

COVID-19 IMPACTS ON LANDLORD- TENANT RELATIONSHIP

Consideration of Relevant Lease
Provisions

COVID-19 Has a Significant Impact on Leases

- Problems caused by COVID-19 and Response
 - Lack of Income and Ability to Pay
 - Loss of Business Revenues
 - Loss of Jobs and Underemployment
 - Stay-at-Home Mandates Lead to Unutilized Commercial Properties
- Impact to Fundamental Lease Rights and Obligations
 - Landlord: Obligation to Provide Quiet Enjoyment to Premises in Exchange for Receipt of Rent
 - Tenant: Right to Receive Quiet Enjoyment and Use of Premises in Exchange for Payment of Rent

How to Resolve Tension between Landlord and Tenant

- Pre-Existing Legal Framework
 - Contractual Lease Terms
 - Statutes
 - Common Law / Case Law
- New Legislation
- Future Litigation

Importance of Considering Lease Provisions

- Limitations of Statutory Framework
 - Statutes only cover a limited number of issues
 - Generally applies only to residential leases
 - Commercial leases are more open to negotiation between parties
- Lease provisions generally control unless contrary to law or public policy

Common Lease Provisions

- Damage or Destruction – Has the COVID-19 Pandemic Damaged or Destroyed the Premises?

Damage or Destruction – Cont.

- AIR Paragraph 9.6(a)
 - Provides for Abatement of Rent
 - Requires Damage or a Hazardous Substance Condition
 - Does COVID-19 Virus Exist at the Premises?
 - Has COVID-19 Virus Damaged the Premises or Its Improvements?
 - Does COVID-19 Qualify as a Hazardous Substance?
 - Meets technical terms of definition
 - However, definition suggests a manufactured product and COVID-19 is not within the scope of examples
 - Limited to Rental Value Insurance Proceeds
 - Potential Obligation of “Insuring Party” to Cover COVID-19 Damages

Damage or Destruction – Cont.

- Excerpts from AIR Paragraph 9.6(a)

*“In the event of Premises Partial Damage or Premises Total Destruction or a Hazardous Substance Condition for which Lessee is not responsible under this Lease, **the Rent payable by Lessee for the period required for the repair, remediation or restoration of such damage shall be abated** in proportion to the degree to which Lessee’s use of the Premises is impaired, **but not to exceed the proceeds received from the Rental Value Insurance.**”*

Damage or Destruction – Cont.

- Relevant Definitions
 - Paragraph 9.1(a) – “Premises Partial Damage” defined as “**damage or destruction to the improvements on the Premises**, other than Lessee Owned Alterations and Utility Installations, **which can reasonably be repaired in 6 months or less**”
 - Paragraph 9.1(b) – “Premises Total Destruction” defined as “**damage or destruction to the Premises**, other than Lessee Owned Alterations and Utility Installations and Trade Fixtures, **which cannot reasonably be repaired in 6 months or less**”
 - Paragraph 9.1(e) – “Hazardous Substance Condition” defined as “the occurrence or discovery of a condition involving **the presence of, or a contamination by, a Hazardous Substance**, in, on, or under the Premises which requires restoration.”
 - Paragraph 6.2(a) – “Hazardous Substance” defined as “any product, **substance**, or waste whose presence, use, manufacture, disposal, transportation, or **release**, either by itself or in combination with other materials expected to be on the Premises, is either: (i) **potentially injurious to the public health, safety or welfare, the environment or the Premises**, (ii) regulated or monitored by any governmental authority, or (iii) a basis for potential liability of Lessor to any governmental agency or third party under any applicable statute or common law theory. Hazardous Substances shall include, but not be limited to, hydrocarbons, petroleum, gasoline, and/or crude oil or any products, by-products or fractions thereof.”

Damage or Destruction – Cont.

