

## COVID-19 AND COMMERCIAL LEASING CONCERNS

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### CORONAVIRUS (COVID-19) AND COMMERCIAL LEASING CONCERNS

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When attempting to determine what rights one may have under a commercial lease in the wake of the COVID-19 pandemic, the following lease concepts should be considered first and foremost:

Covenants of Continuous Operations. A covenant of continuous operations is an agreement in a lease whereby the tenant agrees to operate for a pre-determined number of days and hours. These covenants are typically found in retail leases.

- A tenant whose lease contains a covenant of continuous operations will likely be excused from the obligation to operate where prevented from doing so due to unforeseen events or circumstances. This is especially true where the lease contains a force majeure provision.
- Regardless of whether a lease contains a force majeure provision or other language excusing the tenant from operating, requiring a business with little or no customers to operate could lead to the demise of that business which is not in the landlord's or the tenant's long term interest. Therefore, landlords and tenants facing this dilemma are well served to reach an amicable resolution regardless of what the lease may provide.

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Force Majeure Provisions. A force majeure provision is a contract clause that excuses a party's performance of contractual obligations where performance is rendered impracticable or impossible due to unforeseen circumstances not the result of the party seeking the relief.

- Force majeure provisions in commercial leases do not typically excuse one from the obligation to pay rent, even where a force majeure event has occurred, and this interpretation has been largely upheld by the courts.
- Whether the COVID-19 pandemic qualifies as a force majeure event is not entirely clear. Force majeure provisions are narrowly interpreted by the courts. Therefore, the absence of "pandemic" or similar words could very well result in a conclusion that the COVID-19 pandemic does not constitute a force majeure event within the meaning of the contract.

Casualty Clauses. Casualty clauses in commercial leases outline the rights and obligations of the parties when the tenant's premises or the building in which the tenant's premises are situated suffers damage due to a fire or other casualty.

· Casualty clauses almost always afford the tenant some degree of rent abatement while the tenant is deprived of occupancy of the demised premises.

· Casualty clauses have largely been interpreted by the courts to apply to physical damage resulting from a fire, flood, earthquake or explosion. Rarely do they include language addressing things like pandemics. Therefore, given the courts' tendency to interpret casualty clauses, like all other commercial lease clauses, strictly, in the absence of specific language addressing a pandemic or similar event, courts are likely to conclude that the COVID-19 pandemic does not constitute a casualty.

Eminent Domain Provisions. Eminent domain refers to the power of the government to take private property in order to convert it to a public use.

· Due to the COVID-19 pandemic, many businesses have been forced to cease operations by governmental order. Tenants and property owners who suffer a taking by eminent domain are constitutionally entitled to just compensation. Therefore, businesses affected by governmental shut down orders may be inclined to argue that the shutdown amounts to a taking by eminent domain.

· To date, the federal and state governments have neither agreed to, nor have they been required by the courts to, compensate business owners under the doctrine of eminent domain due to governmentally-mandated shut downs orders. Given that business losses due to governmental shut downs precipitated by the COVID-19 pandemic will be in the billions of dollars, it is unlikely that state and federal governments will compensate business owners suffering losses due to governmental shut down orders in the absence of a court order mandating such compensation.

While society has suffered pandemics in the past, the severity of the COVID-19 pandemic, and the effects it will have on businesses and society in general, is unprecedented in modern times. Whether courts will interpret the aforementioned provisions as they have traditionally done remains to be seen. Governmental intervention will certainly be necessary to blunt the adverse effects of the COVID-19 pandemic on the economy and to sustain industries which are vital to the well-being of our society. The CARES Act, and state initiatives like it, have already begun to inject needed capital into the economy, provide debt relief, and fund other investments with the aim of aiding large and small businesses alike. As these programs continue to come on-line, new problem-solving means and methods, and likely different outcomes, will become available to commercial landlords and tenants. Being educated about these opportunities, taking advantage of them when appropriate, and engaging in thoughtful approaches are all things that commercial landlord and tenants can do to help to sustain their businesses during these turbulent times.

## **PROFESSIONALS**

Jonathan Grosser

## CAPABILITIES

Real Estate