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General Session 1

Recent Developments 2021: Despite, Including, and During the COVID-19 Pandemic

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FEDERAL CASES	
FIRST CIRCUIT	
United States Court of Appeals for the First Circuit	
58 Swansea Mall Drive, LLC v. Gator Swansea Prop., LLC, 981 F.3d 117 (1st Cir. 2020)	
Issue:	Whether judgment for Landlord is proper in a contract dispute arising from Landlord's refusal to execute agreements drafted by the bank in connection with Tenant's attempt to secure a leasehold mortgage loan.
Facts:	Gator Swansea Property, LLC ("Landlord") and 58 Swansea Mall Drive, LLC ("Tenant") were parties to a ground lease (the "Lease") whereby Tenant leased from Landlord a shopping center premises in 2013. In March 2015, Tenant sought a mortgage loan from United Bank (the "Bank") and offered its leasehold interest in the premises as collateral. The Lease permitted Tenant to mortgage its leasehold interest if it was not in default beyond the applicable grace periods. The Bank requested that Landlord sign an agreement (the "3(n) Agreement") specifically recognizing Tenant's right pursuant to Article 6, Section 3(n) of the Lease to place a leasehold mortgage on the leased premises. Landlord refused to sign the 3(n) Agreement because the loan documents were drafted in such a way that would call into question whether the loan documents and/or the 3(n) Agreement would create in the Bank a priority interest in insurance proceeds. Neither the 3(n) Agreement nor the loan documents included provisions whereby conflicts between the loan documents and the Lease would be governed by the Lease terms. Further, the Bank repeatedly rejected Landlord's efforts to include in the 3(n) Agreement a provision providing for the Lease terms to prevail in the event of a conflict or ambiguity between the loan terms and the terms of the Lease. Because Landlord failed to sign the 3(n) Agreement by the required deadline, the Bank terminated Tenant's mortgage loan. In response, Tenant charged Landlord with breach of the Lease. The District Court found that Landlord had not breached any duty by refusing to sign the 3(n) Agreement because it had no obligation to execute such an agreement where Landlord had a reasonable belief that the terms of the mortgage could lead to future litigation over Landlord's rights to insurance proceeds.
Holding:	The Court of Appeals found that the language of Article 6, Section 3(n) of the Lease required the Bank to be reasonable when drafting the terms of the 3(n) Agreement. The Court also found that Landlord was only obligated under the Lease to sign documents pursuant to Article 6, Section 3 of the Lease that preserved its priority rights to insurance proceeds. Because none of the Bank's documents established that the Lease terms would govern in case of conflict, the Court held that Landlord did not breach the Lease by refusing to sign the 3(n) Agreement.
First Circuit: United States District Court for the District of Massachusetts	
Cummings Props., LLC v. Prod. Res. Grp., LLC., Civil Action No. 20-11653-NMG, 2021 U.S. Dist. LEXIS 66507(D. Mass. Apr. 2, 2021)	
Issue:	Whether Tenant sought to litigate the case on the merits in state court, which would preclude its right to remove the action to federal court.

Facts:	Cummings Properties ("Landlord") leased certain properties to Production Resource Group, LLC ("Tenant") in or before 2020. Landlord alleged that Tenant subsequently breached the lease agreement by failing to pay rent between May, 2020, and August, 2020. Landlord then served upon Tenant a summary process complaint seeking to evict Tenant and to collect liquidated damages. Soon thereafter, Landlord filed an eviction suit in Woburn District Court. One week later, Tenant filed an answer, served discovery requests, and moved to transfer the case to the Massachusetts Superior Court. Landlord opposed that motion and oral argument was heard in Woburn District Court. The court denied Tenant's motion. The next day, Tenant removed the action to Massachusetts District Court based on diversity jurisdiction. Landlord requested that the Court remand the action to state court, contending that by filing and arguing a motion in state court, Tenant waived its right to remove the case to federal court.
Holding:	The District Court concluded that Tenant did not waive its right to remove the action to federal court. The Court relied on the principal that "[a] defendant waives its right to remove an action to federal court if it manifests a clear and unequivocal intent to adjudicate the case in state court." The Court reasoned that Tenant's actions of filing an answer, serving discovery requests, and moving to transfer the case to another state court before removing the case to Massachusetts District Court were measures taken to preserve Tenant's rights in light of the accelerated timeline that applies to summary process proceedings. By taking those actions, Tenant was not seeking to litigate the merits of the case. Because Tenant did not litigate the merits of the case in state court and because Tenant timely filed its *Notice of Removal* within 30 days of being served the complaint, the case was properly before the Massachusetts District Court.
First Circuit: United States District Court for the District of Puerto Rico	
Jackie's Rest., LLC v. Plaza Carolina Mall, L.P., No. 17-2376 (RAM), 2020 U.S. Dist. LEXIS 100676 (D.P.R. June 8, 2020)	
Issue:	(1) Whether Tenant has the right to terminate its Lease with Landlord early on the basis of the closure of certain common areas of the mall, and is therefore entitle to the return of its security deposit; (2) Whether Landlord was entitled to keep Tenant's restaurant equipment after Tenant abandoned the premises.
Facts:	In 2012, Jackie's Restaurant, LLC ("Tenant") signed a lease agreement (the "Lease") with Plaza Carolina Mall L.P. ("Landlord") to lease commercial space within the food court of Landlord's mall (the "Leased Premises"). The Lease term was 10 years with fixed monthly payments. The Lease provided Landlord the right to change, modify, add or subtract from the configuration of the common areas of the mall. It further defined breach of the Lease as a failure of Tenant to pay rent or other amounts when due. The Lease also expressly granted Landlord a security interest and contractual lien on all of Tenant's equipment on the Leased Premises, with "all of the rights and remedies of a secured party under the

	Uniform Commercial Code". Landlord was authorized under the Lease to prepare and file financing statements perfecting the security interests. Tenant complied with its obligations until a hurricane caused the mall to close temporarily in September 2017. In November 2017, Tenant gave notice purporting to terminate the Lease, claiming that Landlord failed to fulfill its essential duty, pursuant to Article 1077 of Puerto Rico's Civil Code ("Article 1077"), of maintaining the mall and holding common areas open to the public after the hurricane. Tenant subsequently abandoned the Leased Premises, stopped paying rent, demanded the return of its security deposit, and requested access to the Leased Premises in order to remove its equipment. Landlord retained the security deposit and prohibited Tenant from removing Tenant's equipment and other personal property from the Leased Premises. In December 2017, Tenant filed a complaint, seeking a judgment requiring the return of its security deposit and declaring Tenant's ownership of the equipment inside the leased premises.
Holding:	The Court held that Tenant did not have a legally sufficient cause to terminate the Lease, that Tenant's abandonment of the Leased Premises was a breach of the Lease, and therefore Tenant was not entitled to the return of the security deposit. According to the Court, efforts to terminate a lease pursuant to Article 1077 must be supported by the failure of an essential obligation, not merely an "accessory" or "complementary" obligation, The Court reasoned that the primary purpose of the Lease was to provide Tenant possession of the Leased Premises, and that use of the common areas was accessory. Further, Landlord had the right to temporarily close the common elements for repairs. The Court further held that Landlord could not keep Tenant's equipment. Although Tenant did breach the Lease, Landlord never perfected its security interest in Tenant's equipment by filing financing statements. The Court did not address Landlord's arguments that it had a contractual lien in the equipment. Nor did it address Tenant's arguments that the security interest language of the lease only applied to assets which were "attached" to the Leased Premises, and not to equipment.

SECOND CIRCUIT	
Trustees of Columbia Univ. in the City of N.Y. v. D'Agostino Supermarkets, Inc., 36 N.Y.3d 69 (2020)	
Issue:	Whether a damages clause in a lease surrender agreement that, upon tenant's breach of the agreement, made all future payments that had been due under the surrendered lease immediately due and payable was disproportionate to the landlord's actual damages.
Facts:	The Trustees of Columbia University ("Landlord") and D'Agostino Supermarkets, Inc. ("Tenant") entered into a 15-year commercial lease of the ground floor and basement levels of a building owned by Landlord. 13 years into the lease, the parties entered into a surrender agreement that terminated the lease in exchange for Tenant's surrender of the premises and payments totaling \$261,751.73 to Landlord. The lease termination was to be effective as of the Tenant's

	surrendering of the premises. The surrender agreement also had a damages clause which provided that, in the event of Tenant's default of the surrender agreement, all future payments that were due under the terminated lease would immediately become due and payable. Tenant vacated and surrendered the premises shortly after the surrender agreement was executed, and timely made two initial payments totaling $86,000. One month after the surrender, Landlord relet the premises. Tenant later defaulted on the surrender agreement by failing to make four consecutive monthly payments as they became due. Landlord brought suit to enforce the damages clause and recover future payments due under the lease totaling $1,020,125.15, plus interest and costs. Tenant moved to strike the damages provision on grounds that it was "grossly excessive" in comparison with the amount due Landlord under the surrender agreement ($175,751.73).
Holding:	The Court of Appeals found that Landlord's damages were limited to those incurred by the Tenant's breach of the surrender agreement rather than those for the breach of the lease. The surrender agreement was a new agreement between the parties that terminated the lease and all of Tenant's obligations thereunder in exchange for Landlord obtaining earlier access to relet the property. The court also concluded that the liquidated damages provision in the surrender agreement was unenforceable as it was clearly excessive in comparison to the damages resulting from Tenant's breach of the surrender agreement.
VRA Family Limited Partnership v. Salon Management USA, LLC, 183 A.D.3d 614 (2d Dep't 2020)	
Issues:	(1) Whether tenant remained liable for breach of a lease that it had assigned to a third party. (2) Whether landlord's acceptance of rent from a third party leasehold assignee constitutes waiver of a lease's consent-to-assign provisions. (3) Whether assignment releases tenant's obligations under a lease absent landlord's consent.
Facts:	In January, 2006, VRA Family Limited Partnership ("Landlord") leased a commercial property to Salon Management USA, LLC ("Tenant") for a 10-year term. In 2016, Landlord brought suit against Tenant alleging that in November 2013, Tenant had vacated and abandoned the premises after demolishing improvements without the Landlord's consent. Landlord sought to recover damages for unpaid rent, late fees, unpaid insurance premiums, physical damage to the property, and breach of the lease. Tenant argued that it had assigned the lease to a third-party assignee, and that Landlord's acceptance of rent from and direct conversations with the third-party assignee constituted a waiver of the non-assignment and non-waiver provisions in the lease.

Holding:	The court found that Tenant remained liable on all causes of action. The lease expressly required Landlord's written consent to any assignment, which was not obtained by either the Tenant or the third party assignee. The court also found that the lease contained clear and unambiguous language providing that Landlord's acceptance of rent from the third-party assignee did not, absent the written consent of the Landlord, constitute a waiver or acceptance of the assignment. Finally, the court found that the assignment did not release Tenant from any obligations under the lease without an express agreement with Landlord, nor could such release be implied simply from Landlord's acceptance of rent from the third-party assignee.
228E58STR, LLC v. Koleksiyon Mobilya San A.S., 2020 WL 4260959 (S.D.N.Y., 2020)	
Issues:	Whether a guarantor's liability ended when the tenant vacated and surrendered the premises mid-lease.
Facts:	In 2015, 228E58STR, LLC ("Landlord") and Kolesiyon USA LLC ("Tenant") executed a ten-year lease of commercial space. As additional incentive for Landlord to enter into the lease, Koleksiyon Mobilya San A.S. ("Guarantor"), the direct owner of Tenant, executed a guaranty in which it agreed to "personally guaranty to Landlord the payment of all rent and additional rent payable by the Tenant…under the Lease through the Surrender Date." While the term "Surrender Date" was not defined in either the guaranty or the lease itself, the terms of the lease provided that any surrender had to be in writing and signed by the Landlord in order to be valid. In May 2019, Tenant vacated the premises. Four days after vacating, Tenant tendered a written acknowledgment of surrender which the Landlord never signed. Tenant paid rent for the month of May, but neither Tenant nor Guarantor made any further payments to Landlord. In August 2019, Landlord formally terminated the lease. Landlord brought suit against the Guarantor, seeking rents owed both before and after Tenant's vacating of the premises as provided for by the terms of the guaranty. Guarantor argued that the Tenant properly surrendered the premises according to the terms of the guaranty, thus terminating the guaranty. Landlord contended that the Tenant breached several terms of the lease when it abandoned the premises without Landlord's consent and subsequently defaulted on all of its payment obligations, for which Guarantor is liable.
Holding:	The court ruled that, because Landlord did not consent to the surrender as required by the terms of the lease, the Tenant never formally "surrendered" the premises. As a result, Guarantor's liability for unpaid lease obligations under the guaranty had never terminated, and Guarantor remained liable to Landlord for all damages incurred.
1710 Realty, LLC v. Portabella 308 Utica, LLC, 189 A.D. 944 (2d Dep't 2020)	
Issue:	Whether a commercial lease was properly terminated for non-delivery of the premises where the lease required that the premises be delivered in "broom clean" condition, while also noting that the premises was to be delivered "as is."
Facts:	1710 Realty, LLC ("Landlord") entered into a commercial lease dated December 16, 2015 with Portabella 308 Utica, LLC ("Tenant"). Under the terms of the lease, the

	leased premises were to be delivered to Tenant "on the Commencement Date as is". The Commencement Date was defined as "the later to occur of the date that (i) Tenant is delivered occupancy of the Demised Premises in the Delivery Condition (hereinafter defined), (ii) Tenant has been issued permits from the Department of Buildings of New York City in connection with Tenant's Work and (iii) January 15, 2016." Payment of rent would start 270 days after the Commencement Date. If the leased premises were not delivered within 90 days of the date of the lease, Tenant had the right to terminate the lease. "Delivery Condition" was defined as "vacant, broom clean and free of prior tenants' personal property and fixtures." On April 19, 2016, Tenant informed Landlord that it would be exercising its termination right as Landlord had not delivered the premises in the Delivery Condition (submitting evidence that furniture, debris, and other items had been left in the leased premises) within 90 days of the lease date. Landlord sued, seeking to recover accelerated rent, arguing that the "as is" language effectively modified the "broom clean" requirement; Tenant relied on the language in the lease, asserting that Landlord had failed to meet the Delivery Condition, so the lease had been validly terminated and the obligation to pay rent had never commenced.
Holding:	The appellate court concluded that the "as is" language did not modify, nor effectively eliminate, the "broom clean" requirement in the definition of "Delivery Condition." The Court reconciled the two seemingly conflicting provisions (that is, the delivery of the premises "as is" while also being "broom clean") by noting that the "fallacy of the [Landlord]'s position is that the 'as is' condition referred to in Section 13.1 is the condition of the premises on the Commencement Date, not the condition of the premises on the date of the lease." Therefore, since the leased premises were not delivered in broom clean condition, the Tenant had the absolute right to conclude that the Landlord's clearance and cleaning of the premises was incomplete and to terminate the lease. Thus, the Tenant was entitled to the return of the security deposit and the first month's rent, with interest.
THIRD CIRCUIT	
None.	
FOURTH CIRCUIT	
Vaso, L.L.C. v. Brave New World Invs., L.L.C., 301 So. 3d 515 (4th Cir. 2020)	
Issue:	(1) Whether addenda added after a buyer accepted a landlord's counteroffer but prior to tenant's exercise of its right of first refusal to purchase constituted part of an initial purchase offer; (2) Whether notice given by email satisfies a commercial lease's notice requirements for a right of first refusal where exercise of the offer requires written notice but does not further specify the form of notice.
Facts:	Vaso, L.L.C. ("Tenant") and Brave New World Investments, L.L.C. ("Landlord") entered into a commercial lease agreement that granted Tenant a right of first refusal

	("ROFR") to purchase Landlord's building and associated garage (the "Property"). This ROFR gave Tenant the right to match any written offer received by Landlord during the term of the lease, and provided that Tenant would have 10 days after receiving the written offer to accept the match and execute a purchase agreement with Landlord on the same terms and conditions as the initial offer. On October 3, 2018, Torres Enterprises, L.L.C ("Buyer") submitted a conditional offer on the Property. Landlord extended a counteroffer that required the sale to be subject to Tenant's ROFR. On October 4, 2018, Buyer accepted this counteroffer without conditions. That same day, Landlord and Buyer entered into a purchase agreement expressly subject to Tenant's ROFR. On October 6, 2018, a member of Landlord's company sent Tenant an email containing the fully executed October 4th offer. Tenant initiated steps to finance the purchase of the Property and match the offer. After Buyer learned that Tenant planned to match the offer, Buyer's realtor emailed Tenant an addenda to the offer on October 10, 2018. The addenda contained new sale terms and conditions that (i) accelerated closing by 75 days, (ii) rendered the $500,000 deposit non-refundable, (iii) eliminated due diligence, and (iv) required that the entire purchase price immediately be placed in escrow pending closing if Tenant exercised its ROFR. The addenda stated that in order to exercise its ROFR, Tenant needed to match these new additional terms instead of the initial October 4th offer. On October 12, 2018, Tenant sent Landlord notice via email that it was exercising its ROFR. On October 16, 2018, Tenant executed a purchase agreement matching the October 4 offer and made a demand on Landlord to execute the purchase agreement. Landlord did not execute the purchase agreement, and instead sold the Property to an affiliate of Buyer on October 18, 2018. On October 25, 2018, Tenant filed a petition for temporary restraining order, preliminary injunction, permanent injunction, declaratory relief, specific performance, and damages. Landlord and Tenant filed cross motions for summary judgment. The trial court granted Tenant's motion for summary judgment and denied Landlord's motion.
Holding:	The appellate court affirmed the trial court's decision to grant summary judgment in favor of Tenant. Despite Landlord's argument that Tenant could no longer match the initial October 4th offer after receiving notice of the October 10th addenda, the court concluded that the addenda were additional terms and conditions added after Buyer accepted Landlord's October 4th counteroffer and were not part of the initial offer. Therefore, the court held that Tenant was not required to comply with the addenda in order to validly exercise the ROFR. Landlord also argued that formal notice to Tenant was required to trigger the 10-day ROFR period, that Landlord's October 6th e-mail did not constitute formal notice because it not sent by certified mail or personal delivery, and that Landlord was free to negotiate the best terms and conditions for sale until formal notice was given. The court rejected the notion that notice to trigger the ROFR period required certified mail or personal delivery, noting that the lease only required that the offer be in writing and was silent on how Tenant must accept the offer. Given the narrow time frame of this

	deal, the court also found that transmission of notice by email was reasonable. Accordingly, the October 6th email with the executed October 4th offer was reasonable notice that triggered the ten day ROFR period, and Tenant properly exercised its ROFR by matching the October 4 offer.
Expo Properties, LLC v. Experient, Inc., 956 F.3d 217 (4th Cir. April 15, 2020)	
Issue:	Whether a letter signed only by a landlord and an estoppel certificate signed only by a tenant satisfy the requirements of Maryland law for modification of a lease.
Facts:	Merchants Properties, successor in interest to Expo Properties ("Landlord") owned an office complex in Maryland, which they leased to Experient ("Tenant"). Upon the completion of the lease term, Landlord and Tenant disagreed over the condition in which the Tenant should leave the complex and which party was responsible for any construction or maintenance required to bring the complex into that condition. Landlord and Tenant had both inherited the lease from predecessors-in-interest: the original landlord, John Laughlin ("Original Landlord"), leased the office complex to the original tenant, Galaxy Registration, Inc. ("Original Tenant"). The original lease, signed in 1994, included language obligating Original Tenant to cover various general categories of expenses, as well as more specific cost-sharing provisions. It also required that amendments to the lease be signed by both the landlord and the tenant. In addition to various mutually-executed amendments, such as routine rent increases, Original Landlord wrote a letter to Original Tenant in 1998 in connection with a dispute over who would pay for a new fire protection system. This letter, signed only by Original Landlord, maintained that the "lease makes it clear that all costs for repairs, maintenance, and capital improvements will be borne by [the tenant]," and cited Article 4 (D) of the lease concerning "Additional Rent Payments." In 2004, Original Landlord transferred his interest in the lease to Expo Properties, one of the plaintiffs in this case, which executed a fourth lease amendment in 2005. This amendment specified that additional space would be rented to Original Tenant, now doing business as Expo Exchange, on a triple net basis. In 2006, Landlord acquired Expo Properties and its interest in the lease. In the course of this transition, tenant Expo Exchange signed an Estoppel Certificate for Landlord. This Estoppel Certificate stated that the original lease, between Original Landlord and Original Tenant, had been "modified and amended" by various instruments, including the 1998 letter from Original Landlord to Original Tenant. After the issuance of the Estoppel Certificate, Tenant took over Expo Exchange's interest in the lease. In 2011, Landlord and Tenant executed an amendment extending the term of the lease to July 2013. The amendment defined "the existing lease" as "the LEASE AGREEMENT executed . . . on March 17, 1994; its Four subsequent Amendments . . . and the Estoppel Certificate dated July 18, 2006." In 2012, as Tenant was preparing to vacate the premises, Landlord requested inspection reports for the building's roof and HVAC systems. Based on these reports, Landlord requested that Tenant make repairs. Landlord also informed Tenant that it would be sending its own inspectors, and that Tenant would have to make any

	additional repairs identified during this second round of inspection. Tenant failed to make any repairs, and in July 2013, Landlord sued for breach of contract, promissory estoppel, negligence, and declaratory relief. In September 2015, Tenant moved for partial summary judgment, claiming, (1) neither Original Landlord's 1998 letter nor the Estoppel Certificate amended the lease, (2) Tenant was not obligated to replace HVAC units and carpeting, and (3) Tenant was not obligated to pay for structural repairs that Landlord had not made and yet had charged costs for as additional rent during the lease term.
Holding:	The Fourth Circuit upheld the trial court's ruling that neither the 1998 letter nor the Estoppel Certificate amended the lease. Landlord argued that the letter and the Estoppel Certificate were lease modifications that restructured the lease by eliminating all cost-sharing provisions and making the Tenant solely responsible for building costs. However, the Fourth Circuit held that Maryland law requires mutual assent to modify a contract and found that neither of these documents contained evidence of mutual assent because they were each signed by only one party and because neither document specifically mentioned which terms of the lease it was modifying. The Fourth Circuit also dismissed Landlord's argument that the 1998 letter and the Estoppel Certificate clarified an ambiguity in the lease, finding that the written lease contract was not ambiguous about cost-sharing and that the 1998 letter offering an interpretation of the lease terms was therefore inadmissible parol evidence. Finally, the Fourth Circuit reviewed the cost-sharing provisions of the lease and found them to be unambiguous, holding that pursuant to such terms, Tenant was not required to pay for Landlord's requested repairs.
FIFTH CIRCUIT	
The Shops at Legacy (RPAI) L.P. v. Del Frisco's Grille of Tex., LLC, No. 05-19-01274-CV, 2020 Tex. App. LEXIS 6571 (5th Cir. Aug. 17, 2020)	
Issue:	(1) Whether a rent adjustment provision in a lease should be construed as a liquidated damages clause or a permissible use provision when the restriction does not relate to a tenant's intended use of the premises; (2) Whether such a disputed provision is an unenforceable penalty when the provision results in identical damages regardless of the extent of its breach.
Facts:	RPAI, L.P. ("Landlord") owned and managed The Shops at Legacy, a mixed-use commercial development. In 2014, Del Frisco's Restaurant Group ("Tenant") entered into a lease agreement with Landlord to open a DF Grille restaurant. The executed lease included a provision triggering a rent increase if the Tenant "directly or indirectly operate[d], manage[d], or ha[d] any interest in any commercial establishment" with "the same or similar Trade Name" or "a concept that [was] the same as Tenant's permitted use" within a restricted radius. The provision also explained that the "adjustment in rental reflect[ed] the estimate of the parties as to the damages which Landlord would be likely to incur by reason of the diversion of

	business and customer traffic from the Demised Premises and Project to such other store within the Restricted Area, as a proximate result of the establishment of a Competing Business." In 2015, Tenant signed a lease to open a DF Steakhouse in another retail complex within the restricted radius. Asserting the two restaurants were distinct and differentiated concepts, Tenant refused to pay the higher rent charged by Landlord under the Shops at Legacy lease. Landlord subsequently brought suit for declaratory judgment asserting that Tenant was in violation of the radius restriction under the Lease. Tenant filed a motion for summary judgment asserting that Landlord's interpretation of the lease was too broad and that the radius restriction was an unenforceable liquidated damages clause because it contained an impermissible penalty. The lower court granted Tenant's motion for summary judgment. Landlord appealed.
Holding:	Under de novo review, the Court held that the disputed provision was a liquidated damages clause and could not be construed as a permissible use provision because it did not relate to the Tenant's intended use of the leased premises nor any premises under Landlord's control. The Court also concluded that the provision's plain language rendered the language "unenforceable on its face," as an impermissible penalty because the provision awarded identical damages regardless of the extent of the breach. In reaching its decision, the Court highlighted how the lease triggered liquidated damages without regard to the effect of Tenant's conduct and whether its new operation in the restricted zone diverted customers from the leased premises at The Shops at Legacy. In so holding, the Court emphasized how the record established no evidence Landlord suffered actual damages as a result of Tenant's conduct.
SIXTH CIRCUIT	
None	
SEVENTH CIRCUIT	
Mali v. Innovative Movement Dance Co., LLC, 2020 IL App (5th) 190273-U (Ill. Ct. App., February 19, 2020)	
Issue:	(1) Whether a landlord properly mitigated damages under Illinois state law; (2) Whether a landlord was entitled to damages relating to a realtor's commission paid by landlord in relation to a lease with tenant that was later breached.
Facts:	Innovative Movement ("Tenant") and Mali ("Landlord") entered into a lease agreement on August 23, 2017, under which Innovative Movement agreed to rent the building for use as a dance studio for $2,000 per month. In order to find Innovative Movement as a Tenant, Landlord had entered into a separate contract with a realtor, under which Landlord paid the realtor a commission of 7% of all rent Tenant would pay Landlord under the 26-month lease. This commission was paid in advance by Landlord, and was not mentioned in the lease.

	In September 2018, Tenant requested Landlord release Tenant from the lease due to a lack of revenue. Landlord informed Tenant that it would look for a replacement tenant, and that Landlord would release Tenant only if Landlord incurred no financial loss. Landlord, who was out of state, encountered difficulties in re-letting the premises, including a requirement to install two handicapped restrooms in the event the use of the premises changed. In October 2018, Tenant closed its business and vacated the premises; Tenant paid rent through November 2018. In November 2018, Landlord entered into a new two-year lease with a new tenant. The new tenant's rent was $1,800 for the first year of the lease (beginning in January 2019) and $2,000 for the second year of the lease. In January 2019, Landlord filed a complaint against Tenant for damages plus costs of suit. The damages included: $1,000 for half of the January 2019 rent, $2,400 for the $200 per month difference in rent beginning January 2019 through January 2020, and $2,800 for the realtor's commission (7% of the rent that was to be paid over the 20 remaining months of the original lease term).
Holding:	The Court found that the Landlord's efforts to obtain a new tenant were reasonable, and as such Tenant remained liable for the full amount, less mitigation, of rent under the lease agreement. As the new tenant began paying rent on January 15, 2019, Tenant remained liable in the amount of one-half of the January 2019 rent and $200 per month for the first year of the new lease. However, the Court found that the Tenant was not liable for the $2,800 realtor's commission, as the Landlord did not incur the commission *as a result of* the Tenant's breach. Instead, the obligation to the realtor was incurred in obtaining the lease with Tenant, and was nothing more than an expense incurred in that transaction.
Mt. Trace Development, LLC v. Spillman, 142 N.E.3d 477 (Ct. App. Ind. February 19, 2020)	
Issue:	Where a lease was silent on the issue of removal of personal property from the leased premises, whether Tenant nevertheless had an obligation to return the property to its original condition upon termination of the lease.
Facts:	In January 2016, Mountain Trace ("Landlord") and Spillman ("Tenant") entered into a written lease agreement, which provided that, in addition to a monthly rent of $1,500, Tenant was to be held responsible for any damages caused by Tenant from the date of the lease until it was terminated. After Tenant's failure to pay rent, an eviction order was issued requiring Tenant to vacate the premises by January 22, 2018, and noting that "any property not removed at the time of eviction is deemed as abandoned property." Tenant failed to remove its property from the leased premises by January 22, 2018, and Landlord incurred expenses in the amount of $9,000 to have it removed. Landlord sought damages for the additional expense incurred in removing Tenant's property, but the lower court found that the lease contained no requirement for Tenant to remove its property from the leased premises and that, pursuant to the eviction order, the property was "abandoned" so Tenant had no obligation to remove it.

Holding:	Although the lease did not explicitly state that Tenant had an obligation to surrender the leased premises to Landlord in the same condition as when the parties entered the lease, Tenant was required to do so as a matter of law. So, after Tenant failed to fulfill this duty, Landlord had to remove the property to return the leased premises to its condition at Lease inception, and incurred a foreseeable cost in doing so.
EIGHTH CIRCUIT	
Eighth Circuit: United States District Court for the Eastern District of Arkansas, Central Division	
Tpp 303 Nlr v. Dick's Sporting Goods, No. 4:18-CV-00836-BRW, 2020 U.S. Dist. LEXIS 20952 (E.D. Ark. Jan. 9, 2020)	
Issue:	Whether there was a mutual mistake as to a lease agreement co-tenancy provision which governs whether Tenant is entitled to pay co-tenancy rent in lieu of minimum rent.
Facts:	Tpp 303 Nlr Plaza ("Landlord") and Dick's Sporting Goods ("Tenant") negotiated a lease agreement (the "Lease") for space in Landlord's shopping center. Included in the Lease was a co-tenancy provision which required 60% of the remaining leasable floor area of the shopping center to be fully staffed and occupied by "Required Tenants" (as defined in the Lease). Tenant argued that it was entitled to pay co-tenancy rent instead of minimum rent because 60% of the remaining leasable floor area was not staffed and occupied by Required Tenants as of the Rent Commencement Date. Landlord disagreed and filed suit alleging mutual mistake of fact. Landlord acknowledged that under the present interpretation of the Lease, Landlord was "not even close" to satisfying the co-tenancy requirements as of the Rent Commencement Date. Landlord instead argued that both Landlord and Tenant were previously mistaken in believing that the mix of tenants existing at the time the Lease was executed (over a year prior to the Rent Commencement Date) satisfied the co-tenancy provision. Tenant argued that there was no mistake in its understanding of the language, and that if there was a mistake in the Lease, it was only by Landlord, and it was a mistake of law not of fact. Tenant filed a motion for summary judgment.
Holding:	The Court held that Landlord presented enough evidence of a mutual mistake to withstand summary judgment. To demonstrate a mutual mistake of fact warranting reformation, it must be shown "by clear and decisive evidence that, at the time the agreement was reduced to writing, both parties intended their written agreement to say one thing and, by mistake, it expressed something different." The Court found that the evidence demonstrated that from the beginning of negotiations in 2016 through the execution of the Lease in 2017, and for more than a year after the Lease was signed, neither party expressed concerning that the co-tenancy requirement would be violated as of the Rent Commencement Date. Additionally, Landlord spent over $8 million improving Tenant's lease site and improving the shopping center to accommodate Tenant's store. Furthermore, Tenant's internal budget projections revealed that Tenant anticipated paying full rent, and the evidence indicated that Tenant hadn't raised any concerns internally about a co-tenancy violation until just over 3 months prior to the Rent Commencement Date. Finally, the Lease language made it unlikely Landlord could fulfill the co-tenancy requirement.

	Therefore, the Court found that material facts remained in dispute as to whether the co-tenancy requirement expressed something different than the parties intended.
Eighth Circuit: United States District Court for the Eastern District of Missouri, Eastern Division	
Ross Dress for Less v. St. Louis Retail Outlet, No. 4:18 CV 1289 CDP, 2020 U.S. Dist. LEXIS 60955 (E.D. Mo. Apr. 7, 2020)	
Issue:	Whether a settlement agreement accepted by both parties precludes Tenant's demand for additional compensation not included in the accepted agreement.
Facts:	Ross Dress for Less ("Tenant") operated a retail store as a tenant of St. Louis Retail Outlet, LLC ("Landlord"). The dispute began when Tenant accurately claimed that it had overpaid rent for a period of years. The terms of the lease agreement (the "Lease") allowed Tenant to terminate the Lease if Secondary Reduced Occupancy Periods ("SROPs") continued for 24 consecutive months, in which case Landlord would pay to Tenant an amount equal to the unamortized cost of Tenant's leasehold improvements ("ULIs"). Tenant determined that an SROP had existed for over 24 consecutive months and notified Landlord of the issue. Both parties agreed that they wanted to avoid litigation and negotiated a settlement agreement. A detailed settlement offer was transmitted by Tenant to Landlord on June 19th, 208, and Landlord accepted the offer "*in toto*, with no additions or alterations", by email on June 22, 2018. After Landlord's acceptance, Tenant included in the formalized, draft settlement agreement, an additional ULI charge of nearly $500,000 which was not previously included in negotiations nor addressed in the emailed settlement offer. Tenant argued that no binding settlement was made on June 22 because there was no meeting of the minds on all essential terms necessary to resolve all issues. Landlord argued that a binding settlement was agreed to on June 22, precluding Tenant's ability to add additional ULI charges.
Holding:	The Court held that the June 22 settlement agreement did contain all essential terms necessary to resolve the entirety of the dispute and the agreement was valid and enforceable. The Court considered that Landlord accepted Tenant's June 22 settlement agreement *in toto* and it was not until days after the parties mutually agreed to those terms that Tenant asserted it was owed the additional ULIs. Further, Tenant never indicated that it intended to limit the settlement to only certain disputes. Because the words and conduct of the parties showed that the June 22 settlement agreement was considered a complete settlement, Tenant's post-settlement conduct did not change the enforceability of the June 22 settlement agreement.

NINTH CIRCUIT	
Ross Dress for less, Inc. v. Makarios-Oregon. LLC, No. 3:14-cv-1971-SI, 2021 WL 72358, at *1 (D. Or. Jan. 8, 2021)	
Issue:	Whether a lessor is entitled to the full cost of remediating all deficiencies in performance without regard to whether a specific deficiency caused any loss in market value to the leased premises.
Facts:	Plaintiff Ross Dress-for-Less, Inc. ("Tenant") held two leases for portions of two conjoined commercial buildings in downtown Portland, Oregon with Defendant Makarios-Oregon, LLC ("Landlord") and Walker Place, LLC. The 50-year leases expired on September 30, 2016, and Tenant vacated the buildings on or about that date. Before the end of the lease, Tenant sought a judicial declaration that its proposed end-of-lease plans would satisfy its contractual obligations. All parties moved for summary judgment, which the court granted in part and denied in part in March 2016. The parties then agreed to bifurcate the lawsuit and waive their right to have a jury resolve all factual disputes. Tenant moved for an order determining whether it could remain on the premises to complete any work that still needed to be done to surrender the premises in the condition required under the leases. The court denied the motion. The two landlords filed supplemental counterclaims for damages, alleging Tenant failed to return the premises in the condition required under Section 16 of the Richmond lease. Tenant eventually settled with the Walker Place, LLC, but not with Landlord. Landlord filed two more supplemental counterclaims alleging Tenant breached the implied covenant of good faith and fair dealing and Tenant failed to pay rent for a period near the end of the lease. Section 16 of the lease states "Tenant agrees that, prior to the expiration of this lease… the Tenant, at the Tenant's sole cost and expense, shall make such alterations to the building then erected on the demised premises as shall be necessary to constitute such building an entirely independent and self-sufficient structure." Tenant argues that the repair, restoration, and separation work that Landlord contends Tenant was contractually obligated to perform under the Richmond lease had no economic value. In other words, Tenant contends there would be no diminution in value caused by Tenant's failure to perform that work, and the cost of performing work would be disproportionately greater than any nonexistent diminution in value caused by Tenant's failure to perform. Thus, under the doctrine of economic waste, Landlord should recover nothing. At trial, Tenant also presented evidence showing the best use of the building is "adaptive reuse," keeping the building conjoined.
Holding:	The court held Tenant materially breached the lease by not complying with Section 16 of the Richmond lease.

	The court also held that the only way for the economic waste doctrine to apply and limit the Landlord's recovery is for the court to find any increase in value to the building resulting from the performance of the contract to be grossly disproportionate to the cost of performance. Furthermore, the court held the burden of proof was on the Tenant to show the cost would be disproportionate to the benefit, and Tenant did not meet its burden. The court suggested one way the Tenant could have easily met its burden was if it had submitted appraisals from experts estimating the fair market value with the work completed and without. The court also held that even if the best use of the building may be "adaptive reuse," that does not show that performance by Tenant of its obligations would have provided no value for the Richmond building.
Goens v. Blood, 437 F.Supp.3d 793, (S.D. Cal. Jan. 31, 2020)	
Issues:	(1) Under the California lis pendens statute, a party needs to allege a real property claim to avoid expungement. Does a tenant seeking mostly monetary damages constitute a real property claim under California law? (2) Whether the fraud exception to the parol evidence applies in this case to allow a commercial tenant to seek to enforce an oral agreement allowing him to remain on the property until the expiration of the lease agreements.
Facts:	On June 1, 2018, Plaintiff Joshua Goens ("Tenant") entered into a lease agreement for commercial property located at 5909 Mission Gorge Road, San Diego, California with Defendants Victoria L. Blood and Vondell M. Forrester, as co-trustees of the Nathan A. Blood 1992 Trust ("Landlords"). The Landlords also owned two additional properties at 5909 and 5913 Mission Gorge Road (all three properties are hereinafter collectively referred to as "Subject Property"). In January 2019, Tenant raised concerns with the Landlords about the dilapidated condition of the Subject Property, specifically issues related to mold remediation and unsafe working conditions. Tenant then spent time and effort remedying the problems. The Landlords treated Tenant as a property manager of the Subject Property. In June 2019, the Tenant and Landlords entered a second lease agreement for the 5909 Mission Gorge Road property for a term of two years. The Tenant contends that before signing the lease agreement, there was a mutual oral agreement that Tenant would be the master lessor to the Subject Property. Additionally, before entering the lease, Landlords informed Tenant that the Subject Property was listed for sale, but expressly stated that "it would not be sold, because it had been on and off the market for the past five years" and the sale would not interfere with Tenant's lease term. Tenant subsequently signed a lease for the 5909 Mission Gorge property in August of that year. Although the parties did not enter a lease for the 5913 Mission Gorge property, Tenant acted as the property manager for the entirety of the Subject Property. In late September 2019, Tenant became aware of a potential buyer for the Subject Property. Shortly thereafter, Tenant's and Landlords' attorneys discussed a potential settlement of all claims, including Landlord's representations to the Tenant regarding

	the sale of the Subject Property. But, the discussions were unsuccessful, and Tenant received a 60-day Notice to Quit for the 5909 Mission Gorge property. Tenant then filed suit against the Landlords alleging sixteen causes of action, including breach of contract and intentional misrepresentation, seeking monetary damages and injunction relief preventing Tenant from losing possession of the Subject Property. The Tenants then recorded two notices of pendency actions ("Lis Pendens") in San Diego County for the Subject Property. Landlords now move to expunge the lis pendens, and seek payment of attorneys' fees related to the motion.
Holding:	The court ruled in favor of Landlords and expunged the lis pendens notices. The court found that under existing California case law, actions concerning a leasehold could constitute an action concerning real property, which is necessary to maintain a lis pendens claim. However, the court recounted a recent California Court of Appeals case that held, "where the pleading combines theories of liability for monetary damages and for a constructive trust, we hold the that plaintiffs should not be able to maintain lis pendens." Therefore, finding this case analogous to the Court of Appeals case due to Tenant seeking mostly monetary damages, the court held Tenant's interest in the title was not compelling and Tenant failed to sufficiently allege a real property claim under Section 405.4. The court also held since Tenant sought to enforce the alleged oral agreement, and not simply invalidate the leases, the fraud exception to the parol evidence rule did not apply. Therefore, the Tenant failed to establish he would likely prevail on his causes of action for injunctive relief.
Apartment Association of Los Angeles County, Inc. v. City of Los Angeles, 500 F.Supp.3d 1088 (C.D. Cal. Nov. 13, 2020)	
Issues:	(1) Whether the apartment association was likely to succeed on the merits of its claim that an eviction moratorium violated the Contract Clause or the landlords' substantive due process rights. (2) Whether the apartment association established a likelihood of irreparable harm.
Facts:	Apartment Association of Los Angeles County, representing owners and managers of residential and commercial housing units in Los Angeles ("Plaintiffs"), brought action against the city ("Defendant"), alleging the city's eviction moratorium and rent freeze ordinance during COVID-19 pandemic violated landlords' rights under the Contract Clause, Due Process Clause, Takings Clause, and Tenth Amendment. Plaintiffs moved for a preliminary injunction to prevent the order. The eviction moratorium (ordinance 186606) temporarily prohibits evictions of residential and commercial tenants for failure to pay rent during COVID-19 for 12 months after the expiration of the local emergency. In other words, the moratorium

	allows tenants one year to make any rent payments that were missed because of COVID and does not eliminate any obligation to pay lawfully charged rent.
Holdings:	The court held the plaintiffs were not likely to succeed on the merits of their claims that the city's eviction moratorium and rent freeze violated landlords' rights under the Contract Clause or violated the landlords' substantive due process rights. The court reasoned that the ordinance protected a basic societal need, was temporary in nature, did not disturb landlords' ability to obtain a judgment for contract damages, did not absolve tenants of any obligation to pay any amount of rent, did not appear to impact the landlords' ability to obtain housing, and was implemented in the context of state of public health emergency. The court also held Plaintiffs failed to establish the likelihood of irreparable harm, because there was no indication that landlords were in imminent danger of losing their properties to foreclosure, and unchallenged state law enacted similar prohibitions against no-fault evictions and evictions for COVID-related rent delinquencies.
In re Hawkeye Entertainment, LLC, 625 B.R. 745 (Bankr. C.D. Cal. Feb 19, 2021)	
Issues:	Whether the provision in the lease authorizing recovery of attorney's fees and costs was "on a contract" under California Civil Code Sec. 1717.
Facts:	In 2009, Hawkeye Entertainment, LLC ("Tenant") entered into a lease agreement with Pax America Development, LLC, to rent the first four floors and basement of a commercial building in Los Angeles, CA. The building was sold a few times, and the property is currently owned by Smart Capital, LLC ("Landlord"). Landlord and Tenant have had ongoing disputes over the years, which culminated in Landlord serving Tenant with a notice of default and three-day notice to make payment. Shortly thereafter, Tenant filed for chapter 11 bankruptcy, and sought to assume the lease, to deem the Tenant not to be in breach or default, and to modify its sublease with W.E.R.M. Investment. The Landlord opposed the motion for assumption, alleging Tenant had defaulted on the lease and could not provide adequate assurance of future performance. In October 2020, after a lengthy trial, the court held Tenant was not in default and granted the motion to assume the lease. Tenant now moves for an award of attorney fees and costs against the Landlord. The relevant portion of the lease provides: 22.11(q) In the event that… either the Landlord or Tenant shall institute *any action or proceeding* against the other *relating to the provisions of this Lease or any default hereunder*, the party not prevailing in such action or proceeding shall reimburse the prevailing party for its actual attorneys' fees, and all fees, costs and expenses incurred in connection with such action or proceeding, including, without limitation, any post-judgment fees, costs or expenses incurred on any appeal or in collection of any judgment. [emphasis added]

Holdings:	The court ultimately awarded Tenant attorney fees under California's fee shifting statute. The court held the three-day notice to make payment, and the bankruptcy case, in itself, was not an "action or proceeding" as called for by the lease provision. However, the court also held the Tenant's motion to assume its commercial lease was an action or proceeding "on the contract." The court reasoned the motion required a five-day trial focused on the question of whether Tenant was in default of specific terms of the lease agreement and involved resolution of many of the same issues that would have been presented in an unlawful detainer action.
Dam v. Hodges, No. CV 18-6757-DMG, 2020 WL 3841046 (C.D. Cali. May 13, 2020)	
Facts:	This case involves cross-motions for summary judgment. Plaintiffs Cristina Dam and Liberation, Inc., ("Tenants") and Defendants Jonathan and Louis Hodges ("Landlords") entered into a commercial property lease in April 2017. Tenants leased the property with the intention of eventually making renovations. This case concerns the dispute between the parties over those renovation efforts. Various contractors renovated certain aspects of the property, although the parties also disagree over who hired them and who directed them to do their various tasks. Regardless of who controlled the contractors, Tenants claim that the contractors oversaw and carried out the renovations incompetently. As a result, Tenants represent that they have had to spend over $200,000 to remedy the "defective" work and have had to endure "extreme delays" of their business's grand opening caused by the shoddy construction. Landlords, on the other hand, make a similar claim. At issue in the current motion is the parties' disagreement over the installation of a large storefront window at the front of the property. Plaintiffs contend that Landlords hired a contractor named Alex Quintanilla to install the window, but Quintanilla claims that he worked for Tenants. Quintanilla never installed the window because he was unable to get "the proper permit" by "the summer of 2017." Tenants claim that, during the time that Quintanilla was trying unsuccessfully to install the window, Landlords used a sledgehammer and damaged the wall in which the window would be placed." Landlords deny this happened. Instead of a storefront window, a plywood board currently covers the gap in the wall where a window would normally be placed. It is unclear who placed the plywood board there. Regardless of how the plywood barrier came into being, Tenants claim that its run-down appearance has hurt the business's goodwill and driven away customers. They also claim that, after two years of serving as a window substitute, the board has deteriorated to the point that "it contains large gaps, causing a safety hazard and allowing the elements to enter the premises." The court granted Tenant's motion for injunctive relief in 2019, and Tenant now alleges six causes of action: (1) breach of contract (2) breach of covenant of good faith

	and fair dealing (3) nuisance (4) negligence (5) breach of covenant of quiet enjoyment and (6) negligent hiring and supervision. The Landlord alleged all the claims must fail under the leases' indemnification clause or under the "as is" clause.
Holding:	The court was not convinced the indemnification clause applies to the instant case, because it was riddled with errors making it hard to comprehend and appears to only apply to third party claims. The court also found the "as is" clause was too ambiguous in the context of the other provisions in the lease requiring the Landlords to conduct certain repairs. The court granted partial summary judgment for the Landlords on the breach of covenant of fair dealing, nuisance, negligence, and negligent hiring claims. However, the court denied summary judgment for either party on the breach of contract claims regarding the window and the breach of quiet enjoyment.
In re Gap, Inc., 492 F.Supp.3d 1345 (Multidistrict Litigation Oct. 2, 2020)	
Issue:	Whether the pretrial motions against commercial tenant warranted centralization under 28 U.S.C. 1407.
Facts:	Tenant movants The Gap, Inc., Old Navy, LLC, Banana Republic, LLC and Athleta, LLC (collectively "Tenant"), moved to centralize pretrial proceedings in seven actions, pending in five districts. The proceedings concern Tenant's decision not to pay rent on retail leases nationwide on grounds that the business disruption caused by the COVID-19 pandemic frustrated essential purposes of each of its leases and excused it from paying rent. Tenant wanted to centralize proceedings in the Northern District of California or the Eastern District of Michigan. Tenant alleges there would be common fact and expert discovery concerning the foreseeability of the pandemic. The common fact issues included Tenant's assumption of the risk, custom and practice in the industry, the effects of the pandemic on safety and in-person retail shopping, and potential safety measures retailers may or must employ. All seven landlords oppose the motion, arguing there are no relevant, disputed, common factual questions and to the extent there are common factual questions, they are overwhelmed by individual factual questions. The landlords also argue the disputes are simple and not sufficiently complex to warrant centralization, and several landlords have sought rulings on early summary judgment motions, without the need for discovery.
Holding:	The court held centralization of pretrial proceedings was not warranted, even though actions involved some overlapping factual questions and discovery, because the overlap was limited and overshadowed by many individual questions in each action relating to unique properties, leases, and negotiating parties at issue, and many of the actions had already been remanded or settled and dismissed. The court also found

	centralization might hinder the orderly and efficient resolution of these cases, and Tenant can attempt informal coordination.
Jo-Ann Stores, LLC v. Sound Properties, LLC, No. C19-1831JLR, 2021 WL 2313428 (W.D. Wash. June 7, 2021)	
Issue:	Whether entering a lease with an addiction rehabilitation center violated the “normal retail” uses only provision of a lease between a shopping center and another tenant.
Facts:	Plaintiff Jo-Ann Stores (“Tenant”) seeks a motion for summary judgment against defendant Sound Properties (“Landlord”) for breach of contract. In 1996, Tenant entered a lease for a location in a shopping center with John and Leeann Farrell, who ultimately sold the shopping center to Landlord in 2013. Around the time of the sale, the shopping center had various tenants, including a dance studio, laundry and cleaning service businesses, and a financial service business. The lease contained the following covenant: “The Shopping Center shall be maintained, operated and managed as a first-class retail project… and occupied only for normal retail uses customarily conducted in first-class shopping centers…” The lease additionally included the following section: “No waiver by either party of any of the… covenants… and no waiver of any legal or equitable relief or remedy shall be implied by the failure of either party to assert any rights, or to declare any forfeiture, or for any other reason, and no waiver of any of the said… covenants… shall be valid unless it shall be in writing signed by both parties hereto.” The parties agreed that in the event of breach, Tenant had the right to (i) terminate the lease, (ii) pay substitute rent during the period of such breach, or (iii) to refrain from making any payment of rent during the period of breach provided that the business cannot reasonably be conducted from the property on a profitable basis of such breach. After Landlord purchased the shopping center, Tenant sent an estoppel certificate, certifying to its knowledge that “the Landlord is not currently in default under the lease.” However, the certificate stated, “[Tenant] had not inspected the shopping center… to verify the Landlord is in compliance… and Tenant hereby reserves all rights regarding the same.” Furthermore, the certificate included “[n]othing contained herein will… waive or estop any claims, defenses, rights or remedies of Tenant… or relieve the Landlord from any of its obligations under the [l]ease.” In 2018, Landlord signed a lease with Ideal Option, a medical addiction treatment clinic, which did not sell any products. In response, Tenant sued for breach of contract because an addiction treatment center is not a retail use of the property that is normally found in first-class shopping centers.