- Relevant Definitions – Cont.
 - Paragraph 9.1(c) – “Insured Loss” defined as “damage or destruction to improvements on the Premises . . . which was ***caused by an event required to be covered by the insurance described in Paragraph 8.3(a)***” Paragraph 8.3(a) requires the “Insuring Party” to obtain and keep in force a policy or policies in an amount equal to the full insurable replacement cost of the Premises (but in no event more than the commercially reasonable and available insurable value thereof) ***insuring against all risks of direct physical loss or damage*** (except the perils of flood and/or earthquake unless required by a Lender).
- AIR Paragraph 8.3(b) requires the “Insuring Party” to “obtain and keep in force a policy or policies in the name of Lessor with loss payable to Lessor and any Lender, ***insuring the loss of the full Rent*** for one year with an extended period of indemnity for an additional 180 days (“Rental Value Insurance”).”

Damage or Destruction – Cont.

- CAR Leases
 - Commercial Lease
 - Raises Similar Issues to AIR Lease
 - Remedies Somewhat Different from AIR Lease
 - Residential Lease
 - Damage must render the premises uninhabitable
 - Tenant is still occupying premises

Damage or Destruction – Cont.

- Excerpts from CAR Commercial Lease Paragraph 26

“If, by no fault of Tenant, **Premises are totally or partially damaged or destroyed** by fire, earthquake, accident **or other casualty** . . . Rent shall be abated as of the date of damage. The abated amount shall be the current monthly Base Rent prorated on a 30-day basis. **If this agreement is not terminated, and the damage is not repaired**, then **Rent shall be reduced** based on the extent to which the damage interferes with Tenant’s reasonable use of the Premises.”

- Excerpts from CAR Residential Lease Paragraph 28

“If, by no fault of Tenant, **Premises are totally or partially damaged or destroyed** by fire, earthquake, accident **or other casualty** that render Premises totally or partially uninhabitable . . . **Rent shall be abated** as of the date Premises become totally or partially uninhabitable. The abated amount shall be the current monthly Rent prorated on a 30-day period. **If the Agreement is not terminated, Landlord shall promptly repair the damage**, and Rent shall be reduced based on the extent to which the damage interferes with Tenant’s reasonable use of Premises.”

Common Lease Provisions – Cont.

- Force Majeure – Does COVID-19 Pandemic Qualify as an Unanticipated Event Beyond the Parties' Control that Relieves the Performance of Lease Obligations?
 - Is Either Party Prevented from Performing by COVID-19?
 - Tenant can still pay rent
 - Premises are still available for use
 - Do premises meet condition required by lease?
 - Are premises *uninhabitable*?
 - Obligation to Pay Rent Often Not Excused

Force Majeure – Cont.

- AIR Lease – No Force Majeure Provision
- CAR Leases – No Force Majeure Provision
- Sample Lease Provision

“If either party is ***prevented from performing any obligation*** hereunder by any strike, ***act of God***, war, terrorist act, shortage of labor or materials, governmental action, civil commotion ***or other cause beyond such party’s reasonable control (“Force Majeure”)***, such obligation shall be excused during (and any time period for the performance of such obligation shall be extended by) the period of such prevention; provided, however, that ***this Section shall not*** (a) permit Tenant to hold over in the Premises after the expiration or earlier termination hereof, or (b) ***excuse (or extend any time period for the performance of)*** (i) ***any obligation to remit money*** or deliver credit enhancement, or (ii) any of Tenant’s obligations whose breach would interfere with another occupant’s use, occupancy or enjoyment of its premises or the Project or result in any liability on the part of any Landlord Party.”

Common Lease Provisions – Cont.

- Insurance – Are Insurance Proceeds Available to Cover the Parties' Losses Attributable to the COVID-19 Pandemic?
 - Does Not Impact Parties' Underlying Lease Obligations
 - Provides an Alternative Source of Funds to Protect Parties from Loss

Insurance – Cont.

- AIR Paragraph 8.4(b)

“Lessee shall obtain and maintain *loss of income* and *extra expense insurance* in amounts as will reimburse Lessee for direct or indirect loss of earnings ***attributable to all perils commonly insured against by prudent lessees*** in the business of Lessee ***or attributable to prevention of access to the Premises as a result of such perils.***”

- Requires Tenant to Obtain Insurance
- Questions
 - Is COVID-19 a Commonly Insured Peril?
 - Do Insurers Cover COVID-19 Losses?

