



Stoel Rives_{LLP}

Force Majeure

in the Era of COVID-19

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Commercial Brokers Association Webinar

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Focus on real estate transactions and dispute resolution for real estate brokerages, multiple listing services, homeowners' associations, developers and principals.

Assist with the representation of the Commercial Brokers Association, several residential and commercial brokerage firms, and the Northwest Multiple Listing Service.

Previously at Foster Pepper PLLC (2017–2018) and Mills Meyers Swartling P.S. (2014–2017).

- Summary of Washington “Stay Home, Stay Healthy” Proclamation
- Legal – Force Majeure Provision
- Legal – No Force Majeure Provision
- Transaction Difficulties

- Very fluid situation
- Evolving daily
- Government orders can change or be modified on a moment's notice
- We have general guidance; anything beyond that is speculative (e.g. no precedent for this)



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Summary of “Stay Home, Stay Healthy”

Basic Components

- Requires every Washingtonian to stay home unless they need to pursue an essential activity.
- Bans all gatherings for social, spiritual and recreational purposes.
- Closes all businesses except “essential businesses.”
- People are required to remain in their homes unless they work for “essential businesses” or participating in “essential activities.”
- Initially lasts two weeks

- Healthcare / Public Health
- Emergency Service Providers
- Food and Agriculture
- Energy
- Water and Wastewater
- Transportation and Logistics
- Communications and IT
- Government Operators Performing Essential Functions
- Critical Manufacturing
- Hazardous Materials
- Financial Services
- Chemical
- Defense Industrial Base

What is essential?

What About Real Estate?

- Real estate brokerage not essential
- March 27, 2020 Guidance from Governor Inslee provides that very limited **residential** real estate activities are allowed
- DOES NOT APPLY TO COMMERCIAL REAL ESTATE
- Focus is on residential properties and people transferring out of/into new residences
- Order lasts two weeks
- Will it be extended? Modified?

What About Property Management?

- Residential single and multi-family property management, including working with tenants, can occur subject to strict requirements:
 - In-person meetings are prohibited except when necessary for a customer to view a property or sign necessary documents
 - No open houses
 - Property visits by appointment only, no more than 2 people on site at any time, and must follow CDC guidelines

CDC Guidelines

- Clean hands often
- Avoid touching eyes, nose, and mouth
- Avoid close contact – stay six feet away
- Stay home if sick
- Cover coughs and sneezes with inside of elbow
- Wear a facemask IF you are sick
- Clean and disinfect frequently touched surfaces daily

Spreading Coronavirus

- As an industry, we must be very concerned about spreading the virus
- Brokers across the country have been reported to be showing houses and meeting with client before AND after diagnosis
- Brokers uniquely positioned to spread the virus by visiting properties and meeting with clients
- DON'T DO IT

What Can Commercial Brokers Do?

- Brokers may:
 - Provide services to their clients remotely from their house; and
 - Use technology services that enable remote business, including online forms, electronic signatures, electronic data and analyses, electronic photographs and videos, and similar tools that can be used from home.

What Can Commercial Brokers Do?

- Brokers may not:
 - Conduct any business outside of their home, including physically showing properties, visiting clients in-person anywhere, viewing properties, taking property photos, etc. except when brokering residential properties and then only in accordance with the protocols established by the Governor as set forth in the Residential Bulletin. There are no exceptions.



Takeaways

- Workers that are considered non-essential and who do not have in-person contact with others, can work remotely from home **only**
- Preserving **residential** real estate sales was the focus of the Governor's order (e.g. homelessness), not commercial
- Restrictions don't always make sense
- Initially lasts 2 weeks; likely to be extended and modified



Questions

- What if my buyer or seller has questions about their rights and obligations under their purchase and sale agreement or lease?

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Questions

- Can brokers continue to physically preview or show properties in any fashion – even alone?
- Can brokers or their representatives go to a property to provide access to a tenant or buyer before or after a closed transaction?



Questions

- Can I input new listings?

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Questions

- Can experts such as architects, engineers, surveyors and inspectors perform work related to feasibility studies and due diligence?

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Questions

- Can the State of Washington revoke licenses and prosecute with civil/criminal charges for failing to comply with the stay-at-home order?

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Questions

- Others?

