



The Global Legal Network
Local Relationships Worldwide

NAVIGATING COMMERCIAL LEASE DISPUTES ARISING OUT OF COVID-19

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COVID-19 IMPACTS ON BUSINESSES

- Study done by Columbia University (Summer, 2020)
 - 5,800 small businesses surveyed
 - Mass layoffs and closures occurred just weeks into the crisis, 41.3% were temporarily closed
 - Risk of closure increased based upon expected length of the crisis
 - Many were financially fragile: median business with more than \$10,000 in monthly expenses had only 2 wk of cash on hand
 - Most planned to seek funding through the CARES Act, but not many were successful or it wasn't enough
 - <https://www.pnas.org/content/117/30/17656>



WASHINGTON GENERAL OUTLOOK



SEPARATION IS IN THE PREPARATION

- Lease language still guides the decision on whether to negotiate resolution or seek legal remedies (ADR clauses)
- Lease obligations to consider (*e.g.*, sale percentages)
- Leases anticipating interruption/insurance for risk
- Landlords/Tenants working relationship, prior issues, and future plans
- PR and Image in pursuing legal remedies

PREPARATION FOR THE SEPARATION

- Providing legal notices
- Moratorium by city/county/state – de facto due to court closures or lack of court access
- Getting insurance involved
- Service and commencing suit
- Engaging counsel and discussing timing and expense

DESPERATION AFTER SEPARATION

- You got the tenant out, now what?
- Was the juice worth the squeeze
- Missing out on stimulus funding/rent protection relief
- General trends in downtown cores
- Long-term planning for recovery (transit, development, anchor resources)

JURY TRIALS IN WASHINGTON STATE

- Most major counties have virtual trials or some hybrid
- King, Pierce, Snohomish, Spokane (already have electronic filing)(webinars and presentations by judges on logistics)
- Western District WA Federal Court “Virtual Trials, Bench and Jury, A Handbook for Attorneys” (Rev.1/25/2021)
- Smaller counties expanding telephonic hearings and GR 17 filings
- Service of Process (closure/access)
- Jury Awards have been large



INDIANA LANDLORD PERSPECTIVE



LANDLORD PERSPECTIVE (INDIANA)

- Limited appellate court guidance
- Enforce lease terms vs. business solution
 - Monetary and non-monetary implications
- Not all force majeure clauses are created equal
 - Is COVID-19 a force majeure?
 - When does force majeure begin, end?
 - Start/stop
- Responding to unilateral actions taken by tenants
- Planning for future seasonal capacity restrictions and shut-downs

LANDLORD PERSPECTIVE (INDIANA)

- *Abercrombie & Fitch Stores, Inc. v. Simon Prop. Grp., L.P.*, 2020 WL 6948335 (Ind. Ct. App. Nov. 25, 2020)
 - Abercrombie unilaterally closed stores, retracted lease signatures due to “the current uncertainty,” and declared leases terminated
 - Court of Appeals affirmed preliminary injunction preventing Abercrombie from permanently abandoning 53 stores
 - Caused by Abercrombie’s business decision, not shut-down orders
- *Bar Indy LLC v. City of Indianapolis*, 2020 WL 7585709 (S.D. Ind. Dec. 22, 2020)
 - Bar owners sued City challenging constitutionality of shut-down orders
 - Argued, *inter alia*, disparate treatment of bars and nightclubs
 - District court denied their motion for preliminary injunction
 - No irreparable harm or inadequacy of monetary damages proven

COVID-19 IMPACT ON TRIALS (INDIANA)

- State Courts
 - Jury trials returned temporarily, suspended through March 1, 2021
 - Bench trials backlogged, virtual trials an option
- Federal Courts
 - Criminal jury trials – Socially distanced
 - Civil jury trials
 - Northern District: Suspended through March 1, 2021
 - Southern District: Suspended through April 5, 2021
 - Civil bench trials
 - Backlogged
 - Depends on judge's preference



COLORADO TENANT PERSPECTIVE



TENANT LEASE DISPUTE

- High-End Retail Store in Mountain Resort (dependent upon high-end tourism)
- Mediation with retired Judge prior to litigation
 - First, look to force majeure clause, if none, either (1) parties chose not to negotiate risk, so business as usual or (2) apply legal impossibility/ frustration of purpose (how to allocate risk may also appear in other clauses)
 - Parties can waive difficulties; seek accord/satisfaction; abandon lease
 - *See Barrack v. City of Lafayette*, 829 P.2d 424 (Colo. App. 1991) (city was discharged from obligations to deliver untreated water when couldn't be supplied under public health regulations)
 - *See United States Welding, Inc. v. Advanced Circuits, Inc.*, 420 P.3d 278, 281 (Colo. 2018) (citing Restatement (Second) of Contracts § 281 (Am. Law Inst. 1981); 29 Richard A. Lord, Williston on Contracts § 73:27 (4th ed. 2002))