	Tenant then paid substitute rent as specified in the lease. Landlord disagreed with Tenant's assertion and tried to work with Ideal Option to sell products so there was no technical violation of the lease. There is no evidence Ideal Option ever expanded its business. Nevertheless, Landlord threated to evict Tenant due to outstanding rent (full rent – substitute rent). To preserve its continued use of the space, Tenant paid the outstanding amount and agreed to pay the full rent moving forward, with the expectation that if the court ruled in its favor, it would seek to recover the overpayments. Landlord raised three affirmative defenses: waiver due to Tenant allowing other non-retail stores, estoppel, and laches.
Holding:	The court granted Tenant's motion for summary judgment. The court found "retail" was unambiguous, and there was no dispute Ideal Option did not engage in retail because they do not sell merchandise or commodities. Therefore, Landlord was in breach of the contract. The court also held the non-waiver clause was valid, and the estoppel and laches defenses were without merit because the contract was unambiguous.
American Multi-Cinema Inc. v. Manteca Lifestyle Center, LLC, No. 2:16-cv-01066-TLN-KJN, 2020 WL 6449108 (E.D. Cali., Nov. 3, 2020)	
Issues:	(1) Whether there was a genuine issue of material fact as to whether landlord breached the contract by charging tenant property taxes based on its assigned parcel rather than its portion of the shopping center. (2) Whether there was a genuine issue of material fact as to whether landlord breached the good faith and fair dealing clause. (3) Whether there was a genuine issue of material fact as to whether landlord was unjustly enriched by alleged overpayment of property taxes.
Facts:	This case involves a cross-motion for summary judgment. Plaintiff American Multi-Cinema, Inc. ("Tenant") filed a suit for breach of contract against defendant Manteca Lifestyle Center, LLC ("Landlord"), an owner of a shopping center in Manteca, California. The Landlord entered a lease with Kerasotes Showplace Theaters, which was later acquired by Tenant. The relevant portion of Section 7.1 of the lease states: "… Tenant's proportionate share of Property Taxes shall equal the product of the total Property Taxes due with respect to land and improvements *included in the applicable tax parcel* multiplied by a fraction, the numerator of which shall be the [gross leased area] of the Leased premises and the denominator of which shall be the [gross leased area] of all improvements included in *the tax parcel*." (emphasis added)

	The terms "applicable tax parcel" and "tax parcel" are not defined anywhere in the lease. The lease also contains an integration clause. Prior to finalizing the lease, Landlord entered into a development agreement with the City of Manteca. The development agreement called for creating a Community Falls District ("CFD"), a special district created by a local government to enable bonds to be issued to finance construction of public improvements benefiting the district. The CFD did not take effect until 2013. Tenant alleges from 2010, when it became the tenant under the lease, until 2013, when the CFD was established, Landlord billed Tenant 17% of the property taxes on the shopping center. Tenant alleges Landlord used the entire shopping center as the "tax parcel." In 2009, the County remapped and divided the shopping center into 26 smaller parcels, including parcel 41 which included Tenant's entire premises. Once the CFD taxes became effective in 2013, Landlord began calculating Tenant's share of the property taxes by using parcel 41 as the "tax parcel." Tenant states its new share of property taxes were 67% of the entire CFD assessment. Tenant alleges Landlord breached the lease by invoicing Tenant for a disproportionate share of the CFD taxes. Tenant also filed claims for breach of the covenant of good faith and fair dealing, declaratory relief in the form of a judgment from the court stating the "tax parcel" refers to the entire shopping center, and constructive trust and unjust enrichment. Landlord moved for summary judgment for the breach of contract claim for three reasons: (1) Landlord did not breach the lease's representation and warranty clause (2) the definition of "tax parcel" refers to the Tenant's leased area alone and (3) the voluntary payment doctrine stipulates that Tenant waived its breach of contract claim by waiting 18 months to sue.
Holdings:	The court denied summary judgment for the Landlord and the Tenant for the breach of contract claim for three reasons. First, the court found the integration clause prevented parol evidence from being introduced, thus there was a genuine issue of material fact as to whether Landlord breached the representation and warranty clause. Second, the court held "tax parcel" was ambiguous. Third, the court held there was also a genuine issue of material fact regarding the voluntary payment doctrine, because Tenant alleged it made the payments under duress. The court also denied the summary judgment motions for breach of the covenant of good faith and fair dealing and the declaratory relief, because "tax parcel" is ambiguous so there is a triable fact on whether the taxes were calculated correctly. Lastly, the court granted Landlord's motion for summary judgment on the unjust enrichment claim. A cause of action for unjust enrichment consists of fraud, breach of fiduciary duty, or another act which entitles the plaintiff to some relief. Tenant did not clearly plead a wrongful act in its complaint.

Store SPE LA Fitness 2013-7, LLC, v. Fitness International, No. SACV 20-953 JVS(ADSx), 2020 WL 6136860 (C.D. Cal. Sep. 11, 2020)	
Issues:	(1) Whether a signed release by an agent not acting in actual authority is valid. (2) Whether the economic loss doctrine bars the landlords' fraud or negligent misrepresentation claim.
Facts:	Defendants Fitness International, LLC and Fitness & Sports Clubs, LLC ("Tenants") filed a renewed motion to dismiss claims by plaintiffs Store Spa LA Fitness 2013-7, LLC and Store Master Funding V, LLC ("Landlords"). In 2005, Kingsdale Holdings entered into a commercial lease with Royce G. Pulliam. Later in 2012, Pulliam had assigned his interest in the lease to Landlords and Kingsdale Holdings had assigned its interest to Tenants. Tenants agreed to a guaranty agreement , in which they agreed to be "jointly and severally bound to the landlord for the performance of the obligations under the lease, and its liability shall be that of a direct and primary obligor and not merely that of a surety." Tenants managed the property as an LA Fitness gym. Then, around June 2016, Landlords became aware that Tenants had closed the gym, and generally left the property empty despite being bound by the lease until December 31, 2019. The property proceeded to decline into a significant state of disrepair. Landlords summarized the damage as consisting of "multiple roof leaks, no functioning HVAC units, non-functional lighting, overhead doors barely hanging on due to deferred maintenance and water intrusion, exterior paint in bad condition, and two-foot deep potholes throughout the parking lot." In December 2019, Landlords and an agent for Tenants were negotiating how Tenants would surrender the property and manage the costs of repairs. Before coming to an agreement, an agent of the Landlords and an agent of the Tenants performed a walkthrough at the property. While there, the agent for the Tenants drafted a broad release of obligations and presented it to the agent to sign on Landlords behalf. The agent signed the release. The agent for the Tenants then refused to discuss the liability for the damage to the property citing the release. Landlords subsequently brought the instant suit making five claims: breach of contract, breach of guaranty, breach of implied covenant of good faith and fair dealing, fraud, and negligent misrepresentation. The Tenants argued the release was properly executed and therefore released Tenants of liability from breach of contract, guaranty, and breach of implied covenant of good faith and fair dealing. The Tenants also contend the damages for the fraud and negligent misrepresentation claims are barred under the economic loss doctrine.
Holding:	The court held the agent was not acting in actual authority, so the release did not bind the Landlords. The court also held the fraud claim was pled with enough detail to not be dismissed. Moreover, the economic loss doctrine does not bar the fraud or the

	negligent misrepresentation claims, because the claim arises from duties independent from the lease.
Scottsdale Gas Company LLC v. Tesoro Refining & Marketing Company LLC, No. CV-19-05291-PHX-SPL, 2020 WL 954963 (D. Arizona Feb. 27, 2020)	
Issue:	Whether Defendants were entitled to a preliminary injunction to prevent Plaintiff from using a different brand of gasoline than that referenced in the lease assignment/agreement.
Facts:	Defendants Tesoro Refining & Marketing Company, LLC and Treasure Franchise Company, LLC (collectively "Defendants") filed a motion for a preliminary injunction to prevent plaintiff Scottsdale Gas Company LLC ("Tenant") from using Shell signage and selling Shell gasoline on the premises. Tenant owns a retail gas station and convenience store located in Scottsdale, Arizona. Tenant is under a commercial lease with a third-party landlord National Retail Properties LP. Tenant was assigned a leasehold interest in the property as part of a series of related agreements involving Defendants, including a gasoline agreement. The Defendants allege the agreements prohibited Tenant from using any other branding besides "AM/PM" and "ARCO." The Defendants also allege Tenant assured Defendants it would not sell a different brand of gasoline. Tenant responded that the agreements only limited the branding in a franchise agreement that was referenced by the agreements but was never executed. On September 30, 2019, Tenant filed a breach of contract claim and alleged violations of the Petroleum Marketing Practices Act. Additionally, on October 3, 2019, Tenant filed for a temporary restraining order and preliminary injunction seeking to enjoin Defendants from terminating the gasoline agreement between the parties and interfering with Tenant's ability to operate its store. The Court granted the temporary restraining order but denied the preliminary injunction. Defendant answered in late October 2019, and asserted counterclaims for breach of contract, and breach of good faith and fair dealing. In February 2020, Defendants also filed for a temporary restraining order and a preliminary injunction. The court denied the temporary restraining order.
Holding:	The court denied the Defendant's preliminary injunction, holding Defendants did not attach proof of the franchise agreement and therefore were unlikely to succeed on the merits. The court also held there was no evidence of the ARCO brand being damaged and no proof of irreparable harm by using different branding. Lastly, the court found the balance of hardships was neutral because implementing the injunction would shut down Tenant's business and public policy disfavors parties making assurances during the litigation process and acting in a way that differs from the assurances.

Amana Global Company v. King County, No. C21-637-RSM, 2021 WL 1978696 (W.D. Washington May 18, 2021)	
Issue:	Whether restricting access to a tenant's extensive commercial equipment would cause irreparable harm after he refused to vacate after eviction.
Facts:	In 2016, Defendant King County ("Landlord") purchased a warehouse for the completion of the Lower Russel Levee Setback flood protection project. Landlord was able to relocate all commercial tenants except Amana Global, a sole proprietorship ("Tenant"). Relocation agents met with Tenant in 2016, 2017, and 2018 to negotiate for the removal of his company's extensive personal property, but negotiations failed. In July 2018, Landlord filed a petition with the Superior Court to terminate Tenant's lease, and the court granted the petition and terminated the lease. Landlord still attempted to relocate the personal property at its expense, but the parties failed to reach an agreement. Tenant began to plan a move to Chehalis, Washington. He leased a warehouse there on August 1, 2020 and made "substantial progress" to relocate his business but stated that the relocation of the business would take an additional five to six months to complete. Landlord then filed a motion to show cause requesting an issuance of a writ of restitution. The court granted the motion, and after a two-month stay, Tenant was personally evicted on May 10, 2021. The next day, Landlord sent a letter to Tenant with a plan to provide relocation benefits and a way for him to retrieve no more than 10 items from the warehouse personally. Tenant filed a temporary restraining order and now moves to stop enforcement of legal action in state court and to enjoin Landlord from removing millions of dollars in equipment and other personal property from the premises.
Holding:	The court denied the restraining order because Tenant needed to prove there would be irreparable harm. The court held the Tenant failed to show irreparable harm as the equipment was commercial in nature and therefore fungible. The plaintiffs can either seek compensation later when the equipment is sold if legally permitted, or if the equipment is relocated then there would be no injury.
MTO Summerlin LLC v. Shops at Summerlin North, LP, Case No. 2:18-cv-00737-GMN-PAL, 2019 WL 1261105 (D. Nev. Mar. 19, 2019)	
Issue:	Whether a court will delay deciding summary judgment to permit discovery relating to disputed issues of material facts.
Facts:	Plaintiff MTO ("Tenant") operated a café in a commercial development/retail mall owned by Defendant ("Landlord"). The parties' commercial lease contained an exclusive use provision providing that Tenant would be entitled to a fifty percent (50%) reduction in monthly rent if the Landlord leased space in particular geographic area to any other occupant that operated as a full-service restaurant offering a primarily breakfast menu.

	In December 2017, a coffee shop opened in the retail mall, and Tenant gave notice to Landlord under the Provision of its intent to reduce its rent by 50%. Landlord did not grant the reduction and Tenant filed suit for damages. Landlord moved for summary judgment on two grounds: first, that Tenant was not entitled to a reduction because while the coffee shop did serve breakfast items, this was merely incidental to its core business, coffee service. Second, Landlord argued that the coffee was not located within the geographic area described in the Provision. Plaintiff responded that both of these arguments raised issues of material fact, but that additional discovery was needed before it could respond. Plaintiff provided support from an affidavit in support of its opposition and request that it be allowed to conduct discovery regarding the intention of the parties in order to determine whether the coffee shop met the definition in the exclusive use provision.
Holding:	The court agreed with Plaintiff that further discovery was warranted and denied the motion for summary judgment as premature. As part of its reasoning, the Court noted that the Landlord moved for summary judgment less than one month after Tenant filed its Complaint, thus the Tenant had not had a sufficient opportunity to discovery information essential to its position.
Kimp v. Fire Lake Plaza II, 484 P.3d 80 (Alaska Mar. 5, 2021)	
Issue:	Whether a failure to pay rent was grounds for immediate default under a lease. Whether a promise to abate tenant's rent could serve as a basis for promissory estoppel. Whether landlord breached lease when it locked tenant out of the unit. Whether landlord violated covenant of good faith and fair dealing by denying lease modification.
Facts:	Plaintiff ("Tenant") formed a brewing company and planned to open a brewpub. He signed a lease with Defendant ("Landlord") that provided rent-free access to a commercial unit for a period of time to allow him to build out the rental space prior to opening for business. Tenant did not complete construction or open its business by the agreed rent commencement date. Tenant blamed the delay on Landlord, and withheld rent for several months after which the Landlord entered the premises and changed the locks. The Tenant filed suit, alleging breach of lease, tortious interference with a business relationship, and breach of the implied covenant of good faith and fair dealing. Tenant argued that it had not obligation to pay rent because the Landlord orally promised to abate rent until construction was complete. Tenant also argued that Landlord was responsible for delaying construction because other tenants interfered with Tenant's efforts to shut off the water to the unit to perform necessary plumbing work and because Landlord did not diligently negotiate a lease modification in connection with Tenant's

	desire to use the space as a bar with live music rather than the originally-contemplated brewpub. The Landlord counterclaimed that the Tenant breached the lease. The Landlord denied responsibility for causing any delays, and specifically denied any oral promise to abate rent. After hearing the cross-motions for summary judgment, the lower court dismissed all claims against the Landlord and ruled in the Landlord's favor on its counterclaim. The court also denied Tenant's request to compel discovery and awarded the Landlord over $200k in damages. Tenant appealed.
Holding:	The Supreme Court affirmed the lower court's rulings denying Tenant's motion for summary judgment and granted Landlord's motion for summary judgment. The Court held that Tenant's failure to pay was grounds for immediate default under the lease. Text messages Tenant attempted to offer as proof that the parties agreed to a ten-day cure period for failure to pay rent were sent almost nine months after the lease period began, and thus could not speak to the parties' intent when they signed the lease. The lease provision explicitly stated that failure to make timely payment was grounds for immediate default. The Court also held that a promise to abate a tenant's rent could not serve as a basis for a promissory estoppel claim. The Court did not agree with Tenant that his non-payment constituted a substantial change in position, as it was not an actual or substantial economic loss. Instead, Tenant's decision to not pay rent was a financial windfall for Tenant, and thus could not serve as a basis for promissory estoppel. The Landlord did not breach the lease because Tenant's failure to pay rent gave the Landlord the right to pursue immediate default without notice. Furthermore, Landlord also had the immediate right to enter and re-let the unit upon default. Thus, Landlord's actions were expressly allowed under the lease. Lastly, Landlord did not violate the covenant of good faith and fair dealing by delay in making lease modifications as required by Tenant's special land use permit, nor by preventing Tenant from completing its construction work on time because of delays in approving water shutoff. The Court stated that the Tenant did not bargain for an agreement where Landlord was required to allow an entertainment venue within the brewpub, thus Landlord's refusal to permit such changes to the lease could not frustrate the benefit for which Tenant bargained. Also, Landlord made reasonable efforts to accommodate Tenant in coordinating the water shutoff, as it had to minimize disruption to other tenants.

Bachner Co. v. Dep't of Admin., Div. of Gen. Servs., 468 P.3d 703 (Alaska Jul. 10, 2020)	
Issue:	Whether the State Tenant's failure to pay rent for 1400 square feet of formerly free space deprived Landlord of a significant inducement to the making of the lease. Whether State Tenant breached the lease by failing to perform within a reasonable period of time in connection with rent for the 1400 square feet of formerly free space. Whether State Tenant acted in good faith. Whether Landlord's notice was sufficient to terminate lease. Whether State validly exercised its right to renew the lease. Whether the Landlord waived its claim for rent for extra space during initial ten-year lease period. Whether the Landlord waived claim for rent for the extra space after State Tenant exercised its option to renew lease.
Facts:	Company Landlord leased to the State Tenant approximately 15,730 square feet of office space for a ten-year term. The lease provided that the monthly lease payments were only applicable to 14,330 square feet of the lease, but acknowledged that Landlord was providing the State Tenant an additional 1,400 square feet for free during the initial ten-year term. After the ten-year term, the State Tenant had the option to renew the lease for ten one-year periods. If the State Tenant chose to renew, it was required to either vacate the additional 1,400 square feet of space or negotiate to pay for the space. If the parties could not agree on a rate, they would use a third-party to determine it. The Landlord realized before the lease was signed that there was an additional 1,434 square feet of space that was not accounted for under the lease. About three months before the end of the initial lease term, the State Tenant contacted Landlord to negotiate a rate for the 1,400 square feet. In response, Landlord brought up the additional 1,434 square feet, but the parties did not reach any agreement. Thereafter, the State Tenant remained in possession under a renewal term, and continued to make regular lease payments. State Tenant sought to amend the lease to include payment for the 1,400 square foot parcel, but the Landlord refused to do because State Tenant failed to include the 1,434 square foot piece in its proposed amendment. Landlord issued a notice of default and 60 days later sent a letter to the State Tenant demanding that it vacate or negotiate a new lease. In response, the State Tenant unilaterally amended the lease and included the 1,400 square feet, also making a retroactive payment into Landlord's account. Landlord first filed an action in superior court to evict the State Tenant, but it was dismissed for failure to exhaust administrative remedies. Landlord filed a claim with

	Department of Administration to determine if the lease was terminated and whether the State Tenant was required to pay for the addition 1,434 square feet. The contracting officer determined that the lease was not terminated and the claim for the additional space was not timely filed. He also determined in the alternative that there was no support in the lease that the State was obligated to pay for the additional space. Landlord appealed to the Commission of Administration, but the administrative law judge held that the State Tenant had not materially breached the lease, and the lease was not terminated. He did not address arguments relating to the additional 1,434 square feet. Landlord appealed to the superior court, which affirmed the administrative law judge's findings, but found that Landlord improperly attempted to bring the claim for the additional space in this contract action. Both parties appealed.
Holding:	First, the Court held that the State Tenant did not materially breach the lease by failing to timely pay rent for the 1,400 square feet of formerly free space after the initial ten-year lease expired. Landlord's agreement to let State Tenant use the space for free for ten years (during the 10-year term of the lease) did not deprive Landlord of a significant inducement to the making of the lease because the Landlord knew if would not get paid for that space for 120 months, possibly longer if the State Tenant decided to vacate the space at the end of the first term and left Landlord to find a new tenant. The length of delay was a small fraction of the parties' over-ten-year relationship and the unpaid rent was a small fraction of the amount the State paid during that time. Second, the Landlord could not establish that it made a clear request for the State to make a timely payment of the 1,400 square feet, or that the State failed to pay within a reasonable period after such a request was made. Third, the State Tenant acted in good faith in negotiating market rate for the 1,400 square feet. Fourth, the lease did not terminate because after sending the notice of default, Landlord continued negotiating and accepting rent for the square footage that was not in dispute, which was not consistent with an intent to terminate. Fifth, because the lease was not terminated, the State properly exercised its right to renew. Sixth, Landlord waived its claim to rent for the 1,434 square foot space during the leases first term, but that Landlord did not expressly waive its claim for rent after October 2013, and the Court remanded for further proceedings on the issue.

Ashley Real Estate LLC v. Rubin Blattman, No. 1 CA-CV 20-0249, 2021 WL 871759 (Ariz. Ct. App. Mar. 9, 2021)	
Issue:	Whether court had personal jurisdiction over Tenant in forcible entry and detainer action when Tenant surrendered possession of the property prior to the filing of Landlord's amended complaint.
Facts:	Tenant entered into five-year commercial lease in a Mesa shopping center with Landlord. Within six months, Tenant was in arrears and stopped making rent payments. Landlord served a 10-day notice of default. Tenant did not respond and Landlord filed complaint, but did not directly name Tenant as an individual, instead named Tenant's LLC. Tenant surrendered possession of the property, and then Landlord filed first amended complaint, and later a second amended complaint, both of which named Tenant individually as a defendant. The superior court entered judgment against both Tenant and Tenant's LLC, and Tenant appealed. On appeal, Tenant argued that the superior court lacked subject matter jurisdiction over the Landlord's claim against him as an individual, and that he was not a "person in possession of land" and could not be liable.
Holding:	The court held that it had personal jurisdiction over Tenant because jurisdiction is determined at the time the landlord files the complaint. Tenant, in his capacity as agent of LLC, was served the initial complaint and had actual notice of the detainer action. The court stated it would be problematic if the court were divested of subject matter jurisdiction merely because Tenant, a potential occupant who was served the complaint, surrendered the property before the Landlord expressly added him as a defendant. If that were the case, landlords would lose statutory protections if a tenant could hold out until a special detainer action was filed, then turn possession over to the landlord and walk away unscathed.

Lee v. Kotyluk, 59 Cal.App.5th 719 (2021)	
Issue:	Whether a notice provided under the section of the unlawful detainer statute governing a tenant's breach of a condition or covenant of the lease need identify the party to whom the tenant can turn over possession of the property. Whether a landlord's successor can rely on the notice provided by the original landlord to a tenant of a breach of a condition or covenant of the lease, and file an unlawful detainer action against the tenant after perfecting title.
Facts:	This case involves California Code of Civil Procedure section 1161, subdivision (3) Plaintiff landlords filed an unlawful detainer action against defendant, alleging that defendant was unlawfully possessing land because defendant was using the property to sell unlicensed marijuana. Plaintiffs alleged that this violated a section of the lease that required the property to be used "only for the primary operation of a retail store selling

	Crystals & gems, Candles, Incense & Oils, Greeting Cards, New & Used Books, and related items." The tenant had entered into the original lease with the previous owner/landlord, and the previous landlord had served the tenant with notice of default on June 4, 2019, with an expiration of June 7, 2019. Plaintiffs did not obtain ownership of the property until June 20, 2019. The defendant tenant initially filed a demurrer to the complaint which was overruled. He then filed a motion for summary judgment, which was denied. Then, a week before the trial, defendant filed a motion in limine for judgment on the pleadings, which contended that the notice was defective because plaintiffs did not own the property when the notice was served. The trial court found that the notice was defective as it was issued prior to the plaintiffs owning the subject property, and that the notice was further defective in that it did not provide any information regarding whom to turn the property over to. After hearing the tentative ruling, plaintiffs reiterated that Haynes, not plaintiffs, had served the notice. In response, the trial court stated that nothing in the complaint or the notice stated that Haynes had served it. Further, the court explained the proper procedure would have been for Haynes to file the lawsuit upon expiration of the notice and then amend her complaint after the sale to add plaintiffs as a party. The court also found the notice was defective because it did not identify the person to whom defendant could return possession of the property (which had not been raised by either party). Plaintiffs' request for leave to amend was denied, as the court found the defective notice could not be cured. The minute order issued after oral argument stated that "the notice [is] defective as it was issued prior to [plaintiffs] owning the subject premises. The notice also lacks any information as to whom to turn possession over to." Plaintiff landlords appealed.
Holdings:	The court of appeal held that a notice provided under the section of the unlawful detainer statute governing a tenant's breach of a condition or covenant of the lease need not identify the party to whom the tenant can turn over possession of the property if the tenant chooses to quit. After reviewing the statute, the court found no requirement that information be provided regarding whom to turn the property over to, and the court further refused to read additional requirements into the statute. "Given the detailed requirements for payment instructions in section 1161, subdivision (2), the lack of specific notice requirements concerning return of the property to the owner in subdivisions (2), (3), and (4) is noteworthy. Rather, these subdivisions only require the notice to demand "possession of the property" (§ 1161, subds. (2) & (3)) or "possession of the demised premises" (§ 1161, subd. (4)). Had the Legislature sought to require more detailed instructions in the notice on how to restore possession of the property to the owner, the particularized requirements in subdivision (2) shows it knew how to do so. As such, the absence of any such requirements in the notice appears to be intentional. When language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful." "Moreover, the purpose behind a three-day notice is not subverted if the notice fails to identify the party to whom possession should be returned. The notice's purpose is to inform the tenant of the breach so the tenant can rationally choose whether to cure the breach and retain possession, quit the property, or contest the allegations." "

	Landlord's successor in interest can rely on landlord's notice to a tenant of a breach of a condition or covenant of the lease and file an unlawful detainer action against the tenant after perfecting title. The court held that while the trial court correctly granted defendant's motion, it erred by refusing to allow plaintiffs leave to amend – Plaintiffs could have cured the defect by amending the complaint to state that the previous landlord had served the notice. Furthermore, the court held that plaintiffs were entitled to base their unlawful detainer action against defendant on the notice served by the previous landlord. "There was no need to serve a new notice on defendant to make him 'guilty of unlawful detainer' again. And we are aware of no authority suggesting that a tenant's unlawful possession of the property somehow resets if a new party subsequently takes ownership of the property."
Truck Insurance Exchange v. AMCO Insurance Company, 56 Cal.App.5th 619 (2020)	
Issue:	Whether landlords were additional insureds under tenant's policy that would allow landlord's insurer to obtain equitable contribution after settling customer's action for injuries caused by car crashing into restaurant.
Facts:	A vehicle accident caused a car to crash through a restaurant, injuring two restaurant patrons. The patrons sued the restaurant owner and his landlords, alleging that the property lacked safety measures that would have protected the patrons from this type of injury. Summary judgment was granted for the restaurant owner but denied for the landlords, who knew a similar accident had occurred years earlier but failed to implement safety measures to prevent a recurrence. The landlords settled the action with the restaurant patrons. The additional insured provision of tenant's policy stated "any person or organization from whom you lease premises is an additional insured, but only with respect to their liability arising out of your use of that part of the premises leased to you." The landlords' insurer, respondent Truck Insurance Exchange ("Truck"), then sued the restaurant's insurer, appellant AMCO Insurance Company ("AMCO"), for equitable contribution, asserting that AMCO wrongfully denied Truck's request that AMCO defend and indemnify the landlords. The "additional insured" provision in the restaurant's AMCO policy covered the landlords' liability "arising out of" the restaurant owner's "use" of the premises. Following a bench trial on stipulated facts and the parties' briefing, the court found that the landlords' liability arose from the restaurant owner's use of the premises and was therefore covered under the AMCO policy. The court entered judgment for Truck requiring AMCO to pay 50 percent of the settlement amount and costs of defense. On appeal, AMCO asserts the trial court erred in finding that the landlords' liability "arose from" the restaurant owner's "use" of the premises. AMCO contends that being the mere situs of an accident does not constitute "use" of a premises, and that the summary judgment rulings in the underlying action required the trial court to find that the landlords' liability was not caused by the restaurant owner's use of the premises.

Holdings:	The court of appeal held that the landlords were additional insureds under the policy for liability arising out of tenant's use of the property "The phrase 'arising from' in a general liability insurance policy requires only a minimal causal connection . . . and the respective liability of the parties is irrelevant to the additional insured provision." "Thus, we consider whether the . . . liability "arose out of" . . . "use" of the premises. "California courts have consistently given a broad interpretation to the terms 'arising out of' or 'arising from' in various kinds of insurance provisions. It is settled that this language does not import any particular standard of causation or theory of liability into an insurance policy. Rather, it broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship." "Here, [tenant insurer] did not write its additional insured endorsement to bar coverage where the tenant was not at fault. To the contrary, the endorsement references only the landlords' liability, providing coverage "with respect to [the landlords'] liability arising out of [the tenant's] use" of the property. "[T]he fact that an accident is not attributable to the named insured's negligence is *irrelevant* when the additional insured endorsement does not purport to allocate or restrict coverage according to fault." AMCO further asserted that the trial court's 50 percent apportionment was erroneous, however the court of appeal held that since AMCO did not assert this argument in the trial court, it had been forfeited.
In re PNW Healthcare Holdings, LLC, 617 B.R. 354 (W.D. Wash 2020)	
Issue:	(1) Whether the correct focus of definition of "residential real property" versus "nonresidential real property" should be on the intended use of such property (2) Whether master subleases between landlords and Chapter 11 debtors as master tenants, to allow use of leased, skilled residential nursing facilities to provide housing for patients receiving residential care through debtors, were in nature of "residential" leases.
Facts:	Chapter 11 debtors and creditors filed a joint motion for determination of date to assume or reject unexpired leases and for relief from performance obligations. This case provides a detailed history of 11 U.S.C. Section 365, up through the 2005 amendment (which focused on the issues in retail properties, primarily in shopping malls) and determination of residential versus nonresidential leases for determinations of deadlines to assume or reject leases. The Debtors are for-profit entities that operated one of the Debtors' fourteen individual skilled residential nursing facilities and one assisted living facility in the states of Washington, Idaho, and Oregon. All the Facilities, except for the one owned and operated by Debtor North Auburn Health, LLC, are owned by certain special purpose entities (collectively "Formation Landlords"). The Formation Landlords lease the Facilities to the Canyon Landlords. Canyon Landlords, in turn subleases the seven Facilities that are backed by Department of Housing and Urban Development ("HUD") loans to Debtor PNW Master Tenant I, LLC, under the terms of a Master Sublease and Security Agreement dated December 1, 2017 ("HUD Sublease"). Canyon NH, LLC subleases the remaining seven non-HUD Facilities to Debtor PNW Master Tenant II, LLC, under the

	terms of a separate Master Sublease and Security Agreement also dated December 1, 2017 ("Non-HUD Sublease"). The terms of the HUD Sublease and Non-HUD Sublease (collectively "Master Subleases") are substantially similar other than those provisions specifically concerning the HUD Sublease. All parties to the Master Subleases contemplated that the Facilities would be used as skilled nursing or assisted living facilities. In the Joint Motion, the Movants sought entry of an order (i) determining that the deadline pursuant to § 365(d)(4) to assume or reject leases of nonresidential real property does not apply to the Debtors' leases for their Facilities; and (ii) determining that the other obligations of lessors of nonresidential real property under § 365(d)(3) and (d)(4) are not applicable.
Holdings:	The court held that the correct focus of the definition of residential real property versus nonresidential real property should be on the intended use of such property under the lease. "The Court's decision most immediately impacts the deadline by which the Debtors will be required to assume or reject the Master Subleases and Auburn Lease. If the leases are determined to be of "nonresidential real property," § 365(d)(4) applies and the leases must be assumed or rejected on or before June 19, 2020, absent consent of the Landlords (i.e., the 210th day following the order for relief). If the leases are determined to be of "residential real property," § 365(d)(2) applies and the Debtors can assume or reject any time up until plan confirmation, unless the Court orders earlier assumption upon motion of the Canyon Landlords. As noted above, the statute does not define the terms "residential" and "nonresidential." Further, there is no binding precedent in any circuit including the Ninth Circuit. Accordingly, this Court and others are left to determine the meaning based on the language of the statute, the legislative history, and the use and placement of subsection 365(d) relative to other provisions of § 365. Prior decisions have relied on one of two substantially different approaches to determine if the lease at issue is of residential or nonresidential property. The first approach, used in a minority of cases, focuses on the nature of the lease and includes all commercial leases where the debtor/lessee is in the business of generating income, within the terms "lease of nonresidential real property" ("Lease Test"). Most of courts addressing the issue focus on the nature of the leased property and whether people reside on such property ("Property Test"). The Court concluded that the Property Test and its focus on the use of the property is most consistent with the language of § 365(d), its usage in the broader context of § 365, and the legislative history of the 1984 and 2005 Amendments. Section 365 uses the terms "nonresidential" or "residential" as adjectives to modify "real property," not "lease." While the phrase "lease of nonresidential property" is broader than property located in shopping centers, equating such language to all commercial leases is inconsistent with its use within either subsection (d) or elsewhere in § 365. "In sum, the Court holds that the correct focus of the definition of residential real property versus nonresidential real property should be on the intended use of such property under the lease. In the case at hand, there is no dispute that the Canyon Landlords were aware of

	and intended that the Debtors' facilities would be used as skilled residential nursing facilities or assisted living facilities. Further, as represented in the Joint Motion, the Master Subleases expressly recognize the residential nature of the Debtors' use of the Facilities by referring to "resident," "residents," or residential" no fewer than 40 times . . . Based on the foregoing, the Court concludes that the Master Subleases . . . are leases of 'residential real property' not nonresidential, thereby making § 365(d)(2) applicable to such Master Subleases rather than § 365(d)(3) and (4)."
TENTH CIRCUIT	
2800 Chamblee Diamond, LLC v. Fitsum, 2021 WL 2100402 (Ga. Ct. App. May 25, 2021)	
Issue:	(1) Whether a non-complete clause was clear and unambiguous if it only provided that "Tenant will not attempt to sell any products or services that would be in direct competition with other [t]enants in the retail center." (2) Whether a former Landlord allowing a Tenant's predecessor-in-interest to deviate from its permitted use through the sale of snacks and allowing Tenant under a subsequent lease to continue such deviation was effective as a waiver, and if so, what did the waiver include and was the waiver binding on Landlord's successor.
Facts:	Yohannes Fitsum and AJTJ Investment ("Tenant") purchased the inventory of a coin laundry from a Tenant leasing property in a shopping center. Subsequently, Tenant entered into a lease of the same premises with Walton Glover ("Former Landlord") for use as a "coin laundry". The lease contained a special stipulation that Tenant "will not attempt to sell any products or services that would be in direct competition with other [t]enants in the retail center." Tenant immediately began offering for sale the same snacks in the premises that the prior Tenant had offered, and Tenant assured Former Landlord that it would not expand its offerings beyond that. At some point thereafter, Tenant also began offering coin operated amusement machines and lottery tickets. In September 2019, Former Landlord notified Tenant that it was in violation of the lease for offering and selling the coin operated amusement machines, lottery tickets, and other items including food and clothing items. In October 2019, Former Landlord sold the shopping center to 2800 Chamblee Diamond ("Landlord"). Two weeks after the acquisition, Landlord notified Tenant that Landlord was exercising its right to terminate lease and retake possession, because Tenant had failed to cure default set forth in Former Landlord's notice. Tenant filed a complaint seeking declaratory and injunctive relief. Tenant argued that the special stipulation (i.e., the non-compete clause) was void and unenforceable because it lacks a geographic area or territory as require under Georgia law and that Tenant's use was consistent with the permitted use. The trial court found the special stipulation to be ambiguous and concluded that it was void and unenforceable and that Tenant did not exceed the permitted use by also offering lottery tickets, coin operated amusement machines, and snacks. Landlord appealed the judgment.