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Legal – Force Majeure

Talk to a Lawyer

- Do not advise client on their contractual rights
- Duty to refer clients to experts

Force Majeure Provision

- Contract provision – NOT a legal theory
- Whether and how it applies depends on the specific provision in your contract
- Three key questions:
 1. What constitutes a force majeure event?
 2. Does that force majeure event prevent the party from performing? (i.e. causation)
 3. What are the remedies negotiated by the parties?

Force Majeure in CBA Forms

- CBA Purchase and Sale Agreements – **no force majeure provision**
 - Not uncommon; parties rely on common law (discussed later)
- CBA Leases – do have force majeure provision
 - ST NNN – Section 33.e.
 - ST Gross – Section 33.e.
 - MT NNN – Section 35.e.
 - RET NNN – Section 35.e.
 - Parties need short term answers, such as for payment of rent

CBA's FM Provision

- “**Time periods** for either party’s performance under any provisions of this Lease (**excluding payment of Rent**) shall be extended for periods of time during which the party’s performance is prevented due to circumstances beyond such party’s control, including without limitation, fires, floods, earthquakes, lockouts, strikes, embargoes, governmental regulations, acts of God, public enemy, war or other strife.”

Force Majeure Analysis

Three key questions for every force majeure provision:

1. What constitutes a force majeure event?
2. Does that force majeure event prevent the party from performing? (i.e. causation)
3. What are the remedies negotiated by the parties?

Force Majeure Analysis

(1) What constitutes a force majeure event?

- CBA Form: “circumstances beyond such party’s control, including without limitation, fires, floods, earthquakes, lockouts, strikes, embargoes, governmental regulations, acts of God, public enemy, war or other strife.”
- Whether coronavirus pandemic is a force majeure event is a legal question for an attorney
- Likely that it qualifies
- Provide notice to other party

Force Majeure Analysis

(2) Does that force majeure event prevent the party from performing?
(i.e. causation)

- CBA Form: “during which the party’s performance is prevented “
- The party claiming force majeure must prove that the pandemic and/or government orders **prevented performance**
- Existence of a force majeure event alone is insufficient
- Whether the tenant’s performance was prevented is a legal question for an attorney

Force Majeure Analysis

(3) What are the remedies negotiated by the parties?

- CBA Form: “Time periods for either party’s performance under any provisions of this Lease (excluding payment of Rent) shall be extended”
- Remedies = extension of time periods, BUT Rent still due
- Look at definition of “RENT” in CBA forms



Questions

What do I do in purchase and sale transactions when there is no force majeure provision in the contract?

CBA Force Majeure Addendum

1. **FORCE MAJEURE.** Neither party shall be liable to the other or deemed in default under this Agreement if and to the extent that such party's timely performance of this Agreement is prevented by reason of a Force Majeure Event. "Force Majeure Event" means an occurrence that is beyond the control of the party affected and could not have been avoided by exercising reasonable diligence, making the means of performance objectively impossible. Force Majeure Events includes acts of God, war, riots, strikes, fire, floods, epidemics, or other similar occurrences. This paragraph shall not affect expiration dates of offers or counteroffers.
 2. **CONTINGENCIES AND CONDITIONS.** If, through no fault of Buyer or Seller and by reason of a Force Majeure Event, any contingency or condition in the Agreement cannot be timely completed, then all time periods in the applicable contingency or condition, including the time periods for the related notices and responses thereto, shall be extended for up to _____ days (10 days if not filled in) and shall be completed as soon as reasonably practicable.
 3. **AUTOMATIC EXTENSION OF CLOSING.** If, through no fault of Buyer or Seller and by reason of a Force Majeure Event, the sale of the Property cannot be timely closed on the Closing Date, the Closing Date shall be extended for up to _____ days (10 days if not filled in) ("Extended Closing Date") and the sale shall be closed as soon as reasonably practicable. If the sale of the Property cannot be timely closed by the Extended Closing Date, then this Agreement shall terminate and any Earnest Money shall be refunded to Buyer.
 4. **POSSESSION DATE.** The Possession Date shall be: on the Extended Closing Date; Other:
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Force Majeure Addendum Cont.

- Goal is for parties to agree on a specific extension of time periods
 - E.g. contingencies
 - E.g. closing
- Defines Force Majeure to clearly include epidemics
- Without this addendum, parties to CBA purchase and sale agreements should assume all deadlines remain unchanged



Questions

- Is this pandemic or the coronavirus generally included within the scope of a “force majeure” provision?



Questions

- What if my client wants to invoke the force majeure clause?