TENANT LEASE DISPUTE

- Equitable Remedies and Other Factors
 - Hospitality and service industries (retail shops, hotels, restaurants)
 - If legal impossibility/frustration of purpose is found, aggrieved party might be required to accept a reasonable offer in mitigation of their damages under Restatement
 - Might look to similar businesses during time periods tenant vacated, including local sales tax
 - Might look to governmental relief that was left on the table
 - Might look to how other landlords handled re-negotiations
 - Abatement of rent during shut down period only (base rent)

CA COURT RESPONSE TO COVID-19

- Federal Courts
 - All trials continued through February 26, 2021
- Most State Courts stayed jury trials through February
 - Denver currently stayed through April 2, 2021
 - Once back, allowing civil trials 4 days or less
 - Encouraging parties to waive juries and attend mediation
 - Updated every 3-4 weeks
 - Chief Judge has called this a Constitutional crisis



OREGON LANDLORD PERSPECTIVE



EXTENSION OF TIME TO PAY RENT

- Commercial tenants have until March 31, 2021 (“Grace Period”) to pay rent due but not paid from April 1, 2020 through September 31, 2020 (“Emergency Period”). HB 4213
- During the Grace Period, landlords are prohibited from evicting a tenant based on non-payment of rent due during the Emergency Period
 - Includes – charging late fees or other associated charges on the unpaid balance

PERMITTED NOTICE TO TENANT

- Landlords may send commercial tenants notices informing them of (1) the balance incurred during the Emergency Period, and (2) when the balance is due
- Within 14 days, tenant must notify landlord of intent to utilize Grace Period
 - HB 4213 includes specific language that must be included in communications with tenant during the Grace Period
 - If tenant fails to notify landlord or pay the balance, landlord may recover damages in the amount of 50% rent from tenant
 - But it does not give landlord a hook to evict

LANDLORD MAY EVICT TENANT FOR NONPAYMENT OF RENT DUE OUTSIDE THE EMERGENCY PERIOD

- Rent Due Outside the Emergency Period = Rent due before April 1, 2020, or after October 1, 2020
- Commercial landlords may also evict for reasons other than non-payment of rent during the Emergency Period, but should avoid the appearance that the “other reason” is a pretext for non-payment of rent during the Emergency Period

COURTS IN OREGON

- Multnomah County Circuit Court (Portland) is conducting all FED first appearances by phone/WebEx
 - Option to appear in person, but the court discourages it and the judges dislike it
- Other Oregon Circuit Courts are largely conducting both first appearances and trials in person
- Oregon courts with lighter dockets have generally been quicker to set commercial FED trial dates
 - Between 7-14 days from first appearance
 - Reason: Residential evictions are largely prohibited and will be through at least June 2021

COURT IN OREGON

- Sheriffs have generally been quicker to execute on a writ of execution of judgment of restitution
 - Within 2-3 days of issuance of writ
- Future of HB 4213 Protections
 - Many of HB 4213's provisions also apply to residential tenancies
 - In December 2020, the Oregon Legislature extended the protections with respect to residential tenancies but not to commercial tenancies



DRAFTING FOR MITIGATION

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- New or Existing Leases can be Drafted or Re-Negotiated
 - CA executive order, allows local jurisdictions to enact eviction moratoriums on commercial tenancies from 9/30/20 - 5/31/21
 - Drafting Best Practices (Pre-emptive Measures)
 - Force Majeure (Not necessarily implied by courts)
 - Default Provisions
 - Casualty/Temporary Taking
 - Legal Remedies and other Mitigating Factors
 - Impossibility/ Frustration of Purpose
 - Business Interruption Insurance

DRAFTING FOR MITIGATION

- Negotiated Resolution/Lease Restructure
 - Full or Partial Rent Abatement
 - Rent Deferral
 - “Blend and Extend” Scenarios
 - Tenant Improvement Allowances
 - Credit Enhancements; Percentage Rent
 - Early Termination
- Lender-Related Considerations
- Construction & Development - Pending Leases, Development & Construction Contracts
- Conclusions & Next Steps

CA COURT RESPONSE TO COVID-19

- Most counties allow civil trials presently
 - LA – jury trials processing, also remote appearances
 - Sacramento– jury trials processing, also remote appearances
 - San Diego– jury trials processing, also remote appearances
 - San Francisco – jury trials processing, also remote appearances
 - Exceptions: Riverside, San Bernadino, El Dorado, Butte, Napa and a few others - not allowing jury trials
 - Updated every 2 weeks

POP UP QUESTION

- What lease clause might be relevant to a lease dispute arising out of COVID-19?
 - A. Force Majeure Clause
 - B. Payment Clause
 - C. Allocation of Risk Clause
 - D. All of the above

THANK YOU! IF YOU HAVE ANY QUESTIONS,
PLEASE CONTACT ONE OF THE PRESENTERS



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