COVID-19: Frequently Asked Questions
Reviewing Small Business Lease and Mortgage Obligations

Business owners experiencing disruptions due to the state mandated closure of non-essential businesses may still be required to make payments under their commercial lease and mortgage agreements. Commercial real estate agreements vary, and may not contain provisions which will excuse a lessee or mortgagee from making payments during an event like COVID-19. Thus, it is essential for businesses to review the terms of their commercial real estate agreements to determine their obligations and potential remedies during COVID-19 business interruptions. Below is a list of some of the key questions to consider during such a review.

1. Does the agreement contain a force majeure provision?

Like other commercial contracts, real estate agreements often contain force majeure provisions, which may temporarily excuse a party from fulfilling its obligations, or “performing” under the terms of the agreement, due to any one or more specified events. Generally, the force majeure event preventing performance must be both out of the non-performing party’s control, and not foreseeable at the time the contract was entered into.

2. Does the force majeure provision cover an event like COVID-19?

Not all force majeure provisions are the same, and even if a real estate agreement contains such a provision, it might not cover an event like COVID-19. Some force majeure provisions use sweeping language such as “any event or circumstance beyond the reasonable control of the affected party”. A provision of this breadth would likely include an event like COVID-19. However, a more common provision would be “acts of god, fire, windstorm, hail and other matters beyond the reasonable control of the affected party.” Where a force majeure provision includes a list of events followed by a catch-all phrase, the provision will only capture events similar to “fire, windstorm and hail” and would not cover a pandemic such as COVID-19. In reading a force majeure provision, it may be helpful to look for events such as “disease”, “epidemic” or “pandemic”, which are more likely to cover an event like COVID-19.

3. Does the force majeure provision cover an event like governmental shutdown of non-essential businesses?

Beyond the event of COVID-19 itself, a force majeure provision may cover governmental action in response to the COVID-19 pandemic. If a business is affected by operational restrictions (hours limitations) or occupancy restrictions (banning large gatherings or limiting number of people in a store) a force majeure provision including language related to a government “mandate”, “quarantine”, “moratorium” or some other form of “exercise of policy power” may cover the governmental action in response to the COVID-19 pandemic.

4. Are payment obligations relieved under the force majeure provision?

If a real estate agreement contains a force majeure provision, it’s important to confirm that payment obligations are not excluded from coverage. Many commercial real estate agreements exclude missed payments from relief under a force majeure provision, and instead allow only for
non-performance of other conditions of the agreement. If payments are excluded from coverage, then the lessee or mortgagee is still obligated to make payments, even during a *force majeure* event.

5. What if there is no *force majeure* provision, or the provision does not cover payments, COVID-19, or government action?

If a real estate agreement doesn’t contain a provision excusing payments during an event like COVID-19, and a landlord or mortgagor sues for missed payments, the non-performing party may be able to raise the defenses of impossibility of performance or frustration of purpose. Under the defenses of impossibility of performance and frustration of purpose, the non-performing party must show that after the contract was made, performance became impracticable or substantially frustrated by the occurrence of an event that was outside of the party’s control, without the party’s fault, and the non-occurrence of the event was a basic assumption on which the contract was made. Both of these defenses can be difficult to prove in court, as the non-performing party must prove near complete frustration of purpose, or impossibility. It is not sufficient to show that performance has become temporarily, economically burdensome. [Please see the Contracts Q&A for a more complete discussion of these defenses].

Alternatively, a tenant may be able to terminate a commercial real estate agreement due to a “temporary taking” by the government. If the agreement contains a provision excusing performance in the event of condemnation, a business may be able to argue that the shutdown of non-essential business is a temporary taking. A temporary taking occurs when governmental action directly and immediately interferes with the enjoyment and use of private land. However, most leases limit tenant termination rights for condemnation to permanent takings, so it is important to read the agreement to determine whether the temporary closure would constitute a condemnation under the terms of the agreement.

6. None of the options above apply to the agreement, are there other options?

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law on March 27, 2020. The CARES Act expanded the Small Business Administration’s loan program, to provide new loan guarantees and subsidies to small businesses. Information on the Act and eligibility requirements can be found here: [https://www.mayerbrown.com/en/perspectives-events/publications/2020/03/small-business-loans-under-the-cares-act](https://www.mayerbrown.com/en/perspectives-events/publications/2020/03/small-business-loans-under-the-cares-act)

7. When can a commercial Tenant be evicted for failure to pay rent?

Illinois is a judicial eviction state, which means that when a Landlord wants to evict a Tenant, the Landlord must file an eviction lawsuit, obtain an order from a judge authorizing the eviction, and then have the county sheriff’s office enforce that order by evicting the Tenant. Absent a contrary provision in the Lease, when a Tenant has failed to pay the rent, a Landlord must send the Tenant a 5-day pre-suit notice informing the Tenant that rent is past due. Unless the lease says otherwise, if the Tenant pays all of the rent owed within the five-day period, then the lease violation is cured, and the Landlord cannot file a valid eviction lawsuit against the Tenant. However, many
commercial leases contain provisions that require a shorter or longer time period for the notice (such as 10 days or three days), or that waive the notice requirement entirely.

If a Tenant receives a pre-suit notice from the Landlord, the Tenant must read the notice carefully, to determine whether it contains the information required under Illinois law. Some of the key requirements of a pre-suit notice include: that the notice is in writing, informs the Tenant that the lease will be terminated unless payment is made, and it must state that “Only FULL PAYMENT of the rent demanded in this notice will waive the landlord's right to terminate the lease under this notice, unless the landlord agrees in writing to continue the lease in exchange for receiving partial payment.” A pre-suit notice that is missing required information, or is improperly served, can be grounds for dismissing an eviction lawsuit later on.

Once any required notice has been properly served, and any applicable notice period has expired, the Landlord will bring the eviction lawsuit in the circuit court for the county where the property is located by filing a summons and an eviction complaint. Once the eviction complaint has been filed, summonses will be issued and served on the Tenant and the Tenant must respond.

The Circuit Court of Cook County has announced that no orders for an eviction or foreclosure will be entered through May 18. The court will continue to monitor the pandemic and make more announcements as needed. This means that although a Landlord in Cook County will be unable to obtain an eviction order from a judge as required under Illinois law, the Landlord can still file an eviction lawsuit against a Tenant during this period and the Tenant must properly respond if served. Although the Cook County Circuit Court’s decision to refrain from entering eviction orders may delay eviction proceedings in the county, Illinois does not currently have any other mechanisms in place to protect commercial tenants from eviction due to unpaid rent.