Insurance – Cont.

- CAR Leases

- Commercial Lease Paragraph 29

“Tenant is advised to carry business interruption insurance in an amount at least sufficient to cover Tenant’s complete rental obligation to Landlord. ***Landlord is advised*** to obtain a policy of rental loss insurance. Both Landlord and Tenant ***release each other***, and ***waive their respective rights to subrogation*** against each other, ***for loss or damage covered by insurance.***”

- Residential Lease Paragraph 29.A

“Tenant’s, Guest’s, invitees or licensee’s personal property and vehicles are not insured by Landlord, Manager or, if applicable, HOA, against loss or damage due to fire, theft, vandalism, rain water, criminal or negligent acts of others, ***or any other cause***. **Tenant is advised to carry Tenant’s own insurance (renter’s insurance) to protect Tenant from any such loss or damage.**”

- Parties Merely “Advised” to Obtain Insurance – No Requirement
- No Rights under Other Party’s Insurance
 - Commercial Lease – Rights Released and Waived
 - Residential Lease - No Coverage from Any Cause

Common Lease Provisions – Cont.

- Condemnation – Do Government Shut-Down or Social Distancing Orders Intended to Fight the Spread of COVID-19 Represent a Condemnation of the Premises?
 - Exercise of Police Powers Generally Not Considered a Taking
 - Nature of Recourse
 - Basic recourse is against government entity
 - However, if premises are “taken”, does rent obligation continue?
 - Consider Remedy under Lease
 - Consider Lease Allocation of Condemnation Proceeds

Condemnation – Cont.

- AIR Paragraph 14

“If the Premises or any portion thereof ***are taken under the power of eminent domain or sold under the threat of the exercise of said power*** (collectively “***Condemnation***”), ***this Lease shall terminate*** as to the part taken *as of the date the condemning authority takes title or possession*, whichever first occurs. If more than 10% of the Building, or more than 25% of that portion of the Premises not occupied by any building is taken by Condemnation, Lessee may . . . terminate this Lease *as of the date the condemning authority takes such possession*. If Lessee does not terminate this Lease . . . this Lease shall remain in full force and effect as to the portion of the Premises remaining, ***except that the Base Rent shall be reduced in proportion to the reduction in utility of the Premises*** caused by such Condemnation. ***Condemnation awards and/or payments shall be the property of Lessor . . . provided, however, that the Lessee shall be entitled to any compensation paid by the condemn[e]r for Lessee’s relocation expenses, loss of business goodwill and/or Trade Fixtures***, without regard to whether or not this Lease is terminated pursuant to the provisions of this Paragraph. ***All Alterations and Utility Installations made to the Premises by Lessee, for purposes of Condemnation only, shall be considered the property of the Lessee and Lessee shall be entitled to any and all compensation which is payable therefor.***”

Condemnation – Cont.

- CAR Leases

- Commercial Lease Paragraph 28

“If all or a part of the Premises **is condemned for public use, either party may terminate this agreement as of the date possession is given to the condemner. All condemnation proceeds, exclusive of those allocated by the condemner to Tenant’s relocation costs and trade fixtures, belong to Landlord.**”

- Residential Lease – No Condemnation Provision

Common Lease Provisions – Cont.

- Express Allocation of Risk – Does the Lease Allocate Risks Associated with COVID-19 to Either Party?
 - Condition of Premises
 - See AIR Lease Paragraph 2
 - CAR Leases
 - Commercial – See Paragraphs 11 and 12
 - Residential – See Paragraph 10
 - Quiet Enjoyment
 - See AIR Paragraph 38 (“Subject to payment by Lessee of the Rent and performance of all of the covenants, conditions and provisions on Lessee’s part to be observed and performed under this Lease, ***Lessee shall have quiet possession and quiet enjoyment of the Premises during the term hereof.***”)
 - CAR Leases – No Quiet Enjoyment Provision

Common Lease Provisions – Cont.

