

The Impact of COVID-19 on Commercial Leases

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The economic fallout from the COVID-19 pandemic has caused commercial landlord and tenants to grapple with difficult business decisions and legal questions concerning their relationship. Currently, Pennsylvania landlords have little ability to pursue legal claims against defaulting tenants. The Pennsylvania Supreme Court recognizes that “the economic consequences of the COVID-19 pandemic may cause individuals to suffer a loss of income which in turn may delay rent payments [and] mortgage-loan payments” and issued an Emergency Order on March 18, 2020 that, in part, prohibits officers of the Court from effectuating “eviction, ejection, or other displacement from a residence based upon the failure to make a rent, loan, or other similar payment.” This Order was extended to April 30th pursuant to the Supplemental Emergency Order issued by the Court on April 3, 2020, but may be continued. This Order, at this time, does not address commercial properties, but our firm will continue to monitor and update as needed.

Given these restrictions, landlords and tenants should consider how their respective leases allocated the risks associated with COVID-19, including interruptions in business operations. While landlords cannot currently have tenants evicted, they should consider what other legal remedies are available to them. Now is the time for parties to delve into their leases to determine how to protect their interests. This post focuses on some key lease provisions landlords and tenants should review as they navigate these uncertain times.

- Force majeure clauses, which excuse a party’s performance if an unforeseeable event beyond the non-performing party’s control prevents it from being able to perform its duties under the contract. While force majeure provisions applies in some cases, it is not likely applicable under commercial leases. Our firm has been monitoring if COVID-19 will fall under force majeure clauses.
- Co-tenancy Provisions: A co-tenancy provision allows tenants to pay a reduced rent or even terminate the lease. Generally, the provision is triggered when a multi-tenant building is unable to meet a specific occupancy threshold. For example, a lease for a tenant in a shopping mall may have a co-tenancy provision included where if a certain percentage of the other tenants close, the rent will be reduced.
- “Go-Dark” provisions: Many leases contain “go-dark” provisions that permit tenants to discontinue business operations so long as the tenant continues to pay rent under the lease. However, the different parties will have varying concerns over these provisions. For example, a landlord, may have negotiated recapture rights that permits the landlord to terminate the lease after the tenant has “gone dark.” Tenants and borrowers may have negotiated flexible go-dark covenants that may be beneficial while the business is mandatorily shut down due to COVID-19 related orders. In contrast, some commercial leases have continuous operations clauses. Continuous operations clauses cannot require a tenant to open if doing so violates laws, ordinance or orders

Additionally, the following two examples of lease provisions may come into play, but are likely to be a difficult burden for tenants to exercise, as these provisions would only apply in specific and limited circumstances.

- Casualty Provisions: While casualty provisions typically only address the physical premises, it is unclear whether a tenant can argue that potential contamination of the premises due to COVID-19 will constitute physical impairment.
- Constructive Eviction/Covenant of Quiet Enjoyment: Lastly, tenants may invoke the constructive eviction doctrine or claim that the landlord breached the implied covenant of quiet enjoyment for failing to adequately protect tenants. However, this argument is likely only viable if landlords were explicitly negligent with respect to ensuring the health and welfare of the building’s tenants.

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