Holding:	The court found that: (1) The non-compete clause (i.e., the special stipulation) was not ambiguous, and therefore, it was enforceable. (2) By knowingly allowing Tenant to continue to sell snacks, Former Landlord effectively waived the permitted use as it relates to the sale of snacks, and such waiver is binding on Landlord; however, the waiver did not extend to the sale of lottery tickets or offering of coin operated amusement machines.
Bezl Limited, LLC v. Raymond Office Plaza, LLC, 313 Ao.3d 632 (2021)	
Issue:	Whether the lower court's amended final judgment of possession in favor of landlord should be affirmed.
Facts:	A landlord brought an eviction proceeding against a non-residential tenant. The court issued an order requiring the non-residential tenant to pay monthly rent into the court registry while the landlord's eviction action was pending. The tenant failed to comply with the order, and the court entered a final judgment for possession in favor of the landlord. The tenant appealed the decision.
Holding:	The court affirmed the amended final judgment of possession. It reasoned that, while the result may be harsh, when a tenant fails to tender payment on or before the statutory deadline, the court must issue a default judgment for possession, regardless of the reason for such failure.
FM3 Liquors, Inc. v. Bien-Aime, 2021 WL 1395217 (Fla. Dist. Ct. App. Apr. 14, 2021)	
Issue:	Whether Tenant had a right to renew the lease or purchase the property upon expiration of the lease term.
Facts:	Stanley Bien-Aime ("Landlord") of commercial property brought action against Tenant for immediate possession of a property FM3 Liquors ("Tenant") had been occupying for a decade pursuant to written lease. While the expiration of the lease was not disputed, Tenant contends it was entitled to either renew the lease or purchase the property. The issue of renewal was foreclosed by the court's recent opinion in *Jahangiri v. 1830 N. Bayshore LLC*, because the renewal provision failed to provide the amount of or procedure to establish the rental during a renewal term. 253 So. 3d 699, 701 (Fla. 3d DCA 2018) ("[T]he amount of rental is an essential element of a lease, if not the basis for a lease, and an agreement to make a lease, or to renew or extend a lease, that fails to specify either the amount of the rental or a definite procedure to be followed to establish the amount of the rental, is too indefinite to be legally binding and enforceable.") The option to purchase was included in the lease payments section which read: "Tenant shall pay to Landlord monthly installments of $1,900.00, payable in advance on the first day of each month, for the initial One (1) years of the lease term. Tenant has option to purchase property at the end of first year lease for $320,000. The next

	five years shall be at market value or CPI. The remaining five years will also be at market value or CPI." The lower court interpreted this as establishing a one-time option to purchase at the end of the first year. The other option to purchase was located at the end of the renewal provision. It provided that "Tenant will have first option to purchase property during lease term. Tenant will have 30 days to exercise its option with written notice to Landlord. This lease shall withstand any sales or transfers of the property with the same terms and conditions." The lower court interpreted this as establishing a right of first refusal should there be another potential buyer during the lease term, rather than an option to be exercised at will. The Circuit Court awarded Landlord immediate possession of the property upon expiration of the lease term. Tenant appealed.
Holding:	No. Tenant does not have the right to renew the term or purchase the property. The court agreed with the lower court that (i) the renewal option was void since it did not establish a basis for rent during the renewal term, and (ii) the conditions of the purchase options were not satisfied (i.e., the options were time limited or a right of first refusal).
In re Cinemex USA Real Est. Holdings, Inc., 627 B.R. 693 (Bankr. S.D. Fla. 2021)	
Issue:	Whether, and to what extent, CB Theater, as Tenant, should be excused from its payment obligations under the Lakeside Lease during the COVID-19 pandemic.
Facts:	CB Theater Experience LLC ("<u>CB Theater</u>") and certain related entities (collectively, "<u>Debtors</u>") are in the movie theater business and operated 41 movie theaters across 12 states. Debtors filed a voluntary Chapter 11 petition on April 25, 2020, and at the time, they were party to 41 unexpired real property leases. One of those leases (the "<u>Lakeside Lease</u>") is between CB Theater, as Tenant, and Cobb Lakeside ("Lakeside"), as Landlord for a movie theater property ("<u>Lakeside Theater</u>") located in the Lakeland Village Shopping Center. The lease included a force majeure provision which stated "[i]f the performance by Landlord or Tenant of any of its obligations under this Lease is delayed by reason of "Force Majeure", the period for the commencement or completion thereof shall be extended for a period equal to such delay." On March 20, 2020, the governor of Florida closed movie theaters in response to the COVID-19 pandemic. Debtors provided a detailed brief identifying which leases, and under which theories, the Debtors believed their rent payment obligations were suspended. CB Theater identified the equitable doctrines of impossibility of performance and frustration of purpose as its justification for suspension of payments under the Lakeside Lease from March 20, 2020 until the theater could reopen. On June 5, 2020, theaters were allowed to reopen at 50% capacity, but the Lakeside Theater remained closed because it allegedly would be suffering a financial loss and new movies were not being released. Thus, CB Theater also sought excused rent, or

	reduced rent, after June 5, 2020, despite being able to operate a movie theater during that time.
Holding:	As to the rent due during the required closure (i.e., March 20, 2020 through June 4, 2020), the court held that the force majeure clause in the Lakeside Lease (i) excused payment of rent until the Lakeside Theater was allowed to reopen and (ii) extended the time of non-performance (i.e., not being able to operate a movie theater and pay rent) would be added to the end of the lease term and along with that extension an obligation to pay rent. As to the rent after June 5, 202 (when the theater could have operated at a limited capacity), the doctrine of frustration of purpose did not excuse performance because CB Theater was able to reopen but chose not to for economic reasons. Additionally, the Lakeside Lease's force majeure clause would not excuse performance. Therefore, from and after June 5, 2020, CB Theater was obligated to make full lease payments and pay any unpaid administrative expenses.
In re Science Fitness, LLC, 2020 WL 1580289 (Bankr. S.D. Ga. Mar. 31, 2020)	
Issue:	(1) Whether Landlord is entitled to holdover rent from a non-tenant who is a purchaser of certain personal property in a Chapter 7 bankruptcy; and (2) Whether Express's damages for 41 missing mirrors should be the installed retail value or the uninstalled value.
Facts:	Science Fitness ("<u>Debtor</u>") filed its bankruptcy petition when it was operating a health club in the premises it leased from Evans Plaza Partners ("<u>Landlord</u>"). As part of the bankruptcy, the Chapter 7 Trustee ("Trustee") sold substantially all of Debtor's assets to Evans Fitness Club Express ("<u>Express</u>"). With Landlord's consent, Express was given the right to enter the leased premises at certain hours to remove the purchased assets. Shortly thereafter, a dispute arose between Landlord and Express over whether Express purchased certain personal property. Landlord filed suit requesting an injunction to prevent Express from removing the disputed items. Landlord also asserted a claim for holdover rent for the three months it was unable to deliver the premises to a new Tenant because of the personal property dispute and on-site storage of the personal property. Express counterclaimed that it was entitled to the installed retail value of 41 mirrors it purchased but was unable to remove from the premises as these items were missing.
Holding:	The court found that Landlord was not entitled to holdover rent, because Express was not a Tenant under the lease. Pursuant to the bankruptcy proceedings, the lease was rejected, and therefore, the Trustee never assumed the lease and, therefore, could not have assigned the lease to Express. Additionally, the Landlord never consented to an assignment of the lease, making any transfer from Trustee to Express void. Furthermore, even if Express was a Tenant, this is not a holdover situation under the lease, because Express left the premises on the date set forth in the bankruptcy court's order.

	As for Landlord's argument that it did not have access to the entire premises because of the on-site storage, Landlord who agreed to store the items on-site, rather than at an off-site facility. Thus, Landlord is cannot assert that it was denied access due to this storage. While Express is entitled to damages for the missing mirrors, Express is not entitled the installation cost because it bought uninstalled mirrors from the Trustee and would have to pay for the installation.
J.C. Penney Corporation, Inc. v. Oxford Mall, LLC, 2020 WL 5057759 (N.D. Ala. Aug. 27, 2020)	
Issue:	(1) Whether Tenant's five options to extend the lease for five years each included previously exercised options; and (2) Whether Landlord breached the lease by beginning redevelopment plans without consent from Tenant.
Facts:	In 1968, J.C. Penney ("Tenant") entered into a written lease agreement with Landlord's predecessor in interest ("Former Landlord") for certain space to be used as a retail department store. The lease provided that Landlord must keep the mall substantially the same except for within specified areas and that the mall could not be changed or expanded without Tenant's prior written consent. In 1985, Tenant and Former Landlord amended the lease to extend the original lease term four years from 1990 to 1994. The lease was again amended in 1997 which granted Tenant two additional successive options to extend the term, giving them a total of six options to extend, one of which had already been exercised. In 2008, Tenant and Former Landlord entered into another amendment, which stated that the lease would expire in August 2008 and granted Tenant "five (5) successive options to extend the term of this lease each for a separate addition period of five (5) years from the date upon which the term would otherwise expire and subject to the same terms, covenants, and conditions as those specified in this lease, except that Tenant may not exercise again any option previously exercised." In 2009 and 2014, Tenant exercised two options to extend the lease in letters which characterized those options as the "first of five" and "second of five". The court record did not include anything to indicate that Former Landlord disagreed with that characterization. In 2017, Oxford Mall ("Landlord") acquired the property through foreclosure sale. In 2018, Landlord sent Tenant some potential redevelopment plans for review. In February 2019, Tenant notified Landlord that Tenant intended to exercise what it believed to be its third option to extend the lease. In March 2019, Landlord entered into a redevelopment agreement that called for the demolition of the Sears building in the mall, which would disconnect Tenant's premises from the enclosed, air-conditioned mall. Three days later, Landlord notified Tenant that it had already

	exercised all of its options to extend, asserting that Tenant had a total of five options for 5 years each that began at the end of the original lease term in 1994. Tenant sued Landlord for breaching the lease by refusing to allow it to exercise its options to extend and for changing the mall without its permission.
Holding:	The court found that the lease, as amended, unambiguously granted Tenant five options to extend for 5-year terms beginning in 2009 and that Tenant had only exercised 2 of those options. As such, the court declared Tenant had the right to extend the lease in 2019 and the right to extend for two subsequent 5-year terms. The court denied summary judgment on the issue as to whether Landlord breached for commencing redevelopment work without Tenant's consent because genuine issues of material fact existed.
Safeway Stores 46, Inc., v. Wy Plaza, L.C., 2020 WL 6688606 (D. Wyo. Oct. 20, 2020)	
Issue:	(1) Whether Tenant's claims related to the overpayment of rent are barred by Landlord's affirmative defenses, including laches; and (2) Whether Landlord breached the lease or the covenant of good faith or fair dealing in connection with Tenant's failure to deduce costs related to the improvements; and (3) Whether a Landlord is unjustly enriched (e.g., "money had and received") and whether it is a mutual mistake (e.g., "money paid by mistake") when a Tenant has a right to deduct certain improvement costs from percentage rent but fails to do so and the Tenant does not raise the overpayment until years after the events occurred.
Facts:	Safeway ("Tenant" and Wy Plaza ("Landlord"), through its predecessors in interest, entered a lease on January 29, 1980. Under the lease, Safeway operated a grocery store in the shopping center for over four decades. In September 2000, Landlord's predecessor in interest approved Tenant's construction plans and waived Landlord's right to construct an addition on its own. Safeway constructed the addition in May 2001. The lease provided that "[i]f lessee constructs said addition, lessee may deduct from percentage rent, if any, otherwise payable under the provisions of this lease for any calendar year ... an amount equal to said percentage rent until such time as the balance in the amortization account, as hereinafter created, equals zero. An amortization account shall be created to record the operation of the provisions of this paragraph. The original balance of said account shall be the cost of said addition." On November 30, 2001, about six months after Tenant completed the addition, Landlord purchased the shopping center. On March 20, 2002, Landlord and Tenant entered into the Fifth Shopping Center Lease Modification Agreement (the "Fifth Modification"). The Fifth Modification detailed Tenant's construction of the addition at a cost of $2,577,717.00, which expanded Tenant's premises by 7,550 square feet. The Fifth Modification also increased Tenant's minimum rent and its pro-rata share of real estate

	taxes and common area maintenance expenses. The Fifth Modification left the remainder of the lease in full force and effect. On February 12, 2010, Tenant sent a letter to Landlord claiming Tenant had mistakenly overpaid rent from 2005 to 2008. Tenant claimed it overpaid because they failed to deduct the total annual minimum rent from percentage rent. Tenant claimed it had overpaid solely based on its percentage rent obligation. However, Tenant did not claim an overpayment was due to the amortization of the construction costs associated with the addition. As a result of this letter, the parties compromised to resolve the overpayment issue and executed an estoppel certificate in 2010 reflecting the compromise. On November 7, 2018, Tenant's senior real estate manager sent a letter to Landlord seeking recovery of mistaken overpayments in the amount of $1,111,525.94. In the letter, Tenant claimed it inadvertently failed to deduct for the amortized balance of the addition costs in accordance with the lease from 2005 to 2017. Landlord responded and denied Tenant's claims, asserting that the 2010 estoppel certificate, which was delivered in connection with resolving the prior overpayment, had resolved Tenant's overpayment claims. Tenant then filed suit.
Holding:	The court held that the doctrine of laches barred Tenant's action in all respects because both elements of laches (inexcusable delay in the assertion of a right, and injury, prejudice, or disadvantage to the defendants or others) were satisfied. The Court also found that Landlord did not breach the lease or the covenant of good faith and fair dealing. It reasoned that the rights related to the deduction of the amortized balance of the addition costs could only be exercised by Tenant, and Landlord did not have an affirmative duty under the lease to deduct the addition costs from rent. The court refused to apply the doctrine of good faith and fair dealing to imply such a duty because the lease was between two sophisticated parties. The court rejected Tenant's claims related to unjust enrichment and mutual mistake. Under Wyoming law, unjust enrichment is not an available remedy because an express contract existed, and no facts indicate a mutual mistake occurred between Tenant and Landlord.
Wasatch Valley Pizza LLC v. Wilson Properties & Assocs. LC, 2021 WL 1419478 (UT App 45)	
Issue:	Whether the requirements to obtain conditional use permit and related zoning approvals were anticipated in the lease, and thus, whether the owner breached the warranty in the lease.
Facts:	In 2016, Wasatch Valley Pizza ("<u>Tenant</u>") was considering leasing certain property (the "<u>Tenant</u>") owned by Wilson Properties & Associates ("<u>Landlord</u>") in Centerville, Utah, to develop a Pizza Hut restaurant. Tenant spoke with a city planner, who indicated the City would not require Tenant to obtain a conditional use permit ("<u>CUP</u>") or a new certificate of occupancy for the Property as long as Tenant did not

	increase the size of the building by more than 30% or its assessable value by more than 50%. Landlord and Tenant entered into a lease agreement (the "Lease") on June 29, 2016, in which Landlord warranted that "the [Property is] zoned for restaurant use and there is no legal impediment to the construction and use of the [Property] as a restaurant or for restaurant uses." The Lease did not define the terms "restaurant use" or "legal impediment." With respect to necessary permits, the Lease also included a contingency in favor of Tenant, which provided, among other things, that Landlord would "cooperate with Tenant to enable Tenant to ... maintain, renew or obtain permits, licenses or other approvals." Several months after entering the Lease, the City's zoning administrator informed Tenant that a CUP would in fact be required. Tenant began taking steps to obtain the CUP, but the City would only approve it upon Tenant meeting certain additional conditions mandated by the State, all at an estimated cost to Tenant between $100,000 and $200,000. Tenant demanded that Landlord pay these costs based on Landlord's warranty regarding same. Landlord refused, and Tenant subsequently withdrew its application for the CUP and terminated the Lease. Tenant sued Landlord for breach of the Lease based on Landlord's warranty regarding zoning approvals and refusal to pay costs required for same, plus damages. Landlord counterclaimed, asserting that Tenant breached the Lease by failing to pay rent and other expenses. The district court denied Tenant's motion for summary judgment and granted summary judgment in favor of Landlord. Tenant appealed.
Holding:	The Court affirmed the district court's judgment in favor of Landlord, holding that the requirements to obtain conditional use permit and related State approvals were anticipated in the Lease, and thus, Landlord did not breach the warranty as to such approvals as set forth therein. The Court focused its analysis on the interpretation of two terms left undefined within the Lease: "restaurant use" and "legal impediment" and evaluated the terms of the Lease based on the four corners of the document. As to "restaurant use," the court agreed with Tenant's contention that there was no question such intended use was to operate Pizza Hut fast food restaurant. The parties' interpretations of "legal impediment" diverged, however, in that Tenant initially relied upon the *Black's Law Dictionary* definition as a "hindrance or obstruction" that "slows the progress of someone or something" and Landlord alternatively relied on a common dictionary definition as more of a "bar" or "block" [to such restaurant use]. In response to Landlord's criticism of Tenant's rather broad interpretation, Tenant qualified its position and instead argued same should be interpreted as any obstacle that cannot be overcome with "reasonable efforts." The court embraced Landlord's argument as to a narrower interpretation, and found that the contingency provision of the Lease, which anticipated that there might be permitting requirements that could not be overcome by "reasonable efforts," including conditions that might make it "not feasible or economically satisfactory for Wasatch to

	build or operate its proposed facility." Further, because the requirements to obtain CUP approval were anticipated in the Lease as evidenced by an explicit strikeout to exclude "zoning change" from the definition of permit, Tenant's broad interpretation of the term "legal impediment," as used in Landlord's warranty was not a reasonable construction of that provision. Thus, Landlord did not breach the Lease by refusing to pay the cost of satisfying the CUP and other permitting requirements.
FEDERAL CIRCUIT	
7800 Ricchi, LLC v. United States, 152 Fed. Cl. 331 (Fed. Cl. 2021).	
Issue:	Whether the United States breached its lease agreement by vacating the leased premises before the end of the amended lease.
Facts:	In November of 2013, the United States Postal Service ("USPS") entered into a five-year lease. USPS sought to extend the lease by 18 months while it looked for and built its own facility. USPS sent a signed Letter of Intent to the landlord. However, before the landlord could sign the amended lease agreement, USPS received another offer to buy another facility. On July 19, 2018, USPS entered into Purchase and Sale Agreement to purchase another facility. On September 17, 2018, USPS informed the landlord via certified mail that USPS would vacate by November 30, 2018 (the last day of the original lease). The landlord brought this action alleging breach of contract, breach of implied-in-fact contract, breach of the duty of good faith and fair dealing.
Holding:	The Court held in a claim for damages alleging the government breached its duty of good faith and fair dealing that the motion for summary judgment was properly granted because there was no genuine issue of material fact on whether a valid contract existed, as plaintiff and government never formed a contract. There was never an offer and acceptance since the letter of intent was not binding or a valid extension of the lease as it merely authorized plaintiff to prepare a lease amendment to be signed by the government upon mutual acceptance of the contents in the amendment document. The letter of intent was a step in the preliminary negotiation of terms but was not an offer. The Court further held that plaintiff's implied-in-fact contract claim failed because plaintiff could not show an offer and acceptance necessary to prove existence of an express contract, and it asserted no additional arguments or evidence supporting its implied contract claim. As such, the government did not breach the lease or its duty of good faith and fair dealing when it informed the plaintiff about its intention to leave the premises at the expiration of the lease.

ALASKA	
Bachner Co. v. Dep't of Admin., Div. of Gen. Servs., 468 P.3d 703 (Alaska 2020).	
Issue:	Whether the State, after refusing to pay rent for ten months and then unilaterally amending the lease and paying ten months' worth of past-due rent, had materially breached the lease.
Facts:	A company leased office space to the State. During the initial ten-year lease, the lease stipulated that the State would not pay rent on 1,400 square feet. If the lease was extended, the parties were to negotiate a rate for the free space. Towards the end of the initial term, the State exercised its first renewal option and opened negotiations with the company over the free space's value. The parties retained an expert to value the space, but the State questioned his methods and conclusions. The parties failed to reach an agreement, and the State did not pay rent for any of the extra square footage. Eventually the State executed a unilateral amendment to the lease based on the expert's valuation and, ten months after the end of the lease's initial term, paid all past-due rent for the formerly free space identified in the lease. The company filed a claim with the Department of Administration, contending that the State had materially breached the lease, the lease was terminated, and the State owed additional rent. A contracting officer rejected the claim, and on appeal an administrative law judge found there was no material breach, the lease had been properly extended, and the company had waived any claim regarding space not identified in the lease. The Commissioner of the Department of Administration adopted the administrative law judge's findings and conclusions. The superior court affirmed the Commissioner's decision except with regard to the space not identified in the lease; it directed the company to pursue any such claim in a separate action. Both parties appealed to this court.
Holding:	The Court held that in the action concerning property leased by the State, the Commissioner of the Department of Administration's decision that the State did not materially breach the lease was supported by substantial evidence, including evidence that the landlord freely entered into the lease designating a portion of the square footage as free for the duration of the first term and the delay was only a small fraction of the parties relationship and the unpaid rent only a small amount the State paid the landlord over the parties' ten year relationship. As the lease was not terminated, the State properly exercised its right to renew in 2014 and the State was then current on its rent obligations and not in default; it had retroactively paid all the rent for the 1,400 square feet contemplated by the lease. Thus the State was entitled to renew the lease, and its September 2, 2014 renewal was valid.
Kimp v. Fire Lake Plaza II, LLC, 484 P.3d 80 (Alaska 2021).	
Issue:	Whether a property owner entering their own property and changing the locks after a tenant failed to pay rent constituted a (1) breach of the lease, (2) tortious interference with a business relationship, and (3) breach of implied covenant of good faith and fair dealing.

Facts:	A business owner formed a brewing company with plans to open a brewpub in Eagle River. He signed a lease that provided rent-free access to a commercial unit for a predetermined period of time to allow him to prepare the rental space prior to opening for business. The brewing company encountered numerous delays during construction and did not open for business as planned. It also did not pay rent once the rent-free period ended. After the property owner received no rent for several months, it entered the property and changed the locks. The business owner filed suit, claiming the property owner breached the lease, tortiously interfered with a business relationship, and breached the implied covenant of good faith and fair dealing. The property owner counterclaimed that the brewing company breached the lease. On cross-motions for summary judgment, the superior court dismissed all claims against the property owner and ruled in the property owner's favor on its counterclaim. The court also denied the business owner's request to compel discovery and awarded the property owner over $200,000 in damages. The business owner appeals the superior court's grants of summary judgment, its denial of his motion to compel discovery, and its award of damages.
Holding:	The Court held that summary judgment against a business owner on his promissory estoppel defense was proper because his non-payment of rent did not constitute a substantial change. The Court further held that the superior court properly granted summary judgment dismissing all of the business owner's claims against a property owner because the property owner did not breach the parties' lease. Once the business owner defaulted, the property owner had an immediate right to enter and re-let the unit under the lease. Lastly, the Court held that the business owner adduced no evidence raising a genuine issue of fact as to breach of implied covenant of good faith and fair dealing because the property owner made reasonable efforts through its property management company to coordinate with the business owner in good faith on shutting water off to the unit.
ARIZONA	
Dabush v. Seacret Direct, LLC, 250 Ariz. 264, 478 P.3d 695 (2021)	
Issue:	Whether a special relationship existed between sublessees of a portion of a multi-tenant commercial building and an invitee such that the sublessees owed the invitee a duty to maintain the building's roof in a reasonably safe condition.
Facts:	Plaintiff Dabush was injured when he fell through the skylight on the roof of a multi-tenant commercial building. 2619 E. Chambers, LLC owned the building and leased the entire building to Seacret Spa, LLC ("Spa"). Spa subleased portions of the building to Seacret Retail, Seacret Direct, LLC ("Direct"), and Prizma Capital, LLC ("Prizma"). Dabush assisted Prizma by supervising Prizma workers when they would perform repairs on the commercial building. Prizma was hired to fix leaks on the warehouse roof, and Dabush went on the roof either to supervise Prizma workers or to inspect and take

	pictures of their work. While on the roof, Dabush put his foot on Skylight 10 and fell through it, severely injuring himself. Dabush asserted that Direct and Prizma were possessors of the roof and therefore owed him a duty to maintain the roof in a safe condition. The trial court granted Defendant's motions for summary judgement on the grounds that, because they were not the owners or possessors of the warehouse roof, they owed no duty to Dabush. The court of appeals affirmed as to Prizma, but reversed as to Direct, holding that a genuine fact dispute existed as to whether Direct exercised control over the roof.
Holding:	Affirmed in Part, Reversed in Part. (i) Prizma and Direct did not have a right to control the roof under their subleases, and did not exercise actual control over the roof, thus there was no duty of care owed to invitee. (ii) Prizma and Direct were not possessors of the roof and did not become possessors by virtue of the repairs Prizma and Direct conducted on the roof. (iii) Prizma and Direct did not assume a duty of care regarding the condition of the roof by conducting repairs on the roof and other sections of the building.
Thompson v. Burton, 2020 WL 1488746 (Ariz. Ct. App. Mar. 26, 2020)	
Issue:	Whether a commercial landlord could use a FED action to obtain possession of a premises from a tenant where the tenant did not formally exercise the renewal option in the lease agreement.
Facts:	The Thompson Family Living Trust ("Landlord") leased a commercial building to Burton and the 363 Group in September 2013 to operate a medical marijuana "grow house." Burton and Landlord signed a written commercial lease with a one-year lease term and a tenant option to renew for another 12 months. The lease included an integration clause stating that it "constitutes the entire agreement between the parties and may be modified only by a writing signed by both parties," and for the tenant to exercise the option, written notice must be given to Lessor not less than 30 days prior to the expiration of the initial lease term. Three days after signing the lease, the parties executed Addendum A, which increased the optional renewal from 12 months to 1-3 years. In April 2014, the parties executed Addendum B, which extended the renewal term for an additional 7-year period once the original 3-year period has expired. Both addendums state that they supersede any conflicting terms or requirements that may appear in the lease agreement, but neither mentions nor modifies the formal notice requirement.

	Burton occupied the building from September 2013 to November 2016, when Burton subleased the building to another party. Landlord never received written notice that Burton intended to exercise the renewal option. Landlord terminated the lease in June 2017 and filed a FED action. The lower court found that Burton never renewed the lease, meaning the original lease expired in September 2014, and Burton remained on the premises as a month-to-month tenant until August 2017 when the lease was terminated.
Holding:	Affirmed. The Court of Appeals found that Burton signed the lease, and no conflict existed between the lease and the addendums as to the notice requirement. Furthermore, the lease supplanted any prior agreement within its scope via the integration clause, including any possible agreements about renewal in an earlier letter of intent. Additionally, any "mutual understanding" that the option to renew had been informally exercised lacked support in the evidence since the tenants only provided partial transcripts.
CALIFORNIA	
Zuniga v. Cherry Avenue Auction, Inc., 61 Cal. App. 5th 980 (Cal. Ct. App. 2021).	
Issue:	Whether a landlord is liable for harm caused to a tenant due to an allegedly unsafe overhead power line. Whether the *Privette* doctrine can be extended to cover a landlord-tenant relationship.
Facts:	Defendants own and operate an outdoor swap meet in Fresno. In August 2013, plaintiff and her husband rented two vendor spaces at the meet. While setting up their booth, a metal pole holding their advertising banner touched an overhead power line. Plaintiff and her husband were electrocuted, and he died. A jury found that the defendants were 77.5% liable and the entered a $9.5 million judgment against the defendants. On appeal, the defendants contended that they owed no duty of care because the danger presented by the overhead power lines was open and obvious. The defendants further contended that the *Privette* doctrine should be extended and protect them from liability.
Holding:	The Court held that the evidence presented in this case did not establish as a matter of law that the danger presented by an overhead power line at an outdoor swap meet was open and obvious. In particular, it was not obvious that the line was uninsulated, that it was energized, or that the amount of electricity being transmitted was lethal. Thus, a warning would not have been superfluous; it would have provided information that was not obvious. The Court further held that because no workers' compensation insurance covered the injuries to plaintiff and her husband, the *Privette* doctrine should not be extended to the landlord-tenant relationship that existed in this case. The Court declined to

	resurrect the doctrine of contributory negligence by recasting it as the absence of a duty of care.
Aljabban v. Frontana Indoor Swap Meet, Inc., 54 Cal. App. 5th 482 (Cal. Ct. App. 2020).	
Issue:	Whether tenants are entitled to take a sink/cabinet unit, the water heater, or decorative molding when vacating the premises. Whether a security deposit could be used to cover damages when the parties did not specifically agree that the security deposit could be used to cover repairs.
Facts:	Plaintiffs operate a beauty salon on the premises of an indoor swap meet managed by the defendants. When vacating the premises, the plaintiffs removed a sink/cabinet unit, a water heater, and some decorative molding. In response, the defendants withheld $680.00 of the security deposit to cover damages. The contract between the two parties specified that their relationship was that of a licensor and licensee and that booth construction becomes a permanent fixture that cannot be removed. The plaintiffs allege that they spent nearly $30,000 in remodeling the space. After moving out, the plaintiffs brought an action, in part, to recover the security deposit that the defendants had withheld. The plaintiffs alleged that they entered into a landlord/tenant relationship despite the language in the vendor's permit stating otherwise.
Holding:	The Court held that when the plaintiffs vacated their swap meet space, they were not entitled to take a sink/cabinet unit, the water heater, or decorative molding because those items were permanent trade fixtures within the meaning of Civ. Code, § 660, in that they were physically attached and some were necessary to the use of space as a beauty salon. The court clarified that ease of disconnection was not dispositive. The Court further held that although substantial evidence supported a finding that the swap meet manager incurred repair expenses, the parties' agreement did not permit use of the security deposit to repair damage to the premises. Retaining part of the security deposit therefore supported claims for breach of contract and conversion. Lastly, the Court reversed the award of attorney fees because the judgment as to the claims of conversion and breach of contract were reversed.
Oh v. Teachers Ins. & Annuity Assn. of America, 53 Cal. App. 5th 71 (Cal. Ct. App. 2020).	
Issue:	Whether a landlord is liable for complying with legal requirements for storing and labeling hazardous material when the landlord is not aware that the product is dangerous. Whether is landlord is liable for items that a tenant keeps in an area that is deemed to be under the exclusive control of the tenant.
Facts:	Plaintiffs are the parents of Ji Hoon Ho who died when a hair care product he was handling exploded and led to him being engulfed in the resulting fire. His employer

	did not know the product was dangerous, and so did not comply with legal requirements for storing and labeling hazardous material, or with provisions in the lease of the premises where the fire occurred. Plaintiffs sued the owner and lessor of the premises and the companies that managed the premises. Plaintiffs claim that the defendants had a duty to maintain and inspect the area where the employer stored the product, to ensure the area was safe and in compliance with state and local ordinances, and should have discovered the product was hazardous.
Holding:	The Court held that a landlord and its property managers owed no duty of care to a worker who was killed in an industrial fire because there was no evidence they had actual or constructive knowledge of a hazardous material, nor were they obligated to investigate containers. The Court further held that the negligence per se claim failed because the landlord did not violate former Cal. Code Regs., tit. 24, § 109.2 (recodified as Cal. Code Regs., tit. 24, § 110.2) by not correcting a code violation of which it was unaware. The Court further held that a fenced yard where the tenant kept materials was not under common control because the lease terms and course of performance under Civ. Code, § 1636, and Code Civ. Proc., § 1856, subd. (c), showed the yard was for the tenant's exclusive use.
MES Investments, LLC v. Dadson Washer Service, Inc., 56 Cal. App. 5th 451 (Cal. Ct. App. 2020).	
Issue:	Whether California Civil Code § 1945.5 applies to a nonresidential lease within an apartment complex.
Facts:	In February 2017, plaintiff and appellant MES Investments, LLC (MES), purchased a 22-unit residential apartment complex in the West Hollywood area of Los Angeles. Some years earlier, in March 2002, the property's prior owner entered into a written lease agreement with defendant Dadson Washer Service, Inc. (Dadson), for the lease of a laundry space in the complex. The lease had an initial term of 10 years and would automatically renew for two additional 10-year terms, unless Dadson elected not to renew it. The lease was already on its second 10-year term when MES purchased the property. MES notified Dadson that it had determined the lease was "no longer operative" because the renewal provision did not comply with Civil Code section 1945.5. Dadson disagreed and refused to vacate the premises. MES filed suit for declaratory relief and cancellation of the lease.
Holding:	The Court held that the notice requirements in Civ. Code, § 1945.5, for an automatic renewal provision in a residential real property lease did not apply to a washing machine service company's lease of a laundry room in an apartment complex because that room was not residential real property but was a machine room, separate and distinct from the tenants' residences, which was consistent with the definitions in Civ. Code, §§ 1940, subd. (c), 1954.26, subd. (d)(1), 1954.51, subd. (e), indicating that both residential property and commercial property could exist in a single structure.

Constellation-F, LLC v. World Trading 23, Inc., 45 Cal. App. 5th 22 (Cal. Ct. App. 2020).	
Issue:	Whether a commercial lease provision that increases rent in the event that the tenant stays past a certain date is valid. What level of unity of interest and ownership is necessary to invoke the alter ego doctrine.
Facts:	A commercial lease set the rent to increase if the tenant stayed past a certain date. The lease provision specified that the rent would increase after the lease expired. The case law refers to this type of provision as a holdover rent provision or as "a graduated rental." After remaining on the premises after the expiration of the lease, the defendant refused to pay the increased rent amount. Plaintiff filed a breach of contract action against defendants, a corporation and its "doing business as." Plaintiff sought damages for past-due rent, late fees, interest, failure to maintain and repair, costs incurred by not being able to use the premises, and holdover rent. The trial court held defendants liable for all damages except the holdover rent, which the trial court ruled was an unenforceable penalty. The trial court awarded plaintiff $13,695 and plaintiff's successors $35,801.74 plus $10,000 in additional damages. The trial court rejected alter ego liability, holding that the plaintiff did not show that it would be "contrary to the interest of justice to regard the two entities separately." Plaintiff appealed and defendants cross-appealed. Defendants filed a separate notice of appeal of an order after judgment denying their request to be determined the prevailing parties and for attorney fees, and partially granting plaintiff's request for attorney fees.
Holding:	The Court held that the trial court erred by ruling a commercial lease's holdover provision was an unlawful penalty. Defendants were at complete liberty to avoid the higher rent. They had merely to leave. Defendants failed to show this holdover provision amounted to an illegal liquidation of damages. Defendants never proved plaintiff had market power, which is the power a monopolist has to oppress consumers by setting price at the monopolist's whim. Given this failure of proof, the trial court should have enforced the holdover agreement, which the parties had determined by their free, solemn and voluntary act. The Court further held that the trial court rightly found insufficient evidence to invoke the alter ego doctrine. While the evidence showed unity of interest and ownership, it did not show treating defendants as separate entities would promote injustice.
Garcia v. D/AQ Corp., 57 Cal. App. 5th 902 (Cal. Ct. App. 2020).	
Issue:	Whether an exculpatory clause would protect a lessor from claims made by the lessee in the event that the lessee sustained injuries that were the result of building code violations.
Facts:	Plaintiff was the lessee under a lease for a commercial property. The lease contained an exculpatory clause providing that the lessor "shall not be liable for injury … to the person … of Lessee" and others, whether resulting from conditions arising on the premises or from other sources.

	In 2016, the plaintiff fell down a staircase after hitting his head on a beam in the doorway at the stop of the staircase. Plaintiff sued defendants, alleging causes of action for premises liability and negligence. He alleged his fall was caused by the inherently dangerous condition of the staircase due to numerous building code violations. The trial court granted defendants' motion for summary judgment on the ground the lease exempted defendants from liability.
Holding:	The Court held that an exculpatory clause in the commercial lease plaintiff had signed shielded the lessor from liability for ordinary negligence. Its language was clear, stating the lessor was not liable for injury to the lessee. These circumstances made this a case where, when the parties knowingly bargain for the protection at issue, the protection should be afforded. While plaintiff did not know the staircase from which he fell violated the building code, he knew about the low beam at the top of the door frame that knocked him backward, and he had seen another person hit his head on the same low doorway. More to the point, the failure to discover a dangerous condition was what the exculpatory provision purported to specifically cover.
Whittier Self Storage, LLC v. Villari Family P'ship, 2020 Cal. App. Unpub. LEXIS 1381 (Cal. Ct. App. 2020).	
Issue:	Whether, under the terms of a long-term lease, the landlord or tenant has to pay an increase in real property taxes assessed.
Facts:	In 2012, the landlord died and the property was transferred to the trusts of the landlord's beneficiaries. It is undisputed that the lease generally required the tenant to pay property taxes on the value of the property and any improvements. It is undisputed that the lease gave the tenant title to all improvements and all tax benefits related to those improvements. The trial court interpreted an exception in the tax section of the lease exempting tenant from "[a]ny tax . . . upon any sale, conveyance or encumbrance of the Premises by the Landlord" to apply to the increased property taxes reassessed upon the landlord's death and resulting transfer of the property to the trusts belonging to the landlord's children. Accordingly, the trial court found that the landlord was responsible for the increase in property taxes resulting from the latter reassessment not only for 2012, but also for the remaining years on the lease.
Holding:	The Court held that the trial court erred in its interpretation of the lease. The lease provided that unless an exemption applied, "all taxes" including "assessments, and other charges of every description which . . . may be levied upon or assessed" against the property would be tenant's responsibility. The reassessment here was not "upon any . . . conveyance," but was "levied or assessed" on the increase in land value and tenant improvements. As such, the tenant was liable for the increased real property taxes.

Dong Shin Church of S. Cal. v. Four Season Care, 2020 Cal. App. Unpub. LEXIS 3265 (Cal. Ct. App. 2020).	
Issue:	Whether a landlord and tenant entering into negotiations to sell the leased property to the tenant terminates or otherwise modifies the landlord-tenant relationship or the underlying lease.
Facts:	In this unlawful detainer case, plaintiff-landowner Dong Shin Church of Southern California, Inc. (Dong Shin) entered a 2012 five-year lease with defendant Four Season Care, Inc. (Four Season), for real property located in the City of Fullerton (City). The lease included Four Season's option to extend it an additional five years. After the lease started, the City raised a land use issue with Four Season's business at the property. In response, Dong Shin and Four Season coordinated and secured a conditional use permit. In 2013, Dong Shin began negotiating to sell the property to Four Season's majority shareholder. A document with generally agreed upon sale terms was discussed and, in 2014, Four Season tendered a $300,000 lump sum deposit that Dong Shin accepted. Despite further negotiations, the parties failed to reach a formal sales agreement. Notwithstanding, Dong Shin and Four Season coordinated to subdivide the property as the parties continued their negotiations. For the next three years, Four Season applied for permits and hired construction workers to subdivide the property, with Dong Shin's knowledge. Four Season did not make any payments to Dong Shin after March 2015. Then in November 2017, Dong Shin notified Four Season the 2012 lease had expired and filed an unlawful detainer action the following month. At an unlawful detainer trial, the court found Dong Shin failed to show a landlord-tenant relationship presently existed.
Holding:	The Court held that parties' September 2012 lease was not terminated or otherwise modified and therefore allowed the plaintiffs to pursue relief under the unlawful detainer statute. The Court further held that any purported "vendor-vendee" relationship did not terminate or "supplant" the parties' ongoing landlord-tenant relationship.
Douglas Emmett 2013 v. I&G Direct Real Estate 10, 2020 Cal. App. Unpub. LEXIS 5597 (Cal. Ct. App. 2020).	
Issue:	Whether a commercial lease's reference to "arbitrators" includes appraisers brought in to determine the value of property for purposes of rent calculation.
Facts:	Appellant Douglas Emmett 2013, LLC (Douglas Emmett) leased property to respondent I&G Real Estate 10, LP (I&G). The long-term lease (Lease) required that the rent be recalculated periodically as a percentage of the current fair market value of the property. The Lease provides that, absent agreement between the parties, a panel of appraisers must determine the value of the property for purposes of rent calculation.

	The trial court ordered that the court, rather than the appraisers, must decide the proper valuation method under the Lease. Douglas Emmett disagreed and appealed from that order. In addition to the appraisal provision, the Lease provides for arbitration of some disputes. The Lease expressly states that "arbitrators" shall not have the authority to interpret the Lease or the law. Determining the appropriate method for assessing the fair market value of the property requires interpreting the Lease. Thus, the dispositive issue on appeal was whether the Lease's reference to "arbitrators" in this context includes the appraisers.
Holding:	The Court held that references to "arbitrators" in the lease included appraisers. The Court explained that because the parties agree that the appraisers perform an arbitration function under the lease, it is therefore reasonable to conclude that the parties intended to include appraisers within the broad category of "arbitrators" who are not permitted to interpret the lease.
Plotts Real Estate v. Reidy, 2020 Cal. App. Unpub. LEXIS 7860 (Cal. Ct. App. 2020).	
Issue:	Whether a tenant and related parties can successfully challenge a trial court decision in awarding damages without establishing evidence to show a reversible error.
Facts:	On January 1, 2007, plaintiff/respondent (landlord and affiliated parties) and defendant/appellant (tenant and affiliated parties) entered into a ten year lease with two extension options, each five years in length. The defendant obtained a Type 47 liquor license. This type of license requires that the establishment operate as a "bona fide eating place". A "bona fide eating place" is an establishment that makes actual and substantial sale of meals during normal meal hours and whose sales of food prepared and sold to guests exceeds its sales of alcoholic beverages. Around September 2012, the Department of Alcoholic Beverage Control (ABC) began an undercover investigation and found that the premises were not acting as a bona fide eating place. In early 2013, defendant informed plaintiff of the findings of the investigation. From April 2013 to August 2013, plaintiff requested defendant to produce documentation and/or information which defendant believed it was entitled to under the terms of the lease. In September 2013, plaintiff demanded that defendant cure three identified defaults and gave notice of one "noncurable" default and plaintiff's remedy under the lease. In November 2013, plaintiff informed defendant that it had used defendant's security deposit to cover costs related to curing defaults and demanded that defendant replenish the security deposit and pay additional expenses related to the defaults. The plaintiff and defendant then decided on a solution that would allow the defendant to sell the business to another operator as long as the plaintiff approved the sale. After bringing a potential buyer, the defendant alleges that the plaintiff acted unreasonably in rejecting the offer. The plaintiff then brought an action against the defendant for breach of contract and the defendant cross claimed alleging intentional interference with prospective economic advantage. At the close of trial, the jury gave two special verdicts. In the first, the jury found that the defendant had breached his lease agreement. In the

	second, the jury found that the plaintiff did intentionally interfere with prospective economic advantage. The trial court, however, only awarded defendant $254,228.10 against a single plaintiff as opposed to awarding the defendant $254,228.10 against both plaintiffs. Appellants identify the issues on appeal as: Whether the trial court erred (1) "in vacating the jury's award against plaintiff on defendant's claim of intentional interference with prospective economic advantage" and (2) "in awarding prejudgment interest to plaintiff" on its recovery under the complaint.
Holding:	The Court held that the appellants did not meet their burden of establishing a reversible error and affirmed the judgment of the lower court.
3250 Wilshire Blvd. Partners v. Min, 2020 Cal. App. Unpub. LEXIS 7793 (Cal. Ct. App. 2020).	
Issue:	Whether a landlord can use the address listed in a lease for the purposes of giving notice to a tenant who has "walked away" from the lease without a formal termination of the lease.
Facts:	On June 25, 1998, Min and John Lee (collectively, tenants) entered into a four-year agreement with landlord to lease office space located at 3250 Wilshire Boulevard, Suite 1005 (the Suite 1005 lease). Paragraph 27 of the Suite 1005 lease provided landlord could serve tenants with notices required or permitted under that lease by mailing notices to tenants at the subject property (hereafter referred to as Suite 1005). According to Min, as set forth in his declaration in support of the motion at issue on appeal, he moved out of Suite 1005 on October 8, 1998, and thereafter had no further contact with cotenant Lee. On October 15, 1998, Min entered into a separate, three-year agreement with landlord to lease office space at a different suite in the same building, 3250 Wilshire Boulevard, Suite 601 (the Suite 601 lease). He remained bound by the Suite 1005 lease. He stated in his declaration that landlord "promised to try and take [his] name off the old [Suite 1005] lease as [he] used them [landlord] to rent another space in the same building." On June 16, 1999, Min sent a letter to landlord's chief financial officer (CFO), stating he had decided to terminate the Suite 601 lease after previous discussions with landlord about it. Regarding the Suite 1005 lease, Min explained in the same letter: (1) he left Lee's company in October 1998; (2) Lee's attempt to remove his name from the Suite 1005 lease was rejected by landlord in early 1999; (3) he was aware Lee was past due on the rent for Suite 1005; and (4) landlord's agent told him he would "be 'hit' also" if Lee went into default. Min requested "further help on the [Suite 1005] lease" of a nature not specified in the letter. On June 17, 1999, the same day Min entered into an agreement with landlord terminating the Suite 601 Lease, landlord issued a 3-day notice to pay rent or quit against Lee and Min under the Suite 1005 lease, stating they were $23,957.53 in arrears on the rent. The same day, landlord served Lee and Min by posting the 3-day notice at, and mailing the 3-day notice to, Suite 1005. On June 25, 1999, landlord

	filed an unlawful detainer action against Lee and Min, seeking possession of Suite 1005 and rent owed under the Suite 1005 lease. On or about November 5, 1999, landlord filed an application in the trial court for an order allowing it to serve Lee and Min with the summons and unlawful detainer complaint by posting the documents at, and mailing them to, Suite 1005, pursuant to Code of Civil Procedure section 415.45. On January 5, 2000, landlord served Lee and Min by mail at Suite 1005 with a request for entry of default in the unlawful detainer action. On February 16, 2000, the trial court entered default against Lee and Min. On February 18, 2000, the court entered a judgment for possession of Suite 1005 in favor of landlord and against Lee and Min. And, on May 24, 2000, the court entered a money judgment in favor of landlord and against Lee and Min in the amount of $30,115.56 (past due rent, plus interest and attorney fees). Defendant Andrew Min appeals from the trial court's order denying his motion to vacate a judgment entered in 2000 in favor of the plaintiff.
Holding:	The Court held that Min terminated the Suite 601 lease by written agreement with landlord before he moved out of 3250 Wilshire Boulevard. He vacated the building without providing a forwarding address to landlord, knowing he was still a party to the active Suite 1005 lease because he and landlord had not signed an agreement terminating that lease, and knowing there was back rent due under that lease. Suite 1005 was not only Min's last known address, it was his current address under the active Suite 1005 lease to which he was still a party. Complying with the trial court's November 5, 1999 order, landlord served Min with the summons and unlawful detainer complaint by posting the documents at, and mailing the documents by certified mail to, Suite 1005. The Court held that the trial court did not err in denying Min's motion to vacate the renewal of the judgment under section 683.170, as landlord properly served the summons and unlawful detainer complaint on Min.
Macrotron Sys. v. Gooch & Housego Palo Alto LLC, 2020 Cal. App. Unpub. LEXIS 1627 (Cal. Ct. App. 2020).	
Issue:	Whether a landlord is liable to pay for renovations that the lease requires even if the renovations are not completed by the landlord.
Facts:	G&H manufactures and supplies optical components used in laser technology for high-end microscopes and telecommunications. Macrotron is an electronics supplier owned by Gordon and Anita Ting (hereafter, Ting) that also owns and partially occupies a large commercial building in Fremont, California. In August 2014, G&H leased just over half of the building's square footage from Macrotron. The lease provided for G&H to make specified improvements to the premises. The parties understood those improvements would require compliance with energy efficiency standards for lighting and lighting control systems set forth in Title 24, Part 6 of the California Code of Regulations. G&H worked closely with Macrotron to implement the changes and at no point did Macrotron object to the changes. The total cost of

	required changes amounted to $492,177. However, when G&H presented the bill to Macrotron, Macrotron refused to pay. Section 8 of the lease provided that "Landlord shall deliver the Premises to Tenant … (ii) with the Premises and Building in compliance with all Applicable Laws, including ADA Requirements and Title 24." Various disputes arose over the parties' responsibilities under the lease, culminating in a jury trial on cross-actions between Macrotron and G&H for breach of contract and related claims. The jury rejected all of Macrotron's claims against G&H, found that Macrotron breached the lease, and awarded G&H $2,015,100.88 in damages. On appeal, Macrotron challenges two specific claims of breach associated with about half of the total damages: its failure to pay for energy efficiency compliance work and its refusal to allow G&H to access bargained-for HVAC capacity.
Holding:	The Court held that based on the evidence presented, a jury could reasonably construe Section 8 as placing responsibility for Title 24 remediation on Macrotron, whether it performed the work or paid for its performance by a third party.
Orozco v. Conrad, 2020 Cal. App. Unpub. LEXIS 4431 (Cal. Ct. App. 2020).	
Issue:	Whether excessive punitive damages against a landlord can be justified by a combination of the landlord's wealth and their "moderate level of reprehensibility."
Facts:	Samuel and Rubicelia Sanchez entered into a lease with the owners of a shopping center in Elk Grove for the purposes of opening a restaurant. After Rubicelia became ill, the Sanchezes asked Gloria Orozco to take over the lease. Orozco borrowed $150,000 from them and used the money, along with money she borrowed from family, to acquire kitchen and restaurant equipment and construct the restaurant space to fit her needs. For the next seven years, Orozco paid only what she could afford in rent. The property manager, who was the property manager throughout Orozco's tenure in the shopping center, agreed to the arrangement. Orozco never signed a lease with the property owners. In March 2009, Orozco and Samuel Sanchez signed a document stating that she was responsible for the restaurant but she did not think it meant that she was taking over the lease to the restaurant space. In 2014, Conrad proposed to buy the shopping center. During his due diligence of the property, he saw that there was approximately $730,000 in unpaid rent related to the restaurant that Orozco occupied. Once Conrad owned the building, he began to contact Orozco about the unpaid rent. He created a lease amendment that would transfer the rights to the property and equipment inside of the restaurant to Conrad in exchange for forgiving the unpaid rent. The amendment would also create a month to month lease. After giving Orozco the lease amendment, his employee continuously called Orozco about returning the signed lease. After signing the lease amendment, Conrad began looking for a new tenant and once he found a new tenant, he instructed Orozco to move out. In the termination letter, Conrad demanded the remaining rent and reminded Orozco that the equipment belonged to him.

