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Coronavirus and Commercial Leases

By now it is clear that the coronavirus outbreak in the United States is negatively affecting many commercial tenants and landlords. One of the clearest examples is Cheesecake Factory's recent announcement that it's planning a "rent strike" for April across its restaurants, as forced closures and social distancing measures sharply reduced its revenue. Many other tenants are following suit and have indicated that they also plan to forego rent payments during this crisis, which has resulted in landlords fearing a default under their real estate secured loans. For commercial landlords and tenants, COVID-19 presents obvious concerns. What can be done? Above all, it is imperative that landlords and tenants open the lines of communication. The parties should work together to find a solution amenable for all concerned. Just like most businesses throughout the nation, many courts are operating with skeleton crews with limited hours or are postponing "non-emergency" cases all together, so swift judicial intervention is unlikely in the event of a rent abatement impasse. Because there is generally no federal law applicable to commercial leases, state law typically governs the relationship between landlords and tenants. As this situation progresses, it is important to monitor state laws and possible disaster declarations for their impact on lease and loan documents. In situations where emergency state laws or declarations are not applicable, the lease agreement will provide guidance on what remedies are available to both landlords and tenants in these uncharted waters.

Both landlords and tenants will want to review their leases in their entirety; however, the following clauses commonly contained in leases should add salient guidance:

- **Rent Abatement** – These are express provisions establishing when a tenant is entitled to abatement, or non-payment, of rent without triggering a breach of the lease. These clauses usually take effect when the leased premises have been damaged, or otherwise taken, to such an extent that the tenant cannot make good use of it. Even the connotation of the word "damaged", which typically means casualty or other physical destruction of the leased premises, may be flipped on its head. It is unclear whether courts will interpret tenant arguments that "damage" includes COVID-19 contamination. There may also be rent abatement for interruptions in utilities, or other services within landlord's control, that are essential to a tenant's operations. Force majeure clauses (i.e., clauses addressing unforeseeable circumstances preventing someone from fulfilling a contract) typically enumerate scenarios that would excuse a party from its obligations under the lease. However, most force majeure clauses operate as an extension of any pertinent deadlines within the lease and do not entitle a tenant to rent abatement. Again, however, the specific language of the lease will dictate whether a tenant is entitled to a rent abatement. One thing should be clear to tenants, failure to timely pay rent in full when due, is likely a default under its lease, entitling landlord to all remedies available under the lease and applicable law.

- **Operating Hours** – Some retail leases require that tenants be open for certain hours and days, and on occasion specify the number of employees required during operations. Given persisting shelter-in-place and work-from-home directives from various state governments, many tenants may be unable to comply with these operating requirements. While granting tenants short term flexibility with respect to operating requirements is encouraged, long-term agreements curtailing operating requirements should be approached with caution, given that no one knows when business will return to “normal.” Additionally, as always, lease modifications should be in writing to avoid future confusion, particularly as this fluid situation continues to evolve.
- **Access** – Given the social distancing measures currently being practiced, many landlords have considered closing or limiting access to common areas. Depending on the specific lease terms, many of which guarantee access to the premises on a 24/7 basis, closing or restricting access to common areas could be a breach of the lease. This is particularly true if tenants must navigate common areas in order to access the leased premises. Additionally, altering access to common areas, or otherwise making material changes to the premises, which interfere with tenant’s use of the leased space could run afoul of the quiet enjoyment provisions in the lease. If conditions continue to deteriorate, and restriction or closure of common areas becomes necessary, landlords should communicate with their tenants in order to ensure proper accommodations are being made for continuity of operations, predominantly with respect to tenant (and customer) ingress and egress on the leased premises.
- **Eminent Domain** – Many leases also contain eminent domain, or takings, clauses that spell out the parties’ interests in the event the government appropriates all or a portion of the leased property. While government shelter-in-place orders are unlikely to rise to the level of a regulatory taking, some lease provisions may be broad enough to entitle a tenant to rent abatement for a temporary governmental order prohibiting or restricting access to the leased space. Again, however, the remedies available to the parties depends on the specific lease language and it is still unclear how courts will interpret these issues.

Ultimately, it is in both the landlord and tenant’s best interests to engage in open dialogue and attempt to resolve these complicated issues together. Making unrealistic demands, or altogether failing to engage in good faith discussions with the other party, would be folly. Instead, landlords and tenants should put themselves in each other’s position and evaluate whether a reasonable solution exists. Landlords undoubtedly understand that tenants will be suffering due to lost revenues. Tenants similarly must understand that landlords owe duties to their lenders, including meeting financial covenants and continuing to service the debt, that are affected by tenants not paying rent. Failing to adhere to these duties could put landlord into default with its lender, and landlords may need lender approval before they can make any tenant concessions or otherwise modify a lease. Landlords and Tenants also need to recognize that many leases may require landlords to continue to provide key services such as janitorial, security and maintenance, especially if a landlord’s property includes a lease with an “essential business” (*e.g.*, urgent care centers or home improvement stores that remain open); in those cases, landlords need to be aware of any such ongoing obligations and tenants should recognize that any costs incurred by landlord to meet those ongoing obligations may be, if the lease so provides, included in operating expenses passed through as additional rent to tenants.

Possible solutions to COVID-19 rent abatement requests by tenants could include rent deferral with re-amortization of deferred amounts over the remaining term of the lease; reducing rent payments to cover only landlord’s expenses (*e.g.*, CAM and finance charges); temporarily tying the amount of rent due to a percentage of tenant’s monthly sales; or drawing down on any security deposits in order to offset monthly rent, with the understanding that tenants will replenish security deposits in the future. Each party should carefully review the notice provisions of their lease and ensure that they are providing notices to the other party in the time and manner required. Additionally, landlords should build their record by making demands for rent in writing once overdue, and by issuing any pre-eviction notices as required by the lease and by applicable state law. We cannot overstate the

importance that unless there is a written release or modification of tenant's obligations to pay rent, tenant will in nearly all instances be in breach of its lease by failing to pay. This will entitle landlord to all remedies available to it under the lease and applicable law, which generally includes the right to take possession of the leased premises and/or terminate the lease. In any case, the parties should collaborate to find viable solutions to this disruption in the historically symbiotic relationship between landlords and tenants.

Please visit our website for further guidance from our [COVID-19 Response Team](#) and to read our [related Alerts](#). To sign up to receive future COVID-19-related Alerts directly, [please subscribe here](#).

If you have questions, please reach out to your primary contact at Hahn Loeser, or contact one of the attorneys listed below for more information.



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