

Covid- 19 and Real Estate

Here follows a summary on the United States approach to offsetting the impact of Covid-19 emergency orders on residential and commercial real estate and how US courts may interpret the co-tenancy clause in a retail lease contracts.

Federal Response

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) became law on March 27, 2020 providing economic stimulus and relief for both businesses and individuals.

Among the provisions are specific relief for investors and consumers in the **real estate sector**. These include: *i)* a temporary moratorium on foreclosures and evictions in connection with federally-backed mortgage loans on 1-4 family residential units regardless of delinquency status (for 60 days from March 18, 2020); *ii)* a right to request forbearance for federally backed loans on single family homes for up to 180 days (+ additional 180 days if requested), incurring no excess fees, penalties or interests and no necessity to document hardship; *iii)* a right to request forbearance for federally backed loans on multi-family property provided borrower had paid regularly until February 1, 2020, with documented hardship and for up to 90 days; *iv)* in the case of *iii)* above, said borrower may not evict or charge late fees to tenants during the forbearance of loan; *v)* 120-day moratorium on evictions based on late payment of rent, no late payment fees or penalties for tenants of any property that participates in federally funded housing programs; *vi)* bonus depreciation for qualified improvement of non-residential property applied retroactively from December 31, 2017, allowing taxpayers to immediately expense costs of certain improvements to the interior of non-residential property and possibly claim tax refunds if they have been depreciating improvements for past 39 years.

States' response

An early April poll commissioned by the Wall Street Journal suggests that half of US small business retailers have not paid their rent or mortgage in full for the month of April.

Since the start of the pandemic, State courts and legislators have offered **various degrees of relief to retailers and renters**, with the state of California taking the lead in terms of executive, judicial and legislative action.

In general, states have provided relief to commercial and residential tenants in the forms of: suspensions on eviction and foreclosure court proceedings for 90 days (from April 6, 2020, California Judicial Order); moratorium on enforcement of evictions or foreclosures for commercial property for 90 days (from March 20, 2020, NY State Executive Order); suspension of civil proceedings, not related to urgent matters of public health - effectively suspending any eviction or foreclosure proceedings (until April 17, 2020, Florida Supreme Court; until June 17, 2020, Chicago, Illinois); prohibition of

evictions and foreclosures for both residential and commercial tenants for unpaid rent or mortgage due after the state of emergency (declared on March 12, 2020, Nevada Executive Order); mortgage relief granted to borrowers impacted by the Covid-19 from large banks including Chase, Citigroup, JP Morgan, US Bank, Wells Fargo and approximately 200 state-chartered banks (California State Relief Package); other states have strongly urged financial institutions to follow suit in providing relief to mortgage borrowers (New York, Illinois).

Application of co-tenancy provisions on retail leases in shopping centers

Retail leases in the US typically include a **co-tenancy provision**, requiring that a percentage of spaces in malls be occupied and/or rented by specifically named anchor tenants. The landlord is typically allowed a period of time to remedy the shortfall before the co-tenancy provision can give rise to termination by the tenant. Depending on the terms of the lease, a landlord is generally permitted a cure period of 12 months before a tenant can terminate a lease.

Contractual co-tenancy provisions are generally enforceable in a court of law in the US.

In general, even if a shortfall in occupancy is caused by a force majeure event, courts can be expected to enforce a co-tenancy provision, unless, of course, the contract specifically included a force majeure exception (ie. store closures due to force majeure), in which case co-tenancy provisions would not be enforced. In any event, it is unlikely that the Covid-19 induced government-ordered shutdown would have been contemplated as a contractual force majeure event. This is uncharted judicial territory and in the case of Covid-19, the shutdown applies to both the landlord and the tenant.

Thus, although co-tenancy provisions might be enforceable, in the absence of a force majeure clause, it is difficult to assess damages to a tenant seeking the application of co-tenancy rights when the tenant is also ordered to shut down. There is precedent to courts exercising their equitable powers in determining the applicability of the clause were the entire mall was required to go dark.

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