- Takeaway: What is nominally a dispute between a debtor and its landlords may practically be a dispute between the landlords and the debtor's secured lender - with the debtor caught in between - in connection with the process that had been negotiated between the debtor and the lender prior to the bankruptcy filing.

## A few more chapter 11 basics . . .

- The date of the filing of the bankruptcy – the “Petition Date” – is a critical demarcation in any bankruptcy case.
- Claims incurred prior to the Petition Date (“Prepetition Claims”) are generally subject to compromise through the bankruptcy process.
- Prepetition Claims can typically only be paid at the end of a case as the result of a chapter 11 plan and can never be paid without court approval.

## Administration of the Case

- A chapter 11 debtor requires court approval to enter into a transaction outside of the ordinary course of business. 11 U.S.C. § 363(b).
- A chapter 11 debtor may operate in the ordinary course without court approval. 11 U.S.C. § 363(c).
- Claims on account of postpetition transactions (i.e., the costs of administration) are subject to administrative priority. 11 U.S.C. §§ 503(b) and 507(a)).
- Administrative Priority: Administrative expense claims must be paid in full before payment of Prepetition Claims and a chapter 11 plan of reorganization or liquidation must pay all administrative claims in full. 11 U.S.C. § 1129.
- However, even an administrative expense claim bears the risk of an insufficiently funded bankruptcy estate, i.e., administrative insolvency (as we'll see, very important point for landlords).



## Automatic Stay

- Automatic Stay
  - The filing of a bankruptcy case operates as a federal stay on civil actions against the debtor or its property. 11 U.S.C. § 362.
  - Creditor or counterparty cannot, as against the debtor:
    - Bring a new action
    - Continue an existing action
    - Proceed with a foreclosure or eviction
    - Terminate an unexpired contract

## Automatic Stay (cont.)

- Court may lift the stay for “cause,” for example, where the debtor does not comply with its postpetition obligations to landlords, meaning landlords can return to their state court remedies.
- Covid-19 Backdrop: bankruptcy judges will likely be focused on the practical result to a landlord if a lift stay motion were granted or if they dismissed the bankruptcy case. In other words, in a debtor/landlord dispute, one reason a bankruptcy court might be more inclined to give a debtor the benefit of the doubt during the Covid-19 pandemic (and refuse to lift the stay) could be where the state courts are unavailable to effectuate a remedy for the landlord.

## Basic Creditor Protections During Pendency of Case

- Secured Lenders
  - Adequate protection: Absent consent, a debtor must demonstrate adequate protection against diminution of value in exchange for the use of cash collateral. 11 U.S.C. §§ 363(c)(2) and 363(e).
  - Adequate protection is derived from the Fifth Amendment.
  - Hard to prove – so instead, generally accepted “market negotiation” to receive consent of an oversecured creditor:
    - Superpriority liens and claims
    - Interest during the pendency of the case
    - Regular reporting to lender

# Basic Creditor Protections During Pendency of Case (cont.)

- Landlords
  - Postpetition lease obligations are administrative expense claims.
  - Postpetition lease obligations must be paid when due, except that a court may extend the time for payment up to 60 days past the Petition Date for cause shown:
    - **“The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. 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 [...]”** 11 U.S.C. 365(d)(3).
    - “Order of relief” is the same as the Petition Date in Non-Voluntary Cases.
    - “Timely” is subject to interpretation.
  - Landlords may be entitled to “adequate protection.” 11 U.S.C. § 363(e).
    - Law far less developed here than context of secured lenders.
  - Leases must be assumed or rejected within a maximum of 210 days. 11 U.S.C. § 365.

## Landlord Adequate Protection Issues

- Landlords bear risk of administrative insolvency for their postpetition claims.
- Bankruptcy Code section 363(e) provides a basis for the grant of adequate protection to real property lessors in the form of budgeting and reserving funds to pay rent and related charges arising during the initial the 60 day period, including stub rent, and ongoing rent due thereafter. *See, e.g., In re Cont'l Airlines, Inc.*, 154 B.R. 176, 180 (Bankr. D. Del. 1993) (finding that adequate protection is available under section 363(e) for a decrease in value due to the use, sale, **or lease** of an entity's interest in property); *In re P.J. Clarke's Rest. Corp.*, 265 B.R. 392, 404 (Bankr. S.D.N.Y. 2001) (providing that a "landlord's right to adequate protection seems to follow clearly from the language of section 363(e)").

