

COVID-19 ISSUES AFFECTING COMMERCIAL LEASES

Landlord Response to Tenants' Request for Rent Relief (Scott Dibbs)

- Many tenants (and, particularly, restaurant and other retail tenants) are requesting rent relief from landlords due to adverse economic conditions relating to the COVID-19 pandemic.
- In reviewing these requests, landlords are advised to request financial and other information and evaluate each tenant's situation on a case-by-case basis.
- Before granting rent relief or amending a tenant's lease, landlords are also advised to check their loan documents to confirm what, if any, lender approvals might be required.
- Some larger restaurant/retail tenants are notifying their landlords that they are ceasing rent payments for a period of one to four months (although one expects that many of these situations will ultimately turn into rent relief/restructuring negotiations).
- As a practical matter, current landlord options in the event of tenant defaults are very limited, with evictions effectively frozen in Florida (not to mention the potential public relations disaster that could result from taking aggressive action against a struggling tenant during a pandemic crisis).

Legal Issues Affecting Tenant's Right to Rent Abatement (Matt Chair)

- Commercial leases are unlikely to expressly allow for a tenant not to pay rent due to circumstances like COVID-19 or the resulting economic climate.
- When the current wave of COVID-19-related tenant rent relief requests are ultimately litigated, issues that may arise in the litigation are force majeure clauses and impossibility.
- There are few cases in Florida construing force majeure clauses. Courts construe them narrowly and generally hold that the event on which the party is relying must be specifically listed in the provision.
- Impossibility is a fact-specific defense that may discharge an obligation if it becomes impossible to perform, neither party assumed the risk of impossibility, and neither party caused or could have prevented the cause of the impossibility.
- Courts have held that changed market conditions or financial circumstances generally do not support an impossibility defense.

COVID-19 and Insurance Coverages (Rick Eckhard)

Business Interruption Insurance (BI)

Business Interruption insurance is generally an add-on to a commercial property policy. Commercial property policies cover direct physical loss or damage to a property caused by an “insured peril.” Similarly, the Business Interruption add-on to a commercial property policy covers the insured’s lost profits resulting from a “direct physical loss or damage” to the insured’s premises caused by an “insured peril.”

- The requirement that the disruption to business income arise from physical damage to property will likely limit the application of business interruption policies to COVID-19 exposure.
- It is important to note that ISO policy forms do not define what constitutes “direct physical loss of or damage to” property. You could certainly argue that damage caused by the presence of a virus suffices.
- There are a couple of cases in which the court focused on loss of utility as effectively satisfying the requirement of physical damage to property, but none in Florida.
- Another impediment to recovery under business interruption insurance is the addition, in response to the bird flu epidemic 15 years ago, of an express exclusion under commercial property policies for loss due to virus or bacteria, but not all policies include that exclusion.

Civil Authority Coverage:

Business Interruption insurance typically includes Civil Authority Coverage, which covers business income losses resulting from a public authority restricting the use of or access to an insured’s premises. However, as with business interruption coverage, “Civil Authority” coverage often requires that the underlying civil order or restriction directly result from physical damage to the property (e.g., an earthquake’s damages a building’s foundation to such an extent that a public agency deems it unsafe and prohibits access).

Contingent Business Interruption Insurance (CBI):

“Contingent business interruption” or “Supply chain” coverage is available to cover losses caused not by the physical damage at the covered property, but rather by more remote supply chain disruptions. It applies to losses suffered by third parties on whom the policyholder’s business is dependent. CBI coverage is generally but not always triggered when a supplier or key customer suffers a direct physical loss, which disrupts the business operations of the insured.

Event Cancellation Insurance:

Event cancellation insurance is a specialized policy that protects an insured from financial losses such as lost ticket sales, out-of-pocket expenses, contractual guarantees, and reimbursement to attendees. As with business-interruption policies, the extent of coverage is dependent on the specific language used; in this case the issue is whether the COVID-19 pandemic falls within the policy definition of a “covered event.” “Covered events” typically include the physical, practical, or legal inability to hold an event as planned, including inability as a result of a government order.

Comprehensive General Liability Insurance (CGL)

CGL policies generally cover bodily injury and property damage to third parties on the insured’s premises. CGL insurance will likely respond to allegations that an insured caused a guest, customer or third party harm by failing to exercise reasonable care in implementing, enforcing or warning of the risk of potential exposure to the coronavirus.

Workers Compensation Insurance (WC)

Workers' compensation policies cover employees for injuries "arising out of or in the course of employment." Usually, losses related to "occupational diseases" are covered under workers' compensation policies, while "ordinary diseases of life" (i.e., those that are not work-related) are excluded. There is an exception to that exclusion where the employee establishes a direct causal connection to the workplace. Such causal connection may exist for first responders, laboratory workers and grocery store employees who are required to work in the presence of the virus.

Directors and Officers Insurance (D&O)

D&O policies generally cover claims against directors and officers for breach of their fiduciary duties. If a third party brings a claim against the directors and officers of a company for breach of their fiduciary duties related to the coronavirus, a D&O policy could potentially respond.

Pollution Liability Insurance:

Whether Pollution Liability Insurance policy provides coverage for COVID-19 related exposures depends on whether the policy language deems a virus a "pollutant" and whether transmission of such virus constitutes "release" of the virus/pollutant.

NEW POLICIES and DEVELOPMENTS:

The insurance industry is responding quickly to this pandemic. In early February 2020, ISO introduced new endorsement forms that provide coverage for actual loss of business income and extra expenses caused by a government order closing the insured's premises.

10 days ago, legislators in New Jersey introduced a bill that would force certain insurance companies to provide coverage for business interruption notwithstanding the virus exclusion. The bill was put on hold, in part because of concerns regarding its constitutionality.

TAKE-AWAY: The big take-away for us as real estate lawyers is to carefully review the language of our clients' policies and to work with an experienced insurance consultant.

Landlord Responses to Reported Infected Occupant and Building Closure Issues (Art Menor)

- Many Leases contain specific provisions permitting the Landlord to close the Building in the event of emergency type situations. In some cases, Buildings may be required to close by governmental action.
- The Orders that have been issued to date by the Governor, Counties, and Cities apply to businesses (Tenants) and arguably not to Buildings (Landlords). In addition, the lists of essential or critical services that may continue to operate are broad and often Buildings have one or more of those uses in them. If an essential or critical service exists in the Building, the Building should be able to remain open.
- Most Landlords will want to keep their Buildings open for as long as possible to mitigate the risk of Tenant claims for rent relief.
- If a Landlord learns of a Building occupant testing positive for COVID-19 they should advise all other occupants of the Building and deep clean/disinfect the affected space in order to mitigate liability exposure.

- If a Tenant wants to remain in occupancy of space in which there has been an infected occupant, the Landlord should require a waiver and indemnification from the Tenant if they decide to let them remain in occupancy.