- Other Relevant Provisions
 - Attorneys’ Fees (affects economic feasibility of litigating disputes)
 - AIR Lease Paragraph 31
 - CAR Leases
 - Commercial – Paragraph 41
 - Residential – Paragraph 36
 - Mediation / Arbitration (failure to mediate affects right to recover attorneys’ fees under CAR lease)
 - Commercial – Paragraph 35
 - Residential – Paragraph 35

Take-Away and Conclusion

- Standard Lease Provisions
 - Not Entirely Determinative
 - Provide Some Support to Both Landlord and Tenant Arguments
- Consider Drafting Opportunities for Clients through Modification of Standard Terms
- Similar Analysis Will Apply to Other Conditions and Events Beyond COVID-19

Potential Defenses to Tenant's Performance

- Contractual
 - Force Majeure
- Common Law
 - Commercial Frustration
 - Impossibility/Impracticability

Contractual - Force Majeure

- A force majeure clause may excuse or temporarily suspend a party's performance due to the occurrence of an unanticipated event beyond the control of the party.
- Is the Event Covered?
- What Relief is Provided?

NBA Collective Bargaining Agreement

- **Section 5. Termination by NBA/Force Majeure.** (a) “Force Majeure Event” shall mean the occurrence of any of the following events or conditions, provided that such event or condition either (i) makes it impossible for the NBA to perform its obligations under this Agreement, or (ii) frustrates the underlying purpose of this Agreement, or (iii) makes it economically impracticable for the NBA to perform its obligations under this Agreement: wars or war-like action (whether actual or threatened and whether conventional or other, including, but not limited to, chemical or biological wars or war-like action); sabotage, terrorism or threats of sabotage or terrorism; explosions; epidemics; weather or natural disasters, including, but not limited to, fires, floods, droughts, hurricanes, tornados, storms or earthquakes; and any governmental order or action (civil or military); provided, however, that none of the foregoing enumerated events or conditions is within the reasonable control of the NBA or an NBA Team.

Common Law: Impossibility/Impracticability

Three elements:

1. An unforeseeable event.
2. Outside of the parties' control.
3. Which renders performance impossible or impractical.

Common Law- Frustration of Purpose

- Allows a party to terminate a contract if, after the contract is executed, an intervening event makes the purpose of entering into the contract meaningless.
- Unlike force majeure or impossibility, the party does not need to show that performance under the contract is impossible.

Negotiation Trends

- **Rent Deferral** - Deferred payment of rent for a short period (e.g. 1 to 3 months). Tenant could repay the deferred amount via a promissory note, extend the lease term for length of deferral period or amortize deferred amount over the remaining lease term.
- **Rent Reduction** - Payment of reduced rent for a short period. The reduced rental amount could also be repaid by the tenant in the same manner as described for a rent deferral.
- **CAM Only Payments** - Payment of only tenant's share of common expenses, taxes and insurance for a short period with no payment of base rent.
- **Security Deposit Application** - Application of tenant's security deposit toward upcoming rent payments without a requirement to replenish the security deposit until the crisis abates.
- **Percentage Rent** – Reduce Base Rent to a percentage of profits.

Governmental Responses to the COVID-19 Pandemic

- Evictions
 - ◉ ~~The CARES Act~~ (eviction ban expired on July 24, 2020)
 - U.S. Dept. of Housing & Urban Development Mortgagee Letter 2020-07
 - Federal Housing Finance Agency 08/27/20 Announcement
 - U.S. Department of Veterans Affairs Circular 26-20-29
 - CDC Agency Order (85 FR 55292)
 - ◉ ~~Gov. Newsom's Executive Order N-37-20~~ (expired May 31, 2020)
 - Tenant, Homeowner, and Small Landlord Relief and Stabilization Act of 2020 (AB 3088)
 - Gov. Newsom's Executive Order N-28-20
 - Santa Barbara County's "Urgency Ordinance"
 - Santa Barbara City Ordinance 5941
- Unlawful Detainers
 - ◉ ~~Cal. Rule of Court—Emergency Rule 1~~ (repealed effective Sept. 2, 2020)
 - Tenant, Homeowner, and Small Landlord Relief and Stabilization Act of 2020 (AB 3088)
- Foreclosures
 - ◉ ~~The CARES Act~~ (foreclosure moratorium expired May 17, 2020)
 - U.S. Dept. of Housing & Urban Development Mortgagee Letter 2020-07
 - Federal Housing Finance Agency 08/27/20 Announcement
 - U.S. Department of Veterans Affairs Circular 26-20-30
 - ◉ ~~Cal. Rule of Court—Emergency Rule 2~~ (repealed effective Sept. 2, 2020)
- Property Taxes
 - Gov. Newsom's Executive Order N-61-20

