

## 4 COVID-19 Questions Clients Are Asking Real Estate Lawyers

By **Andrew McIntyre**

*Law360 (March 30, 2020, 4:08 PM EDT)* -- The global spread of COVID-19 has created great uncertainty in the real estate market and as a result, real estate lawyers have been bombarded over the last six weeks with wide-ranging questions and concerns from clients.

Among the issues clients are raising are what sorts of options landlords and tenants have as retailers and other tenants struggle to pay rent and whether force majeure clauses in contracts apply in the midst of a pandemic.

Here, Law360 looks at four questions real estate lawyers are receiving amid the COVID-19 pandemic.

### **What if my tenant can't pay the rent?**

Retail and restaurant tenants have been hit hard by the spread of COVID-19 and many tenants are now finding they are unable to make the next month's payment. Tenants and landlords are seeking counsel from lawyers on that scenario, and attorneys say it could play out in various ways.

Philip Feder, a partner at Paul Hastings LLP, expects that to the extent litigation arises, courts may be sympathetic with tenants, given the severity of the situation and how quickly it came on.

"It seems to me that the rules have been thrown out the window. Once the courts open up again, I think that judges will be forgiving," Feder said. "If [landlords] want to take the high road, if they want to retain their tenants, maybe give an extra month's rent."

But there's another approach. The \$2 trillion stimulus bill President Donald Trump signed last week includes \$350 billion in assistance for small businesses, and landlords may ask tenants to apply for that assistance.

The idea is that landlords, rather than take a hit from rent suspensions, may ask tenants to collect that Small Business Administration assistance and subsequently pass it on to landlords in the form of continued rent payments, said Paul Meyer, a partner at Mayer Brown LLP.

And Pamela Westhoff, a partner at Sheppard Mullin Richter & Hampton LLP, said she's also receiving calls from clients on the SBA loan front.

“Landlords are asking tenants to support the financial position they are in,” Meyer said.

“I shouldn’t be your bank. You should turn to the SBA first,” Meyer added, characterizing the way some landlords may view the situation.

### **How do I underwrite new loans?**

The real estate market depends on the continued availability of credit, and lawyers say lenders are trying to figure out just how they should be underwriting new loans, given the hit certain sectors of the economy are taking.

“How do we value these assets? Loans are typically made as a ratio of loan-to-value,” said Mark Fawer, a partner at Greenspoon Marder LLP, characterizing the way lenders are viewing the situation. “Are they taking a long-term view or a short-term view?”

Fawer said the long-term view takes into account a normal value for the building while the short-term view may value the building significantly lower, given the pandemic.

The type of asset is a factor on the minds of lenders as they consider underwriting.

Restaurants and hotels with retail are in one group, apartment buildings a second and office properties a third, in terms of the effect of COVID-19 on tenants, Fawer said. And industrial properties are in yet another category, since last-mile delivery properties may be doing even better than they had prior amid a spike in e-commerce delivery demand.

“Some banks have pressed the pause button, even though they have the availability of funds, saying, Let’s see if things settle down over the next few weeks,” Fawer said. “How do you get things done logistically if you’re underwriting a deal? There’s a lot you can do from your desk ... but you can’t do an in-person site visit.”

### **Has the government unconstitutionally taken value from my property?**

Another question that’s come up in the midst of the COVID-19 pandemic is whether governments have unconstitutionally taken value from property owners with the various responses to the pandemic, and lawyers say that may be a tough argument to prevail on.

“That’s an argument that will be jurisdiction--=based,” Meyer said. “Clearly, there is the takings clause in the U.S. Constitution, but also different states have their own takings clauses that may be more expansive than what is in the U.S. Constitution.”

Meyer noted that the Constitution separates takings into two categories, physical and regulatory. He said the physical taking argument, meaning government physically taking over a property and depriving the owner of value, is the easier of the two to prevail on, but that’s not applicable for COVID-19.

The argument now would be a regulatory one, and the theory is that landlords who have lost rent as a result of government measures to curb the spread of COVID-19 may claim governments have violated the U.S. Constitution in doing so.

The Fifth Amendment provides protection against federal takings and the Fourteenth Amendment against state and local takings.

Meyer, though, said courts may find COVID-19 actions to be a “valid use of police power,” powers given to states under the Tenth Amendment to act for the well-being of the public, in siding against property owners.

“It’s hard to do,” Meyer said, on the question of winning such takings suits.

### **Can force majeure help me?**

Lawyers have received a deluge of communication on the question of whether force majeure provisions in contracts may allow parties to get out of certain obligations, and the question is complex since such provisions generally are not worded to include pandemics.

“People are asking, ‘What are their contractual rights? What are their contractual obligations?’” Meyer said. “Everyone is trying to figure out what their rights and obligations are. [Force majeure] appears in many different types of real estate contracts, but not all.”

Meyer said purchase and sale agreements rarely have force majeure clauses, while longer-term contracts like property management agreements, leases and loan documents typically do.

Contractors, for one, are starting to assert force majeure claims in response to shelter in place orders that have slowed down construction work, Meyer said.

The hospitality sector is also carefully reviewing force majeure clauses in contracts as the spread of COVID-19 has caused widespread conference cancellations, and parties involved are scrambling to figure out what their rights and obligations are.

And the COVID-19 pandemic is also changing the way new clauses are written.

“Most force majeure clauses do not have any mention of pandemics or epidemics,” Feder said. “I’m already seeing contracts being drafted that include mention of pandemics.”

--Editing by Rebecca Flanagan.

*Correction: An earlier version of this article misstated the way Mark Fawer grouped various types of properties and misstated the roles of landlords and tenants in one instance. The errors have been corrected.*