As COVID-19 continues to spread and claim lives, various federal, state, and local government agencies have reacted with unprecedented measures around, among other issues, social distancing and business closures. Indeed, as of this writing, at least eleven states (including California, Illinois, Michigan, New York, Ohio, and Oregon) have ordered “shelter in place” restrictions on the movement of citizens from their places of residence. These government actions have, in many instances, required non-essential businesses to either partially or completely close their doors to the public. In numerous other instances, prior to government-ordered closures, businesses have announced voluntary closures either to prevent spread of the disease, or because demand for products and services has ground to a halt. Such businesses have included Apple, Starbucks, Nike, several large department stores, and many other large retailers, as well as various office buildings (including office buildings utilized by PepsiCo and Netflix).

Few commercial lease documents expressly anticipate the occurrence of a pandemic like COVID-19. That being said, typical commercial leases have several provisions that may potentially apply to situations such as this pandemic. This article explores the potential impact of COVID-19 on commercial lease relationships existing between landlords and tenants, and in particular on the obligation of tenants to continue to pay rent during operational suspensions, whether voluntary or mandated. Our analysis focuses on lease provisions typically found in commercial leases, regardless of asset class but specifically inclusive of office, industrial and retail.

When assessing the impact of COVID-19 related closures, landlords and tenants (collectively, “Lease Parties”) should always look to their specific lease language to assess the impact of such closures on their obligations under their leases. Some relevant lease provisions that Lease Parties should consider include the following:

**Force Majeure** – A typical force majeure provision excuses non-performance of lease obligations by impacted parties for events that are out of their control. Such a provision may be expressly labeled as “Force Majeure”, but is often instead included in a section such as “Inability to Perform”, “Unavoidable Delay”, or “Unexpected Delay”, with no reference to the term “force majeure” at all. While such provisions rarely apply directly to a “virus” or “pandemic”, they often do apply to potentially applicable provisions such as an “act of God”, government order or mandate, shortage of labor or materials, or other instance “beyond the party’s control.” Force majeure provisions typically expressly exclude payment of rent and other financial obligations from the obligations to which they apply, but may provide relief from compliance with other lease obligations. For example, a force majeure provision may excuse a tenant’s obligation to continuously operate in the premises or to complete tenant
improvements by a particular date. It may also excuse a landlord from completing or delivering the premises on a particular schedule, or from providing certain building services or amenities. In most cases, having some sort of force majeure provision is better than having no such provision at all, since without it, defaulting parties may simply have to rely on whatever cure periods are expressly provided for in their lease (if any).

If there is a force majeure provision in their lease, landlords and tenants should confirm whether such provision includes a cap on the amount of time that non-performance can be excused due to a force majeure event, or whether the entire duration of the interruption is excused. In addition, a party wishing to claim force majeure should review the applicable provision to determine whether notice (written or otherwise) of force majeure is required to be provided to its counterparty. It is likely good practice to provide written notice, even if not required by the terms of the applicable provision. Finally, smaller tenants should confirm that the provision applies to delays by either party, rather than solely to delays by the landlord. Ultimately, while force majeure provisions will likely not excuse a tenant’s obligation to pay rent, they could potentially excuse failures by Lease Parties to perform other material obligations under their lease documents as a result of COVID-19.

Quiet Enjoyment and Interference

Quiet enjoyment is a right that is typically either implied in law or expressly provided for in a lease. Quiet enjoyment does not refer, as the name suggests, to a peacefully quiet environment. Rather, per Black’s Law Dictionary, “[t]he term quiet here does not mean that there is no noise. Here it means that there is no outside interference with an activity. An activity is enjoyed without the interference of another or superior party.” Where expressly indicated in a lease, more typical quiet enjoyment provisions state that a tenant is entitled to quiet enjoyment free from interference by the landlord. Because it would be difficult to assert landlord responsibility for COVID-19 closures, typical lease language granting a tenant a right to quiet enjoyment will not excuse a tenant’s obligation to pay rent, or otherwise comply with its lease obligations.