Evictions - Federal

- ~~The CARES Act – 120 day moratorium on evictions if property owner’s mortgage is insured, guaranteed, supplemented, protected or assisted in any way by HUD, Fannie Mae, Freddie Mac, etc.~~
 - = **Expired on July 24, 2020.**
- HUD Mortgagee Letter 2020-27 – HUD instituted its own moratorium on evictions for borrowers with FHA-insured single-family mortgages through December 31, 2020.
 - Does not apply to FHA-insured mortgages secured by vacant or abandoned properties.
- FHFA Announcement – FHFA instituted its own moratorium on evictions for borrowers with loans owned by Fannie Mae or Freddie Mac through December 31, 2020.
 - Does not apply to Fannie Mae or Freddie Mac mortgages secured by vacant or abandoned properties.
- VA Circular 26-20-29 – VA instituted its own moratorium on evictions for borrowers with VA-guaranteed loans through December 31, 2020.

Evictions - Federal

- CDC Agency Order (85 FR 55292) – temporary halt on evictions to prevent spread of COVID-19.
 - The order is effective through Dec. 31, 2020.
 - Applies to residential properties and is available for tenants who earn no more than \$99,000 (or \$198,000 for a couple).
 - The tenant must provide notice to the landlord or the owner of the property under penalty of perjury that:
 - renter does not exceed the income threshold;
 - renter is unable to pay their full rental payment due to their having either lost income or having experienced “extraordinary” medical expenses;
 - renter has made their best effort to obtain available government assistance and will continue to do so;
 - renter will make every effort to make timely partial payments toward rent as their circumstances will allow; and
 - an eviction would likely render the renter either homeless or force them to live in a shared space without the ability to adhere to CDC social-distancing guidelines.
 - Violations of the CDC Order can result in criminal penalties - a fine of no more than \$100,000 if the violation does not result in a death or one year in jail, or both, or a fine of no more than \$250,000 if the violation results in a death or one year in jail, or both, or as otherwise provided by law.

Question

- Even though the eviction moratorium in the CARES Act expired, are there other eviction moratoria in place at the federal level?
- Please email responses to Lida Sideris at sblawdirector@gmail.com.

Evictions - State

- Executive Order N-37-20 – ~~moratorium on residential evictions for failure to pay rent if tenant has either: (1) lost their job or hours at work due to COVID-19; or (2) had to take care of children whose schools are closed or a family member with COVID-19.~~
= **Expired on May 31, 2020.**
- Tenant, Homeowner, and Small Landlord Relief and Stabilization Act of 2020 (AB 3088) - bans all evictions prior to February 1, 2021 for residential tenants who did not pay their rent between March 1, 2020 and January 31, 2021 because of a financial hardship caused by COVID-19.
 - If a Landlord desires to evict a tenant for nonpayment of rent, a landlord must first provide the tenant a 15-day notice to pay rent or quit, which must include prescribed language informing the tenant of its rights under the Act.
 - If the notice alleges failure to pay rent during the period from March 1, 2020 through August 31, 2020, the landlord may not evict the tenant if the tenant provides the landlord a declaration of hardship that states that the tenant has decreased income or increased expenses due to COVID-19.
 - If the notice alleges failure to pay rent during the period from September 1, 2020 through January 31, 2021, the landlord may not evict the tenant if the tenant provides the landlord a declaration of hardship and pays a “minimum payment” of at least 25% of the rent due by January 31, 2021.
 - The Act provides that local ordinances and laws enacted in response to the COVID-19 pandemic that were extended, expanded, renewed or adopted between August 19, 2020, and January 31, 2021, shall have no effect before February 1, 2021.

