

PRACTICAL NEWS COVID-19 News Source

April 1, 2020



COVID-19 AND COMMERCIAL LEASES

Many businesses have been adversely affected to an increasing degree by the coronavirus pandemic. In the past few days, complete shut-downs have been ordered for non-essential businesses in several jurisdictions, notably the State of New York. Federal stimulus packages may soften the consequences, but are not likely to pick-up all losses, especially as the emphasis seems to be on pass-through of benefits to employees. Not surprisingly, tenants are turning to their landlords for relief from rent and other obligations under their leases.

Tenants may find legal grounds for obtaining relief under one of two arguments. The first involves the specific language of the subject lease. Many leases contain so-called *force majeure* clauses. These clauses excuse non-performance directly caused by events beyond the control of the parties. Typical examples are floods, hurricanes, terrorism and governmental action. These clauses vary; many specify what events are covered, many do not relieve tenants from the payment of rent and some contain conditions that require strict compliance. Most leases contain "access" clauses limiting landlord's responsibility for prevention of access to the premises. Sometimes, such clauses provide tenants with relief on certain conditions, primarily based on length of the period of inaccessibility. Individual leases must be carefully reviewed before predicting the result of litigation over their applicability.

A second argument is based upon the doctrine of "frustration of purpose." This basically provides that when an unforeseeable event occurs that makes performance under an agreement impossible of performance, the contract is terminated. It is questionable whether this argument may be asserted where a *force majeure* clause is contained in the lease. Courts have also varied in determining whether "unforeseeable" should be "unforeseen" and whether "impossible" should be "impracticable." Since the duration of the pandemic will presumably not be perpetual, it is uncertain whether the doctrine will support a suspension of payments or require a termination of the lease. It will be necessary to examine individual lease provisions, including the length of the term, other relevant facts and the applicable law to determine whether this second argument has merit.

PHILLIPS NIZER LLP

Resourceful Representation®

Landlords should also investigate the possibility of obtaining governmental relief whether from direct grants, if made available, real estate tax reduction, income tax credits or even claims for temporary condemnation during the period of enforced closure.

Our real estate and real estate litigation teams at Phillips Nizer LLP are prepared to evaluate the legal positions of landlords and tenants in the present crisis and to guide them in obtaining optimum solutions.

CONTACT US



Marc A. Landis
Real Estate Co-Chair
(212) 841-0705 phone
(212) 262-5152 fax
mlandis@phillipsnizer.com

Lisa R. Radetsky
Real Estate Co-Chair
(212) 841-0739 phone
(212) 262-5152 fax
lradetsky@phillipsnizer.com

Jay H. Kim
Partner
(212) 841-0776 phone
(212) 262-5152 fax
jkim@phillipsnizer.com

Robert L. Bachner
Senior Counsel
(212) 841-0706 phone
(212) 262-5152 fax
rbachner@phillipsnizer.com