	Over the next few weeks, there were a lot of disputes between the two parties regarding the restaurant equipment. Conrad began to act with a "moderate level of reprehensibility" towards Orozco. She brought suit against Conrad alleging conversion, intentional infliction of emotional distress, trespass to chattels, trespass to property, and forcible entry. The jury awarded plaintiff Gloria Orozco punitive damages of $1.8 million after returning verdicts in her favor against defendants Ethan Conrad and his company Ethan Conrad Properties, Inc. for conversion, intentional infliction of emotional distress, trespass to chattels, trespass to property, and forcible entry. The court reduced the jury's damages award in multiple respects and entered judgment against Orozco and cross-defendant Jose Ovalle on Conrad's cross-claim for breach of contract, prompting Orozco and Ovalle to appeal. The court also denied the parties' requests for attorney fees and Orozco's various costs which the parties now challenge.
Holding:	The Court held that the punitive damages awarded by the lower court were too severe. The Court contended that Conrad's personal wealth should not be a driving factor in determining the punitive damages. The Court concluded that the ratio between punitive and compensatory damages was greater than 10 to 1. As such, it believed that the jury's award was excessive. The Court also supported the lower court's decision to award a new trial to determine damages as they related to the conversion claim.
Associated Shower Door Co. v. Parallel Acquisitions & Holdings, LLC, 2020 Cal. App. Unpub. LEXIS 3314 (Cal. Ct. App. 2020).	
Issue:	Whether a tenant can construct a ramp outside of the "premises", as defined in a lease, to comply with ADA requirements.
Facts:	The landlord is the owner of real property located at 427 South Hewitt Street (the 427 building) in Los Angeles. The landlord also owns an adjacent parking lot located at 429 South Hewitt Street (the parking lot). In 2013, the landlord and tenant entered into a written lease for approximately 7,000 square feet of space within the 427 building. The lease defines the "premises" to exclude any rights to "the exterior walls" of the 427 building. The tenant is granted "non-exclusive rights" to use the "common areas" "in common with others entitled to such use." The common areas include the adjacent parking lot. The tenant's use of the common areas is "subject to any rights, powers, and privileges reserved by [the landlord] under the terms" of the lease. These rights, powers, and privileges include the landlord's "exclusive control and management of the [c]ommon [a]reas," "the right to make modifications to the [c]ommon [a]reas," and the right to "add additional buildings and improvements to the [c]ommon [a]reas." Paragraph 49 of the lease provides: "To the extent compliance with the [ADA] is dependent upon [the tenant's] specific use of the [p]remises, [the landlord] makes no warranty or representation as to whether or not the [p]remises comply with ADA or any similar legislation. In the event that [the tenant's] specific use of the [p]remises requires modifications or additions to the [p]remises in order to be in ADA

	compliance, [the tenant] agrees to make any such necessary modifications and/or additions at [the tenant's] expense." The tenant relied on the last line of this provision to justify its actions in building a ramp. After taking possession of the premises, the tenant began to construct a "handicap ramp" that "impacted" the parking lot. In addition, the construction "caused damage" by making "modifications to the structural walls." The tenant did not notify the landlord of its plan to build the ramp and the landlord did not consent to the construction. The landlord sent a letter to the tenant informing it that the work violated the lease and demanding that the tenant cease and desist the construction. The tenant refused the demand and continued to build the ramp. The landlord brought the action against the tenant for "improper construction activities." The defendant filed a demurrer based on the failure to state a cause of action and uncertainty. On May 9, 2019, the lower court sustained the demurrer without leave to amend and held that the lease required the tenant "to comply with the [Americans With Disabilities Act (ADA)]" and the tenant's "complying with the ADA by allegedly building a handicap ramp could not be the basis for a breach of the lease agreement." The court also granted the motion to strike "[d]ue to the [c]ourt sustaining [the] demurrer . . . without leave to amend." The court ordered that the action be dismissed.
Holding:	The Court held that the lease clearly outlined the "premises" that the tenant was responsible for. Insofar as the tenant made modifications to the parking lot and exterior walls, the tenant could not use Paragraph 49 of the lease to justify its actions. The Court held that although the tenant had a license to use ½ of the parking lot, this license does not bring that space into the meaning of "premises" as defined in the lease. Moreover, the Court contended that the defendants do not point out any situation in which the ADA requires a tenant to make changes to property that it does not have exclusive control over. As such, the decision to bar the tenant from making changes to property that is under the exclusive control of the landlord is not in contradiction with the ADA.
Mitich v. Alpert, 2020 Cal. App. Unpub. LEXIS 5784 (Cal. Ct. App. 2020).	
Issue:	Whether a landlord's entry into a stipulated judgment brought against a tenant constitutes a breach of the lease agreement and the implied covenant of quiet enjoyment. Whether damages stemming from a landlord's failure to fix a leaking roof can be offset by the tenant's nonpayment of rent.
Facts:	In 2007, Mitich's corporation leased space within a larger commercial property. Mitich obtained a license from the Department of Alcoholic Beverage Control to sell alcoholic beverages on the premises of a "bonda fide eating place." However, Mitich did not obtain a conditional permit needed to operate a nightclub on the premises. In May 2012, after a property inspection, the City issued a "Notice and Order to Vacate and Repair" to the commercial property owner (Alpert) and each of

	its tenants, alleging various code violations. The City charged that the business was operating illegally as a nightclub, rather than a restaurant with entertainment. In July 2012, in an attempt to resolve the enforcement action, the Alperts executed a stipulation for entry of judgment. In the stipulated judgment, the Alperts acknowledged that the City, after inspection, had observed "numerous" violations of the San Diego Municipal Code and zoning regulations. The Alperts acknowledged that "due to the unsafe building violations," various tenants—including Mitich—"shall not occupy or operate" on the property and agreed that "all tenants must immediately vacate" the property. Despite the language in the stipulated judgment, the Alperts did not immediately evict Mitich. Over the next two years, the parties attempted to work with the City to find a resolution that would allow Mitich to continue to operate his business. After Mitich refused to remedy the situation, the Alperts filed an unlawful detainer action against Mitich and his corporation in 2014. The Alperts received a favorable judgment and evicted the business from the property. In 2016, Mitich filed this lawsuit against the Alperts, alleging breach of contract, wrongful eviction, negligence, nuisance, fraud, and conversion. With respect to the stipulated judgment, the Alperts responded it was the City, not them, who insisted Mitich's business required a conditional use permit. As the property owners, they faced personal liability in response to the City's enforcement policy; they cooperated with the City and Mitich to resolve the dispute in a manner that would allow Mitich to continue to operate his business, and Mitich was responsible for his failure to obtain the required conditional use permit. With respect to the roof, the Alperts admitted the roof leaked throughout the duration of Mitich's tenancy under their ownership and showed they made some attempts to patch the leaks without success. The Alperts also showed that, after the first two months they owned the property, Mitich discontinued making rent payments on the property; the Alperts argued they were entitled to an offset in damages. The trial court found in favor of the Alperts with regard to the stipulated judgment and allowing the damages caused by the leaking roof to be offset by the nonpayment of rent.
Holding:	The Court held that the trial court did not err in its findings. The Court held that it was the City, not the Alperts, that determined Mitich would need a conditional use permit to continue operating the establishment as a nightclub. The Alperts' negotiation and execution of the stipulation for entry of judgment was done to avoid legal liability as property owners. Furthermore, the Court held that Mitich failed to prove that the Alperts did something that the lease agreement prohibited them from doing. The Court further held that the leaking roof did not relieve Mitich of his obligation to pay rent. The Court relied on the findings of the lower court and its conclusion

	that the leaking roof was "not made [a] significant issue" but rather was "transformed into [a] 'significant' claim[] only as the lawsuit developed."
DELAWARE	
Long v. Fulton Bank, N.A., No. N20C-05-022, 2021 Del. Super. LEXIS 423, 2021 (Del. Super. Ct. May 24, 2021)	
Issue:	(1) Whether a landlord's right to possession of improvements is subject to payment of a mortgage; (2) Whether a mortgage confers a valid security interest in the assets and property owned by a tenant; (3) Whether the owner of improvements can dispose of them to settle unpaid principal on a mortgage.
Facts:	Glen Moser, Inc. ("Landlord") leased real property to Churchmans Road Venture ("Tenant"). The terms of the lease permitted Tenant to mortgage the leasehold estate, and required Landlord to provide any mortgagee with notice of default and a right to cure. The lease also permitted Landlord to terminate the lease and assume ownership of the premises, "subject to the payment of any mortgage thereon." Tenant constructed commercial buildings on the property, and entered into a loan agreement with Fulton Bank (the "Bank"), executing a mortgage and assignment of rents in favor of the Bank as part of the loan agreement. Landlord executed a landlord's agreement and waiver which subordinated its rights in the collateral in favor of the Bank. In 2019, Landlord sent a termination notice to Tenant asserting that Tenant had failed to pay rent from 2012 through 2019. Landlord subsequently also sent notice to the Bank demanding that the Bank remove or take possession of its collateral at the premises and to pay to Landlord any proceeds from the sale of such collateral up to the amount of Tenant's outstanding rental balance. Landlord also commenced the instant action, seeking a declaratory judgment that the mortgage did not confer any right in the premises in favor of the Bank. The Bank countered that the Mortgage conferred a valid security interest in the assets and property owned by the Tenant and, because the Landlord terminated the lease and took ownership of the improvements on the premises without satisfying the remaining indebtedness secured by the mortgage, the mortgage served as a lien on the premises and the Bank possessed all rights and privileges afforded to a leasehold mortgagee. The Bank also brought a series of counterclaims, asserting among other claims, that (i) the premises is not the property of Landlord and that the Bank is authorized to foreclose on the premises and (ii) Landlord is barred from recovering any unpaid rent under the lease. Landlord asserted that the Bank abandoned its interest in the mortgage when it did not act upon Landlord's notice of Tenant's default under the lease.
Holding:	The Court found for the Bank, holding that the lease was unambiguous and that the Bank held a valid mortgage interest in the leasehold estate. Citing the lease provision that provided that Landlord was permitted to terminate the lease and assume possession of the premises "subject to payment of any mortgage thereon," the Court

	also found that the Bank's security interest in the improvements on the premises was superior to Landlord's interest in the same.
DISTRICT OF COLUMBIA	
District of Columbia v. Towers, 2021 D.C. App. LEXIS 123 (D.C. 2021).	
Issue:	Whether the District of Columbia is entitled to a stay pending appeal of the trial court's judgment that the moratorium on eviction violated property owners' constitutional right to access the courts. Whether there was risk of irreparable harm in allowing property owners to file and litigate suits for possession.
Facts:	On March 11, 2020, the Mayor of the District of Columbia, acting pursuant to her powers under the Home Rule Act, issued a declaration of a public health emergency. On March 17, the Council enacted, as part of the COVID-19 Response Emergency Amendment Act of 2020, a moratorium on evictions. In response to the actions taken by the local government, Landlords brought this action to challenge the validity of the moratorium on evictions claiming that their constitutional right to access the courts was violated. The trial court focused on the property owners' claim that the filing moratorium violated their "fundamental right of access to the courts." The court determined that "[t]he United States Constitution protects the right of property owners to go to court to regain possession of their property in a summary proceeding," any infringement on this "time-sensitive" right was subject to intermediate scrutiny, and the filing moratorium did not survive such review. Accordingly, the trial court issued a declaratory judgment that the filing moratorium was unconstitutional and directed the clerk to "schedule initial hearings in any pending case filed on or after March 11, 2020, as soon as reasonably possible." After the trial court issued its declaratory judgment, the District filed a timely notice of appeal and then moved for a stay of the trial court's order pending litigation of its appeal, first from the trial court and then from the instant court. The Court entered an administrative stay to allow this motion to be litigated, and now that the trial court has denied the motion for a stay pending appeal, the Court consider whether a stay should issue.
Holding:	The Court held that The District of Columbia was entitled to a stay pending appeal of the trial court's judgment that the moratorium under D.C. Code § 16-1501(b) on filing a complaint seeking a judgment of possession during a public health emergency violated property owners' constitutional right to access the courts. The District's appeal had a likelihood of success because the additional limitation of a filing moratorium for possession claims during a pandemic did not appear to implicate the right of access to the courts any more than, for example, requiring the filing of a notice to vacate before allowing the filing of a complaint for a judgment of possession. The Court further held that there was risk of irreparable harm because

	there was a real danger of self-eviction as a result of allowing property owners to file and litigate suits for possession.
HAWAII	
Kahawaiolaa v. Hawaiian Sun Invs., Inc., 463 P.3d 1081 (Haw. 2020).	
Issue:	Whether numerous non-material breaches of a lease agreement are sufficient to justify a landlord's decision to "lock-out" a tenant.
Facts:	In 2012, Kahawaiolaa (plaintiff) began renting space for his hair salon from Hawaiian Sun (defendants) in the Hilo Plaza building. During the time period relevant to this case, plaintiff paid a monthly rent of $4,410. Plaintiff further testified that Ronald Blanset (defendants) had indicated that he planned to convert Hilo Plaza to condominiums and told plaintiff that he could secure commercial space at a fixed price for a down payment of $12,000. Plaintiff agreed and paid defendants $12,000. A letter dated July 1, 2012 that set forth terms for the $12,000 payment is in the record. In this letter, Hawaiian Sun wrote: "If there are differences, change of heart or we cannot reach an agreement[,] we will compensate you with a reduction of $1,000.00 per month of the [b]ase rent portion of the rent during the term of this lease, unless earlier terminated as herein provided." In January 2015, plaintiff asked the defendants about the lack of progress on the condominium construction. Unsatisfied with the defendants' answers, plaintiff, in accordance with the 2012 agreement, paid $1,000 less rent than the amount due in that month. On February 24, 2015, defendants' attorney sent a letter to plaintiff indicating that he owed $5,699.72 in unpaid rent. In addition to the $1,000 that was withheld from the January 2015 rent, plaintiff withheld his entire rent for the months of February, March, and April 2015. On March 18, 2015 and April 14, 2015, defendants sent plaintiff letters stating that these were 30-day and 15-day notices and demands for plaintiff to pay $14,719.72 in past-due rent and fees. Each letter also indicated that plaintiff had violated his lease by (1) failing to maintain the air conditioner, which allegedly caused damage; (2) having contractors complete work without permission; and (3) failing to complete inspections for a certificate of occupancy, and stated that he did not have the "license(s) to practice in the leased space." The April 14, 2015 letter also alleged that plaintiff had failed to keep defendants informed of his activities, thereby violating his lease. The April 14 letter also offered to apply the $12,000 credit to this amount, indicating a remaining balance of $7,129.72, and gave plaintiff until May 1, 2015 to pay the amount indicated. Plaintiff testified that on April 29, 2015, he delivered a check for $14,000 to the defendants. On May 2, 2015, plaintiff arrived at the premises and discovered that defendants had changed the locks. Posted on the door was a letter from Hawaiian Sun stating that plaintiff had not responded to its notice and that it would return the $14,000 check. When called to testify, defendants conceded that they received the $14,000 check prior to changing the locks. The circuit court issued its written decision and order on August 26, 2016. First, the circuit court found that the July 1, 2012 agreement

	regarding the $12,000 payment and plaintiff's conversation with defendants about repayment gave plaintiff the right to pay a monthly rent reduced by $1,000 until the $12,000 was paid back. Second, the circuit court found that, because defendants received plaintiff's $14,000 check before it locked him out, non-payment of rent was not a proper justification for the lockout. However, the circuit court held that the plaintiff was in material breach of the lease for other reasons and denied the plaintiff recovery. Plaintiff appealed and the Intermediate Court of Appeals (ICA) vacated the circuit court's judgment that the material breaches of the lease agreement were enough to deny plaintiff recovery.
Holding:	The Court held that the ICA properly vacated the circuit court's judgment that two of the tenant's breaches of the lease (the failure to obtain a certificate of occupancy and maintain the air conditioning system) were material because the breaches did not go to the root of the parties' intent in contracting. Therefore, the landlord's self-help remedy was not justified, and the plaintiff was entitled to damages.
IOWA	
Zen Rests. LLC v. Kirkwood Commons, LLC, 947 N.W.2d 770 (Iowa Ct. App. 2020)	
Issue:	Whether a negotiated addendum to a commercial lease satisfied the lease integration clause and was enforceable even though Landlord never signed the addendum.
Facts:	Zen Restaurants, LLC ("Tenant") leased space for two of its restaurants from Kirkwood Commons, LLC ("Landlord") pursuant to a commercial lease agreement (the "Lease") and paid about $300 per month in "common area maintenance" ("CAM") fees. The parties negotiated an addendum to the Lease via email, which Landlord's property manager represented Landlord would honor if Tenant signed the addendum. Tenant testified that it did in fact sign the addendum. Landlord testified that it never signed the addendum. However, CAM fees were calculated in a manner consistent with the addendum for the next 7 years. Landlord subsequently raised the CAM fee to $2,500 per month, which was not consistent with the formula set forth in the addendum. Tenant refused to pay the increased CAM amount and sued Landlord. Following trial, the district court found that the Lease addendum satisfied the integration clause in the Lease. Applying the terms of the addendum, the court increased Tenant's CAM fees, but to an amount much lower than the sum Landlord requested. Landlord appealed.
Holding:	The Court of Appeals held that the addendum was a binding agreement. The Court considered that after Landlord proposed an addendum for the CAM increase, Landlord subsequently agreed via email to honor Tenant's negotiated lower amount in CAM fees, as documented in the final addendum. Tenant also testified that it signed the addendum and returned it to Landlord. The Court found Tenant's testimony to be credible. The Court also found Landlord acceptance of the lower CAM amount, calculated according to the addendum, for 7 years constituted an acceptance of the addendum. Consequently, the Court upheld the lower court's

	finding that the addendum was effectively signed by the Landlord, satisfied the integration clause of the lease, and constituted a binding agreement.
KENTUCKY	
Moore Prop. Invs. v. Fulkerson, No. 2018-CA-000577-MR & No. 2018-CA-001435-MR, LEXIS 453 (Ky. Ct. App. July 2, 2020)	
Issue:	Whether a settlement agreement violates the statute of frauds when it does not set forth essential terms between the parties.
Facts:	Laura Fulkerson ("Tenant") entered into a lease agreement with Moore Property Investments, LLC ("Landlord") for commercial office space to open a veterinary clinic. Tenant made significant improvements to the property at her own expense and negotiated an ancillary option agreement with Landlord for purchase of the premises. When Tenant exercised the option, Landlord filed a civil action against her seeking a declaratory judgment and damages for alleged failure to pay common area expenses. During the course of those proceedings, the parties mediated their dispute and a settlement agreement was fully executed on December 7, 2015 (the "Settlement Agreement"). The Settlement Agreement divided the premises via a condominium regime, such that Landlord would retain 52% ownership of the premises and Tenant would obtain 48% ownership. The Settlement Agreement also included a clause stating "[t]he parties will work in good faith to memorialize the terms of the settlement . . . [h]owever, the Settlement Agreement is enforceable according to its terms." Conflict ensued again despite these efforts between the parties and Landlord filed a motion asking the court to find the Settlement Agreement void under the statute of frauds for lacking essential terms. The trial court denied the motion and found the Settlement Agreement enforceable because it was not a standalone document; rather the parties had intended it to resolve disputed terms under the earlier executed option agreement. Landlord then brought the instant appeal.
Holding:	The Court affirmed the trial court's decision to deny Landlord's motion and found the Settlement Agreement enforceable. In its analysis, the Court determined that the Settlement Agreement expressly stated that the parties intended the agreement to resolve all litigation between them. In other words, the Court held that the Settlement Agreement was not itself a contract conveying real property, but rather, merely an agreement relating back to the lease and option agreement. In Kentucky, the statute of frauds does not apply to settlement agreements; such agreements need not be in writing to be enforceable. Likewise, parties may modify contracts by oral agreement. The Court held that Landlord's claim that the Settlement Agreement lacked essential terms must fail because the Settlement Agreement dis not memorialize a standalone real-estate transaction; rather it only served as a contract modification. Since the essential terms of the contract were sufficiently described in the original lease and option agreement, the terms of the Settlement Agreement were enforceable.

<table>
<tr><td colspan="2">LOUISIANA</td></tr>
<tr><td colspan="2">Fed. Work Ready, Inc. v. Wright, 299 So. 3d 140 (La. Ct. App. 4th Cir. 2020)</td></tr>
<tr><td>Issue:</td><td>(1) Whether a tenant has a cause of action to sue its former landlord for performance of a purchase option when the tenant no longer has the means to purchase the property and the lease has expired;

(2) Whether a tenant can enforce a prior judgment for specific performance of a purchase option when the tenant did not act to consummate the purchase after the judgment was awarded;

(3) Whether a landlord or a tenant is responsible for acting to consummating a purchase option after the tenant is granted specific performance of the purchase option.</td></tr>
<tr><td>Facts:</td><td>Federal Work Ready (“Tenant”) leased commercial property from Barry Wright and Millicent Wright (collectively, “Landlord”) for use as a medical office. The amended lease contained a purchase option in favor of Tenant, which required Tenant to purchase the property within sixty (60) days after giving notice of its exercise of the purchase option. Tenant successfully petitioned the court to hold its exercise of the purchase option as valid by order of specific performance in 2017. However, before Tenant could consummate its purchase option, the lease expired and subsequently Tenant’s sole shareholder was convicted of multiple health fraud felonies resulting in the state terminating Tenant’s corporate status and Tenant declaring bankruptcy.

Thereafter, Tenant’s purported assignee unsuccessfully twice petitioned the court to issue an order for specific performance of the purchase option, despite the expired lease. The court held two hearings, finding against the assignee both times.

The lower court held that Tenant had a right to action, but it had no cause of action. The court reasoned that Tenant did not act on the purchase option at the time specific performance had been granted, and therefore could no longer act upon the option. Tenant appealed.</td></tr>
<tr><td>Holding:</td><td>The Court affirmed the lower court’s denial of relief, noting that because Tenant is bankrupt and does not have the funds to exercise the purchase option, Tenant has no cause of action before the Court.

The Court affirmed that it was Tenant’s responsibility to take action following the judgment for specific performance and that, per the terms of the lease, the time frame for doing so was sixty days from the date judgment had been entered.</td></tr>
<tr><td colspan="2">Nuccio Family, LLC v. Cooties Corp., No. 2020-CA-0659, 2021 La. App. LEXIS 770 (La. Ct. App. 4th Cir. May 12, 2021)</td></tr>
<tr><td>Issue:</td><td>(1) Whether a lease provision regarding punctuality of rent is modified by implication where the landlord accepted partial rent payments;</td></tr>
</table>

	(2) Whether it is inequitable to enforce a punctuality of payment requirement where landlord customarily accepted late rent payments; (3) Whether a lease is altered and/or landlord waives its right to strict enforcement of the lease when a landlord accepts late rent payments; (4) Whether a landlord's right to dissolve a lease for failure to pay rent is subject to judicial control.
Facts:	Cooties Corporation ("Tenant") entered into a lease agreement with Nuccio Family, LLC ("Landlord") for rent of a commercial property in 2017. In April 2020, Tenant informed Landlord of its inability to pay rent and that Tenant would need to seek assistance due to the onset of COVID-19. Later in April, Landlord notified Tenant via letter that Tenant was in default under the lease due to failure to pay rent. The letter stated that a late charge would be applied to the rent and that, if Landlord did not receive rent within the next five days, a second late charge would be assessed pursuant to the lease. The letter additionally stated that if Landlord did not receive the full rent within five days, Landlord would consider the lease terminated and request that Tenant vacate the premises. Tenant made four partial rent payments in May, June, and July 2020. The parties communicated via text message and email but did not come to an agreement about rent reduction during the pandemic. In July 2020, Landlord sent a certified letter to Tenant as notice to correct certain lease violations, including failure to pay rent. Landlord imputed Tenant's partial rent payments to the total rent amount due and informed Tenant of the remaining outstanding balance. This notice warned that failure to pay the outstanding balance by the stated deadline would result in Landlord seeking to remove Tenant from the premises. Tenant made one more partial rent payment in August 2020, and Landlord filed an eviction proceeding. The trial court ordered an eviction in September 2020 and awarded attorneys' fees and court costs to Landlord. Tenant appealed asserting that Landlord's acceptance of partial rent payments had modified the terms of the lease.
Holding:	The Court held that there had been no modification of the lease between Landlord and Tenant. While a modification can occur in writing, orally, or by implication, silence, or inaction, the lease had not been modified because Landlord had explicitly informed Tenant that Landlord would not accept late, partial payments as rent payments, thus indicating that the parties had not agreed to modify the lease. The Court also held that Landlord could demand prompt payment of rent under the lease because Landlord had not customarily accepted late payments without demand for punctual payment. While partial late payments had been accepted, they were imputed to the outstanding rent amount and had not been accepted as rent payment for the month in which they were received. Therefore, Landlord remained entitled to strict enforcement of the lease terms. The Court also held that the terms of the lease had not been altered, and Landlord did not lose its right to strict enforcement, because Landlord had not made a custom of accepting late payments. Although some partial

	late payments had been accepted, they were followed by demands for full payment. When Tenant failed to promptly pay rent after the fifth month, Landlord immediately pursued eviction. The Court determined that this behavior did not establish a custom of acceptance of partial late payments. Lastly, the Court held that the trial court had a reasonable basis for not applying the doctrine of judicial control to the Landlord's right to dissolve the lease for failure to pay rent because Tenant's nonpayment of rent did not involve a good faith mistake of fact.
Old Gentilly Lane LLC v. Robles, 2020 La. App. LEXIS 1731, 2020-0296, 2020 WL 6937762 (La. App. 4th Cir. Nov. 25, 2020)	
Issue:	(1) Whether a person who acquires real property that is subject to an unrecorded lease is bound by the unrecorded lease; (2) Whether a tenant may stay an eviction proceeding pending the joinder of other parties and the adjudication of wrongful eviction claims against such parties.
Facts:	On July 1, 2019, Dominic Giunta ("Original Landlord"), then-owner of the commercial property at issue, entered into a verbal lease with Alex Robles ("Tenant") for the use of a bay on the property. The lease was never reduced to writing or entered into the mortgage or conveyance records, and the only record acknowledging the lease was an exchange of text messages between Original Landlord and Tenant. On September 20, 2019, Daniel Valverde ("Valverde") and Maria Salazar ("Salazar") in their capacities as members of Old Gentilly Lane LLC ("Landlord") acquired the property from Original Landlord in a cash sale. On October 21, 2019, Landlord provided Tenant with a five-day notice to vacate the premises. Tenant refused to vacate, and, on October 31, 2019, Landlord and Valverde, as agent for Landlord, filed a rule for possession of the premises, seeking to evict Tenant. Tenant sought a stay of eviction until Salazar could be joined as a defendant and the court could adjudicate Tenant's claim of wrongful eviction against Landlord, Valverde, and Salazar.
Holding:	The appellate court held that the unrecorded lease was not binding on Landlord because (i) under Article 2712 of the Louisiana Civil Code a third person is not bound by an unrecorded lease and (ii) under Article 3338 a lease would only have effect on third persons if recorded in the appropriate mortgage or conveyance records. The appellate court further concluded that because eviction proceedings are summary proceedings, which must be conducted rapidly within the delays allowed by the court, they do not require observance of all of the formalities required in ordinary proceedings. A wrongful eviction claim is not a valid defense against requiring the delivery of property to its owner, and, therefore, must be raised in an ordinary proceeding. Thus, the appellate court affirmed the trial court's decision not to stay the eviction or join new parties or claims to the summary rule for possession.

Clearview v. Bed Bath & Beyond, Inc., 2020 U.S. Dist. LEXIS 160078, 2020 WL 5229494 (E.D. La. Sept. 2, 2020)	
Issue:	(1) Whether a tenant's rental payments were governed by the ongoing co-tenancy provision of its lease or a voluntary closures provision during shutdowns resulting from the COVID-19 pandemic; (2) Whether COVID-19 business interruptions excused a tenant's failure to timely pay its rent following landlord's issuance of a default notice.
Facts:	In January 2018, Bed Bath & Beyond, Inc. ("Tenant") renewed its lease through January 31, 2023 for premises located in a shopping center owned and operated by Richards Clearview, LLC ("Landlord"). The lease obligated Tenant to pay Landlord "Fixed Rent" totaling $600,669.00 per year in monthly installments. However, the lease permitted Tenant to pay "Alternate Rent" equal to 3% of Tenant's gross sales during any period in which a violation of the ongoing co-tenancy provision existed under the lease. The lease also included a "Voluntary Closure" provision that required Tenant to continue paying Fixed Rent during any periods when Tenant voluntarily ceased operations on the premises. Tenant's failure to pay any rent when due, within 10 days after receipt of a notice from Landlord specifying the amount and details of the unpaid rent, constituted an "Event of Default" under the lease. On March 16, 2020, the Governor of Louisiana issued an emergency order closing all movie theaters and certain other types of businesses due to the COVID-19 pandemic. As a result of the order, the Palace Theater in Landlord's shopping center closed to the public, triggering an ongoing co-tenancy violation. On March 22, 2020, the Governor issued a subsequent order requiring closure of all malls. Tenant fell under an exception to the mandatory closure but voluntarily elected to close to the public on March 23, 2020 and remained closed until June 5, 2020. Tenant remitted partial rent to Landlord on April 1, 2020 but did not pay any rent on May 1, 2020. Landlord issued a notice of default to Tenant on May 5, 2020, citing Tenant's failure to pay full Fixed Rent for April and May 2020. Because of COVID-19 business interruptions at Tenant's corporate headquarters, the notice was directed to Tenant's warehouse where it was received on May 8, 2020 by an employee with no authority to act on behalf of Tenant. Not until May 20, 2020 did the notice make it to someone with the authority to act on it. On May 19, 2020 Landlord informed Tenant that it intended to terminate the lease effective May 26, 2020 as a result of Tenant's non-compliance. Landlord subsequently initiated eviction proceedings. Tenant attempted on May 28, 2020 and June 11, 2020 to send Landlord the total amount of Fixed Rent claimed by Landlord, but both were returned by Landlord.
Holding:	To determine whether Tenant breached its lease by failing to pay Fixed Rent for April and May 2020, the district court first considered whether Tenant was obligated to pay Fixed Rent or Alternate Rent: if Fixed Rent was due, Tenant breached the lease, but if Alternate Rent was due, Tenant fully satisfied its lease obligations. The district court held that sufficient ambiguity existed to support both the Landlord's position that

	Fixed Rent was due under the voluntary closure provision of the lease and Tenant's position that Alternate Rent was due because a co-tenancy violation existed. The district court determined that the exercise of judicial control was warranted and declined to order eviction on the grounds that (i) Tenant had a plausible basis for believing that Fixed Rent was not due, (ii) Tenant attempted to remedy any deficiency without inordinate delay, and (iii) Landlord failed to demonstrate that it suffered any harm as a result of Tenant's delay in remedying the rent deficiency. The court further noted that the circumstances contributing to Tenant's delayed tender of payment following the default notice provided an excuse for the delay, specifically citing the unprecedented challenges presented by COVID-19, which led to the closure of Tenant's corporate headquarters and the redirection of its mail.
MAINE	
H&B Realty, LLC v. JJ Cars, LLC, 2021 ME 14, 246 A.3d 1176	
Issue:	Whether Landlord's breach of the lease agreement by unreasonably withholding consent to Tenant's proposed subtenant relieved Tenant of liability for its breach of the lease by not paying rent.
Facts:	H&B Realty, LLC ("Landlord") and JJ Cars, LLC ("Tenant") entered into a five-year commercial lease agreement (the "Lease") whereby Tenant leased a car dealership property from Landlord. The Lease contained a sublease provision which required Tenant to obtain Landlord's prior written consent, which consent was not to be unreasonably withheld or delayed. The Lease also provided that a proposed subtenant was required to agree in writing to abide by the Lease, and that Tenant was required to provide Landlord with subtenant's financial information and pay an administrative fee, but only after the sublease had been approved. Tenant operated a car dealership on the premises for about two years until Tenant became financially distressed, closed the business, and sublet the property. Three separate businesses sublet the property with Landlord's consent (either expressly or tacitly), and neither Tenant nor any of the prior subtenants ever provided Landlord with the required information for those three subleases. A fourth business, Wholesale Motors, Inc. ("Wholesale"), wanted to sublet the property and was interested in extending the term of the Lease. When Tenant sought Landlord's consent to sublease to Wholesale, Landlord refused because it "did not like [Wholesale]." Tenant subsequently left the property unoccupied and stopped paying rent. Landlord filed a complaint against Tenant for breach of contract. Tenant filed a counterclaim for breach of contract and failure to mitigate damages. The trial court found that (1) Landlord had breached the Lease by unreasonably withholding its consent to sublease to Wholesale on the basis that Landlord didn't like Wholesale, and (2) Landlord breached its duty to mitigate damages because it did not take steps to re-let the property. As a result, the court excused Tenant's breach of contract for failure to pay rent. Landlord appealed.
Holding:	The Supreme Court upheld the lower court's ruling.

	With regard to whether or not consent was unreasonably withheld, Landlord argued its decision was reasonable because neither Tenant nor Wholesale submitted the documentation required by the Lease. The Court refused to re-weigh the evidence because the terms of the Lease were unambiguous … the documentation was required only AFTER the sublease was approved. In the alternative, Landlord argued that even if it did breach the Lease by unreasonably withholding consent to the sublease, that breach was not material. Citing the rule that a "material breach of a contract is a nonperformance of a contractual obligation that excuses the injured party from further performance and justifies the injured party in regarding the whole transaction as at an end," the Court again upheld the lower court's ruling that Landlord materially breached the Lease. Upon review of the trial evidence, the Court found that Landlord was aware that Tenant could only meet its obligations under the Lease by subletting the property, and by refusing to allow the sublease, Landlord "ended any chance [Tenant] had to use the property in a way that would continue to generate income to pay rent."

MASSACHUSETTS	
BP Prucenter Acquisition LLC v. Saks Fifth Ave. LLC, 29 LCR 26 (Mass. Land Ct. 2021)	
Issue:	Whether subject matter jurisdiction is proper in Massachusetts Land Court to interpret commercial lease provisions.
Facts:	BP Prucenter Acquisition LLC ("Landlord") sought a declaration as to its rights under a commercial lease (the "Lease") with Saks Fifth Avenue LLC ("Tenant"). Specifically, Landlord sought a declaration that it had lawfully terminated the Lease on account of Tenant's failure to pay rent. Tenant argued that Landlord's claim does not involve an interest in real property, it is a matter of contract, as such, the claim does not implicate the special expertise of the Land Court, and, therefore the claim falls outside the Land Court's jurisdiction. Landlord countered that a lease creates an interest in real estate and that its termination affects the parties' respective rights in the real estate, thus falling within the Land Court's jurisdiction.
Holding:	The Court held that it **<u>does</u>** have subject matter jurisdiction over the matter, on the basis that "a lease, particularly a long-term commercial lease, creates an interest in real estate." To support this premise, the court found that a lease (1) is governed by G.L. c.259, the Statute of Frauds; (2) depending upon the duration of the lease, under G.L. c.183, §4, "Alienation of Land", a lease may be required to be recorded in the registry of deeds; (3) is governed by G.L. c. 186, entitled "Estates for Years And At Will"; and (4) transfers possession of the real estate. The Court has also previously asserted jurisdiction over various kinds of lease disputes. The Court also found that although cases involving action for non-payment against a tenant in possession would usually be brought as a summary process proceeding in a different court, there is no court precedent determining that the Land Court lacks jurisdiction over the type of dispute at issues, the pandemic has created a backlog on

	summary process actions, and if the Court refused to hear the case Landlord would be without a remedy indefinitely.
MICHIGAN	
Bay City Realty, LLC v. Mattress Firm, Inc., 2021 U.S. Dist. LEXIS 67054 (E.D. MI April 7, 2021)	
Issue:	Whether the COVID-19 pandemic and a state shutdown order were sufficient to give rise to frustration of purpose and impracticability defenses for tenant's non-payment of rent under a lease.
Facts:	Bay City Reality LLC ("Landlord") and Mattress Firm, Inc. ("Tenant") entered into a lease agreement in September 2013. Under the lease, Tenant was obligated to pay monthly rent ("Base Rent"), as well as taxes and a share of the Common Area Maintenance costs (collectively, "Additional Rent"). As of March 2020, Tenant had met all of its contractual obligations. On March 24, 2020, Michigan Governor Whitmer issued an Executive Order closing business "not necessary to sustain or protect life" (the "Shutdown Order"). Tenant was required to close its premises as a result of the Shutdown Order and did not re-open to the public until June 6, 2020. As a result of the Shutdown Order, Tenant paid Additional Rent but not Base Rent for the months of April, May, and June 2020. Landlord filed a complaint against Tenant for nonpayment of Base Rent for April, May and June 2020. Tenant asserted an affirmative defense of frustration of purpose. On February 2, 2021, Tenant paid June 2020 Base Rent. Therefore, the instant case only concerns Tenant's nonpayment of Base Rent for April and May 2020.
Holding:	The Court held that Tenant asserted a proper affirmative defense to its nonpayment of Base Rent for April and May 2020. The Court cited Michigan precedent regarding frustration of purpose in support for Tenant's assertion of the defense. The Court noted that "the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made." *Liggett Restaurant Group, Inc. v. City of Pontiac*, 260 Mich. App. 127, 676 N.W.2d 633, 637-38. The Court then held that the purpose of the lease was frustrated by an unforeseeable event not caused by Tenant: the COVID-19 pandemic and the Shutdown Order. Further, the Court held that the pandemic and Shutdown Order were not reasonably foreseeable at the time the contract was signed in 2013. Finally, relying on the Second Restatement of Contracts, the Court found that frustration of purpose did not terminate the lease entirely but rather simply suspended Tenant's obligation to pay Base Rent for a limited period of time.
In re Loves Furniture Inc., 626 B.R. 291 (Bankr. E.D. Mich. 2021)	
Issue:	(1) Whether, under the U.S. Bankruptcy Code, a landlord's lease termination notice violates an automatic stay when the notice is deposited with an overnight courier prior to the time the petition is filed, but such notice is not deemed given according to the lease terms until after the petition is filed; (2) Whether, under the U.S. Bankruptcy Code, rent which is due prior to the filing of the petition is considered an obligation of the tenant or an administrative expense

	which the bankruptcy trustee must pay to the landlord pursuant to 11 U.S.C. § 365(d)(3) or 11 U.S.C. § 503(b)(1), respectively; (3) Whether, if rent is a pre-petition debt and the debtor/tenant fails to make the rent payment owed for the time period in which the bankruptcy petition is filed, the unpaid rent must be apportioned from the filing date.
Facts:	Loves Furniture, Inc., ("Tenant") leased six properties through four leases (collectively, the "Leases") from LCN AVF Warren (MI) LLC and LCN AVF Dearborn (MI) LLC (collectively, the "Landlord"). Tenant filed for bankruptcy on January 6, 2021 at 5:17 pm EST. That same day, but prior to 5:17 pm, the Landlord deposited termination notices for all the Leases with FedEx. The Leases all contained identical termination and notice provisions. The notice provisions stated that notice would be deemed given and received one business day after deposit with FedEx. The Leases also made rent for the first quarter of 2021 due and payable on January 1, 2021, and required the Tenant to pay real estate taxes for the premises, which were due on February 14, 2021 per the applicable Michigan law. On March 24, 2021, the Landlord filed a motion "Seeking Entry of an Order Compelling Debtor to Provide Immediate and Ongoing Compensation For Its Use And Occupancy of Certain Leased Premises" on the grounds that (i) the Leases were terminated on January 6, 2021 prior to the filing of the petition; (ii) even if the Leases were not terminated before the petition was filed, the Tenant still was required to pay the Landlord for rent to use the space from January 6, 2021 through the end of the first quarter of 2021; and (iii) the Tenant was still responsible under the Leases' terms for the payment of real estate taxes due on February 14, 2021.
Holding:	The court denied the Landlord's motion to compel Tenant to pay compensation for use of the premises for the first quarter of 2021 on three grounds. First, the court held that the Landlord's termination notice violated the automatic stay created by the bankruptcy petition filing, because the petition was filed on January 6, 2021 and the termination was not deemed given to the Tenant until January 7, 2021. The fact that the notice was deposited with FedEx prior to the bankruptcy filing had no effect because the notice was not deemed given at that time pursuant to the Leases' terms. Second, the court ruled that unpaid rent which became due prior to the bankruptcy petition filing date was a pre-petition debt because the obligation to pay rent did not "arise from and after the order for relief," within the meaning of 11 U.S.C. § 365(d)(3). Bankruptcy trustees are obligated to pay certain obligations and administrative expenses from the estate during the bankruptcy process, but since unpaid rent is a pre-petition debt, the unpaid rent is not an obligation or administrative expense as defined by 11 U.S.C. § 365(d)(3) or 11 U.S.C. § 503(b)(1), respectively. Third, the court also affirmed prior case law and concluded that the Bankruptcy Code did not require the apportioning of unpaid rent such that rent for the pre-petition part

	of the quarter (i.e., January 1, 2021 through January 5, 2021) would be deemed a pre-petition debt and rent for the post-petition part of the quarter (i.e.., January 6, 2021 through March 31, 2021) would be deemed to arise from and after the order for relief and would be payable by Tenant at the contractual rate. Because apportioning was not required, the full rent payment owed on January 1, 2021 was deemed a pre-petition debt which Tenant was not obligated to pay. Since the parties had not raised the real estate taxes issue prior to the March 24, 2021 motion hearing, and because the issue was sufficiently complex, the court determined that a further hearing was required to address this issue.
Kirsch v. Aspen Am. Ins. Co., No. 20-11930, 2020 U.S. Dist. LEXIS 234220 (E.D. Mich. Dec. 14, 2020)	
Issue:	(1) Whether a property insurance policy applied to lost practice income and related expenses caused by a temporary executive order prohibiting non-essential dental procedures; (2) Whether the civil authority provision of the property insurance policy was implicated by the executive order.
Facts:	Richard Kirsch, DDS (the "Insured") owned and operated a dental practice in Dearborn Heights, Michigan. The property was insured under a "Building, Blanket Dental Practice Personal Property and Income Coverage" policy from Aspen American Insurance (the "Insurance Company"). In March 2020, the governor of Michigan issued an executive order that suspended all non-emergency dental procedures for approximately two months in an attempt to slow the spread of COVID-19. During the two months that the order was in effect, the Insured was prevented from doing a large portion of his business. As a result, the Insured sought coverage for loss of practice income under various provisions of his insurance policy. The Insurance Company denied coverage, and the Insured brought suit against the Insurance Company on behalf of himself and those similarly situated, alleging that the Insurance Company breached the provisions of the insurance policy by refusing to pay the Insured's claim for loss of income and other expenses that came about because of the executive order. The Insured sought damages for breach of contract, as well as a declaratory judgment that the insurance policy covered the aforementioned losses. The Insurance Company moved to dismiss the complaint.
Holding:	As a threshold matter, both the Insured and the Insurance Company agreed that the dispute turned on the proper interpretation of the insurance policy. The court therefore began by explaining that the plain meaning of the contract controls where the language is unambiguous. Michigan courts engage in a two-step analysis when determining coverage under a policy: (1) whether the insuring agreements cover the loss, and (2) whether an exclusion negates coverage. The "Coverage Agreement" section of the insurance policy explained that it covered "all *direct physical damage* to covered property at the premises described on the