Evictions - State

- Executive Order N-28-20 – allows local governments to halt evictions for tenants impacted by the COVID-19 pandemic.
 - Applies to both residential and commercial tenancies.
 - Originally set to expire on May 31, 2020; initially extended until July 28, 2020 (N-66-20); and then further extended to **September 30, 2020** (N-71-20).

Evictions - Local

- SB County “Urgency Ordinance” – moratorium on evictions for failure to pay rent if the tenant demonstrates that the failure is directly related to a ‘substantial loss of income’ or substantial out-of-pocket medical expenses associated with the coronavirus pandemic or any local, state, or federal government response to the pandemic.
 - Only in effect until the expiration of Executive Order N-28-20, **currently set to expire September 30, 2020.**
 - Applies to both **commercial** and **residential** tenancies.
 - Tenant must provide written notice to the owner and must have documentation to demonstrate substantial loss of income/substantial out-of-pocket medical expenses.

Evictions - Local

- SB City Ordinance 5941 (as amended) - moratorium on evictions for failure to pay rent if the tenant demonstrates failure is due to “Significant Negative Change to Their Household Condition”/“Unforeseeable Emergency Commercial Conditions”
 - **Only in effect until the expiration of Executive Order N-28-20 or until amended by City Council – currently set to expire on Sept. 30, 2020.**
 - Applies to both **residential** and **commercial** tenancies.
 - Tenant must provide LL with documentation supporting change in financial position.
 - A tenant must repay the full amount of deferred rent to the owner within 12 months of the expiration of the ordinance in equal monthly installments.

Unlawful Detainer Actions

- California Rule of Court – Emergency Rule 1 – ~~prevented courts from issuing a summons on a complaint for unlawful detainers unless the action was necessary to protect public health and safety.~~
= **Repealed as of Sept. 2, 2020.**
- Tenant, Homeowner, and Small Landlord Relief and Stabilization Act of 2020(AB 3088) - prohibits a court from issuing a summons on a complaint or entering a default judgment for unlawful detainer for the non-payment of rent in a residential case prior to October 5, 2020.

Foreclosures

- ~~The CARES Act - servicers of federally-backed mortgage loans were not allowed to initiate any judicial or non-judicial foreclosure process, move for foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale~~
= **Expired May 17, 2020**
- HUD Mortgagee Letter 2020-27 – HUD instituted a moratorium on foreclosures for borrowers with FHA-insured single-family mortgages through December 31, 2020.
 - Does not apply to FHA-insured mortgages secured by vacant or abandoned properties.
- FHFA Announcement – FHFA instituted a moratorium on foreclosures for borrowers with loans owned by Fannie Mae or Freddie Mac through December 31, 2020.
 - Does not apply to Fannie Mae or Freddie Mac mortgages secured by vacant or abandoned properties.
- VA Circular 26-20-30 – VA instituted a moratorium on evictions for borrowers with VA-guaranteed loans through December 31, 2020.
- California Rule of Court – Emergency Rule 2 – ~~Actions for foreclosure on mortgage or deed of trust are stayed until until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic if lifted, or until this rule is amended or repealed by the Judicial Council.~~
= **Repealed effective Sept. 2, 2020**

Property Taxes

- Executive Order N-61-20 – Waives penalties for property taxes paid after April 20th, so long as the taxpayer demonstrates they have experienced a hardship as a result of COVID-19 or governmental response to COVID-19.
 - Only applies to residential real property occupied by the taxpayer or real property owned and operated by a taxpayer that qualifies as a small under the SBA's regulations.
 - Property taxes must not have been delinquent prior to March 4, 2020.
 - This waiver is in effect until May 6, 2021. After May 6, 2021, tax assessors can start imposing penalties, costs and interest on unpaid property taxes.