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# The Rent Payment Crisis in the Face of the COVID-19 Pandemic



## FORCE MAJEURE CLAUSES AND PRACTICAL CONSIDERATIONS FOR COMMERCIAL LANDLORDS AND TENANTS

In the wake of the COVID-19 pandemic, commercial landlords and tenants are now in uncharted territory facing complete or partial shutdown of business operations as a result of governmental restrictions and preventative social distancing measures. Just how long this business interruption will last is still uncertain, leaving landlords and tenants scrambling to assess the damages and strategize on whether and how to enforce their rights. In these uncertain times, commercial landlords and tenants should carefully review their leases and, if needed, seek legal advice to ascertain their rights and obligations.

## **Force Majeure Clauses**

One of the ways commercial landlords and tenants may seek to protect themselves is by looking to the “force majeure” clauses in their leases. A force majeure clause is a contractual provision that addresses extraordinary events that are beyond the parties’ control. These clauses typically provide that, to the extent the force majeure event renders performance inadvisable, commercially impracticable, illegal, or impossible or results in a delay in performance, the affected party’s obligations to perform under a lease may be suspended temporarily or excused altogether.

Whether the COVID-19 pandemic or the resulting government shutdowns will constitute “force majeure” events depends on the specific language of the force majeure clause. Generally speaking, courts have historically interpreted force majeure clauses narrowly and will only excuse performance if the specific event is enumerated in the force majeure provision. Thus, if a force majeure clause specifically enumerates “outbreaks”, “pandemic”, “disease” or similar language, then the COVID-19 pandemic may qualify as a force majeure event. Similarly, government mandated closures or limitations of businesses would probably be covered under terms such as “governmental prohibition” or “governmental restriction” under a force majeure provision.

However, even if these events qualify as force majeure events, rent is still likely due. Typically, force majeure clauses excuse performance by the parties, not necessarily payment of rent. If the COVID-19 pandemic and resulting governmental shutdowns qualify as force majeure events under the terms of a specific lease, this may relieve the tenant or the landlord from performing certain obligations, such as providing access to the property or operating the property during specific hours or in specific ways. However, rent is still likely due, without reduction or abatement of any kind, unless the language of the force majeure clause specifically excuses payment of rent in such cases or another provision of the lease provides relief in such a scenario.

Similarly, the global economic downturn resulting from the COVID-19 pandemic and resulting financial hardship are also unlikely to excuse payment of rent under a force majeure clause (unless such clause specifically includes a party’s inability to meet its obligations due to a severe economic crisis in the definition of “force majeure”). Courts have held that even when the economic conditions are the product of a force majeure event, such financial hardship would not excuse performance if the party retained some level of control over its allocation of resources.

## **Some Creative Approaches That May Provide Short Term Relief**

We are living in a new reality and landlords and tenants are now faced with a difficult choice on what to do next. Regardless of what the specific language of the lease says, in deciding whether and how to enforce their rights, landlords and tenants should consider practical realities. It remains to be seen how or when the government and the courts will ultimately approach these issues. In these trying times, landlords and tenants should explore ways to minimize the damage and work together to find solutions to weather the storm.

There are some creative approaches that may provide short term relief for both landlords and tenants during this crisis:

**Review the leases.** Every lease is different and landlords and tenants should carefully review their leases for the specific language of force majeure clauses, rights to rent abatement, go dark provisions and other provisions that may be applicable during these difficult times.

**Do not forget your lender.** In assessing ways to minimize both landlord and tenant hardship, it is important to remember that lease amendments in many cases require the consent of the landlord's lender. Before entering into any lease amendment, landlords should review their loan documents and make sure to comply with any such conditions. It may also be worth considering whether the lender would be willing to defer payments due to a later date. There are also new guidelines which may allow landlords to reduce or suspend mortgage payments that could come into play, depending on the type of mortgage.

**Consider a rent reduction or rent deferment.** Temporary rent reductions or rent deferments could provide some much needed breathing room for tenants during this crisis. The amount of reduced or deferred rent could be paid back gradually during the remainder of the lease, or from monies received as rent relief from the government, or the lease could be extended to account for the months of reduced or deferred rent. In exchange for a rent reduction or deferment, landlords may wish to seek a personal guaranty of the tenant's principal. Any rent reduction or deferment should be set forth in a written agreement and the parties should be clear that any negotiations prior to a final written agreement are not binding. Landlords should be cautious that any agreement for rent reduction or deferment should be carefully drafted to ensure that general references to rent abatements/deferments do not unintentionally include a tenant's share of common areas and maintenance charges and real property taxes which are often referred to in leases as "additional rent".

**Look to the security deposit.** Another possible solution to ease the pain of landlords and tenants during the current COVID-19 pandemic is to look to apply the tenant's security deposit toward upcoming rent payments with the understanding from the tenant that the security deposit will need to be replenished once this crisis is over.

**Look to insurance coverage.** Landlords and tenants should review the specific terms of their policies. Business interruption insurance and rent loss insurance may not necessarily be available for pandemic outbreaks and there are likely to be hurdles to obtaining coverage based upon disruption from COVID-19. However, some states are considering legislation that would force insurers to pay COVID-19 business interruption claims, and both landlords and tenants should keep abreast of these developments.

*The issues described above are not intended to be an exhaustive list, and the situation continues to evolve. Smith, Gambrell & Russell, LLP's COVID-19 Task Force will continue to closely monitor the legal and business implications associated with the COVID-19 pandemic and will report on further developments.*