

Three Real Estate Contract Questions to Consider Now

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Whether you hold an interest in an industrial, commercial, retail, residential asset class; whether you are an owner, buyer, seller, landlord and/or tenant, lender or borrower, property manager, or homeowner; and whether your real estate is business or personal, there is a need to address COVID-19's immediate impact on real estate agreements.

Generally, real estate agreements reflect the business climate and risk assessments at the time the contracts were made. In negotiating, executing, and performing their contracts, parties relied on their relationships with the parties on the other side of the transaction. However, when an unforeseeable or disruptive event occurs, parties must look back at their agreements and reassess their standing, rights, remedies, recourse, and relationships.

Now is the time to check on provisions of your real estate contracts. Below are three common questions you may be asking:

1. Which provisions of a real estate purchase and sale contract, lease, or loan document might offer protections or provide guidance at this time?

The following is a sample list of applicable contract provisions:

- Force Majeure/Acts of God – Force majeure and other provisions in real estate documents that address the parties' rights and obligations if events occur beyond their control. Some may cover national emergencies and governmental orders.
- Defaults – Define which actions or inactions will result in a default under the relevant document and whether the defaulting party has any right to notice and an opportunity to cure.
- Taking – What happens when all or some material right to utilize your real estate asset has been taken away or restricted in a way that diminishes the property value or prevents you from utilizing it for your intended purposes.
- Access – Property owners will often have certain rights to enter and inspect leased premises and may have the right to restrict access. Purchasers and sellers of a property may have ongoing rights or obligations to allow access to properties to complete due diligence. These

provisions may or may not address how circumstances may change in exigent circumstances.

- **Covenant of Quiet Enjoyment** – The covenant of quiet enjoyment provides tenants with the assurance they will be able to peaceably use and enjoy their leased premises. These provisions may or may not specifically address a situation where a landlord voluntarily or involuntarily restricts access to the property.
- **Maintenance** – Leases allocate maintenance and repair obligations, including but not limited to cleaning. Purchase and sale contracts may contain obligations of various parties on how the owner or operator must maintain the property through closing. These provisions may or may not address who pays or the additional costs of implementation of precautionary measures.
- **Payment Obligations** – Payment and closing obligations are often excluded from a force majeure clause with specific clauses that provide that time is of the essence or require payment, despite any other provision that would excuse it.
- **Notice and Cure Periods** – Leases, purchase contracts, and loan documents are often very specific about the required protocols for tendering notices, which then trigger specific cure periods. Failure to give or receive proper notice might impact deadlines for cure or performance and termination rights. Cure periods may be extended as a result of the inability to perform or governmental mandates.
- **Environmental** – Environmental clauses in contracts may provide additional options.
- **Remedies** – Real estate agreements often provide stringent remedies for nonperformance and default. Available remedies should be analyzed in the context of the overall climate in the courts and marketplace. Different parties may be able to avail themselves of certain defenses. Essential businesses may be entitled to certain protections at law and equity. Remedy rights may be expanded or contracted temporarily by governmental entities at the municipal, state, and federal level.
- **Duty to Notify** – Parties may have an express or implied duty to notify other occupants of employees, agents, and/or visitors who have been diagnosed or are experiencing symptoms of the virus and were present at the property.
- **Performance, Contingency, and Delivery Periods** – Contracts related to real estate may have performance, contingency, or delivery periods. Those dates (often expressed as a number of “days” or “business days”) should be carefully reviewed to determine whether voluntary or mandatory building closures affect the number of “days” or “business days” allowed for performance. Governmental mandates might offer tolling or temporary waivers of obligations.
- **Operating Covenants** – Sellers of businesses and real estate or tenants may have obligations to keep operations going or risk default. Check contracts for provisions which require “continuous operation.” Parties may or may not have the right to close buildings, cease services, or implement security or screening measures. Some contracts may require notices of material change to representations and warranties, valuations or business operations.
- **Abatement/Self Help** – Agreements may provide abatement rights or self-help rights for missed delivery dates or failed obligations on the part of the other party. It is possible that

governmental actions, force majeure, and common law doctrines might already or soon will provide protections or require reasonable extensions.

- General Deadlines for Performance and Termination/Extension Rights – Carefully watch dates and deadlines in contracts. Extension and termination rights are often narrowly construed, especially where there is a “time of the essence clause.” Some deadlines may allow for tolling in the event of a force majeure, but others may not.

2. What else should purchase and sale, lease, or loan parties consider as we all move forward from this point?

The following are some additional considerations:

- Reliance on Third Party Providers – Not all third party providers whose services are necessary to perform obligations under a transaction will be classified as essential workers. Governmental orders may prohibit or allow such parties to provide services or restrict the providers to provide services remotely. Check the applicable and evolving ordinances and contact the providers directly to determine if services are available remotely. Assess how deadlines (including, but not limited to, filing deadlines, IRS Section 1031 deadlines, due diligence deadlines for inspections, title, and survey) may be impacted.
- Electronic Signatures and Notarization – Some states have [adopted legislation](#) related to electronic signing and notarization procedures. Not all jurisdictions and providers have equivalent technology available at this time.
- Recording Office Delays – Buyers, sellers, lenders, and borrowers are reminded that there will likely be delays in conducting recordings. Local recording offices may not be open for business or may experience a backlog. Electronic recording is available in some, but not all, jurisdictions.
- Closings – Check with the title company on whether electronic signatures, electronic notarization, insurance over the gap period between closing, and electronic recordings are available during periods where there might be restrictions on face-to-face closings. There are fluid situations where maintaining a physical office may not be permitted. For example, the governors of California, Pennsylvania, New York, and Illinois have issued [“stay at home” orders](#) for residents in those states and restrictions on businesses. Discuss contingency plans if title companies and lenders are not able to fund on time. Essential service providers will be stressed, and electronic transfers of funds can be delayed.
- [Insurance Coverages](#) – Do the parties have coverages for economic losses, including business interruption/business income and loss of rents? Are there any issues that are covered by commercial general liability insurance? Most standard form insurance policies will not provide business interruption/business income insurance coverage for forced/voluntary shut down caused by pandemics, but the parties should carefully review all of their insurance policies with their risk management teams to see whether the relevant policies are non-standard forms that do include such coverage.
- Evolving Federal, State, Municipal laws, Ordinances, and Doctrines – New laws and ordinances will result from the most immediate public needs and will continue to evolve as

contract provisions are interpreted differently by different parties whose interests differ. Our Coronavirus Task Force has analyzed several legislative updates including this one on [the Families First Coronavirus Response Act](#).

3. From a practical perspective, where should I start?

Discuss your specific situation with your attorney. Apply good business judgment. Everyone is suffering through this together. It is important to understand the applicable contract documents and assess your relationship with your transaction parties. Courts and Congress may end up taking unusual positions and taking protective steps in the coming months to avoid recession, flatten the curve, and share the loss in ways that today's contracts might not have contemplated.

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