## Takeaway

- After a debtor enters chapter 11, it receives the benefit of the automatic stay, meaning its landlords may not use the courts to enforce their claims against the debtor to (1) collect past due, prepetition rent payments and/or (2) evict the debtor.
- At the same time, section 365(d)(3) of the Bankruptcy Code requires the debtor to pay rent to its landlords that becomes due after it files for bankruptcy – i.e. postpetition rent payments.
- Hypo: In September 2020, a debtor files for chapter 11. At the time of the petition, debtor is behind on its rent payments (assume it hasn't paid rent in 2 months). Once the debtor has filed for chapter 11, under the automatic stay, a landlord may not enforce its claim for the 2 months of past due rent. However, Section 365(d)(3) requires the debtor to make postpetition rent payments.

## Possible Consequences For Debtor Failure to Timely Perform Postpetition Obligations

- Lift of the automatic stay
- Conversion to chapter 7
- Dismissal of the case
- Appointment of a chapter 11 trustee
  
- *But see COVID-19...*

## Covid-19 Defenses to Postpetition Performance under a Lease

- Bankruptcy Code provisions:
  - Equitable Powers of the Bankruptcy Court: 11 U.S.C. § 105
  - Interpretation of 11 U.S.C. § 365(d)(3)
  - Suspension: 11 U.S.C. § 305
- State law defenses to payment:
  - Force Majeure Clauses
  - Impossibility/Frustration of Purpose
- Backdrop of Covid-19 State directives protecting commercial tenants.



## 11 U.S. Code § 105. Power of court

- Bankruptcy Code section 105(a) provides courts with broad equitable power to issue “any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a).
- This equitable power reflects a crucial public policy charge upon bankruptcy courts: maximize value and maintain going concerns where able.
- However, this equitable power is limited as “[a] bankruptcy court may not contravene specific statutory provisions” of the Bankruptcy Code. *Law v. Siegel*, 571 U.S. 415, 421-22 (2014).

## Recent chapter 11 cases: debtors appeal to court's equitable powers under section 105 to defer rent payments

- **Pier 1 Imports, Inc.:** filed for chapter 11 on February 17, 2020 in Virginia
- **Craftworks Parent, LLC:** Filed for chapter 11 on March 3, 2020 in Delaware
- **Modell's Sporting Goods, Inc.:** filed for chapter 11 on March 11, 2020 in New Jersey
- Scenario:
  - In Pier 1, Craftworks, and Modell's, the debtors filed for bankruptcy shortly before the Covid-19 outbreak and subsequent state shutdown orders. Following the shutdown, each debtor requested relief from the bankruptcy court under bankruptcy code section 105(a) that included deferring the payment of postpetition rent beyond 60 days from the petition date.
- Issue: granting a deferral of postpetition rent for longer than 60 days conflicts with the statutory 60-day limit on deferral imposed by section 365(d)(3).

## *In re Pier 1 Imports, Inc., No. 20-30805 (KRH) (Bankr. E.D. Va, 2020)*

- **Pier 1's plan:** pursue a going concern sale and continue its previously announced restructuring efforts, which included permanently closing hundreds of stores.
- **Covid-19 shutdown orders:** beginning in early March, in response to COVID-19, States issue shutdown orders requiring Pier 1 stores to shutter their operations completely.
  - Result: Pier 1's operating revenues plummet and are insufficient to pay for its postpetition expenses (including lease obligations).
- **Pier 1 requests emergency relief under section 105 (March 31, 2020):**
  - (1) the debtors would defer payment of non-critical expenses (including postpetition rent payments to landlords) and (2) the parties would abide by temporary procedures designed to reduce administrative costs (including adjourning all hearings on motions seeking stay relief, payment, or to compel rejection or assumption of contracts or leases)
- **Court grants requested relief in over the objections of landlords.**
  - **Significantly, court defers rent past the 60 day limit of section 365(d)(3).**
- **Pier 1 Court issued subsequent opinion in support of the relief granted (Judge Huenneckens):**
  - Court focused on practical realities, seeking to effect the objective of the chapter 11 process and avoid a destructive liquidation process.
  - “[t]here is no feasible alternative to the relief sought in the motion. The debtors cannot operate as a going concern and produce the revenue to pay rent because they have been ordered to close their business. [...] Any liquidation efforts would be ineffective and potentially squander assets that could otherwise be administered for the benefit of all creditors.” See *In re Pier 1 Imports, Inc., No. 20-30805 (KRH) (Bankr. E.D. Va., 2020)* [Dkt. No. 637, May 10, 2020].