	Declarations caused by or resulting from any covered cause of loss." Another provision explained that "practice income" and "extra expenses" would be covered where the losses were caused by "*direct physical damage* to the building or blanket dental practice personal property." The policy also contained a "civil authority" clause, which expanded the practice income coverage to include actual loss of practice income caused by an action of civil authority that prohibits access to the premises due to *direct physical damage* to the property. The court held that the insurance policy directly tied the Insurance Company's liability to physical loss or damage to property. A policy requirement that loss be physical is widely held to exclude alleged losses that are intangible. The court explained that "[w]hile there is no published Michigan court decision interpreting the language of a standard 'direct physical loss or damage' policy provision, the Sixth Circuit, found that Michigan courts would likely follow the majority rule and require 'tangible damage' for coverage under such a policy provision." The court agreed, holding that any claims where the Insured suffers merely an economic loss unrelated to physical damage of property are not covered by the policy. The court came to the same conclusion with respect to the civil authority clause, ultimately finding that because neither the coronavirus nor the executive order had caused any physical damage to the Insured's property, there was no reimbursable claim under the policy language. Accordingly, the court granted the Insurance Company's motion to dismiss.
MISSISSIPPI	
None	
NEW JERSEY	
Cherry Hill Retail v. Bistro, No. A-4639-18, 2021 LEXIS 424 (N.J. Super. Ct. App. Div. Mar. 16, 2021)	
Issue:	(1) Whether a lease guaranty is subject to reformation if such guaranty contains a discrepancy between the name of the tenant listed on the lease and the tenant's name on the guaranty; (2) Whether a landlord sufficiently mitigated damages where a new tenant takes nineteen months to sign a lease but the landlord continued to market the property in the interim; (3) Whether a lease guarantor is a necessary party to an action which does not name the guarantor but arises out of the lease.
Facts:	Marino's Bistro To Go Cherry Hill ("Tenant") assumed an existing lease in a shopping center owned and operated by Cherry Hill Retail Partners ("Landlord"). The guarantor under the lease was Michael DiPlacido, Sr. ("Guarantor"). When Tenant assumed the lease from the previous tenant, Tenant's owner and Tenant's investor purported to execute a personal guaranty (the "Guaranty"). However, while the lease had been assigned to Tenant, the Guaranty had been made for the benefit of Marino's Bistro To Go, an affiliated entity of Tenant. Paragraph nine of the lease assignment cross-referenced the Guaranty, thereby conditioning Landlord's consent to the assignment upon the execution of the

	Guaranty. Furthermore, under the terms of the Guaranty, Tenant's owner and Tenant's investor agreed to be jointly and severally liable to Landlord in conjunction with all other guarantors. Tenant failed to pay rent for four (4) months and Landlord initiated eviction proceedings. Landlord named Tenant's owner and Tenant's investor as parties in its complaint. Tenant executed a consent order to enter a judgment of possession and agreed to vacate the premises. After Tenant's departure, Landlord took several steps to locate a replacement tenant, including contacting brokers, distributing brochures, making telephone inquiries, and using an online commercial real estate platform. During this time, Landlord showed the property to Playa Bowls ("New Tenant") and continued to try to identify a new tenant for the property. New Tenant executed a lease for the property nineteen (19) months after Landlord initially showed the property to them. Landlord brought suit against Tenant's owner, Tenant's investor and the entity listed as guarantor on the guaranty alleging breach of contract, estoppel and breach of the covenant of good faith and fair-dealing for their failure to abide by the guaranty. Tenant's owner, investor and the named guarantor countered that they were not liable under the guaranty because the tenant identified in the guaranty differed from the tenant noted on the assignment of lease and further arguing that Landlord did not properly mitigate its damages. The trial court found that the guaranty could be reformed to name the proper tenant and that Landlord had sufficiently mitigated its damages. Tenant appealed.
Holding:	The Court affirmed the trial court's holding that the guaranty was subject to reformation, citing, inter alia, the fact that the lease assignment cross-referenced the guaranty as clear and convincing proof that the discrepancy was merely a drafting error. The Court also noted that since Tenant did not present evidence to the contrary, reformation was appropriate in light of the mistake. The Court also affirmed the trial court's holding that Landlord had taken adequate efforts to find a replacement tenant and mitigate damages. Although New Tenant did not sign a lease for nineteen months, Landlord took affirmative steps during that period to lease the space. Therefore, Tenant was not entitled to subtract nineteen months of rent from Landlord's claim for damages. The Court also concluded that Guarantor was not a necessary party to the proceedings. Because the guaranty provided that Tenant's owner and Tenant's investor were jointly and severally liable to Landlord in conjunction with all other guarantors, Landlord had no obligation to seek contribution from Guarantor, whose interests were therefore not "necessarily afflicted." The Court thus rejected Tenant's argument that the trial court should have made Guarantor a necessary party sua sponte.

Emerson Redevelopers Urban Renewal v. Laurel Chinese Rest. II, No. A-0596-19T3, LEXIS 2140 (N.J. Super. Nov. 9, 2020)	
Issue:	Whether a termination provision in an Assignment and Modification of Lease can be deemed illusory without a hearing to resolve disputed facts.
Facts:	182 Emerson, LLC ("Landlord") leased a portion of the premises to Laurel Chinese Restaurant in 2007. After restructuring, Laurel and its proprietor Min Cao, assigned their interest as tenants to Caiqui Zheng ("Tenant") by way of an Assignment and Modification of Lease (the "AML"). The AML contained a termination provision that gave Landlord the right to terminate the lease at any time upon 90-120 days' notice to Tenant. Tenant occupied the premises from December 2016 until February 2019 when Landlord exercised the termination provision effective May 31, 2019. In April 2019, Emerson Redevelopers Urban Renewal ("Buyer") acquired the property and filed the instant case when Tenant refused to surrender the property at the terminate date. The parties dispute whether Tenant was represented by an attorney, whether the Tenant understood English, and whether the Tenant was competent enough to contract for the termination provision at the time the AML was signed. The parties also dispute whether Tenant knew of Landlord's intentions to sell and redevelop the property or whether the termination provision was contracted for as consideration for Tenant's alleged poor credit worthiness and lack of restaurant experience.
Holding:	The Court held that the trial court erred when it found the AML termination provision illusory without a hearing. The Court reasoned that the parties disputed several material facts, namely whether Tenant was represented by an attorney, whether the Tenant understood English, and whether the Tenant was competent enough to contract for the termination provision AML execution. The Court further concluded that fundamental questions were unanswered regarding the termination language, Plaintiff's intention to redevelop the property, and the consideration provided by Landlord. Therefore, a hearing was necessary to resolve these facts before the termination provision could be invalidated. The Court vacated the order and remanded the case for a plenary hearing.
NORTH CAROLINA	
None	
OHIO	
U.S. Bank, N.A. v. Higbee Lancoms, LP, No. C-200247, 2021 Ohio App. LEXIS 1742 (Ohio Ct. App. May 26, 2021)	
Issue:	(1) Whether an enforceable oral agreement is reached when parties to an existing contract exchange e-mails containing proposed amended terms; (2) Whether the partial performance of an oral agreement waives the applicability of the statute of frauds;

	(3) Whether equitable estoppel prevents a landlord from collecting past-due rent where there is neither actual nor constructive fraud.
Facts:	In 1998, U.S. Bank ("Landlord") entered into a 20-year lease agreement with Higbee Lancoms, LP ("Tenant"), under which, Tenant was obligated to pay monthly rent, taxes, maintenance costs, and other operating expenses. The lease also required that any changes to the terms of the lease must be in writing and signed by both parties. In January 2018, six months before the lease was set to expire, representatives of Landlord and Tenant communicated by email regarding lease renewal. A month later, Landlord sent a lease renewal proposal to Tenant. Tenant informed Landlord that it was not interested in continuing to pay rent under the renewal. In April 2018, Tenant reasserted that it did not want to pay rent but would continue to pay operating expenses for a one-year term. Landlord responded to this proposal by email stating that it had sent the proposal to the appropriate parties for approval. Negotiations continued through May 2018 with no resolution. In July 2018, after the lease had expired, Landlord continued to invoice Tenant for rent. In August 2018, Landlord informed Tenant that it was a holdover tenant and was required to pay rent. Landlord emailed Tenant in September 2018, two months after the lease expired, to inform Tenant that the one-year rent abatement would not begin until the parties signed a lease amendment, and that Tenant must pay rent until that time. When Tenant did not comply, Landlord brought suit against Tenant for failure to pay rent and other expenses. The lower court granted Landlord summary judgment and awarded Landlord back rent and other expenses. Tenant appealed.
Holding:	The Court reversed, holding that Landlord and Tenant did not come to an oral agreement because the emails between the parties (a) did not evidence a meeting of the minds; (b) made clear that no lease extension could be finalized until both Landlord and Tenant had signed an amended lease; and (c) spanned eight (8) months, suggesting that the discussions were of a proposed deal, rather than a final one. In addition, because there was no oral agreement, the Court found that the doctrine of partial performance could not remove the parties' oral agreement from the operation of the statute of frauds. Further, the Court found that the Landlord made no factual misrepresentations and was clear in its communications that any lease extension was contingent on approval by the appropriate parties. Therefore, the Court found that there was no actual or constructive fraud that would allow Tenant to seek equitable estoppel as a remedy. Finally, because the parties did not reach an oral agreement and Tenant continued to operate the property according to the expired contract's terms, the Court held that an implied contract, containing the same terms as the expired agreement, was in effect and Tenant was therefore required to pay monthly rent in addition to other operating costs.

Wroblesky v. Hughley, 2021 Ohio App. LEXIS 1069 (Ohio Ct. App. Mar. 31, 2021)	
Issue:	(1) Whether issuance of a liquor permit to tenants who lease premises for operation of a restaurant and bar is a condition precedent to a landlord's enforcement of the lease; (2) Whether the doctrine of frustration of purposes applies to excuse tenants' performance under a lease when the lease provides for operation of a restaurant and bar and tenants have not received a liquor permit; (3) Whether the doctrine of impracticability excuses the performance of tenants whose failure to receive a required liquor permit for their operations results from governmental delay.
Facts:	In November 2017, Renza Hughley, Jr. and Tom Dyson (collectively, "Tenants") and Anthony M. and Frank Wroblesky (collectively, "Landlord") entered into a one-year, written commercial lease agreement for premises to be used "exclusively as a restaurant and bar." The Tenants did not have a liquor license at the time of signing, nor had they obtained one at the time of trial. Landlord delivered possession of the premises to Tenants on December 1, 2017. Tenants subsequently made payments to Landlord in December 2017, January 2018, and February 2018 only. In August 2018, Landlord file a complaint against Tenants for breach of contract for the failure to pay rent, real estate taxes, and insurance premiums. Tenants filed a motion for summary on judgment, asserting (i) that the Ohio Liquor Control Commission had approved a liquor permit subject to conditions which had already been satisfied, (ii) that the issuance of a liquor permit was a condition precedent to the enforcement of the lease, and (iii) that the lease was unenforceable under the doctrines of frustration of purpose and impracticability due to government action. Landlord filed a cross-motion for summary judgment. The trial court granted summary judgment to Landlord.
Holding:	The Ohio Court of Appeals upheld the lower court's decision for the Landlord on all three of the Tenants' defenses. First, the appellate court found based on the plain and ordinary meaning of the lease that the parties did not intend the issuance of a liquor permit to be a condition precedent to the Tenants' payment obligations. In addition to language saying the Tenants were "[t]o procure any licenses and permits required for any use made of the Leased Premises by the Tenant," not a single provision specifically conditioned the payment obligations on the issuance of a liquor or other license or permit. For instance, the force majeure provision required continued payment of rent and other charges even where the Tenants' performance was hindered or prevented by issues beyond their control including strikes, restrictive government regulation, and other reasons. Second, the appellate court noted that the Supreme Court of Ohio had not expressly adopted the doctrine of frustration of purpose, and the appellate court declined to do

	so in this case. The Tenants claimed the exclusive purpose of the lease was for a bar, but the language of the lease said the property was to be used for a restaurant and bar. The Tenants never contended they were unable to use the premises as a restaurant. Thus, the lack of a liquor permit only restricted the purpose of the lease; it did not totally frustrate it. Third, because the lease required the Tenants to obtain all licenses or permits and did not excuse Tenants' payment obligation in the event of restrictive governmental law or regulations, or other reasons beyond their control, the appellate court found that the parties expressly allocated the risk of government delay to the Tenants. Accordingly, the doctrine of impracticability due to government action was precluded.
Autumn Court. Operating Co., LLC v. Healthcare Ventures of Ohio, LLC, No. 2:20-cv-4901, 2021 U.S. Dist. LEXIS 18295 (S.D. Ohio Feb. 1, 2021)	
Issue:	Whether a commercial landlord is entitled to CARES Act funds pursuant to a pledge agreement entered into with its subtenant granting landlord an ownership interest in the tenant upon an event of default under the sublease.
Facts:	Healthcare Ventures of Ohio LLC, Health Prime One, Inc., and NH Management Corporation (collectively, "Tenant") operated 11 skilled nursing facilities pursuant to multiple virtually identical sublease agreements (collectively, "the Sublease") entered into with HG Property Services Corp. ("Landlord"), which expired as of July 1, 2020. The Sublease provided that an Event of Default would occur under the Sublease if Tenant failed to comply with any monetary or other material obligations prior to expiration of a cure period, which lasted for 30 days after receipt of written notice of an Event of Default. Consequently, certain performance obligations could survive the termination of the Sublease. Additionally, as security for the Sublease, Tenant and Paul M. Dauerman, President of Healthcare Ventures of Ohio LLC ("President") provided a Pledge Agreement that granted Landlord a continuing security interest in certain ownership interests held by President and his companies in the Tenant until (i) termination of the Sublease and (ii) payment and satisfaction of all of Tenant's obligations under certain other agreements. On June 30, 2020, Tenant's role as the operator of the nursing facilities terminated upon expiration of the Sublease. On August 3, 2020, Landlord served upon Tenant a notice of default under the Sublease. On August 27, 2020, the government transferred 1.9 million dollars of grant money to Tenant's account under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). Landlord and certain other plaintiffs subsequently filed a motion for preliminary injunction in connection with, among other things, the CARES Act funds. Among the allegations made by Landlord and the other plaintiffs were allegations that (i) Tenant did not cure any of the identified Events of Default prior to expiration of the contractual cure period on September 2, 2020 and (ii) because of the uncured defaults, Tenant's obligations under the Sublease had not been satisfied and the Pledge Agreement had not expired, thereby triggering ownership rights in Tenant for HVO Operations Windup, LLC as the wholly owned subsidiary and nominee of Landlord ("Landlord's Nominee").

	Accordingly, the plaintiffs argued that Landlord's Nominee owned Tenant and was entitled to access the CARES Act funds in Tenant's bank account.
Holding:	The court denied the Motion for Preliminary Injunction brought by Landlord and other plaintiffs and held that Landlord's Nominee could not claim any right over the CARES Act funds because Landlord failed to demonstrate any default by Tenant. In the absence of a default, Landlord's putative property rights over Tenant's assets had not been triggered under Sublease. The court concluded that even though CARES Act created no explicit or implied private right of action, Landlord could be entitled to CARES Act funds outright if the governing contract between the parties suggested this conclusion. However, the court found that, by its express terms, the Pledge Agreement between Landlord and Tenant terminated when the Sublease expired on June 30. Even if the Pledge Agreement remained in force, only uncured defaults could trigger the ownership rights under the Pledge Agreement and entitle Landlord's Nominee to access the CARES Act funds. The court further found that Landlord and the other plaintiffs were not likely to succeed in establishing that there were uncured defaults by Tenant under Sublease. Additionally, the court noted that it was highly unlikely that the Pledge Agreement would permit Landlord to keep financial interests in Tenant's business when Tenant fulfilled all material obligations under the now expired Sublease. Therefore, the court denied Landlord's Motion for Preliminary Injunction and held that Landlord could not claim any right over CARES Act funds that the government disbursed to Tenant's account.
Santo's Italian Café LLC v. Acuity Ins. Co., No. 1:20-cv-01192, 2020 U.S. Dist. LEXIS 239382 (N.D. Ohio Dec. 21, 2020)	
Issue:	Whether an insurer must cover the business income loss of a tenant holding business interruption insurance when the loss was caused by pandemic-related, government mandated closure.
Facts:	Santo's Italian Café LLC ("Tenant") purchased business interruption insurance from Acuity Insurance Co. ("Insurer") in 2019. The policy included coverage for loss of business income and extra expenses stemming from "direct physical loss of or damage to property." The policy also covered loss of business income and extra expenses stemming from action by a civil authority prohibiting access to the premises if such action was "taken in response to dangerous physical conditions resulting from the damage. . . ." The policy further excluded from coverage any damage caused by a virus or bacteria. In March 2020, the governor of Ohio issued an order restricting all bars and restaurants to carry-out sales only. Insurer refused to cover the lost business income that resulted from this order, and Tenant filed a complaint for breach of contract, arguing that the COVID-19 pandemic and resulting closure order should be covered as a direct loss of the use of the insured premises. Insurer then filed a motion to dismiss for failure to state a claim.

Holding:	The Court granted Insurer’s motion to dismiss because Tenant failed to show any type of physical force or intrusion to the property. The Court cited an Ohio state court case that found “physical injury” under a homeowner insurance policy to mean “a harm to the property that adversely affects the structural integrity of the house.” (quoting *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, 40, 2008-Ohio-311, 884 N.E.2d 1130 (Ohio 8th Dist. Ct. App. 2008)). Relying on the *Mastellone* decision, the Court held that Tenant must show “distinct, demonstrable, physical alteration of the insured property,” which they did not do. The Court further held that Tenant could not recover under the civil authority clause of the insurance contract because Tenant still had access to the premises; they simply could not serve dine-in customers. Finally, the Court held that even if Tenant’s complaint had alleged a plausible claim for coverage, such coverage would still have been excluded under the policy’s virus exception clause.
PENNSYLVANIA	
Lincoln Square 1776 Assocs., LLC v. Great Am. Ins. Co., No. 20-4003, 2020 U.S. Dist. LEXIS 197316 (E.D. Pa. Oct. 23, 2020)	
Issue:	(1) Whether a suit for declaratory judgment claiming force majeure, frustration of purpose, impracticability, and impossibility is a parallel proceeding to a breach of contract suit under the same commercial lease; (2) Whether exceptional circumstances justify dismissing a parallel action.
Facts:	Lincoln Square 1776 Associates, LLC (“Landlord”) entered into a master lease with Stay Alfred, Inc. (“Tenant”) for thirty–eight (38) rental units in a multi-family residential apartment building. As required by the lease, Tenant entered into a Lease Guarantee Bond (the “Bond”) with Great American Insurance Company (“Insurer”) to guarantee Tenant’s monthly payments to Landlord. The Bond included a force majeure clause which provided that Insurer is not liable under the Bond for failed payments “due to a Force Majeure event”. However, the Bond did not define “force majeure event.” The lease further provided that any enforcement action under the lease must be brought in Pennsylvania state or federal court. Tenant failed to pay Landlord rent owed for April, May, or June 2020. Following the required notice and cure period, Landlord submitted a notice of claim to Insurer under the Bond. Insurer then commenced a declaratory judgment action against Landlord in Washington state, claiming that the global lockdown caused by the COVID-19 pandemic was a force majeure event and that Insurer was therefore not liable to Landlord for its claim under the Bond. Landlord motioned to dismiss the Washington state action, claiming lack of personal jurisdiction and improper venue. Subsequently, Landlord commenced the instant action in the United States District Court for the Eastern District of Pennsylvania asserting Insurer breached of the terms of the Bond. Insurer filed a motion to dismiss asserting that the Washington and Pennsylvania actions were parallel proceedings and that exceptional circumstances justified dismissal of the case to conserve judicial resources. Landlord countered that

	the actions were not parallel because the Washington state court lacked personal jurisdiction over Landlord.
Holding:	The Court denied Insurer's motion to dismiss. Although the Court agreed that the Washington State and Pennsylvania actions were parallel proceedings because (i) both claims concerned the same commercial lease, (ii) Insurer could allege the same defenses in both actions, and (iii) Landlord and Insurer were adverse parties in both actions, the Court did not find that exceptional circumstances warranted dismissing the case. The Court analyzed the circumstances under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1972) and found that the six-factor test favored Landlord. Specifically, the Court found that (i) the parties did not bring an *in rem* action; (ii) the forum selection clause in the lease waived Insurer's claim of an inconvenient federal forum; (iii) breach of contract claims do not implicate a federal policy against piecemeal litigation; (iv) the Washington State court had not yet made a decision on Landlord's motion to dismiss; (v) federal and state courts are equally qualified to apply settled state contract law; and (vi) neither party argued that the Washington forum was inadequate. Accordingly, the Court held that the parallel action could proceed and denied Insurer's motion to dismiss.
Wilkinson Langhorne Ltd. P'ship v. Ruby Tuesday, Inc., No. 20-00095, 2020 U.S. Dist. LEXIS 123891 (E.D. Pa. July 14, 2020)	
Issue:	(1) Whether future missed rental payments can be considered as part of the amount in controversy in a breach of contract claim; (2) Whether the deficiency in required insurance coverage can be considered as part of the amount in controversy in a breach of contract claim; (3) Whether the "value of the real estate" standard or "the object of the litigation" analysis is the proper test to determine an amount in controversy for ejectment actions.
Facts:	Wilkinson Langhorne Limited Partnership ("Landlord") owned and leased real estate in Bucks County, Pennsylvania to Ruby Tuesday, Inc. ("Tenant"). A provision in the lease required Tenant to maintain a certain level of insurance coverage. In the event of default, the lease gave Landlord the right to dispossess Tenant of the premises without terminating the lease and without absolving Tenant of its ongoing obligation to pay rent. Landlord brought suit in the United States District Court for the Eastern District of Pennsylvania alleging that Tenant breached the insurance coverage provision of the lease by maintaining insurance coverage below the required amount. Landlord claimed the amount in controversy included (i) the rent owed under the remainder of the lease ($600,000) (ii) the value of the premises ($1.5 million), and (iii) the amount of insurance exposure Landlord faced from Tenant's insufficient coverage ($540,000). Tenant did not dispute that it breached the insurance provisions of the lease, however,

	Tenant moved to dismiss Landlord's claim on the grounds that Landlord failed to allege the amount in controversy required for diversity jurisdiction.
Holding:	The Court emphasized that the amount in controversy is assessed from the plaintiff's perspective at the time a plaintiff files the complaint. Subsequent events cannot increase the amount in controversy to meet the $75,000 threshold. Accordingly, the Court determined that any unpaid rent accruing after the filing of the original complaint cannot be included in the amount in controversy. Likewise, the Court refused to consider any anticipated or speculated future unpaid rent as part of the amount in controversy because such amounts were not in dispute at the time Landlord filed its complaint. However, the Court held that where the Tenant did not maintain insurance at the amount required under the lease and therefore exposed the Landlord to additional risk in the event of a casualty at the premises, the difference between the maintained insurance coverage and the required coverage under the lease was part of the amount in controversy. Since Tenant's insurance coverage was deficient by $450,000, Landlord met the $75,000 amount in controversy requirement. The Court also concluded that in ejectment actions, the correct measure for the amount in controversy was the Third Circuit's "object of the litigation" analysis, not the Fourth Circuit's "value of real estate" standard. The object of litigation analysis assesses the amount in controversy from the plaintiff's perspective at the time the complaint is filed. Thus, the Court considered the aforementioned $450,000 in deficient insurance coverage, rather than the value of the premises, in determining that the Landlord met the $75,000 amount in controversy requirement for the ejectment action.
SOUTH CAROLINA	
Sea Island Food Grp., LLC v. Yaschik Dev. Co., No. 5794, 2021 S.C. App. LEXIS 11 (S.C. Ct. App. Jan. 27, 2021)	
Issue:	Whether a subtenant can recover under an intentional interference with contract claim against a master landlord that wrongfully declared a building totally destroyed following a casualty event.
Facts:	A fire caused extensive damage to the second floor and roof of a building owned by Yaschik Development Co. ("Landlord"), which was leased to a limited partnership ("Master Tenant") that in turn leased spaces to a number of tenants, including Top of the Bay, Inc. ("Subtenant"). After the fire, the Master Tenant began repairs but became aware that because of structural and code compliance issues, the repairs would exceed the $1 million insurance policy it maintained in accordance with the master lease. The Landlord and Master Tenant disagreed as to who had responsibility to fund the repair costs over the insurance payout. After the Master Tenant sent repair plans to the Landlord for approval, the Landlord sent the Master Tenant a letter terminating the master lease on the basis that the building was a total loss. The master lease language, which was echoed in the subleases, provided:

	> If premises are totally destroyed by fire or other casualty, this lease shall terminate as of the date of such destruction and rental shall be accounted for as between Landlord and Tenant as of that date. If premises are damaged but not wholly destroyed by fire or other casualty, rent shall abate in such proportion as use of premises has been lost to the Tenant. Landlord shall restore premises to substantially the same condition as prior to damage as speedily as practicable, whereupon full rental shall commence. The Subtenant subsequently brought suits against both the Landlord and Master Tenant, claiming (i) that the Landlord wrongfully terminated the master lease because the building was not totally destroyed, and this wrongful termination interfered with the sublease between the Subtenant and the Master Tenant and (ii) the Master Tenant breached the sublease by failing to restore the premises after the fire. The court granted the Master Tenant a directed verdict on the restoration issue, finding that when the Landlord terminated the lease the Master Tenant no longer had a duty to restore the premises. The court, however, denied a directed verdict for the Landlord on the claim of sublease interference. At trial, the jury found that the Landlord had breached the master lease and interfered with the subleases by improperly declaring the building a total loss. The Landlord moved for judgment notwithstanding the verdict, which was also denied. The Landlord appealed the denial of both the motion for a directed verdict and the motion for judgment notwithstanding the verdict.
Holding:	On appeal, the Landlord argued that the Subtenant's claim against it was meritless because interference with contract claims require an underlying breach of contract, and the court had granted a directed verdict in favor of the Master Tenant on the Subtenant's breach of contract claim. However, the appellate court rejected this argument, observing that the trial court had found that the breach of the sublease by the Master Tenant was justified, not that there was no underlying breach. The appellate court held that the Landlord's motions for a directed verdict and for judgment notwithstanding the verdict were properly denied because there was sufficient evidence that the Landlord interfered with the sublease between the Master Tenant and Subtenant. The appellate court reasoned that by declaring the building a total loss, the Landlord made it so the Master Tenant could not honor the sublease. The appellate court rejected the Landlord's argument that its decision to declare the building a total loss was a reasonable business decision based on the amount of money it would have saved by selling the building instead of repairing it and that any possible interference with the sublease was therefore justified. Instead, the appellate court reasoned that there was sufficient evidence for a reasonable jury to determine that the Landlord did not actually believe the building was a total loss. In particular, the appellate court pointed to evidence that the Landlord knew the building had structural issues with repair costs in excess of insurance coverage, the Landlord began negotiating to sell the building only one month after the fire, and large portions of the building were still intact after the fire. Accordingly, the appellate court found that interference with the sublease was unjustified.

<table>
<tr><td colspan="2">TENNESSEE</td></tr>
<tr><td colspan="2">None</td></tr>
<tr><td colspan="2">TEXAS</td></tr>
<tr><td colspan="2">Tanger Mgmt., LLC v. Haggar Direct, Inc., No. 1:20-CV-874-RP, 2021 U.S. Dist. LEXIS 89509 (W.D. Tex. May 11, 2021)</td></tr>
<tr><td>Issue:</td><td>(1) Whether the Covid-19 pandemic and related events excuse a tenant’s failure to pay rent under the force majeure provision of its lease;

(2) Whether a landlord’s closure of its shopping center due to the Covid-19 pandemic constitutes a breach of the covenant of quiet enjoyment.</td></tr>
<tr><td>Facts:</td><td>Tanger Management, LLC (“Landlord”) leased certain properties to Haggar Direct, Inc. (“Tenant”) to be used as retail clothing stores. In response to the Covid-19 pandemic, Tenant closed its retail stores in March 2020. For the same reason, Landlord had already closed some of its shopping centers, and it closed its remaining shopping centers by April 2020. Landlord notified Tenant that it would open its shopping centers in May, but Tenant objected that it could not safely open its stores by then. Tenant did not pay rent for April or May 2020 but resumed paying rent in June. In August, citing reduced revenue, Tenant proposed paying only 50% of rent for that month and thereafter paying rent proportional to its sales as compared against 2019.

Landlord and Tenant subsequently brought numerous claims against each other. Landlord brought a breach of contract claim against Tenant for failure to pay rent. Tenant filed counterclaims and affirmative defenses, arguing that it did not owe rent for April and May and should be permitted to calculate sales-based rent from August 2020 onward. Tenant brought claims against Landlord for breach of the covenant of quiet enjoyment and impracticability and frustration of purpose as a result of Landlord’s temporary closure of its shopping centers. Tenant also brought a claim for mutual mistake and reformation, arguing that its leases were based on the mutual mistake that Tenant would be permitted to operate its stores. Landlord filed a motion to dismiss each of Tenant’s counterclaims.

The most detailed issue of the proceedings was whether Tenant’s failure to pay rent was excused under the force majeure clauses of its leases. The disputed leases contained three types of force majeure clauses:
The first type of force majeure clause, which was in most of the leases, excused failure to perform certain obligations provided the failure resulted from force majeure, which included any delay arising from various causes including those beyond the control of the non-performing party. These leases stated that Tenant’s obligation to pay rent under the lease would not be construed to be a cause beyond Tenant’s reasonable control.
The second type of force majeure clause provided that if Landlord or Tenant were delayed or prevented from performing their obligations due to government restrictions or reasons not the fault of the delayed party, then the period of delay would be added to the time provided for the performance of such obligation and the defaulting party would not be liable for losses or</td></tr>
</table>

	damages caused by such delays; provided that the provision would not affect Tenant's obligation to pay rent or any other monies. • The third type of force majeure clause, which appeared in one lease, stated that the clause should not be construed to relieve Tenant from payment of rent except as otherwise excused under the lease. This lease included a provision stating that if, due to an act, omission, or negligence of Landlord, Tenant was unable to conduct its business for a period in excess of 24 consecutive hours, Tenant's rent would abate until Landlord corrected the problem. Landlord argued that, even if the Covid-19 pandemic were considered a force majeure event, none of the force majeure clauses excused Tenant's rent obligations.
Holding:	The Court denied Landlord's motions to dismiss the breach of contract claims based on the force majeure clauses, finding that Tenant had offered plausible interpretations of each of the clauses that would excuse payment of rent due to a force majeure event. For the first type of clause, Tenant argued that its failure to pay rent should be excused because it was the result of the Covid-19 pandemic, a force majeure event. It argued the provision that "obligations to make payments . . . shall not be construed to be a cause beyond [Tenant's] reasonable control" did not apply because Tenant did not claim its inability to pay rent was the "cause" of the force majeure event, but instead that the pandemic caused its failure to pay. The Court found Tenant's interpretation plausible and concluded that, although the clause did not explicitly include government regulations, Landlord's brief included implicit arguments that such regulations were force majeure. For the second type of clause, Tenant argued the clause meant that Landlord could delay its obligation to provide retail space, but that Tenant was only required to resume paying rent when Landlord resumed its performance to provide retail space. Tenant argued that the language providing the force majeure clause "shall not affect Tenant's obligation to pay rent" meant that Landlord could add two months to the end of the current lease term. Tenant argued that the third type of force majeure provision excused it from paying rent during the period for which Landlord's shopping centers were closed because the closure was an "act" of Landlord that caused Tenant to be reasonably unable to conduct its business in the premises. Because the Court found Tenant's arguments regarding the three types of provisions plausible, the Court denied Landlord's motion to dismiss Tenant's breach of contract claim based on these provisions. The Court similarly denied Landlord's motion to dismiss Tenant's claim that Landlord breached the covenant of quiet enjoyment. Despite Landlord's argument that Tenant, by failing to pay rent, had forgone its right to quiet enjoyment, the Court concluded that (i) Tenant pleaded a plausible claim that at least some of Tenant's properties closed as a result of Landlord's closure orders and (ii) discovery was required to determine why each store was closed and whether Landlord's orders amounted to breaches of the covenant of quiet enjoyment with respect to any of them. Finally, with respect to Tenant's other claims, the Court (i) dismissed Tenant's claim for frustration of purpose and impracticability/impossibility on the basis that Tenant did not plead that its payment of rent was impossible and (ii) denied Landlord's

	motion to dismiss the claim for mutual mistake and reformation because Tenant plausibly pleaded that the parties intended the lease to reflect the belief that Tenant would be able to operate its stores.
In re CEC Entm't, Inc., 625 B.R. 344 (Bankr. S.D. Tex. 2020)	
Issue:	(1) Whether Section 365(d)(3) of the Bankruptcy Code gives the court equitable power to alter a tenant's rent obligations; (2) Whether a force majeure event can excuse a tenant's performance obligations when the force majeure clause of the tenant's lease specifically excludes failure to pay rent; (3) Whether a party to a lease can rely upon the frustration of purpose doctrine to excuse its obligation to timely pay rent when the lease contains a force majeure provision allocating risk between the parties.
Facts:	CEC Entertainment, Inc. ("Tenant") operates a nationwide chain of Chuck E. Cheese venues. After the COVID-19 pandemic coupled with government-imposed regulations severely impacted Tenant's ability to operate its venues, Tenant filed petitions under Chapter 11 of the Bankruptcy Code on June 24, 2020, and, on August 3, 2020, filed a Motion for Order Authorizing Debtors to Abate Rent Payments at Stores Affected by Government Regulations ("Abatement Motion"). The Abatement Motion sought ". . . . rent [abatement] for stores closed or otherwise limited in operations as a result of any governmental order or restriction . . . ." Several of Tenant's landlords objected to the Abatement Motion, and this Memorandum Opinion addressed the objections of the landlords at six of Tenant's venues located in North Carolina, Washington, and California for which Tenant sought rent abatement or reduction. In support of its position, Tenant made three arguments. First, Tenant argued that Sections 365(d)(3) and 105(a) of the Bankruptcy Code gave the Court equitable power to alter Tenant's rent obligations. Alternatively, Tenant argued that the pandemic and related government regulations were force majeure events which entitled it to delay contractual performance under its leases. Finally, if neither the Bankruptcy Code nor the force majeure clauses permitted rent abatement, Tenant argued that the doctrine of frustration of purpose relieved Tenant's obligation to timely pay rent.
Holding:	The United States Bankruptcy Court for the Southern District of Texas concluded that Tenant was not entitled to reduction or abatement of its rent obligations because neither the Bankruptcy Code, the force majeure clauses of the lease, nor the doctrine of frustration of purpose afforded Tenant the relief requested. The Court concluded that both the text and the intent of Section 365(d)(3) of the Bankruptcy Code clearly required the Tenant to continue to timely perform its lease obligations after filing for bankruptcy. Therefore, the Bankruptcy Code did not permit the Court to equitably alter Tenant's state law rent obligations. Considering whether the force majeure clauses in Tenant's leases excused performance, the Court first concluded that the force majeure clause in the North Carolina lease did not allow Tenant to withhold or abate the rent. The force majeure

	clause specifically stated: "this Section shall not apply to the inability to pay any sum of money due hereunder or the failure to perform any other obligation due to the lack of money or inability to raise capital or borrow for any purpose." Because rent was a "sum of money due" under the lease, the Court held that the force majeure clause precluded Tenant's argument that the pandemic and associated governmental regulations excused its rent obligations. The Court applied a similar analysis to the leases in Washington and California and held that the force majeure clauses of each lease expressly precluded a force majeure event from excusing prompt payment of rent. Finally, in response to Tenant's argument that the frustration of purpose doctrine excused its obligation to timely pay rent, the Court concluded that the language in the force majeure clause of each lease superseded the doctrine of frustration. In all three states, the doctrine of frustration does not apply if the contract between the parties discloses an allocation of risk from one party to the other. Because Tenant expressly agreed in the force majeure clauses that government regulations would not relieve its obligation to pay rent, it was precluded from relying upon a frustration of purpose argument. The Court denied Tenant's Abatement Motion for the reasons stated above and held that Tenant was not entitled to a reduction or rent abatement of its rent obligations.
VIRGIN ISLANDS	
None	
VIRGINIA	
In re Pier 1 Imps., Inc., 615 B.R. 196 (Bankr. E. D. Va. 2020)	
Issue:	Whether tenants who filed for Chapter 11 bankruptcy should be granted temporary relief through a motion that would delay rent payments for certain landlords for a limited period of time during the COVID-19 pandemic.
Facts:	Pier 1 Imports and its affiliated debtors (collectively, the "Tenants") filed for Chapter 11 bankruptcy on February 17, 2020. As a result of subsequent stay-at-home mandates resulting from the COVID-19 pandemic, the Tenants' sales dropped sharply thereafter. The Tenants took action to preserve their liquidity by "furloughing employees, closing stores, decreasing salaries, and reaching out to every landlord to negotiate a consensual rent deferral." These actions proved insufficient for paying their expenses and the Tenants filed a Debtors' Emergency Motion for Entry of an Order (I) Approving Relief Related to the Interim Budget, (II) Temporarily Adjourning Certain Motions and Applications for Payment, and (III) Granting Related Relief (the "Motion"). The Tenants attached an interim budget to the Motion, which only required them to pay critical expenses for their business (the "Interim Budget"). The Court granted the Motion. After holding a subsequent hearing on the Motion as required by the Original Order, the Court granted a supplemental order, which further modified the Interim Budget by providing that Tenants would continue to pay for utilities, insurance, and security systems, but that only certain landlords would receive rent payments during a designated "limited operations period". This modified Interim Budget would delay

	rent payment for certain other landlords (collectively, the "Deferred Landlords"). The Deferred Landlords objected to the supplemental order.
Holding:	The Court found in favor of the Tenants and upheld the Motion and supplemental order. The Court concluded that the temporary relief sought by the Motion served the best interests of all parties involved because there was no feasible alternative for relief due to the Tenants' scarce resources and disruptions from COVID-19. Further, the Court noted that granting the motion only delayed the Tenants' payment of accrued rent to the Deferred Landlords and did not cancel the obligation to pay rent altogether. The Tenants' deferred rent payments would accrue for the limited operations period in accordance with the terms of the leases and state law. The Court also found that the Deferred Landlords were not entitled to relief via adequate protection under sections 361 and 363 of the Bankruptcy Code because the Tenants' deferred rent payments did not decrease the value of the Deferred Landlords' interests in their properties. To the extent adequate protection were required, the Court found that the continued payment of the related non-rent payments and assurance of cure payment in July was sufficient to protect the Deferred Landlords against any perceived diminution in value. Finally, the Court found that Section 365(d)(3) of the Bankruptcy Code did not give the Deferred Landlords the right to compel the Tenants to pay their rent pursuant to their leases. If the Tenants failed to timely pay rent, the Deferred Landlords' only potential remedy was an administrative expense claim. This finding was consistent with the Court's previous decision in *In re Circuit City Stores, Inc.*, 447 B.R. 475 (Bankr. E. D. Va. 2009).
WASHINGTON	
Borton & Sons, Inc. v. Burbank Properties, LLC, 196 Wash.2d 199, 471 P.3d 871 (2020)	
Issue:	(i) What is the standard of review when reviewing whether an equitable grace period was properly granted on summary judgement; (ii) Are valuable permanent improvements to property required before a trial court may grant an equitable grace period to exercise an option contained in a lease; (iii) Did the trial court have discretion to grant the lessee (Burbank) an equitable grace period; and (iv) Was the lessee entitled to attorney fees and costs?
Facts:	In 2012, Burbank Properties, LLC purchased 164 acres of agricultural land. After facing financial trouble, Eric Rogers—Burbank's owner—was advised to sell the land at below market rate and enter into a leaseback agreement with an option to repurchase the land at the end of the lease. In February 2016, Borton & Sons Inc. purchased the land subject to a three-year "Lease and Option Agreement." Per the Agreement, Burbank was required to exercise the purchase option by December 31, 2017, via registered or certified mail, and closing was to occur no later than December 31, 2018. During the lease period, Rogers continued to harvest potatoes and planted timothy hay on the land.

