

The Potential Impact of COVID-19 on Commercial and Residential Landlords

Many businesses and individuals are experiencing economic hardships related to the COVID-19 pandemic. As a result, many tenants are looking to their landlords for economic relief. The requested relief may include consent for the tenant to make late rent payments and, more significantly, some tenants are seeking abatement of rent entirely. These requests often disregard the landlord's own financial obligations such as timely mortgage payments and obligations to employees and vendors. Landlords are already temporarily restricted from proceeding with eviction actions in Wisconsin.

As tenants make an increasing number of requests regarding relief from rent and other lease obligations, it is important for landlords to consider how their leases secure (or do not secure) their legal rights. While most leases do not include provisions specifically referencing the event of a pandemic, there are common lease provisions that may apply.

Force Majeure

Force majeure provisions, which will likely be invoked more than ever before, excuse non-performance of lease obligations resulting from circumstances outside the party's control. Even when force majeure provisions are implicated, they rarely excuse a tenant from making regular rent payments. More commonly, in the event of circumstances outside the tenant's control, the provision may excuse a tenant from maintaining continuous operations or other active lease obligations. Like other boiler plate provisions, not all force majeure provisions are created equal. The level of protection provided to the parties will vary depending on the specific language in the lease. As a result, landlords should involve counsel in evaluating how force majeure provisions in their own leases are implicated by the COVID-19 pandemic.

Right to Quiet Enjoyment

Many leases also expressly grant the tenant with a right to quiet enjoyment of the property. However, even when not expressly granted, Wisconsin law presumes a tenant's right to quiet enjoyment. The principle of quiet enjoyment prevents landlords from interfering with the tenant's right to use the property for the purpose for which it was leased. The Wisconsin "Stay-At-Home" Order likely does

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not create an issue with quiet enjoyment given that a government-ordered shutdown is not caused by the landlord. However, a more tenant-friendly provision could include relief in instances where tenants lose the benefit of quiet enjoyment based on third-party action. In certain instances, a tenant may even have the right to terminate the lease in the event of an extended period where the property cannot be used for its intended purpose. Again, lease provisions will vary, and counsel should be involved in assessing these provisions.

Impact of the Provision on Landlords

In most instances, the impact of a given provision will depend on the scope of the provision in the lease at issue. For example, condemnation provisions are typically only applicable when all or some portion of the leased property is taken by a governmental entity. However, a broadly worded condemnation provision could be implicated by a government order severely limiting the use of the leased property.

Even where these lease provisions do not provide tenants with an avenue to relief, we anticipate that many tenants will make arguments based on equitable doctrines such as impossibility or impracticability. These legal doctrines are designed to provide relief when a party's performance is made impossible or where the entire purpose of their agreement is frustrated. In most cases, the express language of the lease will carry the day (particularly if the "Stay-At-Home" Order is not extended for several months), but counsel should be involved in evaluating the risk of alternative legal theories.

Given the novel issues raised by COVID-19, most leases will not provide a perfect road map on what happens next. Instead, lease provisions will have to be evaluated on a case-by-case basis. If you have any questions or need assistance, Reinhart has a team of attorneys that focuses on commercial leasing and lending, including transactional work, litigation and dispute resolution. Reinhart is closely following the legal developments related to COVID-19 and stands ready to assist our clients in navigating these issues.

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