*In re Pier 1 Imports, Inc., No. 20-30805 (KRH) (Bankr. E.D. Va, 2020)*  
(Cont.)

- **Issue in *Pier 1*:** does section 365(d)(3) merely provide a landlord an administrative expense claim for the postpetition use of its premises, or something more?
  - Does the right to an administrative expense claim sufficiently protect the landlords?
  - Many courts have strictly construed section 365(d)(3) to provide an additional protection for landlords, meaning that landlords are entitled to immediate payment of postpetition rent when due, subject only to the 60-day grace period for cause. *See, e.g., In re Pudgie's Dev. of NY*, 202 B.R. 832, 836 (Bankr. S.D.N.Y. 1996).
- ***Pier 1* Opinion:**
  - (1) Postpetition rent should be treated as any other administrative claim – i.e. section 365(d)(3) did not create an independent obligation requiring immediate payment.
  - (2) Adequate protection. The landlords received adequate protection of their claims for postpetition rent, since the *Pier 1* debtor *continued to pay insurance and utilities, and other incidental payments*.

## *In re CraftWorks Parent, LLC, No. 20-10475 (BLS) (Bankr. D. Del.)*

- Craftworks, owner and franchisor of several restaurant chains (including Logan’s Roadhouse and Old Chicago Pizza and Taproom), filed for chapter 11 on March 3, 2020 in Delaware.
- **Craftworks’ plan:**
  - Conduct section 363 going concern sale and reorganize around a smaller base of key stores.
  - Heading into chapter 11, Craftworks’ secured lenders were willing to provide DIP financing.
- **Covid-19 shutdown orders:** As a result of the shutdown, Craftworks’ restaurants are forced to shutter, and similar to Pier 1, its operating revenues become severely limited.
- **Craftworks’ request for emergency relief under section 105:**
  - As part of the Craftworks’ request for a final DIP financing order, the debtor proposed pursuant to section 105 to pay only “critical expenses” (which did not include postpetition rent payments) for six weeks.
  - The court agreed over objections from the landlords.

*In re Modell's Sporting Goods, Inc., No. 20-14179 (VFP)*  
**(Bankr. D. N.J., 2020)**

- **Modell's plan:** liquidate its inventory by conducting Going Out of Business sales of lender collateral in its stores.
- **Covid-19 shutdown orders:** as a result of the shutdown orders, (1) Modell's is unable to conduct its Going Out of Business sales in its stores, and (2) its operating revenues are severely limited.
- **Modell's request for emergency relief**
  - Requested deferral of postpetition rent payments beyond the 60 day period.
  - Modell's requested relief under both sections 105 (power of court) and 305 (suspension) and threatened to bring actions for reduction of rent.
  - Landlords concerned about administrative insolvency for accrual of rent.
- **The court grants relief requested (though without issuing a written opinion)**
  - Directs debtor, landlords and lender to mediation to negotiate resolution that takes into account adequate protection needs and force majeure/impossibility arguments. Court said everyone had to share risk/pain.
  - Advises that would still entertain lift stay motions from any landlord who came to court with a willing new tenant in hand.

## 11 U.S. Code § 305. Suspension

- 11 U.S.C. § 305(a) provides in pertinent part that “[t]he court, after notice and a hearing, may dismiss a case under this title, or *may suspend all proceedings in a case* under this title, at any time if . . . (1) the interests of creditors and the debtor would be better served by such dismissal or suspension. . . .” Section 305(c) further provides that a dismissal or suspension order is only subject to one level of appellate review (the district courts in most circuits).
- Section 305 is typically used for abstention doctrine purposes and there is very little case law on suspension.
- Suspension was a leading argument in Modell’s.
- What is the meaning of “may suspend all proceedings in a case?” Landlords argued:
  - “All” means “all.” It cannot mean enforcement of the automatic stay on landlords while suspending the obligation to pay landlords for postpetition use, i.e., it cannot be what amounts to a partial suspension to be used as a sword and a shield.
  - “Proceedings” does not mean the bankruptcy case itself, but adversary proceedings and perhaps certain types of motion practice.
- Other concerns:
  - Limited appellate rights means a limited check on the bankruptcy court for potential abuse of the statute.

