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## COVID-19 and Commercial Real Estate

Since the novel coronavirus disease SARS-CoV-2 or “COVID-19” was detected in Wuhan, China, confirmed cases have spread to more than 150 locations worldwide. On March 11, 2020, the World Health Organization designated COVID-19 as a pandemic, and two days later, the President of the United States declared the COVID-19 outbreak a national emergency.

States, cities and towns across the United States have begun widespread social distancing efforts designed to control the spread of COVID-19. The Centers for Disease Control and Prevention (CDC) has issued several rounds of guidance related to COVID-19. On March 17, 2020, the Mayor and Health Commissioner of the City of Philadelphia issued an order, among other things, temporarily prohibiting the operation of non-essential businesses in Philadelphia, and outlying counties in the Philadelphia region and elsewhere have similarly shuttered businesses. Other jurisdictions, such as Boston, have shut down construction projects. Many of our clients are wondering about the implications on the commercial real estate market.

Real estate owners, developers, and lenders are, no doubt, parties to various agreements – leases, construction contracts, loan agreements – that may excuse a party’s failure to perform certain contractual obligations in the event a so-called “force majeure event” has occurred. Force majeure events in these agreements can include any or all of the following: acts of God; hurricanes; earthquakes and other natural disasters; terrorism; government acts; labor strikes and lock-outs; and other events beyond the control of the parties. While some may include epidemics, pandemics and/or other national emergencies, in our experience, this has not been the norm. Finally, and generally speaking, payment obligations are not subject to force majeure, but other contractual provisions may be implicated (for example, a tenant’s right to abate rent if it cannot access its premises).

Unfortunately, there is no “one size fits all” rule for force majeure provisions, and these provisions must be reviewed and analyzed on a case-by-case basis. Courts, as a general rule, narrowly construe force majeure provisions, and the non-performing party has the burden of proof and must show a causal relationship between the event and the non-performance. Courts review the express contractual language to determine the parties’ intent, and any catch-all portion of a force majeure provision likely will be limited to events of the same kind and nature as the particular events mentioned. Courts will consider whether the alleged force majeure event was foreseeable, was beyond the non-performing party’s control, was due to any fault or negligence by the non-performing party, or whether the non-performing party took any action to perform the contract regardless of the force majeure event.

Whether COVID-19, or any travel ban, city-wide shutdown or quarantine or other mitigating measures, constitute a force majeure within the context of a particular contract

will depend on the express contractual language. If the applicable force majeure provision expressly includes epidemics or pandemics, then, the non-performing party likely would be excused from performing its non-monetary obligations under the agreement. On the other hand, if there is no express force majeure provision for epidemics or pandemics, then the party might avail itself of an expansive catch-all provision if the enumerated force majeure provisions are of a similar nature. In the absence of either an express reference to epidemics and pandemics, or a broad catch-all, we do not think a court would excuse a party's non-performance.

So, what can you do? Landlords, continue to maintain your properties in a clean and sanitary manner. Review your lease agreements to determine whether your tenant(s) have defenses to non-performance of their lease obligations. If you are currently fitting-out space for a tenant, consider whether your lease will excuse a late delivery. If you are forced to shut down a building – whether due to a governmental decree or a known exposure to COVID-19, then review your leases for any provisions related to a tenant's ability to abate rental payments as a result of not having access to the property. Finally, consider whether your business or rental interruption insurance is available to support cash flow.

Going forward, it is reasonable to expect that tenants would expand force majeure provisions to include epidemics and pandemics, similar to the rise of “terrorism” force majeure events in the wake of 9/11. Similarly, you may want to include express carve-outs to delivery obligations as a result of an epidemic or pandemic.

Lenders, review your loan documents to determine whether they excuse a borrower's non-performance or excuse construction or delivery delays. Review your loan files to ensure that mortgages are properly filed, and other collateral is properly secured, as the current crisis inevitably will lead to certain stresses in your portfolio. If you have only annual financial covenant testing (or no financial covenants), consider reaching out to your borrowers to determine interim impacts, rather than waiting until the end of the year. You should review the definition of “Material Adverse Effect” in your loan documents to determine whether the current crisis and its expected economic impact allow you to work now with your borrowers to lessen the overall negative impact on the loan.

Be proactive. Have open lines of communication. Above all, be safe.

If you have any questions or would like additional information regarding COVID-19 and how it might impact your commercial real estate transactions, please contact:



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