	Three days before the option was set to expire, Rogers drafted a "Notice of Exercise of Option to Purchase the Subject Property." Rogers mailed the Notice via regular mail on January 4, 2018. Borton received the Notice four days later, and Borton notified Burbank that it had failed to timely exercise the option and requested an acknowledgement that the option was terminated. Burbank contended that the Notice was valid and enforceable and affirmed its intent to close. Borton initiated a declaratory judgement action, and Burbank counterclaimed. Following cross motions for summary judgement, the trial court ruled that Burbank was entitled to an equitable grace period based on timothy hay loss and loss in equity. The trial court also decreed that Burbank properly exercised the option, and that Burbank was entitled to purchase the property. Borton appealed, and the Court of Appeals reversed in a split opinion. The lead opinion held that the standard of review was de novo, while the concurring opinion concluded it to be abuse of discretion. On the merits, the court held that an equitable grace period was available only when substantial improvements are made to the property such that the lessee would suffer an inequitable forfeiture if a grace period was not granted, and since Burbank made no improvements, Burbank failed to demonstrate that it would suffer an inequitable forfeiture.
Holding:	Affirmed. The Supreme Court, en banc, held that: (i) trial court's order granting an equitable grace period to exercise the option would be reviewed de novo, rather than for an abuse of discretion, thus disapproving <u>Recreational Equipment, Inc. v. World Wrapps Northwest, Inc</u>., 165 Wash. App. 553, 266 P.3d 924; (ii) Valuable permanent improvements to property are required before a court may grant a lessee an equitable grace period; and (iii) Lessee failed to establish that it would suffer an inequitable forfeiture absent the grant of an equitable grace period.
CCT Construction, Inc. v. 4Ever Healing, LLC, 12 Wash.App.2d. 1077 (2020)	
Issue:	(i) Whether an earlier breach by Lessor as well as constructive eviction excused Lessee's performance under the lease; (ii) Whether certain items Lessee installed on the leased premises were intended to become permanent improvements; (iii) Whether Lessor had a duty to mitigate its damages resulting from the breach; and (iv) Whether Lessee was entitled to an award of attorney fees.
Facts:	CCT leased property and structures to 4Ever in June 2016 for five years so that 4Ever could open a cannabis store. Rent was $8,500, and the parties orally contracted to defer $2,500 of rent for each month until the store opened for business. Bassi, managing member of 4Ever, signed on behalf of 4Ever, and Shipman, manager of CCT, signed on behalf of CCT. The property was composed of Unit A and Unit B, and the lease provided that CCT may continue using Unit A for 60 days after the lease's commencement. Additionally, CCT would be able to share on-site parking with 4Ever for the lease's

	duration. 4Ever agreed to pay CCT $15,000 to cover CCT's moving expenses, but CCT never vacated. 4Ever was unable to obtain approval from the City to open a cannabis store, and did not pay rent for the month of September, but continued to occupy Unit B until September 17, when CCT mailed and posted a 3-day vacate notice to 4Ever. 4Ever began removing items from Unit B, including glass cabinets that were bolted down and TV monitors. Shipman and Bassi argued whether such items were fixtures that had to remain on the property. 4Ever had removed most of its personal property by the next day except for a large outdoor AC unit. When Bassi arrived to remove it, he found that Shipman had parked several vehicles on the property in a manner that obstructed access to the AC. Shipman maintained that the AC was a permanent fixture and refused to allow Bassi to remove it. After 4Ever vacated, CCT commenced this action, alleging that 4Ever breached the lease agreement and that Bassi, as guarantor, was personally liable for the breach. 4Ever counterclaimed with breach of contract, conversion, forcible entry, and tortious interference, along with personal claims against Shipman. The trial court ultimately found 4Ever and Bassi liable for breaching the lease, and computed damages as follows: • The Lease required that 4Ever Healing pay rent at the rate of $6,000.00 per month until the business opened. The business never opened, therefore, the rent due under the Lease for the Lease term of sixty (60) months is $6,000.00 per month for a total amount of rent due under the Lease of $360,000.00. • 4Ever Healing paid rent for three (3) months out of the sixty (60) month term of the Lease. 4Ever Healing paid $15,000.00 to the Plaintiff for a relocation fee. These payments totaling $33,000.00 would be credited towards the total rent owed by 4Ever Healing under the Lease. • The re-rental value of the shop, Unit B, is $2,200.00 per month. The rental value of Unit B during the balance of the Lease term of fifty-six (56) months totals $123,200. This amount would be credited towards the total rent owed by 4Ever Healing under the Lease. • The re-rental value of the residence, Unit A, is $2,700.00 per month, which totals $151,200.00 for the remaining fifty-six (56) months of the Lease term. This amount would be credited towards the total rent owed by 4Ever Healing under the Lease. • 4Ever Healing is entitled to a credit of $6,800.00 against rent due under the lease for lost rent from Unit A due to CCT's failure to vacate Unit A on August 1, 2016. • Total damages to CCT from 4Ever Healing's failure to pay rent in breach of the Lease is $45,800.00 based on the following calculation: $360,000.00 total

	amount due under the Lease - $33,000.00 rent and relocation fee paid by 4Ever Healing - $123,200.00 rental value of Unit B during the balance of the Lease term - $151,200.00 rental value of Unit A during the balance of the Lease term - $6,800.00 lost rent to 4Ever Healing = $45,800.00. The court added $6,700 for the value of cabinets and television monitors that 4Ever had removed and $8,000 for property taxes for the duration of the lease, but credited to 4Ever the $4,000 balance of a personal loan Bassi had made to Shipman. Thus, the court awarded to CCT damages of $56,500. It also awarded attorney fees to CCT in the amount of $15,325.
Holding:	The Court of Appeals of Washington affirmed in all respects but reversed the trial court's decision regarding fixtures, finding that the cabinets, monitors, and outdoor AC unit were all removable with a minimum level of physical disruption, and that all of the items were installed for the purpose of enhancing 4Ever's planned cannabis retail store. Thus, they were trade fixtures, and not within the scope of the applicable lease provision, which references "alterations, additions or improvements" and not "fixtures."
WEST VIRGINIA	
None	

FEDERAL CASES	
FIRST CIRCUIT	
In re Furlong, 620 B.R. 422 (Bankr. D.N.H. 2020)	
Issue:	Whether good faith purchasers and creditors are held to the same standard regarding inquiry notice in a race-notice jurisdiction.
Facts:	Furlong ("Debtor") was involved in litigation with the Town of Bartlett ("Town"). As part of that litigation, in 2012, the County Superior Court ("State Court") ordered the Debtor to pay the Town fines of more than $300,000. In 2013, the State Court granted a Petition to Attach on Debtor's property ("Property") to secure the 2012 Order. The Debtor applied to refinance the mortgage on his property in 2013. During the refinancing process, the settlement agent for the mortgage company, Nationstar, obtained a title report that stated the Property did not have any outstanding "Judgment/Liens." The Petition to Attach granted by the State Court was recorded six weeks after Nationastar's title report was obtained. Throughout the rest of the refinancing process, Debtor did not disclose the debt he owed to the town, nor did he reveal the judgement lien on his property. The original mortgage was discharged, and the refinanced mortgage was recorded with the Registry of Deeds in 2014. At the time of record, the Town's attachment lien was senior to the refinanced mortgage. An Execution of Judgement for the 2012 Order was issued in 2016. The Town, relying on the priority information provided by the Registry of Deeds, set up a sheriff's sale of Debtor's Property. Debtor filed a Chapter 7 bankruptcy petition in 2016, which stalled the sale. Nationstar filed an appearance in the bankruptcy case almost eight months later. In 2018, the bankruptcy trustee and the Town entered into a Stipulation and Settlement Agreement in consideration of all of Debtor's real estate. The court granted a Motion to Approve the Settlement Agreement two months later. Nationstar did not object to the Motion. Specialized Loan Servicing, LLC ("SLS") sued in 2018, asking the court to reorder the liens so that the refinanced mortgage would then be senior to the Town's lien because SLS did not know of the Town's lien when the Property was refinanced.
Holding:	The court granted the Town's motion for summary judgement and held that the Town, as an attaching lien creditor, was not on inquiry notice for the improperly recorded claim. Generally, "if a document is properly recorded at the registry of deeds, creditors and purchasers are deemed to have constructive notice of the prior lien, regardless of whether the purchaser or creditor performs a title search." *Id.* at 428 (citing *Amoskeag Bank v. Chagnon*, 572 A.2d 1153, 1155 (1990)). Additionally, a creditor or purchaser's knowledge of a prior claim is sufficient for actual notice of a prior interest, and the creditor or purchaser's interest may be deemed junior, even if that prior claim was not properly recorded. *Id.* While both good faith purchasers and attaching lien creditors are subject to the same standards for actual and

	constructive notice, as stated above, the two parties are evaluated differently regarding inquiry notice. *Id.* The court stated that, "'an attaching creditor can have actual notice of a prior interest only if he or she discovers a *properly recorded* interest during a title search or independently learns of the existence of the interest,'" while an improperly recorded interest may satisfy the inquiry notice standards for a good faith purchaser. *Id.* at 429 (quoting *Amoskeag Bank*, 527 A.2d at 1155).
Gomes v. Harrison, 150 N.E.3d 815 (Mass. App. Ct. 2020)	
Issue:	Whether the title of a bona fide purchaser for value may be defeated by an off-record title defect.
Facts:	Harrison ("Debtor") bought property in 2004, which was secured by a mortgage from Washington Mutual Bank ("WAMU"). That mortgage was properly recorded. In 2008, WAMU closed, and the Federal Deposit Insurance Corporation ("FDIC") was named the receiver. A month later, JP Morgan Chase bought "all loans and loan commitments" of WAMU. Even though WAMU had closed, Debtor was sent a "90 Day Right to Cure Notice" printed on WAMU letterhead, stating that he was in default on his mortgage. Before that 90-day period had elapsed, JP Morgan Chase assigned Debtor's mortgage to a trust through Bank of America ("WMABS trust"). Bank of America assigned the property back to JP Morgan Chase, who then foreclosed on the property. JP Morgan Chase sold the property to Gomes ("Purchaser"). After the sale, Debtor provided evidence questioning whether his loan had actually been sold into the WMABS trust and whether it was able to be assigned and sold by JP Morgan Chase. Debtor claimed that WAMU did not own his mortgage title when FDIC took control, so JP Morgan Chase never truly received the title. Both Purchaser and Debtor filed cross motions for summary judgement, each seeking possession of the property.
Holding:	The court affirmed the lower court's grant of summary judgement in favor of Purchaser. In terms of the transfer of Debtor's mortgage, the court stated that the Debtor "established (at most) a genuine dispute only as to whether his <u>note</u> may have been transferred by WAMU." *Id.* at 750. The note and the corresponding mortgage may be transferred separately and considered apart from each other prior to foreclosure. Even if Debtor's claims were true, though, the Purchaser's title cannot be defeated by an unrecorded assignment. The court reasoned that, "even if an unidentified trust entity could claim ownership of [Debtor's] mortgage notwithstanding the foreclosure, that entity would be unable to defeat [Purchaser's] title because it failed to record its interest prior to [] purchase." Purchaser's potential suspicion of any issue was irrelevant, too, because an unrecorded instrument as a title defect requires actual knowledge by the purchaser. The court stated that Purchaser "ha[d] the status of a bona fide purchaser for value without knowledge of the alleged title defect and, thus, any off-record assignment of the mortgage that theoretically could exist cannot deprive him of standing to evict [Debtor]."

Amalfi, Inc. v. 428 Co., 128 N.Y.S.3d 754 (2020)	
Issue:	(1) Whether a transfer between related parties is a bona fide transfer when the parties stated in their Real Property Transfer tax form that the parties are not related. (2) Whether the defendants had actual notice of the plaintiff's right of first refusal and were therefore not good faith purchasers for value. (3) Whether the defendants committed tortious interference in the fulfillment of the contract, and whether rescission of the contract was based solely on a tortious interference claim.
Facts:	This was an appeal from a Supreme Court decision where the court held that defendant and landlord 428 Co. ("428 Co.") breached its lease by not honoring the tenant and plaintiff's right of first refusal to purchase the commercial building containing tenant's restaurant, which provided in pertinent part that plaintiff could purchase the building "at the same price and on the same terms" as "any bona fide" offer, when 428 Co. sold the commercial building to SS Restaurant Building ("SS"). The right of first refusal was not recorded in the county records. However, 428 Co. and SS were both controlled by the person, despite the fact that when the building was transfer, they reported in the Real Property Transfer Report that the transfer was not a sale between related parties. In a prior case, the court determined that because of tax estoppel, the defendants could not now claim that the transfer was not "bona fide" because the parties were related. The court also determined that despite the plaintiff's failure to record its right of first refusal, defendant SS Restaurant Building ("SS") was not a good faith purchaser for value because they knew or should have known of plaintiff's right because 428 Co. and SS were controlled by the same individual. The court ordered specific performance of the right of first refusal and rescission of improper transfer of property and if plaintiff opted to exercise the right to purchase property, then defendant must reimburse plaintiff for the rent paid in the time since the option should have been honored.
Holding:	In a prior case, the court decided that because of tax estoppel, the defendants were estopped from arguing that the transfer of the subject property was not bona fide on the basis of the parties being related because in the Real Property Transfer Report filed in connection with the transfer from 428 Co. to SS, the parties stated that they were not related companies or business. The court rejected the defendants' contention that the defendants were protected by the recording statute and plaintiff's failure to record its right in the county records. Because the plaintiff did not record the operative lease containing the right of first refusal at issue here, the defendant was not charged with record notice of the plaintiff's right of first refusal, and thus the plaintiff had the burden of proof showing that the defendant had actual or constructive notice of the lease and the right of first refusal. The plaintiff met this burden by submitting evidence that the

	same person owned both properties SS and 428 Co. for over 10 years at the time of the transfer and had actual notice of the lease and the right of first refusal. The appellate court affirmed the trial court's decision that only the portion of the mortgage on the property at the time of the improper transfer had priority over the lease and right of first refusal. The defendant was not a good faith purchaser as they were aware of the right and still proceeded with the property transfer and mortgage consolidation. The appellate court found the trial court should have rejected the cause of action for tortious interference with a contract and recognizes that there was no tortious interference here. The defendants SS did not induce 428 Co. to breach the lease. The dismissal of the tortious interference issue does not mean that plaintiff was not entitled to rescission of the improper transfer because rescission was a remedy under a separate claim which was decided in favor of plaintiff. Lastly, an express contract requiring the plaintiff to pay rent to SS during the relevant time frame does not preclude the plaintiff's unjust enrichment action. The agreement established that the parties reserved the right to seek "alternative or additional claims or defenses" following the appeal.
W Equities Acquisitions, LLC v. Wyckoff Heights Properties, LLC, 140 N.Y.S.3d 119 (2021)	
Issue:	Whether in light of defendant seller's obligation to deliver the premises (free of all tenancies) the inability to obtain surrender agreement from two of the four tenants would constitute a title defect or a breach of the contract.
Facts:	Purchase agreement between purchaser-plaintiff and seller-defendant required that the seller deliver the property free and clear of any and all tenancies. Section 13.02 of the contract provided that if the seller was unable to convey title at the closing in accordance with the contract, the purchaser may elect to accept the title that the seller is able to convey, or terminate the contract and receive a refund of its deposit. The seller was unable to obtain vacation agreements with two tenants and asked the purchaser which option it wanted to proceed with under Section 13.02 of the contract. The purchaser insisted on proceeding to closing and brought action against the seller seeking specific performance of the sale contract. The seller counterclaimed to retain the down payment as liquidated damages for breach of contract, moving for summary judgement to dismiss the prospective purchaser's claim. The court granted the dismissal of the claim, but denied the summary judgement on the counterclaim, as well as the prospective purchaser's cross motion. Both parties appealed.
Holding:	For Section 13.02 of the contract to apply, the defendant needed to prove the existence of a situation beyond their control and that they acted in good faith to convey the title in accordance with the contract. Defendant claimed that they met with the hold-out tenants and offered them $75,000 to surrender their tenancies, as well as offering to pay moving fees among other things.

	The plaintiff did not challenge any of the defendant's specific factual assertions only arguing that the efforts were insufficient as a matter of law. The court disagreed, ruling that the defendant established prima facie that it made a good faith effort to convey the title according to the contract and could thus invoke Section 13.02 of the contract. Thus the plaintiff could either cancel the contract, and receive its down payment or accept the property and the remaining tenancies. The plaintiff refused to choose and thus breached the contract section 13.02.
LVL Co., LLC v. Atiyeh, 469 F.Supp.3d 390 (E.D. Penn. 2020)	
Issue:	(1) Whether a buyer qualifies as a bona fide purchaser to a transaction despite not paying valuable consideration for the property. (2) Whether a member of Seller's family is bound to a restrictive covenant to an agreement only the Seller signed.
Facts:	LVL ("Buyer") purchased an outdoor advertising business from Mr. Atiyeh ("Seller") by way of an asset purchase agreement. Buyer and Seller agreed to certain restrictive covenants in the agreement, prohibiting Seller, for a period of twenty years, from competing with Buyer. Seller retained or subsequently obtained eleven build boards. Following the execution of the agreement, Seller owned Manor Signs, LLC, which owned eleven billboards at issue. Seller attempted to lease five of these billboards to third parties to "do whatever they wanted with the signs." Seller subsequently sought to lease the signs to another third party, and Buyer was notified of this offer. Buyer notified Seller that this would violate the restrictive covenant in the agreement. Seller then approached his wife ["Buyer 2"] and proposed selling her Manor Signs and the billboards for $6,000,000.00 knowing that Buyer 2 would sell the billboards to a third party. Seller then executed an agreement with Buyer 2 for her to become the sole member of Manor Signs and to own the billboards in its possession. Buyer then filed a complaint against Seller and Buyer 2, alleging breach of the restrictive covenant.
Holding:	(1) Buyer 2 was not a bona fide purchaser to the transaction. Seller and Buyer 2 acted in concert to circumvent the restrictive covenants outlined in the agreement. Evidence supported this finding because the billboard permits were never put solely in Buyer 2's name, and Seller's phone number was associated with marketing of the billboards. Further, the $6,000,000 was never actually paid for the property. (2) Buyer 2 was bound by non-compete covenant and other restrictive covenants in asset purchase agreement, except for certain billboards Seller had retain to advertise his affiliated businesses but then purportedly sold to his wife to market for third-party advertising. Buyer 2 had obtained benefits by virtue of her joint tax status and Seller's use of proceeds from the sale to pay down tax obligation and by virtue of free advertising credit each year on purchaser's billboards for wife to advertise her

	businesses. Buyer 2 cannot do what her husband (Seller) has covenanted not do to since Buyer 2 obtained the benefits of the covenant.
Matter of George, 856 S.E.2d 483 (N.C. 2021)	
Issue:	Whether the trial court correctly concluded that two purchasers, the first who bought a tract of property at a foreclosure sale and the second who purchased the property from the first purchaser, were not good faith purchasers for value and thus not entitled to protections available under N.C.G.S. § 1-108.
Facts:	Respondents, Calmore George and Hygiena George, owned a house in Charlotte in a subdivision. The Georges were full-time residents of St. Croix in the U.S. Virgin Islands, but occasionally visited the Charlotte home. On August 22, 2016 the Crossings Community Association, the homeowners' association, filed a claim of lien against the property because of unpaid HOA fees totaling $204.75. The Association stated that if the fees remained unpaid it would initiate foreclosure proceedings under North Carolina law. The Georges did not pay, and in October 2016 the Association filed a notice that it intended to foreclose on the property. The Association attempted to serve this notice on the Georges over mail in St. Croix, but were unsuccessful. The Association also attempted to serve the notice in person at the Charlotte property, and a Deputy Sheriff served the notice on a woman who identified herself as Hygiena George. However, the woman was actually the Respondents' eldest daughter. In December 2016, the office of the Clerk entered an order permitting the nonjudicial foreclosure sale to proceed. On January 12, 2017 KPC Holdings purchased the property at auction. On March 21, 2017 KPC Holdings executed a deed conveying the property to National Indemnity Group. The Georges claimed to have had no notice of the unpaid fees and foreclosure proceedings until March 10, 2017. In April 2017, the Georges filed a motion seeking to have the foreclosure and related proceedings declared null and void. The trial court determined Mr. George had not been properly served with the notice of foreclosure. Since the foreclosure sale proceeded despite lack of personal jurisdiction over Mr. George, the foreclosure sale and conveyances should be invalidated. On appeal, the Court of Appeals found that KPC Holdings was a good faith purchaser and the trial court erred in vacating the foreclosure sale and transfer.
Holding:	The North Carolina Supreme Court found that the Court of Appeals correctly determined that proper service of process was not effectuated upon Mr. George, but that the court erred in determining that KPC Holdings and National Indemnity were good faith purchasers for value. In regard to service of process, the Court said there was an ample basis of fact to conclude that service of process at the house was not sufficient. None of the mail sent to the St. Croix address reached their recipients, the George's usual place of residence was in St. Croix, and because the only encumbrance on the property was

	the $204.75, both KPC Holdings and National Indemnity had reason to question the sufficiency of notice to the Georges. In regard to good faith purchaser status, the court also said that the evidence showed that the trial court did not abuse its discretion in determining that KPC Holdings and National Indemnity were not entitled to good faith purchaser for value status. The court stated that for a purchaser to be denied as a good faith purchaser for value, the record must show some additional irregularities in the proceedings leading to the foreclosure sale and an inadequacy in the price. In this case, there were irregularities and defects in the proceedings, including for the service of process, and inadequacy of price paid for the property.
Clearview v. Bed Bath & Beyond, Inc., 2020 U.S. Dist. LEXIS 160078, 2020 WL 5229494.	
Issue:	Whether a tenant can be evicted from the landlord's property if they failed to pay rent in connection with the COVID-19 pandemic.
Facts:	The retail store, Bed Bath and Beyond ("BB&B"), is a tenant at the Clearview Shopping Center in Metairie, Louisiana. When BB&B did not pay fixed rent in April and May of 2020, the landlord sued for breach of contract and eviction. The lease included, in pertinent part, a co-tenancy provision which provided that Tenant would pay an alternate, gross-sales based rent if there are fewer than two national or regional tenants at the shopping center occupying more than 50,000 square feet. At the time in question, only Target and BB&B qualified as same. The lease also included, in pertinent part, a provision that required that if Tenant closed for business prior to the term, Tenant would continue to pay fixed rent and other types of rent, including a deemed percentage rent. The lease also included, in pertinent part, a provision stating that Tenant has a 10-day cure period after written notice. Louisiana's COVID-19 order required closures for stores in malls, however, included an exception that allowed stores with exterior entrances to remain open. BB&B has an exterior entrance and was permitted under the order to open. However, BB&B temporarily closed from March 13, 2020 through June 5, 2020 (with curbside takeaway beginning on May 1, 2020), and Tenant paid partial rent in April and no rent in May. Landlord sent a notice of default on May 5, 2020, which due to BB&B's corporate employees working from home, was directed to the warehouse. On May 19, 2020, Landlord informed BB&B that it intended to terminate the Lease, effective as of May 26, 2020, and sued for possession. On May 28, 2020, Tenant sent a check for the full amount Landlord claimed due (Landlord had revoked its ACH instructions on May 15, 2020), and Landlord's counsel subsequently informed Tenant that payment had been refused.

Holding:	The Court held that BB&B will not be evicted because BB&B believed in good faith that they did not have to pay rent (due to the co-tenancy clause) and when notified of their obligation, promptly attempted to make payment.
Tanger Mgmt., LLC v. Haggar Direct, Inc., 2021 U.S. Dist. LEXIS 89509.	
Issue:	Whether the Covid-19 pandemic was considered a force majeure event that would not breach a contract and preclude Haagar Direct, Inc. from paying their rent obligations.
Facts:	Haggar is a clothing store that leased multiple retail spaces from Tanger in multiple shopping center. Haggar shut all of its stores in the U.S. and Canada on March 18, 2020 in response to the COVID-19 pandemic. Tanger closed all of its shopping centers by early April, 2020. Haggar did not pay rent to Tanger for April or May, 2020, but did pay June, 2020 rent. Tanger notified Haggar that Haggar was in default in June 2002. Haggar sued Tanger on a claim of breach of contract and sought a declaratory judgment that (1) it did not owe rent for April or May, 2020 and (2) due to poor sales, Tenant's rent should be reduced by 50% on a going-forward basis. Tanger filed a motion to dismiss and to strike affirmative defenses based on the force majeure clauses of the leases, each of which had language that provided in some respect that payment of rent was not excused by the force majeure clause.
Holding:	The court dismissed multiple components of Tanger's motion to dismiss, reasoning that Haggar had asserted plausible interpretations of the force majeure clauses that could excuse Haggar's obligation to pay rent, plausible interpretations of the quiet enjoyment clause which could demonstrate that Tanger had breached the lease, and plausible claims that there was a mutual mistake. However, the court granted Tanger's motion to dismiss with respect to frustration of purpose and impracticality/impossibility. Generally, the leases' force majeure clauses conformed with one of three force majeure clauses. The first force majeure clause ("Bucket One" leases) stated that "Tenant's obligation to make payments or to carry insurance as required by the Lease shall not be construed to be a cause beyond Tenant's reasonable control". Haggar made the argument that Tenant's failure to pay rent is not the force majeure event, but that rather COVID-19 is the force majeure event. The second force majeure clause ("Bucket Two" leases) provides that if either party is delayed or prevented from performing their obligations due to a force majeure event, the period of time extends for performance. Haggar made the argument that this provision allows Tanger to delay providing Haggar with a retail space, and Haggar must pay rent once Tanger provides Haggar with the retail space. Haggar made the argument that the third force majeure clause (the "Bucket Three" lease) provides that Landlord's closure of the applicable shopping center was an "act" that excused Haggar's payment of rent. As the court found each of these interpretations to be plausible, the court dismissed Tanger's motion to dismiss based on the force majeure clauses.

	With respect to the quiet enjoyment clause, the court also dismissed Tanger's motion to dismiss. A breach of quiet enjoyment claim requires, amongst other claims, that the landlord took an "act" to deny the tenant's quiet enjoyment. Tanger closed certain properties, but the parties disagreed as to timing with respect to the different properties. The court reasoned that Tanger had plausibly pleaded enough facts that the quiet enjoyment claim should not be dismissed. The court granted Tanger's motion with respect to frustration of purposes and impracticality/impossibility. The court reasoned that the governmental regulations only required Haggar to shut down, and did not prohibit it from paying rent. Although paying rent was challenging because of reduced profits, the court found it was not impractical or impossible, and therefore granted Tanger's motion on those claims. The court did not dismiss Tanger's motion to dismiss with respect to mutual mistake, finding that Haggar had successfully pled that the parties had intended for Haggar to be able to use the stores for in-person sales.
SIXTH CIRCUIT	
Alles Group, LLC v. MSA II, LLC, No. 18-005584-CB, 2020 WL 5083475 (Mich. Ct. App. Aug. 27, 2020)	
Issue:	(1) Whether the holder of a right of first refusal must exactly match the other potential buyer's offers in order to exercise the right.
Facts:	A tire store operator ("Seller") owned each of two stores through two separate LLCs. Seller entered into an agreement to sell the assets from his two tire businesses to plaintiff ("Buyer"), under which Buyer purchased the real property of one store and entered into a long-term lease for the other store ("Leased Store") with a right of first refusal ("ROFR") if the Leased Store was listed for sale. Seller later entered into an agreement to sell a portion of the Leased Store to a third party for $1.15 million and provided Buyer notice and the opportunity to exercise the right of first refusal. Buyer informed Seller that he wanted to exercise his ROFR, but Seller then told Buyer that the sales contract had been cancelled. Seller then entered into a second agreement to sell the entire Leased Store to the same third party for $1.5 million. Buyer stated in response that he was still exercising his first ROFR, and Seller was obligated to sell Buyer a portion of the Leased Store for $1.15 million. Seller refused to sell to Buyer, and Buyer then sued for specific performance and money damages. Seller moved for summary disposition, arguing first that the first sales agreement had been cancelled before Buyer exercised a ROFR, and that Buyer had not made a cash-offer to match either agreement, which were each for cash sales. Buyer responded that discovery remained outstanding, and that there were genuine issues of material fact as to (i) whether the contract required Buyer to exactly match an offer; (ii) whether there was a time frame in which Buyer was required to exercise the ROFR; and (iii) whether the property had been validly listed as "for sale" as contemplated in the original agreement. The trial court agreed with Seller and granted its motion for summary disposition.

Holding:	The appeals court reversed the trial court's finding that no genuine issue of material fact existed as to whether Buyer properly exercised his ROFR. The appeals court found that the ROFR language in the contract was ambiguous because it did not provide for the time frame in which the ROFR must be exercised or the exact terms under which it must be exercised. The appeals court found that discovery would be proper to determine the parties' intent, specifically as to whether they intended the ROFR to be revocable, and whether they had contemplated specific terms and conditions of the ROFR (i.e. period of time the ROFR option lasts and whether Buyer was required to pay with cash to match the third-party bidder).
August Properties, LLC v. Finance and Administration Cabinet, No. 2018-CA-001657-MR, 2020 WL 116008 (Ky. Ct. App. Jan. 10, 2020), review denied (Aug. 13, 2020)	
Issue:	Whether the purchaser of retail property was the real party in interest to assert claims against tenants of leases in existence at the time of purchase, when the parties failed to notify the tenants of transfer in ownership, as required under the terms of the lease?
Facts:	Appellant, August Properties, LLC, owns and operates a shopping plaza in Georgetown, Kentucky. August Properties purchased the shopping plaza from Pioneer Plaza of Georgetown, LLC ("Pioneer Plaza") by deed executed on February 25, 2015. Pioneer Plaza thereafter filed articles of dissolution with the Secretary of State on December 14, 2015. Prior to its dissolution, Pioneer Plaza entered into two leases that are the subject of this litigation. The first lease was entered into with Appellee Finance and Administration Cabinet ("FAC"), for office space to be occupied by Appellee Cabinet for Health and Family Services ("CHFS"). The second lease was entered into with the Commonwealth of Kentucky. Neither August Properties nor Pioneer Plaza gave notice of the purchase or dissolution either to FAC or to CHFS. On December 16, 2015, August Properties, LLC d/b/a Pioneer Plaza of Georgetown, filed a complaint against both Appellees seeking damages for additional rent owed and repairs. August Properties alleged that the lease agreement required Appellees either to vacate the leased space on or before June 30, 2015, or to enter into a new lease agreement, and that Appellees did not comply with the terms of the lease agreement, rendering them liable for additional rent for the time required to complete necessary repairs. The circuit court dismissed the complaint for lack of standing, holding that August Properties did not show itself to be the real party in interest, as it did not provide any proof that the lease was ever assigned to it from the now-defunct Pioneer Plaza. The court reasoned that the lease was not properly assigned when the lease required the lessor to notify the Commonwealth of any change or transfer of ownership and that noncompliance would result in the termination of the lease. The Court further

	noted that August Properties failed to show that its claims were not barred by sovereign immunity. August Properties filed a notice of appeal on November 8, 2018.
Holding:	The Court of Appeals upheld the circuit court's dismissal of August Properties' claims, holding that the claim was property dismissed for lack of standing. The Court further upheld the Circuit Court's ruling that August Properties failed to show that its claims are not barred by sovereign immunity. The Court found that the real party in interest in the matter was the now defunct Pioneer Plaza. The court reasoned that an LLC and its solitary member are not legally interchangeable as the real party in interest and that the only appropriate plaintiff to assert business damages is the LLC itself.
In re Van Kehrberg, *No. 20-10774-LVP, 2021 WL 672116 (E.D. Mich. Feb. 22, 2021)*	
Issue:	(1) Whether a signatory to a contract is barred from raising the statute of frauds defense; (2) Whether recording a void land contract renders the contract valid; (3) Whether a party can raise the statute of frauds defense after failing to raise it in an answer to a first complaint; (4) Whether a party is equitably estopped from asserting the statute of frauds defense if the opposing party believed and relied on information that the contract was valid; and (5) Whether the intent of the parties to a contract can preserve a party's interest in the contract due to a mutual mistake, even if the contract is void due to the statute of frauds.
Facts:	A Debtor in a bankruptcy court proceeding had become a joint tenant of a commercial property ("Property") with his mother ("Appellee") and three siblings in 1995. Debtor later began operating a business on the Property. Over the next 10 years, Debtor and Appellee secured mortgages to finance construction and improvements on the Property. On January 3, 2007, Debtor and Appellee signed a land contract purportedly transferring interest in the Property to Debtor, but did not record at that time. On June 1, 2007, Debtor and Debtor's siblings executed and delivered a quitclaim deed removing Debtor and the siblings from title to the Property, which they delivered to Appellee and which was recorded on June 6, 2007. Months later, on September 6, 2007, the land contract was recorded. In the following years, Debtor continued managing the property, received the property tax bills from the city, and eventually satisfied the land contract by making all of the mortgage payments on the Property. In July 2013, Debtor signed a quitclaim deed to convey his interest in the Property to himself and Appellee "for the sum of 0." During the following three years, Debtor

	listed himself as the owner of the Property on mortgage documents in one instance; however, in another instance, Debtor listed both himself and Appellee as co-owners. Debtor's business ultimately terminated, and Appellee entered into a commercial lease with a new tenant on the Property. Appellee deposited the rental payments in a joint account she shared with Debtor's spouse. In 2018, Debtor filed for bankruptcy and the Trustee filed a proceeding seeking: "(i) a determination that "the Property constitutes property of the bankruptcy estate free and clear of any interest of [Appellee]" due to fraudulent transfer; (ii) a determination regarding "whether there is any balance owed [Appellee] on the [L]and [C]ontract and, if so, approv[al] [of] the sale of [Debtor's] interest in the [P]roperty"; (iii) reformation of the Quit Claim Deed "to remove [ ] [D]ebtor as a grantor because it does not express the true intent of the parties" as evidenced by the Land Contract, which was intended to maintain Debtor's interest in the Property; (iv) rescission of the Land Contract and "return of all payments made to or for the benefit of [ ] [Appellee]"; and (v) a determination that Appellee breached the Land Contract by failing to deliver title to Debtor." Appellee filed a motion for summary judgment arguing that Debtor had "no interest whatsoever in the Property" based on the first-recorded quitclaim deed, and that the land contract was void because it had not been signed by all of the property owners. The bankruptcy court found that all of Trustee's claims were contingent on the land contract's validity, and that Debtor had an interest in the Property subject to the land contract. However, the bankruptcy court issued summary judgment for Appellee as to all counts, because it found the land contract was void. Trustee appealed.
Holding:	The district court affirmed the bankruptcy court's decision. The district court found that despite being a signatory to the land contract, Appellee could raise the statute of frauds defense as a party to the contract The district court also held that because the land contract was void at its inception, it could not be ratified at a later point—such as through subsequent acts of those without power to validly contract in the first place or through its recordation. The district court found that Appellee did not waive her statute of frauds defense because, although she did not raise it in answer to the first complaint, she did raise it in response to Trustee's second amended complaint. Therefore, Trustee was not surprised or unfairly prejudiced by Appellee's statute of frauds defense, because he was permitted the opportunity to engage in additional discovery and respond to Appellee's defense. The district court also found that Appellee was not equitably estopped from asserting the statute of frauds defense because both Debtor and Appellee were acting on the same information during the years subsequent to recording the quitclaim deed and land contract. Furthermore, Debtor was acting solely upon his own judgment and knowledge. The district court found that even if Debtor's and Appellee's belief that the land contract was valid constituted mutual mistake, the quitclaim deed was also executed by Debtor's three other siblings. The siblings were not mistaken about the

	consequences of the quitclaim deed; they did not even know about the land contract, Therefore, the district court held that the quitclaim deed could not be reformed to name Debtor as a co-grantee, because not all of the parties to the deed had intended that result.
Montijo v. First Cmty. Bank, No. 2020-180584-CZ, 2021 WL 1588831 (Mich. Ct. App. Apr. 22, 2021)	
Issue:	(1) Whether lending institutions owe a legal duty of care to a borrower; (2) Whether Michigan's statute of frauds statute bars all actions based on promises to lend money or extend credit, including promissory estoppel, in the absence of a written promise or commitment; and (3) Whether a lending institution's practice of contacting a broker's clients directly regarding their banking business constitutes an illegal, unethical, or fraudulent act to support a tortious-interference claim.
Facts:	A mortgage broker and his clients ("Applicants") alleged that after discussing the potential for procuring a commercial loan for real property with the Senior Vice President of Lending for First Community Bank ("Bank"), Bank agreed to proceed with the funding, complete a credit line, and deliver a written loan proposal to Applicants. The actual "loan proposal" specifically stated that it was not a commitment to lend, but rather "a structure presentation for discussion purposes only." Plaintiffs allege that weeks later, Bank confirmed that the loan had cleared underwriting and requested that an appraisal payment be wired to the bank, to which Applicants satisfied. Applicants allege that a week before the first scheduled closing, Bank informed Applicants that there was an appraisal issue and they would need to delay the closing. Bank allegedly failed to appear and respond to two additional closing dates, informing Applicants that there were continued "appraisal issues" with the loan. Eventually, Bank texted the Applicants stating it "could not do the loan," allegedly causing Applicants to forfeit their $100,000 earnest money deposit they had already paid to the sellers of the commercial property. Applicants also allege that the broker had agreements with third parties that were provided to Bank, and that Bank contacted those third parties and "tortiously interfered with both the contractual relationship, as well as the business expectancy, between" the broker and those third parties. Bank filed a motion for summary disposition, arguing that it has no legal duty to exercise reasonable care in determining a borrower's eligibility for a loan; that any action to extend credit based on an alleged oral promise is barred; and that Bank's actions in contacting the third parties were not "unfair, illegal, or wrongful" as needed to support a claim of tortious interference. The trial court granted Bank's motion for summary disposition, and Applicants appealed.
Holding:	Citing to precedent, the appeals court upheld the trial court's finding that a lending institution does not owe a potential borrower a duty of reasonable care in processing loan applications. The appeals court also rejected Applicants' claim that Bank owed

	them greater care as an escrow agent, reasoning that there was no escrow agreement between the parties. The appeals court also upheld the trial court's grant of Bank's motion for summary disposition on Applicant's promissory estoppel claim. Under Michigan's statute of frauds, claims may not be brought against financial institutions unless the promise or commitment is in writing and signed with an authorized signature by the financial institution. The appeals courted noted that here, the loan proposal clearly stated that it was not a commitment to lend, but rather for discussion purposes only. The appeals court finally affirmed the trial court's grant of Bank's motion for summary disposition on the Applicant's tortious-interference claim. The appeals court found that Applicants failed to allege actions by Bank that constituted illegal, unethical, or fraudulent behavior. By contacting the broker's clients directly about their banking business, Bank was merely taking initiative to gain a competitive advantage, which does not amount to tortious interference.
Sul aka v. Forgaciu, No. 16-010301-CZ, 2020 WL 908470 (Mich. Ct. App. Feb 25, 2020)	
Issue:	(1) Whether a partner in a joint venture loses his interest in the joint venture by failing to timely pay his share of the expenses; (2) Whether a partner in a joint venture that owns real estate has an interest in the real property itself or the joint venture; and (3) Whether a joint venture agreement to share in the profits derived from the sale of realty is within the statute of frauds.
Facts:	Plaintiff contributed $5,000 toward the purchase of a $20,000 commercial property with two other buyers, each of whom contributed $7,500. Although Plaintiff contributed less, he alleged they were each to have a one-third interest because he had found the property and presented it as a purchase opportunity to the two others. The quitclaim deed to the property conveyed the property to Defendant only. Though the Plaintiff, Defendant, and third partner planned to transfer the property to a new entity, they never did so. The third partner later sold his share to Defendant, giving Defendant a two-thirds share. Defendant spent approximately $30,000 to rehabilitate and improve the property. When Plaintiff proposed that the two enter into an LLC that would hold title to the property, Defendant refused because Plaintiff had not paid for any of the improvements. Defendants argued that Plaintiff's initial $5,000 payment was actually a repayment of a debt owed to the third partner, not an investment in the property. Defendant further argued that Plaintiff's plan was to hold a one-third interest in the business entity that they might operate at the property, rather than an interest in the property itself. Plaintiff filed an action seeking one-third of the net proceeds of the sale of the property, and the trial court found that upon sale of the property, Plaintiff was

	entitled to one-third of the net proceeds, less the $30,000 Defendant had advanced in expenses. Defendant appealed.
Holding:	The appeals court affirmed the judgment in favor of the Plaintiff. The appeals court found that absent language to the contrary in the joint venture agreement, a partner in a joint venture does not lose his interest in the venture by failing to pay his share of the expenses by a specific date. The appeals court also found that by entering into a joint venture that pertained to the operation, development, or ultimate sale of real property, the parties had an enforceable joint venture agreement. Therefore, the statue of frauds did not bar Plaintiff's interest in the real property, because his interest was not in the real property itself, but rather in the joint venture agreement. Specifically, the appeals court stated that an agreement to share in the profits derived from the sale of realty is not within the statute of frauds, and therefore, need not be in writing.
Torrance v. Rom, 157 N.E.3d 172 (Ohio Ct. App. 2020)	
Issues:	(1) Whether the sole proprietor of an LLC had standing to sue a property management company in his individual capacity for breach of contract and breach of fiduciary duty. (2) Whether equitable estoppel should prohibit the defendants from differentiating between the sole proprietor and his LLC due to the sole proprietor's argument that he only created the LLC at the defendants' behest. (3) Whether the sole proprietor has standing bring a claim under the Ohio Deceptive Trade Practices Act ("ODTPA") in his individual capacity in connection with allegations of being fraudulently induced through misleading advertising to create an LLC and to enter into purchase and sale and property management contracts for investment property. (4) Whether the defendant has standing to pursue a civil conspiracy claim despite the absence of a commercial relationship between himself and the defendants.
Facts:	Ronald Torrance ("Plaintiff") entered into three purchase and sale agreements for investment properties that were advertised online as professionally managed and delivering significant returns on investment, while allowing a hands-off experience for the investors. The purchase and sale agreements identified the buyer as the Plaintiff "or his designee." Plaintiff created an LLC to which title was subsequently transferred. One month later, the LLC entered into a management agreement with one of the defendant entities, which was affiliated with the online advertiser and seller of the properties. Having received significantly less return on investment than expected, Plaintiff and the LLC filed an action against the defendants, alleging that through a series of misrepresentations or concealments, plaintiff was fraudulently induced to create an LLC to purchase the subject properties, and to enter into the property-management agreement. Several months after filing the complaint, Plaintiff sold his interest in the LLC to a third party, and the LLC voluntarily dismissed all claims against

	defendants with prejudice. Plaintiff subsequently filed two amended complaints, raising the same claims against defendants in his individual capacity. The trial court dismissed the claims against several defendants, finding that Plaintiff lacked standing; Plaintiff then appealed the dismissal as to those defendants.
Holdings:	The appellate court affirmed the trial court's finding that sole proprietor of the LLC could not sue the property management company in his individual capacity for breach of contract because he was merely an incidental beneficiary to the agreement. The sole proprietor was not a party to the agreement and the agreement did not contain language establishing a direct benefit to him on behalf of the LLC. Because he did not share a commercial or contractual relationship with the defendant property management company in his personal capacity and because the property management company therefore owed him no duties, the court also dismissed his breach of fiduciary duty claim. The appellate court also rejected the plaintiff's equitable estoppel claim, finding that he failed to plead any facts to suggest that his creation of the LLC resulted from the defendants' factual misrepresentations. The appellate court, however, concluded that the Plaintiff did, in fact, have standing and had plead sufficient facts to bring a claim under ODTPA because ODTPA does not require a formal relationship between parties. Rather, a plaintiff need only establish that an injury was proximately caused by a person who commits an enumerated deceptive trade practice. Although Plaintiff could not bring an ODTPA claim in connection with the property management agreements because the only damages would be suffered by the LLC itself, Plaintiff could bring an ODTPA claim in connection with the initial purchase and sale agreements. Based on alleged misleading advertising, a deceptive trade practice, Plaintiff personally signed the purchase and sale agreements and invested money from personal accounts in the purchase of the investment properties (a commercial endeavor), resulting a qualifying ODTPA claim. Finally, the appellate court reversed the trial court's finding that Plaintiff lacked standing to bring a civil conspiracy claim. The court concluded Plaintiff had plead sufficient facts under the ODTPA claim, thereby satisfying the unlawful act element of a civil conspiracy claim. Further, the close collaborative relationships between the various defendants satisfied the civil conspiracy element requiring the interaction of the malicious actions of multiple actors.
SEVENTH CIRCUIT	
Chung v. Pham, 156 N.E.3d 1179 (Ill. App. 3d. 2020)	
Issue:	(1) Did the trial court err by dismissing Cindy's complaints in the underlying and foreclosure lawsuits? (2) Did the circuit court err by awarding Chung attorney fees and rent under the purchase agreement?