## *Bread and Butter Concepts, LLC, No. 19-22400 (Bankr. D. Ks.)*

- Bread and Butter Concepts, owner and operator of a group of restaurants in the Kansas City area, filed for chapter 11 on November 9, 2019 in Kansas.
- **Covid-19:** On March 17, 2020, Bread and Butter and all other area restaurants forced to shutter.
- **Bread and Butter filed motion for emergency relief (April 22, 2020)**
  - Relief requested: (1) temporary cessation of “non-critical payments”; (2) adjourning certain motions and applications for payment; (3) extending deadlines to assume or leases; (4) deferring postpetition rent payments.
  - Bread and Butter sought relief under several theories:
    - **section 105 (power of court);**
    - **section 305 (suspension);**
    - **force majeure clauses, frustration of purpose, and others.**
- **Court granted relief on basis of section 105 equitable powers**
  - Cited to *Pier 1*, stating that “no reasonable alternative” exists and the relief sought offers “a short-term allocation of those scarce resources to meet immediate needs and preserve the value of the Debtors estates for all creditor constituencies.”
  - “Section 105(a) is understood as providing courts with discretion to accommodate the unique facts of a case consistent with the policies or directives set by the other applicable substantive provisions of the Bankruptcy Code.” *In re: Bread and Butter Concepts, LLC, No. 19-22400 (Bankr. D. Ks.)* [May 15, 2020].
  - Note: Unlike *Pier 1*, *Craftworks* and *Modell’s* who filed shortly before the pandemic, Bread and Butter had been in chapter 11 for over 4 months by the time they requested the emergency relief.



## State Law Defenses to Payment of Postpetition Rent

- Terms of the lease: Force Majeure clauses
  - (Hitz Restaurant Group, Chuck E. Cheese)
- Impossibility / Frustration of Purpose
  - (In re Edison Price Lighting, Chuck E. Cheese)
- **Relation to section 365(d)(3):**
  - Section 365(d)(3) provides in pertinent part: “The trustee shall timely perform all the *obligations* of the debtor ... *arising* from and after the order for relief *under any unexpired lease of nonresidential real property*, until such lease is assumed or rejected...”
  - Those “obligations” that the debtor must perform follow from the terms of the lease— including the state law controlling the interpretation of the lease.
  - Result: a defense to payment under the terms of the leases or under state law excuses the requirement to pay rent under section 365(d)(3).

## *In re Hitz Restaurant Group., No. 20-05012, 2020 WL 2924523* (Bankr. N.D. Ill.)

- Hitz Restaurant Group filed for chapter 11 on February 24, 2020 in Illinois.
- **On March 16, 2020, Illinois Governor Pritzker issued shutdown order:**
  - “All businesses in the State of Illinois that offer food or beverages for on-premises consumption – including restaurants, bars, grocery stores, and food halls – must suspend service for and may not permit on-premises consumption.”
  - Note: the shutdown order provides that restaurants are still permitted to serve customers via take-out and delivery.
- **Hitz Force Majeure Argument**: force majeure clause in its leases excuses its obligation to pay rent during those months.
  - **The Force Majeure clause**: “Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this 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.”
- **Opinion (June 3, 2020)**: Beginning on March 16, 2020, the force majeure clause was triggered by the shutdown orders because they constituted “governmental action” and “orders of government” as contemplated by the clause.
  - **Partial Rent Abatement**: Since the shutdown order did not require the outright closure of the business (Hitz could still provide takeout and delivery), Hitz’s obligation to pay rent should be abated “in proportion to its reduced ability to generate revenue due to the executive order.” See *In re Hitz Rest. Grp.*, Case No. 20-05012, 2020 WL 2924523 (Bankr. N.D. Ill. June 3, 2020).

## Caveat: Hitz Restaurant Group

- Typically, force majeure provisions in commercial leases contain language indicating that a force majeure event does not excuse the payment of rent.
- Sample clause:
  - “Whenever a period of time is herein prescribed for action to be taken by Landlord or Tenant, such party shall not be liable or responsible for, and there shall be excluded from the computation of any such period of time, any delays due to the default of the other party in its obligations under this lease, strikes, riots, acts of God, shortages of labor or materials, war, terrorist acts, governmental laws, regulations or restrictions or any other causes of any kind whatsoever which are beyond the reasonable control of such party (“Force Majeure Event”); **provided, however, that the foregoing shall not be applicable to any time period prescribed for the payment of any rental or any other monetary amount by Tenant**, except that the failure of Tenant to timely open the Demised Premises to the public for business shall be excused for the purposes of enforcing the payment of the additional amount in the third sentence of Section 3.2 and imposing the event of default in the fourth sentence of such Section 3.2 to the extent Tenant's Work in the Demised Premises is delayed by a Force Majeure Event.”
- The *Hitz* leases did not contain this language, which gave the bankruptcy court greater latitude than it otherwise would have had to fashion a remedy to the situation.