Indeed, where it is not the landlord, but rather a third party, who interferes with a tenant’s right to peaceably use property, the cause of action available at that point ceases to be an action for quiet enjoyment and instead becomes an action for trespass or nuisance. The difficulty a tenant will have at that point is that there is not likely an action for trespass or nuisance against any viable defendant as government authorities will likely be protected by governmental immunity. Ultimately, Lease Parties looking to understand whether they have a claim for a deprivation of their right to quiet enjoyment resulting from the COVID-19 outbreak should focus their review on whether the language in the lease places responsibility on the landlord for any such deprivation even where the landlord does not cause the deprivation.

Separate from the right to quiet enjoyment, Landlords with larger tenants should also review their leases for any specific remedies that a tenant may have for any

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material interference with the tenant’s use of, or access to, the premises, despite the occurrence of a force majeure event. For example, larger tenants sometimes have the right to rent abatement during any period when the premises (or a significant portion thereof) is “untenantable.” They may even have a termination right if the premises (or such significant portion) is untenantable for a substantial period of time. In the face of COVID-19, a tenant with such a right may argue that the government’s forced closure of their business make the premises untenantable, and without a forced closure, they may argue that the premises are untenantable due to the absence of certain services (e.g., security or front desk staff) or restricted access to common areas or amenities (e.g., fitness centers or conference centers).

Condemnation – Most leases address condemnation or a taking by a government entity. Often such provisions use language narrowly tailored to apply only when a government “acquires” or “condemns” some or all of a property. Other leases, however, use more broad language such as that condemnation applies where a government “law” or “rule” removes a tenant’s ability to “use” its real property. Even in the presence of such broad language, tenants will encounter various hurdles in successfully asserting, under a closure due to COVID-19, that their right to use the property has been taken by the government. This is so even in such geographic regions that have issued “shelter in place” orders, because a taking (also referred to as “condemnation” or “eminent domain”) by the government requires fair compensation by the government in exchange for the applicable loss of property, or loss of use thereof. Even in rare instances where a tenant may be entitled to rent abatement for interference with its use of the premises, government entities - by ordering that people shelter in place or that certain businesses close - have not actually “received” any property, or benefit, for which they would be required to pay compensation (or for which they could offset the tenant’s abated rent to the landlord).

Continuous Operation – Another important lease provision that Lease Parties should review in light of voluntary and/or mandated closures is a continuous operations covenant, which expressly requires the tenant to operate in the premises without interruption, even if the tenant is otherwise satisfying its rent obligations. While continuous operations covenants can be found in a variety of lease types, they are most often found in retail leases. Such covenants may require that a tenant operate at all times on certain days or between certain hours, and often, a specified number of days of failing to continuously operate triggers an event of default. As noted above, a force majeure provision that runs for the benefit of a tenant will usually excuse a tenant’s breach of a continuous operations covenant. Thus, Lease Parties should explore whether their lease contains a force majeure provision, whether such force majeure provision operates for the benefit of the tenant (or if it only runs to the benefit of the landlord), whether timely notice of the force majeure event is required to be provided, and whether the amount of time that the tenant fails to operate exceeds any cap contained in the force majeure provision. If the tenant cannot rely on force majeure to excuse its closure due to COVID-19, then it may be in
breach of its continuous operations covenant, regardless of whether it is still paying rent. Furthermore, even if the force majeure provision does excuse the tenant’s breach of a continuous operations covenant, some leases may also provide for a specific landlord termination right or rent increase if the tenant ceases to operate for a significant period of time (e.g., 365 days) despite there being a force majeure event, so tenants should review any continuous operations obligations carefully.