Facts:	In December 2014, Plaintiff-Appellee Dawn Chung ("Chung") and Defendant-Appellant Sonny Pham ("Pham") executed a purchase agreement for a commercial property located at 7814 North Sommer Street in Peoria, Illinois. The purchase price was set for $202,000, which could be adjusted by the parties. At the time of the sale, Pham represented that he was the sole owner of the property and, further, that there were no leases or other agreements that would allow any other party to claim title to the property. A closing date was set for February 2015. At the time of closing, Pham refused to proceed with the transaction because the property was subject to an undisclosed mortgage held by Morton Community Bank. Chung filed suit for specific performance of the purchase agreement ("underlying lawsuit"). Prior to the complaint being served on Pham, he borrowed money from his sister Hoa Tuyet Pham, a/k/a Cindy ("Cindy") to satisfy the mortgage. Notably, the borrowed money was secured by a mortgage on the same property subject to the purchase agreement, which Cindy was aware of. Soon after, the complaint in the underlying lawsuit was served on Pham and Chung filed a *lis pendens* notice on the commercial property. Ultimately, the court ruled in favor of Chung and granted specific performance. Pham timely appealed. While the appeal was pending, Cindy filed for intervention in the underlying lawsuit and a related foreclosure action, both of which were dismissed by the court. Cindy appealed, asserting that she did not have adequate notice of the underlying lawsuit. Soon after, Chung filed an action to force the transfer of the commercial property subject to the purchase agreement from Pham to Chung. The court ruled in Chung's favor and awarded her both the money and the deed. All the previous rulings are consolidated on one appeal in the present action.
Holding:	(1) The appellate court held the trial court did not err because Cindy was well aware of the mortgage on the property and was therefore given actual notice of the suit when the underlying lawsuit was filed.
Country Visions Cooperative v. Archer-Daniels-Midland Company, 946 N.W.2d 169 (Wis. Ct. App. 2020)	
Issue:	(1) Whether an offer to sell one parcel of real property under an agreement separate from an offer to sell other parcels of real property and other assets between the same buyer and seller was a sham and meant to defeat the contractual right of first refusal ("ROFR") held by a third party; (2) Whether granting specific performance to allow the holder of a ROFR to exercise the ROFR is the appropriate remedy upon finding that the offer triggering the ROFR was a sham; (3) Whether the fair market value of real property may be determined by buyer's unique ability to generate income at the property; (4) Whether the purchase price required to exercise a ROFR for real property includes personal property;

	(5) Whether the holder of a ROFR is entitled to compensatory and/or punitive damages as a result of being deprives of its right to exercise its ROFR; and (6) Whether a ROFR where the burdened party was not a signatory to the original contract is valid and enforceable.
Facts:	In 2007 two entities, Golden Grain LLC and Agri-Land Co-op (collectively, "Golden"), entered into an ROFR agreement with Olsen Brothers Enterprises LLP ("Olsen Brothers") for certain real estate located in Wisconsin (the "Property"). The ROFR was valid for a period of 10 years. In 2010, Olsen Brothers sold the Property to Paul and David Olsen individually, which was a permitted transfer that did not trigger Golden's rights under the ROFR. Shortly thereafter, the Olsens filed for bankruptcy. Defendant Archer-Daniels-Midland Company ("ADM") bought the Property through a bankruptcy estate sale. At this point, plaintiff County Visions Cooperative ("County Visions") held the ROFR through a series of transfers initiated by Golden. In May 2015, ADM began negotiations to sell its Wisconsin graining business assets to prospective buyer United Cooperative ("United"). The Property was included in the proposed sale. ADM and United agreed on a purchase price of $25 million, with $14,570,000 allocated for the purchase of the intangible rights and hard assets, and $10,421,000 allocated for the purchase of the Property and three other parcels. When County Visions learned of the pending sale, it informed ADM of its ROFR. ADM and United then attempted to separate the sale into two transactions: (1) the Property alone and (2) the remaining assets, including the other three parcels and non real estate-related business asset. The parties signed a Commercial Offer to Purchase for the Property for a purchase price of $20 million. The next day, ADM forwarded the accepted offer to Country Visions in order to trigger the window to exercise its ROFR. The day after, ADM and United executed the second transaction, to which United paid $5 million for the three parcels and all intangible assets. While the combined price of the two transactions was for the same $25 million purchase price previously agreed upon, now the Property alone sold for $20 million, in contrast to $10,421,000 that had, earlier been allocated to all four parcels. Country Visions sued both ADM and United (collectively, the "Defendants"), seeking specific performance and damages under various theories, all of which revolved around allegations that the standalone Property transaction was a sham of Country Visions' ROFR. The trial court made the following findings: (1) Country Visions was the proper holder of the ROFR, (2) the ROFR was a recorded appurtenant servitude on the Property, so as to bind ADM to Country Visions' ROFR rights; and (3) any compensatory damages Country Visions was entitled to was based off of how much in profits United generated from its use of the Property since it acquired it. Following the bench trial, the court issued a written decision, holding that "the $20 million price was inflated for the purpose of preventing Country Visions ... from exercising the right of first refusal." The trial court also considered, pursuant to prior case law, what the appropriate exercise price should have been for the Property and Country Visions' ROFR. The trial court gave more weight to the Defendants'

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	valuation expert, finding he properly took into consideration the Property's value as a grain facility. Based on the Defendant's expert's opinion, with one minor adjustment, the court determined that this price was $16.6 million. Turning next to the question of compensatory damages, the trial court relied on Country Visions' CEO's testimony that Country Visions would not have paid more than $8–9 million for the Property. Therefore, the trial court declined to award compensatory damages based on lost profits. The trial court opined, however, that if Country Visions had elected to exercise its ROFR with an appropriate price offered, the compensatory damages would have been approximately $2 million based on lost profits. The trial court also denied punitive damages, based on its denial of compensatory damages and because of certain "factual findings regarding the degree of Defendants' culpability." Country Visions and Defendants appealed the decision on several grounds.
Holding:	The appeals court first affirmed the trial court's holding that the sale of the Property was a sham. The court relied on emails and the timing of the two transactions to conclude that the sale of the Property and the sale of the remaining three parcels and intangible assets were not standalone sales, but rather so interconnected that one sale would not have taken place without the other. Therefore, the appeals court concluded, the trial court did not err in finding the purpose of the transactions was an attempt to stymie Country Visions' ROFR. Second, the appeals court upheld the trial court's decision to award Country Visions specific performance. The appeals court rejected the Defendants' argument that specific performance was not an acceptable remedy because Country Visions' CEO testified that the company would not have paid more than $9 million for the Property. The court determined that the Defendants' argument went against the nature of equitable remedy, which case law finds "[c]ourts may apply ... as necessary to meet the needs of a particular case." The appeals court concluded that it would be inequitable not to allow Country Visions specific performance, given the Defendants' attempts to thwart its ROFR. Next, the appeals court addressed Country Visions' argument that the trial court erred by valuing the Property based on the Defendants' income-based methodology. The appeals court found that this is a contract case and the goal is to place the parties in the position they would have been in had ADM properly performed its contractual obligation to provide Country Visions the opportunity to match a standalone, bona fide offer for the property, had one been made by United. The court relied on the long-accepted principle that "fair market value" is what a willing buyer would be willing to pay a willing seller in an arms-length transaction. Since United was willing to pay, as the trial court concluded, as much as $16.6 million for the Property, then the proper ROFR price is just that. Trial testimony showed that United had "ample economic incentive to offer a higher-than-appraised price" for the Property, based on unique attributes it offered to United's business. The appeals court found that the $16.6 million exercise price determination may have been erroneous because it may have included the value of the personal property included with the real estate. The appeals court took into consideration one of the earlier versions of the sales contract between Country Visions and United—before the

	"sham" offer of $20 million was made. That contract contained an "express allocation of the purchase price between [the] other assets and the real estate: a whopping $14,579,000 for the business assets and a mere $10,421,000 for all four parcels of real estate combined. . . ." The appeals court was not prepared to assign a value to the personal property, given the lack of evidence from the trial as to the issue, so it remanded back to trial court to supplement its decisions. The appeals court also remanded the issue of whether Country Visions is entitled to compensatory damages, reasoning that the trial court would have awarded Country Visions $2 million had Country Visions demonstrated it had been able to exercise the ROFR. While the appeals court opened up the possibility of compensatory damages, it affirmed the trial court's decision denying punitive damages. To receive punitive damages a plaintiff must also show "that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." A defendant's conduct must be "deliberate," "must actually disregard the rights of the plaintiff," and "must be sufficiently aggravated to warrant punishment by punitive damages." The appeals court agreed with the trial court's determination that United's conduct did not meet this standard, partly because United was not initially aware of the ROFR, and then sought to reach an alternative agreement based on the existence of the ROFR. Finally, the appeals court affirmed the trial court's holding that the ROFR was enforceable. The appeals court concluded burden of the ROFR is appurtenant, in that it continues with the Property until it is extinguished, "either by a sale complying with its terms—i.e., one where Country Visions was provided notice—or through the expiration of the ten-year contract period." It also concluded that ADM, as the owner of the Property, was the only party with the capacity to carry out its terms to provide proper notice of a third-party offer to Country Visions, before the sale to United. Therefore, the court reasoned, the obligations of the ROFR are necessarily tied to ownership of the Property. Consequently, the court affirmed in part, and remanded in part.
Country Visions Coop. v. Archer-Daniels-Midland Co., 958 N.W.2d 511 (Wis. 2021)	
Issue:	(1) Did the circuit court err by considering the facility's synergies when determining the exercise price for the right of first refusal ("ROFR")? (2) Was the exercise price in the ROFR contract appropriate?
Facts:	At the center of this case is a right of first refusal ("ROFR") contract between Plaintiff Country Visions Cooperation ("Country Visions") and Defendant Archer-Daniels-Midland Company ("ADM"). The contract provides, in relevant part, that: > ADM cannot sell the Ripon Property without first offering it to Country Visions, and Country Visions has the right to purchase the Ripon Property at the third party's purchase price within 15 days of receiving notice of the third party's offer. In May 2015, ADM started negotiations to sell some of its grain storage facilities around Wisconsin, including the Ripon Property. The prospective buyer was United

	Cooperative ("United"). Country Visions was not aware of these negotiations. In October of the same year, Country Visions learned of the offer and, pursuant to the ROFR contract, requested a copy of the United's purchase offer. A few days later, United made a formal purchase offer for the price of $20 million. ADM notified Country Visions of the offer – Country Visions rejected the offer, claiming it was unreasonably high. The next month, ADM closed on the Ripon Property, and Country Visions filed suit shortly thereafter, seeking (1) a declaratory judgment that they had the right to purchase the Ripon Property at fair market value and (2) specific performance of the ROFR contract. Following a trial, the court ruled in favor of Country Visions and said the $20 million purchase price was too high and valued the property at $16.6 million. The court gave Country Visions 15 days to exercise their ROFR at the new exercise price. Both Country Visions and ADM appealed the circuit court's decision. The court of appeals ruled that the trial court did not err in considering the unique synergies of the Ripon Property and ultimately remanded the case back to the circuit court. Country Visions ultimately appealed, seeking the exercise price to be set at $7.7 million, which was the appraised value of the property.
Holding:	(1) The circuit court did not err because they validly considered the unique synergies that the Ripon Property gave United and buyers are also allowed to offer more money than what the property is worth. (2) Remand is necessary to determine if the contract price was appropriate and included more property than what the ROFR contract was calling for.
First Midwest Bank v. Prime Mkt. Targeting, Inc., No. 3-18-0650, 2021 WL 1577674 (Ill. App. 3d. April 22, 2021)	
Issue:	(1) Did the lower court err by granting default judgment in favor of the Plaintiffs and ordering the foreclosure and sale of the commercial property? (2) Did the trial court abuse its discretion in denying Defendants' motion to vacate the default judgment?
Facts:	This case stems from a commercial property used as an office building located in Frankfort, Illinois. In late 2013, Defendant Prime Marketing, Inc. ("Prime") entered into and executed three promissory notes with Plaintiff First Midwest Bank's ("First Midwest") predecessor in interest. In December 2013, additional Defendant Chicago Title Land Trust Company ("Chicago Title") entered into mortgages and rent assignment agreements with First Midwest as security for Prime. In March 2017, Prime stopped making payments. In June 2017, First Midwest filed a complaint for foreclosure on the commercial property's mortgage against Prime, Chicago Title, and others (collectively, "Defendants"). The named Defendants did not respond to First Midwest's complaint. In March 2018, First Midwest sought an order of default, which the court granted. In

	April 2018, First Midwest filed a motion for default judgment of foreclosure and sale. The court entered judgment in favor of First Midwest. In July 2018, First Midwest made plans to sell the property in August 2018. At this time, the named Defendants filed an emergency motion to vacate the order of default and the default judgment. In support of the motion, Defendants advised the court that they had a purchaser for the property, whom First Midwest did not approve of, which would allow for payment to be made. Soon after the named Defendants filed their motion, the court moved the sale date from August 2018 to October 2018. The prospective buyer Defendants relied on for their motion rescinded their offer and the court subsequently denied Defendants' motion. Defendants appealed, primarily arguing that (1) the court erred in entering the default judgment of foreclosure and sale, and (2) the court abused its discretion in denying their motion to vacate the default judgment.
Holding:	(1) The court held that the trial court did not err in granting default judgment. As support for this holding, the court reasoned that (1) the default hearing occurred well over 90 days after Defendants were served, (2) Defendants were given notice of the entry of default order and notice of hearing for entry of default judgment of foreclosure and sale and never made an appearance, and (3) First Midwest's motion for default judgment was well-supported with an affidavit. (2) The court held that the trial court did not abuse its discretion by denying Defendants' emergency motion. The court reasoned that the failed sale mooted the reasons argued to vacate the default judgment and, furthermore, they made no attempt to justify their lack of diligence in responding to the complaint.
Gartner Properties, LLC v. Hudson Bus. Park, 954 N.W.2d 748 (Wis. Ct. App. 2020)	
Issue:	(1) Did the trial court err by concluding Gartner was not entitled to specific performance of its option to purchase HBP's property? (2) Did the trial court err by concluding Gartner had no right to exercise the option a second time? (3) Did the trial court err by ordering Gartner to reimburse HBP for $8,655.12 in maintenance expenses?
Facts:	In August 2012, Defendant Hudson Business Park ("HBP") purchased a commercial warehouse facility in Hudson, Wisconsin ("the Property"). Soon after, Gartner Studios, Incorporated ("Studios") let HBP know they were interested in renting the property. Studios and HBP entered into a lease agreement in September 2012. The most relevant parts of the lease included: 1. Studios must timely pay HBP rent and other monthly operating costs. 2. Studios has an option to purchase the Property within one year after HBP fully paid off the land contract under which they bought the property.

	3. If Studios defaults, HBP has the right to terminate the purchase agreement. 4. If Studios does not exercise their option to purchase, the option will terminate. 5. HBP is required to order title evidence within 20 days after Studios exercises its purchase option. On January 1, 2016, Studios assigned its interest in the lease to Plaintiff Gartner Properties LLC ("Gartner"), and Gartner subleased the property to Studios. HBP paid off its land contract and for the period of February 27, 2016 to February 27, 2017, Gartner could exercise its purchase option. In an effort to sell the property to a third party, Gartner entered into a listing contract with real estate agent Michael Lynskey. On May 9, 2016, Gartner received interest from STORE Capital Corporation, of which Gartner promptly notified HBP, and a closing date to sell the property was set for June 2016. As noted above, the purchase agreement required HBP to order title evidence – HBP did not. However, this issue was not raised by Gartner. Relatedly, the deal to sell the property to STORE Capital Management fell apart. Following a series of exchanges between HBP and Gartner's attorneys regarding the purchase agreement, during which HBP's failure to provide title evidence was not discussed, Gartner sent HBP a second notice of its intent to exercise the purchase in February 2017. The next month, HBP sent Gartner a notice of default based on Gartner failing to pay property taxes. In April 2017, Gartner filed an action against HBP primarily seeking a declaration that Gartner validly exercised its purchasing option and HBP violated the agreement by failing to provide title evidence. HBP asserted counterclaims for eviction, breach of contract, and declaratory relief that Gartner failed to timely close the purchase agreement. The court ruled in favor of HBP, finding that (1) Gartner waived any claim by failing to raise the issue of title evidence, (2) Gartner breached by failing to close the deal with STORE Capital Management in a timely manner, (3) Gartner was only allowed to exercise its purchase option one time so any subsequent attempt to exercise it was invalid, and (4) under the sublease between Gartner and Studios, Studios was responsible for maintenance expenses and, therefore, Gartner owed HBP $8,655.12. Gartner timely appealed.
Holding:	(1) On the first issue, the appellate court held that the trial court did not err because (i) HBP's failure to provide the title evidence was not the reason the option transaction failed to close, (ii) the title evidence was not needed for the deal to close, and (iii) Gartner failed to raise the issue. (2) On the second issue, the appellate court held the trial court did not err because, in relying on extrinsic evidence of the purchase agreement's formation, Gartner's

	attorney who drafted the agreement testified the purchase option was intended to be merged into the purchase agreement after Gartner exercised it. Furthermore, once the merger occurred, the option ceased to exist. This shows an intent by the parties for the option to only be exercised once. (3) On the third issue, the appellate court held that the trial court erred because HBP failed to establish any type of unjust enrichment received by Gartner. Furthermore, HBP failed to establish any legal theory that would warrant the trial court's award of maintenance expenses. As such, the appellate court reversed the trial court's award of maintenance fees to HBP.
In re Cty. Treasurer Ex Officio Cty. Collector, *161 N.E.3d 283 (Ill. App. 2020)*	
Issue:	Whether a minor error in the description of property on the county assessor's website entitles a tax lien purchaser to a declaration of sale in error. This is an issue of statutory interpretation.
Facts:	In 2015, GAN C LLC purchased $1.4 million in delinquent taxes on a shopping center at the 2015 Cook County annual tax sale. GAN C LLC assigned the purchase certificate to Eeservices, Inc. ("Eeservices"). On its website, the Cook County Assessor identified the property as located on "Dolton Avenue" whereas the property was actually located on "Dolton Road". Eeservices petitioned to vacate the tax sale as a sale in error pursuant to section 21-310(a)(5) of the Property Tax Code. Section 21-310(a)(5) states that "the court shall declare the sale to be a sale in error" when one of the subsections are applicable, including where "(5) the assessor, chief county assessment officer, board of review, board of appeals, or other county official has made an error (other than an error of judgment as to the value of any property)[.]" The trial court denied the application because Dolton Avenue does not exist and therefore, the discrepancy could not have misled anybody or effect a substantial right of ownership. Eeservices appealed.
Holding:	The court concluded that in interpreting subsection (a)(5), it must interpret (a)(5) within the context of section (a) as a whole. In doing so, the court found that the purpose of declaring a sale in error is to protect a tax buyer from the "effect of *caveat emptor* purchases at void tax sales[,]" in essence providing an aggrieved tax buyer a refund mechanism where the purpose of its investment would be frustrated by government error. Therefore, the court held that a scrivener's error, which does not frustrate the investment or effect any right of ownership, did not rise to the level of error necessary to declare a sale in error. The court further concluded that publishing a property description on the county assessor's website is not part of the tax sale process, and therefore there cannot be an error in the process where the claimed erroneous description was not required for that process. The court affirmed the trial court's decision to deny Eeservices petition for sale in error.

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<tr><td colspan="2">Ken Heritage LLC v. Lake Plaza Property Holding, LLC, No. 18-cv-211, 2020 WL 533699 (N.D. Ill. February 3, 2020)</td></tr>
<tr><td>Issue:</td><td>(1) Whether a proposed seller of a commercial business property committed breach of contract, fraud and rescission of contract on misrepresentation theory when it failed to disclose a tenant’s default; and

(2) Whether a proposed buyer of a commercial business property committed breach of contract for failure to close on the real estate sales contract.</td></tr>
<tr><td>Facts:</td><td>Defendant Lake Plaza Property Holding, LLC (“Lake Plaza”) sought to sell its commercial business property, which contained 18 suites leased to commercial tenants such as Dollar General, United Liquor Mart, and State Farm. Lake Plaza used the online auction hub Ten-X to facilitate the sale of the property, and uploaded a “Due Diligence Vault” (“Vault”) to Ten-X with 41 documents, totaling over 1,000 pages. The Vault included a then-current “Rent Roll,” purporting to list how much each tenant paid in rent, along with various taxes, shared expenses, and costs of running the property. During the bidding period, Lake Plaza did not disclose a tenant’s failure to pay three months’ rent.

Plaintiff Ken Heritage LLC (“Ken Heritage”) indicated interest in the property and retained an agent to facilitate the bidding process. The agent accessed the Vault and noted that there were discrepancies, namely the aggregate financial data did not match the terms of the respective leases. He reached out to Lake Plaza’s agent, asking for an explanation for the inconsistent totals. After two email exchanges where Lake Plaza’s agent provided inaccurate data, he sent Ken Heritage’s agent a spreadsheet. Ken Heritage’s agent asked Lake Plaza to confirm that the information was accurate, as it the third set of financials Lake Plaza had provided. Lake Plaza’s agent replied “And yes. ALL OF THESE NUMBERS ARE CORRECT.” Ken Heritage’s agent accepted the answer, despite later testifying that he knew the Ten-X auctioneers to be “cowboys”.

Ken Heritage’s agent submitted the highest bid of $3 million (to which Ten-X’s fee of $150,000 was added for a total purchase price of $3,150,000). The next day, Ken Heritage’s agent executed a contract (the “Agreement”) with Lake Plaza. The Agreement required Ken Heritage to deposit $157,000 in escrow. After Ken Heritage signed, it became aware that the data in the spreadsheet was not accurate, and that the spreadsheet actually overstated the current income of the property. The parties amended the Agreement three times before closing, while trying to sort out the numbers issue. Eventually, prior to closing, Ken Heritage informed Lake Plaza that it did not intend to go through with the closing, based on the misrepresentations Lake Plaza allegedly made, including the Rent Roll issue.

Ken Heritage then filed suit against Lake Plaza and the escrow agent, alleging breach of contract; rescission on a misrepresentation; fraud; breach of duty of good faith and fair dealing; and rescission on a unilateral mistake theory. Lake Plaza filed a counter-claim, alleging declaratory judgment and breach of contract for failure to close.</td></tr>
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	Ken Heritage moved for summary judgment on its breach of contract, fraud, and rescission on unilateral theory claims, while Lake Plaza moved for summary judgment for all of its claims and Ken Heritage's claims.
Holding:	The United States District Court for the Northern District of Illinois first reviewed the parties' cross motions for summary judgment on Ken Heritage's breach of contract claim. In Illinois, to succeed on a claim for breach of contract, "a plaintiff must plead and prove (1) the existence of a contract, (2) the performance of its conditions by the plaintiff, (3) a breach by the defendant, and (4) damages as a result of the breach." The court determined Lake Plaza's representation that "there are no uncured defaults under any of the Leases or circumstances which with the giving of notice, the passage of time or both would constitute a default under any of the Leases" was not accurate It concluded that Lake Plaza had actual knowledge that one of its tenants was in default at the time the contract was signed, having sent the tenant a notice of past-due rent the same day the parties executed the contract. In doing so, the court summarily rejected Lake Plaza's argument that the tenant was not in default because at no point did had Lake Plaza threatened to evict the tenant. The court also rejected Lake Plaza's alternative argument that Ken Heritage purchased the property "as is" and therefore must live with any defaulted renter, notwithstanding representations and warranties in the Agreement. The court opined "a broad interpretation of the as-is clause, however, would render the entirety of the representations and warranties section superfluous." Consequently, the court granted Ken Heritage's summary judgment motion and found that it was entitled to a refund of its deposit. The court then reviewed Ken Heritage's fraud claim based on being repeatedly provided incorrect financial data and based on the assurance that all leases were in good standing. Assessing the alleged fraud in the context of the misrepresentations about the accuracy of the Rent Roll, the court concluded that Ken Heritage's reliance on the Rent Roll was not reasonable, because Ken Heritage's agent had extensive business experience and saw for himself the numbers were inaccurate. Additionally, the numbers changed multiple time, further leading the court to believe that the representations were difficult to rely upon. The district court therefore granted summary judgment in Lake Plaza's favor as to fraud tied to its providing of incorrect financial data. The court, however, denied summary judgment in Lake Plaza's favor as to the misrepresentation about the status of the leases, finding that Lake Plaza had made a false statement. Because the parties had not briefed whether a breach of contract and fraud claim could both be sustained as to the same false statement, the court declined to decide the issue. The court then determined that Ken Heritage was not entitled to summary judgment on its rescission claim, because it already prevailed on breach of contract, and in Illinois, "the equitable remedy of rescission is not available where there is an adequate remedy at law." By virtue of the breach, Ken Heritage was entitled to a refund of its deposit under the contract terms. Because rescission would only afford Ken Heritage a refund of its deposit, the court found the matter moot. The district court also denied Lake Plaza's summary judgment motion on its own claims. The Agreement provided that Ken Heritage had to close only if all of Lake Plaza's representations and warranties in the Agreement were true. The court had

	already determined that not all representations were accurate, so Ken Heritage had no obligation to close.
People's State Bank. v. McCarty, *No. 2020AP1757, 2021 WL 1742080 (Wis. Ct. App. May 4, 2021)*	
Issue:	(1) Whether a parking easement not referenced in a foreclosure judgment is passed to the foreclosing bank as part of the foreclosure sale.
Facts:	Defendant McCarty ("McCarty") owned a piece of commercial property ("Property") that plaintiff People's State Bank ("Bank") was granted in a foreclosure judgment. The Property benefitted from a parking easement on an adjacent residential property belonging to defendant Pilecky ("Pilecky" and together with McCarty, "Defendants"). The foreclosure judgement did not reference the parking easement. Pilecky argued that the lack of reference means that the foreclosed property did not include the parking easement under the plain language of WIS. STAT. § 846.10(1). The Bank argued that the statute requires a foreclosure judgment to include a legal description of the foreclosed property but it does not require a foreclosure judgment to reference any easements appurtenant to that property. The circuit court issued a written decision granting the Bank's summary judgment motion on its declaratory judgment action against Defendants. The court reasoned that the parking easement was an appurtenant easement and was therefore "annexed (or attached) to the benefitted parcel, which is also called the dominant estate." The court also found that because an appurtenant easement is part of the dominant estate, it is "transferred along with that estate" and "follows the rest of the dominant estate regardless of whether it is specifically mentioned" in a conveyance. Pilecky appealed the circuit court's summary judgment order.
Holding:	The court of appeals found that the parking easement is an appurtenant easement. An appurtenant easement "ties the rights or obligations of a servitude to ownership or occupancy of the land, and thus it is transferred with the land." In contrast, an easement in gross "does not tie the benefits or burdens of a servitude to the land, and may be personal or transferable." The court found that the rights conferred by the parking easement at issue were tied to the ownership of the property and not personal to McCarty. The court of appeals stated that WIS. STAT. §§ 846.10(1) and 840.10(1)(a), the two statutes relied on by Pilecky, require a foreclosure judgment and a lis pendens to include a description of the mortgaged premises, but do not require a legal description of, or any other reference to, any easements appurtenant to the mortgaged premises. The court also stated that requiring a foreclosure judgment to reference easements appurtenant to the mortgaged premises would be inconsistent with other Wisconsin statutes and case law, including WIS. STAT. §§ 706.10(3) and 706.10(4). Section 706.10(3) provides that "every conveyance shall pass all the estate or interest of the grantor unless a different intent shall appear expressly or by necessary implication in the terms of such conveyance." As neither the foreclosure judgment nor the sheriff's deed evidence an intent for the parking easement not to pass to the Bank, the court of appeals held that the appurtenant rights under the easement passed along with McCarty's interest in the property. Section 706.10(4) provides that a quitclaim deed

	"*shall pass all of the interest in or appurtenant to the land described which the grantor could lawfully convey,* but shall not warrant or imply the existence, quantity or quality of any such interest." As Pilecky conceded that a sheriff's deed is a type of quitclaim deed, the court of appeals held that it passed McCarty's entire interest in the property to the Bank—including the parking easement. Accordingly, the court of appeals affirmed the circuit court's grant of summary judgment.
RCB Equities #3, LLC v. Jakubow, No. 1-20-0256, 2021 WL 886414 (Ill. App. Mar. 9, 2021)	
Issue:	Did the trial court err in holding that the sale of a property was not unconscionable or unjust?
Facts:	In August 2010, Greystone Bank filed a mortgage foreclosure action against defendant Conrad Jakubow, et al. ("Jakubow") related to a mixed-use property in Chicago, Illinois. In its verified complaint, Greystone Bank alleged that it had suffered damages as a result of Jakubow's default on a promissory note. Greystone Bank also sought the appointment of a receiver to collect payments due to them by Jakubow. The next month, the court entered an order granting Greystone Bank's motion for appointment of receiver. Greystone Bank later assigned their interest in the note to RCB Equities #3, LLC (RCB), making them a plaintiff in the case. Over the next few years, RCB made multiple motions for summary judgment to obtain a judgment from the court in their favor, holding that the note was validly signed and that there was a subsequent default, entitling RCB to damages. Eventually the matter was set for an evidentiary hearing, centering on weighing the credibility of the parties' representations as to the validity of signatures on the promissory note and other related documentation. In November 2017, the court entered an order in favor of RCB (the "November 2017 Order"), concluding that Jakubow failed to offer clear and convincing evidence that the documents were not valid. Relying on the November 2017 Order, RCB field a motion seeking foreclosure of the property, which the court granted in July 2019 (the "July 2019 Order"). Following the July 2019 Order, RCB filed for a motion approving report of sale, confirming sale, and for possession. Jakubow contested it, chiefly arguing that (1) the sale price was unconscionably low, and (2) RCB's notice was too limited. The court granted RCB's motion, which brings us to the current appeal.
Holding:	The court held that the trial did not err in refusing to find the sale of the property to be unconscionable. The court reasoned as follows: (1) it is unusual for a forced sale of land to bring full market value, (2) mere inadequacy of price is not sufficient to disturb a judicial sale, and (3) forced sales such as the one in the current action that are set to occur less than 60 days after the last scheduled date need not give typical notice.
SADA 2400 Ogden, LLC v. 2400 Ogden Ave. - 10041667 LLC, No. 20 C 4224-SLE, 2021 WL 795011 (N.D. Ill. Mar. 2, 2021)	
Issue:	(1) Did SADA have the requisite knowledge to sustain their fraud claims?

	(2) Did SADA have the requisite knowledge to sustain a claim to challenge the validity of the Liquidated Damages Provision? (3) Did SADA adequately plead their fraud claims?
Facts:	In March 2020, Defendant property owner 2400 Ogden Ave - 10041667 LLC ("2400 Ogden Ave") sought to sell a two-tenant commercial office building in an online auction. Also in March 2020, 2400 Ogden Ave's broker prepared an Offering Memorandum which included multiple representations about the value of the property and leasing plans by one of the current tenants. The next month, Plaintiff SADA 2400 Ogden, LLC ("SADA") informed 2400 Ogden Ave's broker that in light of the leasing plans, they were not interested in buying the property. However, SADA requested an opportunity to negotiate for purchase of the property if the lease negotiations failed. The broker responded by saying that the lease negotiations were a done deal and that the property was fully stabilized. At the online auction in early April, SADA placed the highest bid and won. The following day, SADA signed the purchase agreement and wired a deposit in the amount of $1,086,750. An important provision of the purchase agreement (the "Liquidated Damages Provision") provided in relevant part: Buyer and Seller expressly agree that it would be extremely difficult or impractical to determine Seller's actual damages as a result of such a default by Buyer, and therefore the parties agree that Seller shall retain as liquidated damages and not as a penalty and as a reasonable pre-estimate of Seller's actual damages for breach of this Agreement an amount equal to the Earnest Money Deposit and that such liquidated amount represents reasonable compensation to Seller. Also important to the agreement was a provision that allowed for 2400 Ogden Ave to reject or approve the transaction within 15 business days. Shortly after SADA sent the deposit, 2400 Ogden Ave's broker told SADA that 2400 Ogden Ave had not accepted the lease expansion with one of their current tenants but, the tenant had actually accepted. Upon hearing this, SADA told 2400 Ogden Ave to not execute a lease expansion without the involvement of SADA. The following day, 2400 Ogden Ave approved the purchase agreement with SADA and received SADA's deposit. In May 2020, 2400 Ogden Ave and SADA amended the agreement by moving the closing date and included the following provision (the "Release"): Release of Claims. As a material part of the consideration for Seller's execution of this Amendment, Buyer does hereby unconditionally, irrevocably and unequivocally: …(b) release and forever discharge Seller and its past, present, and future members, directors, managers, officers, employees, attorneys, advisers, consultants, servicers, representatives or agents (collectively, the "Released Parties") from any and all existing claims, causes of action, suits, proceedings, demands, damages, costs

	and expenses of every kind whatsoever, whether known or unknown, arising from or relating to any alleged or actual act, omission, occurrence, or transaction prior to or the date of this Amendment (collectively, the "Claims and Liabilities"). Later that month, SADA let one of the current building's tenants know about the deal between 2400 Ogden Avenue and SADA. The tenant informed SADA they did not agree to the deal. Upon hearing this, SADA sought the assistance of 2400 Ogden Ave in assisting with the conflict. 2400 Ogden Ave refused to assist. As a result, SADA demanded a return of the deposit. 2400 Ogden Ave refused. SADA bought two claims based on fraud and one based on the Liquidated Damages Provision. 2400 Ogden Avenue moved to dismiss the claims, chiefly arguing that SADA released 2400 Ogden from all claims pursuant to the Release.
Holdings:	(1) The court held that SADA effectively pleaded themselves out of a fraud claim based on the April misrepresentations by 2400 Ogden Ave related to the lease negotiations because SADA knew of 2400 Ogden Ave's fraudulent activity prior to signing the release. (2) The court held that the Release bars SADA's liquidated damages claim because the claim involves conduct that SADA was aware about prior to signing the Release. As such, SADA has pleaded themselves out of a claim under the Liquidated Damages Provision. (3) The court held that the remaining May 2020 fraud claim was not adequately pleaded because SADA only alleges one sentence about the fraudulent May 2020 conduct and did not offer any factual support or additional allegations.
Solwest, LLC v. Fifth Third Bank, No. 1-19-2350, 2021 WL 1852211 (Ill. App. May 10, 2021)	
Issue:	(1) Whether a commercial entity (a law firm) may bring a claim against another commercial entity under Illinois' Consumer Fraud and Deceptive Business Practices Act (the "Act" or "Consumer Fraud Act") in connection with an in-state commercial real estate transaction; (2) Whether a seller's failure to disclose proposals to replace an HVAC system to the prospective buyer constituted a deceptive practice under the Consumer Fraud Act; and (3) Whether proposals to replace a building's HVAC system constituted "engineering reports" requiring disclosure under a real estate contract, and whether the failure to disclose the HVAC replacement proposals constituted a breach of contract.
Facts:	Defendant Fifth Third Bank ("Bank") sold its historic bank building "as is" to plaintiff Solwest, LLC ("Firm"), a law firm owned by an individual. Bank and Firm agreed that the sale would be "as is, where is and with all faults and limitations." Firm released Bank from claims, losses, or damages arising from the building's physical condition. The real estate contract included a rider that required Bank to submit to Firm copies of any "soil studies and reports, geological and engineering

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	studies or reports," and "all engineering consultants' reports covering all or a portion of the Premises." In 2008, five years before the sale, Bank had obtained two proposals to replace the building's aging heating, ventilation, and air conditioning (HVAC) system. Bank, however, opted not to replace the entire HVAC system, estimated to cost as much as $660,000, and continued to make repairs as needed. Bank did not include the HVAC proposals with the sale documents. Four years after the sale, the HVAC system failed. Firm sought a proposal to replace the system from an HVAC servicer, who forwarded the same proposal it had sent Bank in 2008. Firm then filed a complaint against Bank alleging: (1) violation of the Fraud Consumer Act; (2) breach of contract by failing to include the proposals in the sale documents. Bank filed a counterclaim for breach of contract, alleging Firm's complaint violated the "as is" provision of the real estate contract. Both parties moved for summary judgment. The trial court granted both motions in their entirety. In doing so, the trial court rejected Bank's argument that the Consumer Fraud Act was inapplicable to Illinois real estate, determined that there was no showing Bank had knowledge of issues warranting disclosure under the as-is provision when the contract was executed, and the 2008 proposals were not engineering reports thus not necessary for Bank to provide to Firm. Firm appealed the trial court's grant of summary judgment in favor of Bank.
Holding:	The Appellate Court of Illinois first held that the Act applied to the real estate sale. Specifically, the court focused on Section 1(f) of the Act, which defines the terms "trade" and "commerce" as "the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated." The appellate court emphasized that the Consumer Fraud Act is construed liberally by Illinois courts, and that it had been applied to in-state real estate transactions on prior occasions. The appellate court also determined that the Act, through its broad definition of "Person" applied to sales between two commercial entities, including one owned by a lawyer. Firm was thus permitted to bring a Consumer Fraud Act claim against Bank. The court then reviewed the merits of Firm's Consumer Fraud Act claim. To sustain a Consumer Fraud Act complaint, a plaintiff must show (i) a deceptive act or practice by the defendant, (ii) the defendant's intent that the plaintiff relies on the deception, (iii) the occurrence of the deception in the course of conduct involving trade or commerce, and (iv) actual damage to the plaintiff (v) proximately caused by the deception. The court focused on whether Bank's conduct constituted deception—the third element of a Consumer Fraud Act claim and the trial court's basis for granting Bank summary judgment. The appellate court determined that the proposals the Bank received in 2008 did not indicate the HVAC system needed to be replaced. Rather, the court determined those companies considered their proposals as options should Bank decide to pursue upgrades. Further, the court noted the HVAC system was functional at the time of the sale, which supported the notion that Bank would not have any indication the HVAC system was not in working order. The court affirmed the trial court's grant of summary judgment in Bank's favor on the Consumer Fraud Act claim.

	The appellate court also rejected the Firm's breach of contract claim and concluded Bank had no obligation to turn over the proposals because those proposals were not engineering reports. The court posited "neither company's proposal was a technical analysis of the existing system but instead a list of options. Moreover, the 2008 proposals did not reflect the system's condition in 2013, nearly five years later." The court also noted the existence of an "as-is, where-is, and with-all-faults" clause in the contract and found that the provision controlled, thereby defeating Firm's breach of contract claim.
United States v. Witkemper, No. 1:18-cv-00873-JRS-TAB, 2021 WL 1220625 (S.D. Ind. 2021)	
Issue:	Was the transfer of the Commercial Property from Mr. Witkemper to Mrs. Witkemper voidable?
Facts:	In December 2005, Defendant Richard E. Witkemper created Witkemper Properties LLC ("Witkemper Properties") for the primary purpose of leasing commercial properties. Mr. Witkemper was the sole member of Witkemper Properties and handled its accounting and financial services. The relevant properties are two commercial properties located at 1141 South Walnut Street, Edinburgh, Indiana ("Commercial Property"), and 635 S. Mapleton Street, Columbus, Indiana ("S. Mapleton Property"). Witkemper Properties was dissolved in 2009, after Mr. Witkemper failed to file requisite business reports with Indiana's Secretary of State. Despite being dissolved, Mr. Witkemper continued operating Witkemper Properties as normal. In 2010, a "Tax Advance Agreement" between Mr. Witkemper, his wife, Defendant Ellen F. Witkemper, and several other companies owned by Mr. Witkemper, revealed a failure of Mr. Witkemper to pay property taxes on the Commercial Property. In 2012, A&B Investments ("A&B") filed suit against both Mr. and Mrs. Witkemper and sought a decree of foreclosure on the S. Mapleton Property. In the midst of the legal action Mr. Witkemper executed a quitclaim deed and transferred his interest in the Commercial Property to Mrs. Witkemper in January 2013. In March 2013, the Bartholomew circuit court entered a judgment in favor of A&B for a decree of foreclosure and a judgment in the amount of $452,086.90. The S. Mapleton Property was sold to an entity named Cybermetrix Inc. in August 2013 and the Commercial Property was sold to an entity named Blair Holdings LLC in March 2014. Mrs. Witkemper's interest in the Commercial Property was transferred to Blair Holdings LLC that same month. Mrs. Witkemper promptly deposited the proceeds from the sale of the Commercial Property and began using the proceeds for day-to-day spending purposes. The government bought the present action seeking, in relevant part, to obtain a money judgment against Mrs. Witkemper whom the Government believes received the proceeds from the Commercial Property through a fraudulent conveyance.
Holding:	Yes, the transfer of the Commercial Property from Mr. Witkemper to Mrs. Witkemper was voidable because it was both constructively fraudulent and actually fraudulent. The conveyance was constructively fraudulent because (1) the

	Commercial Property was transferred to Mrs. Witkemper while there was substantial tax liability on the property, (2) the transfer was completed without consideration from Mrs. Witkemper, and (3) Mr. Witkemper was insolvent due to his nonpayment of debts. The transfer was actually fraudulent because Mr. Witkemper intentionally tried to evade creditors. This intent was shown when (1) Mr. Witkemper retained control over the Commercial Property, (2) A&B sued Mr. Witkemper and Witkemper Properties to foreclose the S. Mapleton Property only a few months before he transferred the Commercial Property to Mrs. Witkemper, (3) Mr. Witkemper routinely got other assets out of his name to avoid creditors, (4) the transfer was done without any consideration offered from Mrs. Witkemper, (5) Mr. Witkemper was actually insolvent before the transfer of the Commercial Property, and (6) a court entered judgment and a decree of foreclosure against Witkemper Properties shortly after the Commercial property transfer.
EIGHTH CIRCUIT	
Bernard Court, LLC v. Walmart, Inc., No. CV-19-536, 2020 WL 7251256 (Ark. Ct. App. Dec. 9, 2020)	
Issue:	(1) Whether a restrictive covenant contained in a deed was properly interpreted and thereby valid and enforceable to restrict certain land uses of the property; (2) Whether the restrictive covenant "ran with the land".
Facts:	In 1997, Walmart conveyed property consisting of three lots to Bernard Court, LLC's ("Bernard") predecessor-in-title and issued a deed reflecting that it sold the property pursuant to a restrictive covenant by which: (i) the property would not be used as a grocery store/supermarket or discount department store or wholesale club akin to a Target, Price Club or K-Mart; (ii) that the land and all improvements erected or constructed be maintained in good condition and repair; and (iii) that the restriction shall run with and bind the land and shall inure to the benefit and be enforceable by Grantor, or an affiliated company or its successors. Following a series of transactions, Bernard became the owner of the property in 2007. Bernard attempted to lease a portion of the property to a chain store called Dirt Cheap and sought a declaratory judgment from the Arkansas trial court to void the application of the restrictive covenant on the grounds that the type-of-use restriction contained therein was only valid for 20 years and had expired, and that Dirt Cheap was not a "discount department store or wholesale club" specified in the covenant. Walmart countered that the covenant was clear and unambiguous; that the type-of-use restriction was valid for 50 years; and that Dirt Cheap was a discount department store contemplated by the plain language of the covenant. Bernard also argued that the covenant did not run with the land on the grounds that it was personal to Walmart; Walmart contended the covenant ran with the land, and alternatively, even if it did not, it was enforceable as an equitable servitude. The trial court concluded that: (i) the deed contained a restriction on land use; (ii) the type-of-use restriction was subject to a 50-year term; (iii) Dirt Cheap was a discount department store within the meaning of the covenant; and (iv) the restriction did not "touch and concern" the land, and therefore did not run with the land. However, because the covenant reduced the value of the land when it was sold to Walmart's

	detriment, the covenant was enforceable as an equitable servitude. Bernard timely filed an appeal of this decision.
Holding:	The appellate court affirmed the trial court's holding that the type-of-use restriction in the disputed covenant had a 50-year limit and that Dirt Cheap qualified as one of the disallowed types of stores identified in the covenant. The court reversed the trial court's finding that the restriction did not run with the land and its enforcement of the covenant as an equitable servitude, and remanded for further proceedings. The court's decision concerning the duration of the covenant and its applicability to Dirt Cheap was based on the interpretation of the language used in the deed. The court also found that Dirt Cheap's operating model fit within the definition set forth in the Webster New Universal Unabridged Dictionary's for "discount department store." The appellate court agreed that the trial court's interpretation of the language of the restrictive covenant was carefully and properly considered, and it emphasized that when courts evaluate the language of a contract, they examine the full language of the agreement and reasonably construe provisions therein. Further, when the language of such agreements is clear and unambiguous, the parties will be confined to the meaning of the language used without consideration of the circumstances surrounding the objects and purposes of the restriction. Additionally, the Arkansas Supreme Court has held that punctuation is to aid the construction of contracts, not control them, and if construction neutralizes any provision of a contract, that interpretation should never be adopted if the contract can be construed to give effect to all of its provisions. The appellate court disagreed with the trial court as to whether the restrictive covenant ran with the land. It concluded that the trial court improperly interpreted Arkansas law as recognizing the "minority" rule that a restrictive covenant must "touch and concern" the land to "run with" it. The court held that a covenant is enforceable when it is: (i) beneficial or essential to the use of the land conveyed; (ii) expressly made binding upon the heirs, assigns, or successors of the grantor; and (iii) in writing. As the type-of-use restriction at issue here was both in writing and expressly binding upon Walmart as grantor and its affiliated companies or successors, the appellate court determined that the correct question the trial court should consider is whether the covenant benefited, or is essential to the use of the land, *not* whether it "touched or concerned" the land. The appellate court also concluded that the trial court erred when it determined the covenant was enforceable as an equitable servitude. Promises can be binding as equitable servitudes, even if all the technical requirements for the covenant to run with the land are not met, if (i) the parties intend the promise to be binding; (ii) the promise concerns the land or its use in a direct and not a collateral way and (iii) the subsequent grantee has notice of the covenant. While the trial court concluded that an equitable servitude existed here, it did so based on an alleged diminution in property value sustained by Walmart. However, the appellate court concluded there was nothing in the record to support this finding of a decreased property value and detriment to Walmart.