*In re Edison Price Lighting, Inc., No. 7:20-bk-22614*  
(Bankr. S.D.N.Y)

- Edison Price Lighting, Inc., a manufacturer of high-end architectural lighting operating out of a plant in Queens, New York, filed for chapter 11 on May 1, 2020 in New York.
- The debtor’s plant was closed pursuant to Governor Cuomo’s “New York State on PAUSE” order on March 20, 2020. The plant reopened on June 19 for cleaning and small-scale operations.
- **Edison Price argument based on Impossibility/Frustration Doctrine:**
  - Debtor’s obligation under section 365(d)(3) to pay postpetition rent is subject to a defense based on the New York common law Frustration of Purpose doctrine.
- **Ordered:**
  - Debtor excused from paying postpetition rent for the duration of the PAUSE orders.
  - Judge Drain found the Frustration of Purpose doctrine creates an implied covenant in contracts and leases, and can be raised by a tenant “where an unanticipated event occurred that could be shown to have precluded performance.”
  - As the PAUSE orders made it impossible for the debtor to realize “the very purpose of the lease, i.e. to occupy the premises and manufacture the goods there,” the defense would apply “at least for the duration of those orders.”

*In re: CEC Entertainment Inc. et al., No. 20-33163 (MI)*  
**(Bankr. S.D. Tex.) (Chuck E. Cheese)**

- Court granted Chuck E. Cheese (“CEC”) deferral of postpetition rent for 60 days pursuant to section 365(d)(3).
- **Subsequently, CEC moves for rent abatement (August 3, 2020) – Hearing Scheduled for September 21, 2020**
  - CEC Argument: Impossibility/Frustration of Purpose doctrine (common law doctrine recognized by majority of States)
    - As on-premise dining and entertainment are the core of CEC’s business, the shutdown orders prohibiting on-premise dining and entertainment have rendered the purpose of its leases meaningless. Accordingly, CEC should be excused from its obligations under the leases as the shutdown orders frustrated the purpose of leases.
  - CEC Argument: Force Majeure clauses in the leases
    - Force Majeure clause from standard CEC lease:
      - *“The time for performance by Landlord or Tenant of any term, provision or covenant of this Lease shall be deemed extended by any time lost due to delays resulting from acts of God, strikes, unavailability of building materials, civil riots, floods, severe and unusual weather conditions, material or labor restrictions by governmental authority and any other cause not within the reasonable control of Landlord or Tenant, as the case may be.”*
    - **CEC cites to Hitz opinion.** *In re Hitz Rest. Grp.*, Case No. 20-05012, 2020 WL 2924523 (Bankr. N.D. Ill. June 3, 2020).

*In re: CEC Entertainment Inc. et al., No. 20-33163 (MI)*  
**(Bankr. S.D. Tex.) (Chuck E. Cheese, cont.)**

- **Landlord objections to abatement:**

- Force Majeure clauses differ across leases
  - Not all of the CEC leases have the standard force majeure language – some specifically exclude the payment of money from the coverage of the force majeure clause.
- Limitation of Frustration of Purpose Doctrine
  - CEC Leases have not been totally frustrated. CEC is still operating its business at some of the leased locations – can still provide take-out and delivery.
  - The common law in California and Washington does not permit tenants simply to cease paying rent when operations are restricted; instead, tenants are required to mitigate their damages. Since CEC can still operate (although in a reduced capacity) under the shutdown, it can mitigate damages - implication that total abatement is not warranted.
  - In New York, when courts have found “frustration of purpose” under a lease for real property, they have suggested that cancellation of the lease is the appropriate remedy – not abatement.
- Anti-Force Majeure Provision in CA leases overrides application of CA Civil Code Force Majeure Rule
  - Certain CEC leases have an “Anti-Force Majeure Provision”: *“Inability to Perform. This Lease and the obligations of either party hereunder shall not be affected or impaired because either party is unable to fulfill any of its obligations hereunder or is delayed in doing so, if such inability or delay is caused by reasons of strike, labor troubles, acts of God, or any other cause beyond the reasonable control of either party.”*
  - At the same time, California Civil Code Section 1511 codifies the common law concept of Force Majeure.
  - Argument: Although the circumstances of Covid-19 fall within the scope of Section 1511 to excuse performance due to Force Majeure, the parties could contract to avoid the application of Section 1511.