Questions

- What if my client, a landlord, is unable to deliver the premises on time due to inability to perform tenant improvements or some other reason?



Questions

- Going forward, should force majeure provisions now provide for suspension of rent for a certain period of time, assignment of benefits from tenant to landlord, or an option to terminate?



Questions

- Should the CBA Force Majeure Addendum be used now or later when deadlines or the closing date are approaching?



- Others?

Questions



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Legal – No Force Majeure Provision

Talk to a Lawyer

- Do not advise client on their contractual rights
- Duty to refer clients to experts

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No Force Majeure Provision?

- “Common law”
- “Where, after a contract is made, **the performance is made impracticable**” without the fault of the non-performing party, due to an event that the parties assumed would not occur at the time of contracting. *Restatement (Second) of Contracts § 261 (1981).*”
- Impracticable = **extremely and unreasonably difficult**
- Mere increase in difficulty or expense will not be enough
- PSAs: MAY excuse closing altogether
- Leasing: Who knows. Must assume all remedies possible

Impracticability in Washington

- *Liner v. Armstrong Homes* (CoA Div. 2)
 - Property owner contracted with a builder to build them a home. The owner was required to provide water supply to the property. Claimed impracticality when Kitsap County and the lender decided that the water supply was inadequate because the supplier was not a state-approved water supply service. Court held the impracticality defense failed because the owner failed to investigate and evaluate a well on his property and whether it could be developed to be sufficient.
- Takeaway: the Party claiming impracticability has a heavy burden to show that it exhausted all available solutions to the impracticability

Impracticability in Washington

- *Tacoma Northpark LLC v. NW LLC*
 - Held that the seller's financial inability to complete the permitting process was insufficient to excuse performance.
 - "Financial inability is not equivalent to impossibility."



Questions

- How do we address contract deadlines for properties that are under contract to sell and do not have a force majeure provision?
 - E.g. feasibility period set to expire but we cannot schedule an inspection of the property.
 - E.g. Buyer cannot inspect occupied multifamily units.



Questions

- Does this pandemic qualify for a proportionate rent reduction because the premises is arguably untenable?

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Transaction Difficulties

Presenting a Business Case and Renegotiating Terms

- In today's market and climate, presenting a business case may be your best bet
- As mentioned, force majeure does not necessarily excuse a party from making payments under a contract, though it may extend the time for a party to perform non-monetary obligations
- Impact of guaranties and business interruption insurance for your business
- Constantly evolving arena – what will tomorrow bring?

What We Have Seen

- Concerned parties reserving their rights and stalling
- Landlord's remedies are limited
- Buyers and Sellers making concessions to close transactions



Leasing - Questions

- How are landlords and tenants of multifamily properties impacted?

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Leasing - Evictions

- Residential vs. Commercial
 - Governor prohibited residential evictions for 30 days (does not apply to commercial)
 - City of Seattle Mayor prohibited evictions of small businesses (50 or fewer employees) and nonprofit organizations
 - Court availability limited, depending on where you are. Expect judges to be lenient
- What if Tenant refuses to pay?
 - Client needs to hire a lawyer



Leasing - Questions

- If a landlord defers the tenant's rent payment, or payments, should the landlord obtain a promissory note from the tenant in the amount of the deferred rent, not only to fix the time of repayment and any interest, but also to preclude the tenant from using the impossibility or impracticality defense to pay the rent?
- Does the promissory note need to have language in which the Tenant specifically waives any right to contest the debt or any terms of the note?



Leasing - Questions

- How would you advise tenants and landlords entering into new leases in the era of COVID-19?

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Financing - Questions

- Are 1031 exchange deadlines being extended?

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Property Management

- Advise tenants to notify building management of any COVID-19 diagnosis
- Implement clear and consistent policy for addressing reports of positive COVID-19 diagnosis
- Obligation to disclose to other tenants?
- Ensure common areas are disinfected and comply with CDC guidelines
- Remember – residential property management is okay; office, retail etc. property management is not essential...



Remote Online Notarization

- Remote notarization bill set to take effect in October 2020
- Governor accelerated start date temporarily (30 days)
- Remote notarization is now allowed
 - Notary must use a communication technology (e.g. NotaryCam) that allows the Notary to hear and see the individual
- Must have acceptable ID (still)

Repairs and Construction

- Generally not allowed
- Emergency repairs and construction necessary to structural integrity allowed

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