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COVID-19 Impact on Commercial Real Estate

State mandated closures and other governmental regulations issued to mitigate the spread of COVID-19 are drastically impacting the commercial real estate world. Day Pitney's real estate team continues to evaluate the rapidly changing legal landscape in order to provide the most up-to-date information together with practical business counsel to our clients, advisors, and partners.

These are truly unprecedented times resulting in novel questions for both landlords and tenants as they try to understand their respective rights and obligations under their leases. While a careful review of all lease documentation is warranted to determine if any contractual relief may be available, in most cases and absent upcoming governmental relief, parties will need to work collaboratively to come up with reasonable and practical solutions under their particular circumstances to provide what will hopefully be short-term relief to preserve long-term objectives.

As April rents, loan payments, and carrying costs become due, certain anticipatory questions need to be addressed urgently. This alert highlights some of the commonly asked questions Day Pitney real estate attorneys are receiving together with the answers and suggestions we are providing.

How do force majeure provisions impact the contractual obligations of commercial tenants and landlords?

Common in most commercial leases, force majeure provisions excuse non-performance of certain obligations under a lease if an unavoidable or unforeseen act prevents one or both of the parties from performing. Common examples of events covered by force majeure provisions include natural disasters, labor strikes, governmental actions, wars, and a catchall of unforeseeable circumstances beyond the control of the party that is impacted. If your lease contains a force majeure clause, it is important to carefully review its language to determine which events are covered as such clauses are historically narrowly construed (pay particular attention whether "epidemics" or "pandemics" are considered force majeure events).

If COVID-19 is considered a force majeure event under your lease, some contractual obligations under the lease may be excused: for instance, if a tenant is forced to close its business due to an executive order or other governmental decree, such tenant will not be in default under a provision that requires the continuous operation of the tenant's business in the premises. However, as a general rule of thumb, most force majeure provisions do not excuse or postpone monetary obligations and, in fact, many affirmatively state that monetary obligations are not excused (i.e. a tenant's obligation to pay rent, a landlord's obligation to provide a tenant improvement allowance, etc.).

With limited contractual protections available, what are commercial landlords' and tenants' options?

Tenants are requesting economic relief under their leases such as rent abatements, reductions, deferrals, and application of security deposits. Even if landlords are willing to provide or see no choice but to provide some short-term economic relief to tenants, it is important that landlords first consider the impact any such economic modifications may have on their financing. For example, most commercial real estate loan documents require prior lender consent of any material lease amendments or modifications and/or have certain loan covenants that may be triggered. It is important for landlords and tenants to properly document any agreements and modifications and, especially in the case of landlords, reserve their rights and remedies for future defaults.

We recommend that landlords carefully evaluate each tenant request individually taking into account the unique circumstances facing each tenant, including the nature of tenant's business, the severity of COVID-19's impact on tenant's particular business, tenant's rent payment history, term length and available security. We recommend that tenants be ready, willing and able to share evidence of the economic hardships they are experiencing.

Is federal or state legislation providing rent abatement relief for commercial tenants?

To date, we are aware of no specific Federal or State rent abatement relief for commercial tenants who have been negatively impacted by the spread of COVID-19. However, legislative bodies are currently regularly addressing this dynamic situation with new orders, directives and laws and it is possible that relief legislation may be forthcoming. Day Pitney will continue to monitor all new applicable laws. In the interim, tenants and/or business owners may wish to consider the availability of the following:

- Short-term loans from existing banking relationships;
- Low-interest loans from the U.S. Small Business Administration (SBA). Small businesses and nonprofit organizations in Connecticut, New Jersey and New York may qualify for "disaster relief loans" of up to $2 million from the SBA (to learn more, please visit www.sba.gov/disaster or call the SBA at 1-800-659-2955);
- Insurance claims for business interruption. Typically associated with a "covered loss", it is possible that that legislation could be quickly adopted to include COVID-19 as a business disruption.

Have states implemented a moratorium on loan payments, evictions and/or foreclosures?

Yes, but such moratoriums are state specific and require careful review in each applicable jurisdiction. As an example, the State of Connecticut's Judicial Branch has rescheduled all foreclosure sales previously scheduled to have occurred in April or May to *June 6, 2020*. Furthermore, per order of the Honorable James W. Abrams (Chief Administrative Judge for Civil Matters) dated as of March 20, all issued executions on evictions and ejectments have been put on hold through *May 1, 2020*. For more information, please visit the Connecticut Judicial Branch COVID-19 Response page here.

In New York, certain businesses and individuals facing financial hardship as a result of the COVID-19 were granted a temporary reprieve from the consequences of failing to make loan payments to banks that are subject to the jurisdiction of the New York State Department of Financial Services (DFS), pursuant to an executive order signed by New York Governor Andrew Cuomo on March 21.

In New Jersey, Governor Murphy adopted Executive Order 106, which places a moratorium on the eviction of homeowners and residential tenants. The moratorium takes effect immediately and will remain in effect for no longer than two months following the end of the Public Health Emergency or the State of Emergency established by Executive Order 103, whichever is later. Executive Order 106 does not prohibit the initiation of eviction or foreclosure proceedings during the time Executive Order 106 is in effect, but the enforcement of all "judgments for possession, warrants of removal, and writs of possession, shall be stayed while this Order is in effect, unless the court determines on its own motion or motion of the parties that enforcement is necessary in the interest of justice." The Order does not affect any scheduling or payment of rent which is due, or any other contractual provisions, such as landlord or lender's rights to pursue personal guarantees and security deposits.

Please stay safe and healthy. We all look forward to getting back to "business as usual" as soon as possible. In the meantime, Day Pitney is here to help you navigate through these unprecedented times.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first

publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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