# State Directives re: Commercial Tenants

- **New York** – Governor Cuomo issued Executive Orders:
  - (1) **Executive order 202.8** prohibits enforcing all evictions for any residential and commercial tenants.
  - (2) **Executive order 202.28, 202.48, and 202.57**:
    - Prohibits landlords from initiating or enforcing any commercial eviction for nonpayment of rent if the tenant is either: (a) eligible for unemployment benefits; or (b) otherwise facing financial hardship due to the COVID-19.
    - Prohibits landlords from demanding or collecting any late payment charge or fee for payments of rent owed from March 20, 2020 to September 20, 2020.
- **California** – Governor Newsom issued **Executive Order N-28-20** authorizing local governments to ban evictions for residential and commercial tenants based on nonpayment of rent resulting from a loss of income related to COVID-19. Subsequent executive orders extended Executive Order N-28-20 until September 30, 2020 (**Executive Order N-66-20 and Executive Order N-71-20**).
- **Illinois** – In April 2020, Governor Pritzker issued **Executive Orders No. 2020-30 and No. 2020-33**, staying the enforcement of nonresidential eviction orders. **Expired on August 22, 2020.**
- **Florida** – The Supreme Court of Florida issued **Order No. AOSC20-17**, effective March 18, 2020, suspending the requirement in Florida Rule of Civil Procedure 1.580(a) for court clerks to issue writs of possession (through which a landlord can evict tenants) through April 17, 2020. The court issued subsequent order No. AOSC20-23, extending the previous order until June 30, 2020. **Expired June 30, 2020.**

## Open Issues

- Does section 365(d)(3) create an independent obligation to pay all postpetition rent within 60 days of the filing? If not, what adequate protection rights may be afforded to landlords under sections 361 and 363(e) of the Bankruptcy Code for the postpetition use of their property?
- What do equity and public policy demand in extraordinary and uncharted circumstances and what are the practical and statutory limits on a bankruptcy court's power? Does it alter the equation if – as in the case of COVID-19 – state courts will not conduct eviction proceedings?
- Will we see more bankruptcy courts granting rent abatements based on state law defenses to payment, such as frustration of purpose?
  - Look to upcoming decision re: Chuck E. Cheese (*In re: CEC Entertainment Inc. et al.*, No. 20-33163 (MI) (Bankr. S.D. Tex.)).



# Bankruptcy & Financial Restructuring

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## Specialties

- Debt Restructuring
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- Foreign Insolvency

## Presenters



**Jonathan T. Koevary**

[jkoevary@olshanlaw.com](mailto:jkoevary@olshanlaw.com)

As a bankruptcy partner at Olshan, Jonathan handles bankruptcy and restructuring matters on behalf of creditors, debtors, landlords, and investors and bankruptcy-related litigation. He has a broad range of experience representing clients in all aspects of Chapter 11 and distressed situations, in-court and out-of-court restructurings, and bankruptcy and distressed related lawsuits that include avoidance action defense and the prosecution of successor liability cases and judgment enforcement. Jonathan also represents asset purchasers in distressed asset and M&A transactions, and provides company and credit-specific legal analysis to distressed investors and transactional advice to businesses dealing with distressed entities. Jonathan also has a Chapter 15 practice, representing international and domestic entities in the United States in relation to foreign insolvency proceedings.

Jonathan has been consistently named to New York Super Lawyers List since 2014.

Jonathan received his J.D. from Benjamin N. Cardozo School of Law and holds a B.A. from Columbia University.

## Presenters



**Robert C. Gagne**

[rgagne@olshanlaw.com](mailto:rgagne@olshanlaw.com)

Robert's practice focuses on corporate transactions, securities law, mergers and acquisitions and financings.

Robert received his J.D. from Columbia Law School and holds a B.A. from Brown University.

# Questions?

Contact:

**Jonathan T. Koevary**

**[jkoevary@olshanlaw.com](mailto:jkoevary@olshanlaw.com)**

**212.451.2265**

**Robert C. Gagne**

**[rgagne@olshanlaw.com](mailto:rgagne@olshanlaw.com)**

**212.451.2271**