

COVID-19 ISSUES FOR REAL PROPERTY AND OTHER BUSINESS CONTRACTS

Obviously, COVID-19 and the resulting governmental actions and private reactions are, and will continue, impacting the parties' ability to perform under their existing contracts. COVID-19 will also impact language parties may want to include in future real estate and other business contracts.

Existing Contracts

The most common contractual language that may address COVID-19 are known as "force majeure" provisions. The language typically describes those uncontrollable events (such as war, labor stoppages, governmental laws/regulations, loss of power or extreme weather) that are not the fault of any party and that make it difficult or impossible to carry out normal business.

Some force majeure provisions address national emergencies or pandemics, but those are more recent additions to "boiler plate" language. Notably, force majeure provisions typically require notice and do not excuse the timely payment of rent in leases.

Force majeure provisions in existing contracts should be carefully reviewed to determine whether a credible argument exists for reasonable delay or relief from obligations in the contract that are difficult to perform because of governmental stay-at-home orders or other private actions out of a party's control.

Existing contracts should also be reviewed for other clauses that may provide relief or termination such as "material adverse events or changes" or "conditions to closing" language. There may also be common law (i.e., made by reported court cases and not state statutes) defenses to performance such as "frustration of purpose" or "impracticability."

These defenses, as well as force majeure, are very fact specific and generally require performance of the contract to be materially different than what the parties anticipated. Each situation must be analyzed on a case-by-case basis using the specific facts, contract language and context of each transaction.

For contracts yet to be performed, such as real estate purchase contracts or leases for space being constructed, consideration should be given to proposing amendments to specifically address the current Illinois stay-at-home order. Such amendments, when well crafted, can protect and benefit both parties.

Future Contracts

For new contracts the parties should consider adding clear "COVID-19" type language to force majeure clauses, or possibly creating a stand-alone section of the contract directly addressing COVID-19 type situations. For example:

"During the period of a declared national emergency or a state or local "stay at home" order or similar restriction on the conduct of business resulting in the interruption of the business or employment of one or both of the parties..."

The language should continue to address when and how to extend times for performance and allocate the financial risks involved in a fair and reasonable way given the circumstances of the parties. Again, such stand-alone sections, when well crafted, can protect and benefit both parties.