**Go Dark** – Regardless of whether there is a continuous operations covenant in a lease, a landlord should be particularly cautious if a tenant has any specific right to “go-dark”. In addition, in the absence of a continuous operation covenant, a tenant likely has the right to cease operating even if the lease does not expressly grant a right to go-dark. While a go-dark right (or the absence of a continuous operations covenant) would typically allow a tenant to cease operating either at-will or upon the satisfaction of certain conditions, such a right typically does not excuse a tenant from fulfilling its rent and other financial obligations under the lease. Even so, a tenant going dark can sometimes result in consequences for the landlord. First, if a landlord is relying on that particular tenant for co-tenancy purposes, then other tenants in the center or building may have certain rights in their leases (including rent abatement and/or termination rights) that are triggered by the dark tenant not operating. Additionally, if there is any debt on the property, a tenant going dark could ultimately result in a default of the landlord’s loan. In some loan agreements for retail and office assets, a larger tenant going dark automatically results in a cash flow sweep. Further, any rent received from the dark tenant may be excluded from gross income for purposes of calculating the property’s net operating income, which can result in the property failing to satisfy the lender’s requirements, including debt service coverage ratios (DSCR) and debt yield tests. Other remedies for a lender when a tenant goes dark include the property’s income being put into special reserves, a reappraisal of the property such that the borrower has to pay down any reductions in value, and the borrower having to provide a letter of credit or pledge additional collateral to the lender. If any of such obligations are not met, or in some cases, if the tenant goes dark for a significant period of time, then the borrower will have defaulted under the loan agreement. Finally, since some loan agreements do not contemplate tenants going dark, lenders should also pay attention to whether their landlord borrowers’ leases contain any go-dark rights, as well as whether their loan agreement provides for any of the above protections to the lender.

**Other Considerations** – Some tenants may attempt to support a non-payment of rent by asserting that they are protected by the doctrines of *Impossibility of Performance* or *Frustration of Purpose* (also known as “Commercial Impracticability”). However, the doctrine of Impossibility of Performance is unlikely to support a claim for avoidance of rent because it requires the physical destruction of the object that is the subject of the contract (which, in the context of a lease, is the premises). Similarly, the doctrine of Frustration of Purpose has been rejected by courts when asserted by tenants who experienced a temporary, rather than permanent, loss of their use of the premises, which is...
likely to be the case with respect to closures due to COVID-19. It is, however, conceivable that the Frustration of Purpose doctrine could excuse a tenant from payment of rent where the tenant’s lease expires during the time period impacted by COVID-19, and where the tenant does not renew or extend the lease for the premises, as a tenant could argue that the entirety of the remaining benefit of the lease has been destroyed.

Ultimately, most commercial leases will not clearly address the circumstances surrounding COVID-19, and the government’s role in business closures creates additional ambiguity as to Lease Parties’ customary rights and remedies. While some standard lease provisions may apply inadvertently or indirectly, there is bound to be uncertainty in interpreting and operating under lease provisions for both the near and long term, and parties’ negotiating leverage is unpredictable. In the face of such uncertainty, communication between lenders, landlords, and tenants becomes even more important. Adherence to fundamental provisions and careful review of existing lease documents by Lease Parties and their counsel, with a focus on the provisions highlighted herein, will help Lease Parties to develop practical solutions and strategies to mitigate negative impacts (and maximize positive outcomes) during these challenging and unprecedented times.

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1 Because this Legal Alert focuses on commercial leases rather than residential leases, we do not address the right of quiet enjoyment as it may apply to a residential lease.

2 Impossibility of Performance is a defense to a breach of contract claim that can potentially apply where, most typically, an object that is critical to performance is destroyed, so as to render performance impossible.

3 Frustration of Purpose is a defense to a breach of contract claim that can potentially apply where, most typically, a frustrating event occurs that was not reasonably foreseeable by the parties at the time of contracting, and that frustrating event destroys the value of the party’s performance.

If you have any questions about this legal alert, please feel free to contact any of the attorneys listed under Related People/Contributors or the Eversheds Sutherland attorney with whom you regularly work.