Chambers Self-Storage Oakdale, LLC v. County of Washington, Nos: 82-CV-17-1685, 82-CV-18-2123, 2021 WL 278358 (Minn. Tax Jan. 25, 2021)	
Issue:	(1) Whether fair market value of self-storage facility was properly assessed; (2) Whether self-storage facility was unequally assessed.
Facts:	Chambers Self-Storage Oakdale, LLC ("Chambers") owned and operated a self-storage facility ("Property") classified as Commercial and/or Industrial for property-tax purposes. Chambers filed a property tax petition contesting the Property's 2016 and 2017 assessments, claiming that Washington County (the "County") had overvalued and unequally assessed the Property in each year. The County's appraisal concluded that the cost approach was less applicable, because of the Property's age, both overall and as to its improvements. As to the sales approach, the County reached a valuation of $2,630,000 for each year at issue. The County's appraiser relied on seven comparable sales, some of which were outside of Minnesota, "due to the limited transaction volume observed," but limited its comparables to those with a "regional buyer base." The County's appraiser also made several adjustments to the comparables, including "conditions of sale, quality, and age, to make those properties comparable" to the Property at issue. As to the income approach, the County's appraiser calculated the Property's actual and asking rents for the relevant years, compared those to comparable properties' asking rents, and subtracted considered expenses from projected, effective gross income. Finally, the County's appraiser consulted several industry Investor Surveys to identify appropriate capitalization rates, which the appraiser used to divide the net operating income, for valuations of $2,770,000 and $2,860,000 in 2016 and 2017, respectively. The County's appraiser completed the "final reconciliation" of these fair market valuations by weighing the income approach at 100 percent, explaining that the sales approach was given "secondary emphasis," because "market participants are primarily analyzing properties based on their income-generating capability."
Holding:	The court found that the County's appraiser provided competent and credible conclusions as to the Property's fair market value in the relevant years; however, while it agreed with the appraiser that "an investor looking to purchase [the Property] would look primarily to the income approach," it adjusted the weight he placed on the income approach from 100 percent to 80 percent and 20 percent weight on the appraiser's sales approach. Using these valuations, the court held that the Property should have been valued at $2,742,000 and $2,814,000 for 2016 and 2017, respectively. The court also found against Chambers on its unequal assessment claim, holding that it failed to present evidence of unequal assessment and because the County presented evidence of equal assessment.

	In support of its claim, Chambers argued that the Property generally paid a higher tax per square-foot of rentable space than comparable self-storage facilities. The court found that Chambers provided no legal authority supporting this argument. Chambers also argued that the County did not "use the same standardized values for vacancy, credit loss and expenses, and capitalization rate when assessing other storage facilities in the taxing district." The court held that even if the County had used incorrect values, Chambers should have introduced evidence of the property's actual market value, which it failed to do. Finally, the court dismissed Chambers' argument that the County's appraiser's "unfamiliarity with the mass appraisal process as applied to the subject property and the County's valuation of the subject property on a per unit basis" supported a finding of unequal assessment. The court noted that familiarity with the process is not an element of an unequal assessment claim.
Lowe's Home Centers, LLC (Plymouth) v. County of Hennepin, 938 N.W.2d 48 (Minn. 2020)	
Issue:	(1) Whether fair market value of commercial retail property was properly assessed, where a cost approach was given greater weight than a sales approach; (2) Whether the tax court properly applied adjustments to the sales approach and cost approach, respectively.
Facts:	Lowe's Home Centers, LLC ("Lowe's") owns and operates a retail store and lawn and garden center (the "Property") in Plymouth, Minnesota. The County of Hennepin ("County") assessed the Property's market value at $11,775,000 as of January 2015. Lowe's appealed the assessment to the tax court. The parties' experts disagreed on how to apportion weight between the sales approach and the cost approach in their valuation analyses. The Lowe's expert relied primarily on the sales approach in reaching a fair-market valuation of $5,350,000. This approach considered sales of nine comparable retail properties, adjusted for "age, size, location, date of sale" and several other factors. The County expert relied primarily on the cost approach in reaching a fair-market valuation of $11,950,000. This approach considered the fact that comparable retail-store owners generally acquire land and build a store, and thus adjusted for improvements and depreciation. In reviewing the Lowe's sales approach, the court relied on three of the expert's nine comparable sales properties, adjusting the sales price for each comparable to account for "the impact of deed restrictions, the date of sale, the age of improvements, and the combined impacts of traffic and location." In reviewing the County's cost approach, the tax court analyzed three comparable, commercial land sales based on similarities in size, use, and location, weighing one sale more heavily based on its more favorable location. The tax court concluded that the quality of data and usefulness of the approaches supported warranted applying 25 percent weight to the sales approach and 75 percent weight to the cost approach, and it held that the Property's 2015 fair market value was $10,507,000.

Holding:	The state supreme court reviewed the tax court's market-value assessment for clear error, noting that "the imprecision of market value determinations justifies our deference unless the tax court has either clearly overvalued or undervalued the subject property, or has completely failed to explain its reasoning." The supreme court noted that because each of the three valuation approaches—cost, sale, and income—have strengths and weaknesses, tax courts are encouraged to use at least two approaches "to serve as checks on each other," but to ultimately weigh the approaches based on the facts of each particular case. The supreme court affirmed the tax court's determination of the Property's fair market value, based on a calculation that favorably weighed the cost approach over the sales approach. The supreme court agreed with the tax court weighing based on the facts that big-box retailers rarely purchase each other's properties, so the sales approach's emphasis on comparable sales in this case did not offer comparable sales of properties with strong retail locations like the Property at issue. It also affirmed that the cost approach could be properly applied because the Property qualified as "relatively new construction." The supreme court reiterated a previous ruling in which it had noted that "the quality of the retail location" is a "critical factor" for which, if reliable data was unavailable, would support a tax court attributing greater weight to the cost approach over the sales approach, because the latter relies on comparable sales to the subject property. The supreme court also upheld the tax court's application of adjustments to the sales prices of the comparable properties to account for deed restrictions, date of sale, traffic, and location. It noted that "properties may not be truly comparable if a deed restriction impacts the property's market value by limiting the potential buyers or uses of the property," and that was the case for the comparable properties at issue. The supreme court further agreed with the tax court that even though the County's expert's date-of-sale evidence included "regional or dissimilar properties," it was superior to the Lowe's expert's data, which "contained only general national trends." Finally, the supreme court agreed with the tax court's decision to adopt a location adjustment within the proposed range by the County expert's data, because it found that data more reliable than that proffered by the Lowe's expert. The supreme court also upheld the tax court's application of adjustments to the cost approach, based on its valuation of the land and depreciation. The tax court again found the data provided by the County's expert more reliable, and based its final calculation on an amount within the range proffered by the expert for the value of the land. The supreme court also found that the tax court had provided adequate explanation for its rejection of both experts' recommendations for functional and external obsolescence, because one expert's comparables were too dissimilar and the other expert failed to support his claim of functional obsolescence based on a "well-performing property in a good retail location."

Red Star Group, LLC v. 1933 Lyndale, LLC, No. A20-0335, 2021 WL 417010 (Minn. Ct. App. Feb. 8, 2021), review denied (Apr. 28, 2021)	
Issue:	Did purchaser of commercial real estate breach purchase agreement when it failed to appear at closing after incorrectly asserting that seller failed to provide marketable title?
Facts:	Appellant, Red Star Group, LLC, agreed to purchase a commercial property it was leasing from 1933 Lyndale. The July 2, 2019 purchase agreement required 1933 Lyndale to secure a commitment for title insurance within three days, and provided Red Star with the opportunity to make written objections to the title commitment. The purchase agreement further provided that any matter disclosed by the title commitment that was not objected by Red Star within 7 days becomes a "Permitted Exception." At the closing, scheduled for October 30, 2019, 1933 Lyndale was required to deliver marketable fee simple title subject to any "Permitted Exception." 1933 Lyndale timely secured title commitment for the property and provided it to Red Star. However, the title commitment excluded a 2013 mortgage in excess of $2.3M in favor of CorTrust Bank, N.A. Red Star did not object to the contents of the title commitment. Accordingly, 1933 Lyndale prepared a draft limited warranty deed in advance of the closing excluding the CorTrust mortgage. In late October, Red Star expressed concern about the CorTrust mortgage. On the day of the closing, Red Star informed 1933 Lyndale that it would not accept title subject to the CorTrust mortgage, and failed to appear at the closing, claiming that 1933 Lyndale breached the purchase agreement by failing to provide marketable title. Red Star later commenced this action alleging breach of contract and unjust enrichment, seeking damages and injunctive relief. Lyndale later moved for summary judgment, arguing that it had complied with the purchase agreement and Red Star had not presented any material facts supporting its claim for breach. The district court granted the motion, reasoning that the CorTrust mortgage was a "Permitted Exception" because Red Star failed to object within 7 days of receiving the title commitment, 1933 Lyndale was prepared to provide marketable title at closing, and 1933 Lyndale had no obligation to clear the CorTrust mortgage from the title prior to closing. Red Star appeals the district court's decision.
Holding:	The Court of Appeals upheld the district court's grant of summary judgment, holding that 1933 Lyndale did not breach the purchase agreement. The court reasoned that the CorTrust mortgage was a "Permitted Exception" in accordance with the terms of the purchase agreement. The court held that 1933 Lyndale did not breach the purchase agreement as a matter of law, because its obligation to deliver marketable title had not yet arisen and that obligation was subject to permitted exceptions such as the CorTrust mortgage.
RSB Entertainment, LLC v. Heritage Bank, N.A., 942 N.W.2d 3 (Iowa Ct. App. 2020)	
Issue:	(1) Whether certain bowling equipment was properly classified as fixtures to real property;

	(2) Whether bank disposed of collateral securing loan in commercially reasonable manner and provided notice of same.
Facts:	RSB Entertainment, LLC, and its sole shareholder, Richard Moores, (collectively "RSB") received a loan from Heritage Bank (the "Bank") to buy a bowling alley and attached restaurant (the "Property") in Sioux City, Iowa. Under the loan agreement, RSB executed a promissory note for $1,525,000, and the Bank secured a mortgage on the real property—including fixtures. RSB subsequently defaulted on the promissory note, and the Bank foreclosed, purchasing the real property at a sheriff's sale for $1,350,000—thus leaving a deficiency of $136,447.53 subject to interest and costs. RSB filed an action to enjoin the Bank from disposing of unattached personal property and to secure fair compensation for the unattached personal property's use—to which the Bank counterclaimed, seeking declaratory judgment that bowling equipment and machinery at issue were "improvements, structures, fixtures, or replacements." The Bank also entered into a purchase agreement with a third-party buyer for the Property, which specified the closing date. The Bank subsequently sent RSB a notice of disposition 13 days before the closing date that included a list of unattached personal property. The Property was purchased for $850,000, with $136,000 allocated to the personal property. RSB requested an accounting from the Bank, and after proceeds of the sale and from renting the personal property was applied, an $11,000 deficiency remained. Moores cleared a lien by paying the $11,000 to the Bank. RSB filed an action for damages, claiming the notice of disposition was untimely and not commercially reasonable. The district court decided in favor of the Bank on the fixtures question, and on the disposition question. RSB appealed.
Holding:	The Iowa Court of Appeals affirmed the district court's finding that the bowling equipment and machinery at issue—which included bowling lanes, bowling ball return systems, pin-setting equipment, and scoring systems—constituted "fixtures, improvements, or replacements to the real property." The Court of Appeals followed the common-law rule that "personal property becomes a fixture when: (1) it is actually annexed to the realty, or to something appurtenant thereto; (2) it is put to the same use as the realty with which it is connected; and (3) the party making the annexation intends to make a permanent accession to the freehold." The Court of Appeals struck down RSB's argument that it subjectively intended for the equipment to be periodically replaced. It reasoned that "one can imagine a number of components of real property that are periodically replaced in the practice of good stewardship," but that are "undeniably a part of real property such as siding or roofing material." In a bowling alley that had been operated for several decades, the Court reasoned, equipment and machinery such as bowling ball return and scoring systems constituted fixtures. As to whether the Bank was entitled to a deficiency, however, the Court found that the district court had applied the wrong legal standard and should have reviewed

	based on the rebuttable presumption standard. The Court noted that the Uniform Commercial Code, as codified in Iowa statute, requires that “every aspect of a disposition of collateral, including the method, manner, time, place, and other terms… be commercially reasonable,” and that the Bank must also have “provide[d RSB] with a reasonable authenticated notification of disposition within a reasonable time before the intended disposition.” The Court disagreed with the district court’s finding that notice had been proper. Instead, it determined that because the Bank had not provided RSB with notice of disposition until after it entered into a purchase agreement, it was “the functional equivalent of no notice at all, because it did not protect RSB from a potentially inadequate price and foreclosed RSB’s ability to influence the purchase price.” However, the Court also disagreed with RSB’s argument that the defective notice meant that the sale was not commercially reasonable. The Court noted that, by relying on the fact that “the sale price of the collateral was equal to or greater than market value”, the district court had applied the wrong standard when determining whether defective notice was overcome. It remanded for application of the rebuttal presumption rule under UCC Art. 9, which “shifts the burden to the creditor to prove the amount of proceeds that would have been realized had it provided proper notice would have been less than the proceeds actually achieved.”
TENTH CIRCUIT	
BBG Holding Corp. v. K Cap., LLC, No. 20-cv-03268-MEH, 2021 WL 147085 (D. Colo. Jan. 15, 2021)	
Issue:	(1) Whether a buyer of commercial property breached a purchase and sale agreement; (2) Whether the buyer of commercial property misrepresented its intention to purchase the property.
Facts:	BBG Holding Corp. (“BBG”) owned commercial property in Avon, Colorado and on January 6, 2020 executed a letter of intent with K Capital, LLC (“K Capital). On February 6, 2020, both parties signed a purchase and sale agreement (the “Agreement”) for K Capital to acquire the property. Pursuant to the Agreement, K Capital was required to pay an earnest money deposit for $25,000 by February 13, 2020, and an additional $75,000 by March 16, 2020, or else the Agreement would terminate. Additionally, the Agreement provided that if K Capital provided a written notice of termination on or before March 9, 2020, BBG would return the earnest money deposit. K Capital did not pay the deposit by February 13, but tendered a check for $25,000 to the escrow agent on February 14. On March 3, 2020, the escrow agent informed BBG that K Capital’s check was rejected for insufficient funds. K Capital, however, expressed a continued intent to purchase the property. As BBG expected the sale to ultimately go through, it did not attempt to sell the property to any other party. K Capital failed to tender $100,000 by March 16 ($25,000 to cover the returned check and the additional $75,000 to satisfy the second earnest money payment). On March 17, BBG sent K Capital a written notice of default, and K Capital failed to

	respond. At this time, the COVID-19 pandemic emerged, and BBG alleged the property's value has decreased significantly. It filed suit alleging that if it had known K Capital had no intention to buy the property, it could have sold the property at that time and mitigated its loss.
Holding:	The court determined that a valid and enforceable contract existed between BBG and K Capital and rejected K Capital's motion to dismiss. It rejected K Capital's argument that its failure to pay the $25,000 in earnest money deposit by February 13 terminated the Agreement. Although the Agreement plainly stated that it automatically would terminate if K Capital, as purchaser, did not deposit the earnest money by the agreed-upon-date, the court determined that the parties' actions to continue the sale even after K Capital failed to pay the deposit, allowed for the Agreement to be "readopted" and for its terms to continue to govern the parties' conduct moving forward. The court also agreed with BBG's argument that the parties waived noncompliance with, or termination of, the Agreement pursuant to its express language and Colorado law, which allows for an express provision in a written agreement to be waived expressly or by implication if a party engages in conduct which manifests an intent to relinquish the right or privilege or acts inconsistently with its assertion. Further, the Court determined that the original Agreement properly memorialized the contract for the sale of real property in writing pursuant to Colo. Rev. Stat. § 38-10-108, and BBG's continuation with the sale, even after receiving K Capital's bounced check, indicated a BBG's waiver of a termination or breach of the Agreement. The court rejected K Capital's argument that BBG allegedly failed to plead that K Capital had failed to perform. Instead, the court found that BBG properly alleged that K Capital's failure to deposit the earnest money was a material default of an obligation under the Agreement, and K Capital's argument that it issued a stop payment order on the $25,000 check to effectively terminate the Agreement was without merit because K Capital failed to send BBG a written notice exercising this termination right in compliance with the Agreement. The Court did not dismiss BBG's promissory estoppel claim, but acknowledged that it was unlikely BBG could recover on both it and the breach of contract claim. Finally, the court determined that BBG properly asserted claims for misrepresentation with particularity, as BBG detailed numerous communications from and actions by K Capital during the course of dealing between the parties from January 6, 2020 through March 2020. It held that such communications consisted of those directly between the parties, through brokers, through the Agreement, or the January 6, 2020 letter of intent. The actions included signing the Agreement, tendering the $25,000 check, and stopping payment of the check, among other things.
Better Baked, LLC v. GJG Property, LLC, 465 P.3d 84 (Colo. Ct. App. 2020)	
Issues:	(1) Whether a tenant's right of first refusal under a lease affected title to real property, thereby supporting the filing of a lis pendens in connection with tenant' s action to enforce the right; and

	(2) Whether the trial court should have reached the merits of the tenant's underlying action or the landlord's defense in a show-cause hearing to determine whether the lis pendens recorded by tenant against landlord's property was groundless or spurious.
Facts:	Better Baked, LLC ("Tenant") leased approximately 6800 square feet in a 7800-square-foot warehouse from GJG Property, LLC ("Landlord") for a five-year term (the "Lease"), which provided Tenant a right of first refusal ("ROFR") if Landlord offered to sell the property. Under the ROFR, if Landlord offered to sell the property or received and sought to accept a bona fide offer to purchase the property, Landlord was required to send Tenant a copy of the contract and notice of its intent to make or accept the offer. The Tenant would then have the right to purchase the property on the same terms and conditions of the contract. In August 2017, Tenant procured a buyer (the "Reeds") for the property. The Reeds and Landlord signed a purchase agreement, and Landlord and Tenant signed a First Amendment to the Lease, stating that Landlord was under contract to sell the property and Tenant had agreed to terminate the ROFR on the effective date of the sale. Several months later, Landlord entered into a new purchase agreement with a different party ("Peak"), a second tenant which had asserted its own ROFR) Landlord asserted that Tenant's prior ROFR waiver in connection with the Reeds purchase agreement applied to the pending subsequent purchase, which Tenant disputed. Tenant then recorded a lis pendens that referenced an earlier dismissed action, unrelated to the dispute at issue. Several days later, Tenant commenced a new action against Landlord and recorded a second lis pendens, referencing the new action. Landlord and the prospective buyer sued Tenant to remove both lis pendens, pursuant to Colorado statues §§ 38-35-201 and 38-35-204, as "spurious" liens and documents. The trial court concluded that both lis pendens were groundless and spurious, and that Tenant's claim, even if meritorious, would not affect title to real property; Tenant appealed.
Holdings:	First, the Colorado Court of Appeals held that Colorado courts broadly interpret the statutes governing lis pendens, and thus found that Tenant's ROFR affected title to the property; the filing of a lis pendens was therefore appropriate. The court reasoned that (1) the lease created an interest in real property for Tenant, such that the ROFR was one interest in the bundle of rights in the Lease; (2) denying the Tenant the opportunity to record a notice of lis pendens would result in the Tenant losing its bargained-for right to obtain a property; and (3) the lis pendens statute should have been interpreted broadly, such that the ROFR imposed a restraint on alienation that limited the property owner's right to convey title. Next, the appellate court affirmed the trial court's holding that the first lis pendens was groundless, as it was recorded in connection with a dismissed action. The appellate court, however, reversed the trial court's finding on the second lis pendens. The appellate court held that the trial court erred in reaching the merits of the tenant's ROFR claim and Landlord's waiver defense during the lis pendens show-cause hearing. Instead, the trial court should have focused only on whether Tenant filed the second lis pendens in connection with a present lawsuit that sought relief affecting title to real property. As the court had already held that the ROFR affected title to

	real property, the property in dispute, the lis pendens was not groundless or spurious and should not have been dismissed.
Byron Town Council v. Campos, No. 20-CV-50-SWS, 2021 WL 2176914 (D. Wyo. Jan. 14, 2021)	
Issue:	(1) Whether a 99-year lease agreement executed between a town and an individual was valid and enforceable; (2) Whether the court properly rejected plaintiff's request to exclude evidence pursuant to the parol evidence rule, the doctrine of merger by deed, and relevancy.
Facts:	In February 2012, the Town of Byron, Wyoming's Town Council (the "Town") entered into two agreements with Alex J. Campos ("Campos"): (i) the sale of the Town's Old School Building for a purchase price of $70,000; and (ii) the lease of the Home Economics Building to Campos. The lease was for a term of 99 years and included an option to purchase clause, reserving for Big Horn County School District #1 the right of first refusal. Neither party asserted that the option to purchase was exercised within the time permitted, and the contract terms required the lessee to pay the lessor the total equivalent of the yearly tax liability each year and permitted the lessee to terminate the agreement with a 30-day written notice returning the property to lessor. The court previously determined that the Town voted to lease the cottage to Campos despite the Town's contention that the lease was never approved or authorized by the Town, and the court further determined that the lease agreement did not amount to a donation or gift, as the property's yearly tax liability to be paid by Campos was sufficient to constitute a bargained-for-exchange. It also determined that the issue as to whether the contract was a conditional sale or a lease was not determinative, and as such, denied summary judgment to both parties because a dispute of material fact existed as to both the purpose of the contract and whether the contract's term, which extended beyond the term of the Town Council which had approved the contracts to Campos, was of desirable benefit to the Town at the time. Following this ruling on summary judgment, the Town filed three motions in limine asking the Court to exclude certain evidence relating to the sale and use of the Old School Building, as well as any evidence Campos would use to modify the disputed lease or the sale agreement for the Old School Building.
Holding:	The court rejected the Town's arguments and denied the three motions in limine. The court held that in determining the legal status of the lease agreement and the rights held by the parties, it must look to the surrounding circumstances leading up to and occurring after the execution of the agreement. As Campos did not intend to introduce evidence to amend or modify the lease agreement, but rather wished to address the factual circumstances surrounding the case, the Town could not utilize the parole evidence rule to exclude evidence relating to the disputed lease. The court further determined that Campos's argument concerning the "collateral obligations rule," which is an exception to the merger doctrine, applied. The collateral obligations rule provides that contractual obligations that are collateral to a transaction survive closing and may be enforced under the contract; they are

<table>
<tr><td></td><td>obligations that are not deed-related. The court held that the merger doctrine did not apply because it is only relevant to contracts for the sale of realty; this dispute involved the lease agreement concerning the Home Economics Building, not the sale of the Old School Building. There was no deed to “merge” with any existing prior contract because the lease agreement is a separate contract entirely.

The court also rejected the Town’s argument that the statue of frauds was applicable, finding that the statute of frauds only requires an agreement to be in writing for the sale of property, not for the lease of property. Regardless of the statute of frauds’ applicability, however, the court determined that the evidence Campos sought to present would not serve to modify the contract but would instead detail the facts and circumstances surrounding the disposition of the properties in question to ascertain the purpose, benefit, and ultimate legality of the lease. As such, the evidence was permissible, and the Town’s motion in limine was denied.

Finally, the court rejected the Town’s efforts to exclude evidence relating to the use of the Old School Building Property as irrelevant to the dispute. The court narrowed the focus of the case to the purpose of the lease and whether there was any definable benefit to the Town at the time it approved the lease term. It acknowledged that the inquiry of whether the transaction had a “definable advantage” for the city required an examination of the facts at the time the contract was made.</td></tr>
<tr><td colspan="2">Charles Sanders Homes, Inc. v. Cook & Assocs. Eng’g, Inc., 465 P.3d 1278 (Okla. Civ. App. June 17, 2020)</td></tr>
<tr><td>Issue:</td><td>Whether the price paid at a sheriff’s sale or an appraised value should be used to determine the fair market value of commercial property to properly calculate the amount of a deficiency order concerning a mortgage foreclosure action.</td></tr>
<tr><td>Facts:</td><td>Charles Sanders Homes, Inc. (“Homes”) sold commercial property to Cook & Associates in 2006. In partial satisfaction of the purchase price, Cook & Associates and Justin Cook (together, the “Cooks”) signed a promissory note secured by a mortgage on the property. In February 2012, the note was in default and Homes sued to collect the balance due and to foreclosure its mortgage. The Cooks received the petition in March 2012, but chose not to defend the action and declined to appear, as they believed their equity in the property was in excess of $30,000 and they wished for the case to proceed to judgment and sheriff’s sale quickly and without unnecessary expense.

In May 2012, the trial court granted Homes a default judgment against the Cooks in the amount of $279,769.78; the Cooks did not appeal and the judgment was final. After entry of the judgment, the property was to be sold at sheriff’s sale. Three appointed appraisers valued the property at $279,000. The Cooks did not appear at the sheriff’s sale or submit a bid; Homes, the only bidder at the sale, bought the property for $186,000, exactly two-thirds of the appraised value. The trial court’s order confirming the sheriff’s sale was entered in August 2012 and never appealed.

The court held a hearing regarding the amount, if any, of the deficiency for which the Cooks would be liable. The Cooks did not appear at the hearing and a default deficiency order for $93,769.78 – the difference between the $186,000 sale price and</td></tr>
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	the amount of Homes' judgment – were entered against them Cooks (against Cooks & Associates in October 2012 and Justin Cook in February 2013). The trial court denied the Cooks' motions to vacate the deficiency orders, and this appeal followed.
Holding:	The Court of Civil Appeals of Oklahoma previously heard an appeal by the Cooks of both deficiency orders in which they argued that pursuant to Oklahoma statute, 12 O.S. 2011 § 1038, the deficiency orders were facially void due to constitutionally defective notice of the deficiency hearings because the notice did not state that a number other than the appraised value could be used as the fair market value of the property to determine the amount of their deficiency liability. The appellate court affirmed the trial court's denial of that initial motion. In a proper and timely brought second appeal, the appellate court evaluated two different motions to vacate the deficiency orders, in which the Cooks cited Oklahoma statute, 12 O.S. 2011 § 1031(3), which provides that a judgment or final order may be vacated: "For mistake, neglect, or omission of the clerk or irregularity in obtaining a judgment or order." The Cooks asserted the irregularity in obtaining the judgment stemmed from basing the amount of the deficiency on the price for which the property sold at the sheriff's sale rather than the appraised value of the property. Specifically, they argued that Oklahoma's anti-deficiency statute, 12 O.S. 2011 § 686, requires the trial court use the fair market value of the property on the date of sale in determining the amount of the deficiency, if any, when it addresses a motion for deficiency order pursuant to this section. The appellate court determined that the language of 12 O.S. 2011 § 686 draws a clear distinction between "market value" and "sale price" and in the absence of the rare occasion when the market value and the sale price coincide, the statute directs using the higher of the two in a judicial determination of the deficiency question arising from a mortgage foreclosure. Further, the fair market value is meant to be the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it. The appeals court continued by finding that a sheriff is not the owner of the property and a forced sale price should not be taken as the conclusive measure of fair market value as it lacks the black-letter requirements of a willing seller and a free decision whether and when to sell. Additionally, a sheriff's sale is not an open market sale as it occurs pursuant only to court order outside domestic real estate sales. The appellate court therefore held that the Cooks were entitled to the full protection of § 686, and the deficiency should have been determined by subtracting either the fair market value, as determined by the court, or the sale price of the property, whichever was higher, from the amount owed according to the judgment. The trial court, pursuant to the statute, was obligated to ascertain the fair and reasonable market value of the mortgaged premises as of the date of sale in order to determine the outstanding deficiency. At the time of the deficiency hearing, the trial court had no evidence of fair market value as of the time of sale other than the appraisal of $279,000. The price realized at the sheriff's sale – two-thirds of the appraised value – was the minimum price

	required in order to comply with 12 O.S. 2011 § 762, which prohibits the sale of a property for under two-thirds of its appraised value. The appellate court, however, determined that without any other evidence on which to base fair market value, the statutory minimum bid may not become a judicially-determined actual market value. As such, the appellate court held that the trial court failed to follow § 686's mandated procedure for deficiency orders. The appellate court therefore reversed the trial court's decision, vacated the deficiency orders, and remanded the case back to the trial court for further proceedings to determine the fair market value pursuant to § 686.
Matter of the Protest of Arciterra BP Olathe KS, LLC, 484 P.3d 261 (Kan. Ct. App. 2021)	
Issues:	Whether the Board of Tax Appeals properly based its decision to lower the tax valuation of property leased to a commercial tenant on a "hypothetical leased fee" valuation rather than the value of "build-to-suit leases."
Facts:	In 2005, Bass Pro Shops ("Bass Pro") negotiated a 20-year, build-to-suit lease (the "Lease") with the then owners of the property. Under the terms of the Lease, the landlord would pay property taxes among other costs, and Bass Pro owed annual rent of $600,000, along with any operating expenses. The Lease allowed Bass Pro to build a retail structure on the property, with the option to purchase the property for $10 at the end of the lease period. In 2008, Arciterra BP Olathe KS, LLC ("Arciterra") bought the property for $1,900,000, subject to the Lease. Although the Lease produced positive cash flow for Arciterra from 2008 to 2016, Johnson County (the "County") doubled the valuation of the property in 2016, substantially increasing the property taxes from $295,800 in 2015 to $553,115 in 2016. Arciterra appealed the tax valuation to the Board of Tax Appeals ("BOTA"), which substantially lowered the County's valuation. Both the County and Arciterra agreed that the highest and best use of the subject property, if vacant, was as another built-to-suit improvement. The County recommended the property be valued based on the highest appraisal ($14,475,269 for 2016; and $14,470,320 for 2017). Arciterra presented testimony valuing the property as both a "hypothetical lease fee" estate and a "fee simple" estate and asked BOTA to adopt the lowest appraisal, a fee simple valuation ($7,500,000 for 2016; and $7,850,000 for 2017). BOTA accepted neither request, but adopted the "hypothetical lease fee" value. The County appealed BOTA's decision.
Holdings:	The Court of Appeals of Kansas affirmed BOTA's decision, finding that the County had not satisfied its burden to overturn an administrative-agency decision. Both BOTA and the court found Arciterra's lower valuation more persuasive and more appropriately grounded in Kansas law. First, the court explained that Kansas law requires that when valuing property for ad valorem tax purposes, the valuation should be based on a "fee simple interest" rather than the "leased fee estate," meaning that counties should assess property as if it is

	unencumbered by another interest or estate. Although Arciterra relied on a "hypothetical leased fee" estate, which took into account the value of the lease in place, rather than a "fee simple estate," the County did not argue that this reliance was misplaced, so the court did not address the matter. The court next evaluated the County's valuation, and determined that the utilized calculations were improper. The court explained that, contrary to Kansas law, the County relied directly on the value of build-to-suit leases in its valuation. Such leases result in "contract rents" or rents that do not accurately capture market value because they are essentially financing agreements. The court noted that although Kansas law does not prohibit their consideration outright, built-to-suit leases can only be considered if appropriate adjustments are made to the final property valuations. The County's assessor, however, failed to make or properly explain his adjustments. The court also noted that "contract rent," including the rent associated with the particular lease encumbering the property, is inappropriate to use in property valuation. Instead, market rent should be used based on a consideration of the terms of a lease that a hypothetical buyer and seller would freely negotiate in an arm's length transaction. The court concluded by rejecting the County's assertion that Arciterra erred in valuing the property's highest and best use as vacant, rather than as improved. The court explained that real property, pursuant to K.S.A. 79-503a, must be valued as it physically exists at the time of the valuation. Further, real property must be valued as vacant to separate the value of the property from the value of the business being conducted on the property.
McWhinney Holding Co., LLLP v. Poag, No 17-cv-02853-RBJ, 2021 WL 1056496 (D. Colo. Mar. 19, 2021)	
Issue:	(1) Whether an operating agreement created in connection with a shopping or lifestyle center as part of a master-planned community was breached; (2) Whether the breaching party's parent company is liable for the judgment entered against a subsidiary on an alter-ego theory.
Facts:	Chad and Troy McWhinney entered into an agreement with Poag and McEwen Lifestyle Centers, LLC ("PMLC') in 2004 to form Centerra Lifestyle Center, LLC ("CLC") to build, manage, and own a shopping/lifestyle center, called the "Promenade Shops at Centerra" (the "Shops"), located east of Loveland, Colorado. To hold their ownership interests in CLC, McWhinney and PMLC created two special purpose entities, McWhinney Centerra Lifestyle Center, LLC ("MCLC") and Poag & McEwen Lifestyle Center – Centerra, LLC ("P&M"). MCLC and P&M then signed the Limited Liability Company Agreement of Centerra Lifestyle Center, LLC ("Operating Agreement"). P&M's initial contribution to CLC was an advance of \$2.38 million in cash which was returned after construction began. MCLC's initial contribution to CLC was the property the Shops were to be built on, valued at \$16.78 million.

	The Operating Agreement contemplated two stages of financing for the Shops: the first involved CLC entering a temporary construction loan to fund the construction of the Shops, and the second, which would begin following completion of the construction, involved CLC entering into a permanent loan to refinance the construction loan prior to its maturity date, then a date in October 2006. P&M, acting as Manager of CLC, acquired a $116 million construction loan (the "Construction Loan") from a group of banks with JPMorgan Chase ("JPM") (together, the "Bank Group") as the lead agent. P&M was responsible for finding permanent financing and sending MCLC terms of the permanent loan for its approval. After the formation of CLC, Terry McEwen, the President and co-founder of PMLC, and Dan Poag, another co-founder of PMLC, began seriously discussing their retirement from PMLC, and their corresponding redemption plans. McEwen met with Dan and Dan's son, Josh, to discuss a buyout of McEwen's interest for $40 million. Dan and Josh decided to leverage permanent loans that would be put in place at the Shops and at another lifestyle center in California ("Dos Lagos"), which would allow them to receive the $40 million buy-out for free, as P&M would obtain a $40 million loan secured by its ownership interests in the Shops and Dos Lagos; all the proceeds from the permanent loans on these two properties would then pay off the $40 million loan used to buyout McEwen. McWhinney was not informed of these pertinent developments. In 2006, Josh and PMLC's VP of Finance, David Selberg ("Selberg"), went to JP Morgan Investment ("JPMIM") to purchase a $155 million forward rate swap; this swap was not tied to any loan or loan application. Dan and Josh Poag's plan was to use the $155 million forward rate swap as a tool to obtain the $40 million loan. P&M was never interested in a permanent loan under $155 million, however, and was not close to finding a permanent loan when the swap was purchased. Ultimately, CLC ended up paying a $7.5 million interest penalty for the failed swap. In April 2007, JPMIM, acting through a new subsidiary called I&G Promenande Shops Lender, LLC ("I&G"), and PMLC, acting through its wholly-owned subsidiary called Centerra & Dos Lagos Venture, LLC ("C&DL"), entered into a $40 million Mezzanine Loan Agreement (the "Mezzanine Loan"). C&DL was created for the sole purpose of entering into the Mezzanine Loan. P&M, while retaining its position as Manager of CLC, transferred its 50% ownership interest in CLC to C&DL. C&DL, likewise, pledge the same 50% ownership interest in CLC to I&G, the Mezzanine Loan lender. Around the same time, I&G and the banks that held the Construction Loan entered into an "Intercreditor Agreement". Around the same time, MCLC and P&M executed a First Amendment to the Operating Agreement that included a provision allowing the parties to pledge their membership interest in CLC to financial institutions. Josh Poag only informed McWhinney that Poag & McEwen were going to engage in corporate financing with JPM; McWhinney was never informed about: (i) the purpose of the Mezzanine Loan; (ii) that McEwen was retiring and being bought out of the Poag & McEwen companies; (iii) that Poag & McEwen planned to leverage the Shops with a higher permanent loan than necessary to pay back the Mezzanine Loan; and (iv) and that JPMIM owned specific rights regarding CLC, including the right to approve any

	refinancing of the Construction Loan. Poag & McEwen also concealed the true purpose of the Mezzanine Loan from JPM, informing it that the money was to be used for equity for other projects, repayment of shareholder loans, and shareholder distributions, when it was actually going to McEwen to fund his buyout. Josh Poag and Selberg efforts to secure permanent loan options for the Shops did not succeed. In November 2006, Poag & McEwen had received initial bids for 5 separate commercial mortgage backed securities ("CMBS") loans from 5 different lenders that would have covered the permanent financing for the Shops as well as Dos Lagos. However, as CMBS loans would have netted a figure below $40 million, Poag & McEwen did not seriously consider them. By May 2007, leasing at the Shops was struggling, and Josh Poag and Chad McWhinney began discussing the sale of the Shops to a third party. Around this time as well, Josh Poag directed Selberg to inform JPMIM that Poag & McEwen was no longer pursuing a permanent loan for the Shops; Poag & McEwen never told McWhinney of is decision to abandon the search for a permanent loan. In August 2007, McWhinney and Poag & McEwen received an initial valuation range for the Shops from Eastdil for between $197 and $202 million, which Josh Poag challenged; the final valuation sent in September 2007 was between $206 and $212 million, still short of the $250 million valuation Josh Poag needed to pay off the Mezzanine Loan. In October 2007, McWhinney offered to purchase P&M's 50% interest in CLC for approximately $47 million; Josh Poag responded by stating that Poag & McEewen wanted McWhinney to forego any due diligence period. After this exchange, Poag & McEwen attended a Loveland City Council meeting, where it publicly disclosed that the Shops were performing poorly and were 3 to 5 years from stabilization, which was new information for McWhinney. Following this revelation, McWhinney lowered the offer to purchase the Shops to $45 million, which Josh Poag rejected. This rejection ended all discussions of McWhinney potentially purchasing P&M's interest in CLC. After these buy/sell negotiations ended, Poag & McEwen did not renew its search for permanent financing, but focused on securing a short-term bridge loan for the Shops. It never secured such a loan. Additionally, around this same time, Poag & McEwen attempted to violate another provision of the Operating Agreement when it tried to challenge the assessed value of the property of CLC without McWhinney's approval. Poag & McEwen eventually abandoned its efforts to pursue a tax appeal after McWhinney threatened legal recourse. In 2008, Poag & McEwen started issuing distributions from CLC to cover the monthly interest payments on the Mezzanine Loan; for 5 straight months, it made $500,000 distributions to pay the Mezzanine Loan interest. Additionally, Poag & McEwen made distributions to pay themselves ahead of important debts, did not reserve taxes for the Shops as it needed the full distribution from CLC for its Mezzanine Loan interest payments, and also amended the Construction Loan to an

	interest only loan so they could use money that had been going to pay the principal to pay the Mezzanine Loan interest. In August 2008, McWhinney and Poag & McEwen entered into discussions for another attempted buyout of Poag & McEwen's interest in CLC; Josh Poag informed Chad McWhinney that the interest was valued at approximately $38 million based on an $190 million valuation. The buyout never occurred. Despite Poag & McEwen securing a 3-month extension on the Construction Loan, CLC still defaulted and the Bank Group attempted a workout of the loan. During these negotiations, McWhinney first learned that JPMIM held a veto power to any extensions or refinancing of the Construction Loan via the Intercreditor Agreement. Between February and March 2009, Poag & McEwen and McWhinney communicated regarding allegedly improper "Permanent Loan Notices"; McWhinney rejected these Notices from Poag & McEwen on the grounds they were improper pursuant to the relevant section of the Operating Agreement. During this time, McWhinney also informed Poag & McEwen that it believed a conflict of interest existed between Poag & McEwen and JPM based on the Mezzanine Loan. In April 2009, McWhinney and Poag & McEwen met with JPM to discuss the defaulted Construction Loan, and McWhinney raised the potential conflict. As a result, JPM resigned as lead agent for the Bank Group, and KeyBank N.A. ("KeyBank") assumed JPM's role. Key Bank sent a new term sheet to Poag & McEwen for a 3-year extension of the Construction Loan. During these negotiations with KeyBank in September 2009, McWhinney informed Poag & McEwen that it would only be willing to agree to the extension if Poag & McEwen: (i) paid the full $9 million buydown; (ii) decreased its management fee; and (iii) attempted to extend the term of the extension from 3 to 5 years. After learning of issues between McWhinney and Poag & McEwen, KeyBank sent a second notice of default in October 2009. Neither party remedied the default, and KeyBank foreclosed on the Construction Loan; a receiver was appointed to manage the Shops in December 2009. Despite the foreclosure, the parties continued to negotiate so as not to lose their equity in the project. In December 2009, McWhinney sought approval from Poag & McEwen to purchase the Construction Loan note directly from the Bank Group. Around this same time, Poag & McEwen bought the Mezzanine Loan note from JPMIM for approximately $420,000. Despite failing to pay off the Mezzanine Loan from permanent loan proceeds or the sale of their ownership interest in the CLC, Josh and Dan Poag successfully accomplished their goal of buying out McEwen's $40 million interest in Poag & McEwen without using their own money. Poag & McEwen refused to allow McWhinney to purchase the Construction Loan note, and efforts to negotiate with Key Bank and the other banks for another extension failed. The Shops were sold at foreclosure to the Bank Group for $85 million in June 2010. The Bank Group attempted to sell the Shops, and McWhinney offered approximately $70 million for them. However, G&I VI Promendade, LLC

	("G&I") outbid McWhinney, and subsequently contracted with Poag & McEwen under a new entity, Poag Lifestyle Centers, LLC ("PLC"), to be the manager at the Shops. PLC remains the manager to date. Following its failed attempt to purchase the Shops, McWhinney initiated an action against Poag & McEwen in May 2011.
Holding:	The U.S. District Court for the District of Colorado upheld the state court findings and determined that, pursuant to the Operating Agreement, P&M owed duties of care, loyalty, good faith, and fair dealing to both CLC and MCLC. To support this decision, the court relied on Section 6.6(a) of the Operating Agreement which states that P&M "shall be liable to CLC and MCLC for actions or omissions involving actual fraud, gross negligence or willful misconduct or from which [P&M] derived improper personal benefit." Relying, then, upon this section along with others of the Operating Agreement, the court held that P&M breached the Operating Agreement when it executed the purchase of the $155 million forward swap, because although it was a business decision, P&M breached its fiduciary duties of care, loyalty, and candor because the decision was very risky, there was no loan in place to connect to the forward swap, and the decision was ultimately for the individual benefit of the Poags and P&M. On this final point, the court further acknowledged that this action of the Poags and P&M amounted to willful misconduct. The court held that P&M again breached its fiduciary duties under the Operating Agreement regarding the Mezzanine Loan transaction when it granted JPMIM substantial authority over the management of CLC and the Shops. Specifically, the Mezzanine Loan Agreement required JPMIM's consent to, among other things: (i) make material alterations to the Shops; (ii) assign leases at the Shops; (iii) change the business of the Shops; and (iv) refinance or modify the Construction Loan. Further, Poag & McEwen's failure to disclose the details of the true purpose of the loan, its effect on CLC, and the corresponding need for McWhinney to agree to amend the Operating Agreement to acquire the Mezzanine Loan clearly violated the fiduciary duties of fair dealing and candor and also amounted to willful misconduct and fraud. Further, the court held that P&M breached the Operating Agreement in connection with its attempts to challenge the property taxes at the Shops without McWhinney's prior approval as well as the improper distributions P&M made from CLC on a monthly basis to make interest payments on the Mezzanine Loan. Regarding the tax issue, the court held that P&M made fraudulent representations and breached the duty of food faith and fair dealing when it failed to timely and properly inform McWhinney about its efforts to appeal the tax valuation, and then failed to withdraw the appeals once McWhinney learned of them. Regarding the improper distributions, the court held that P&M's actions were willful misconduct and a violation of all fiduciary duties as its acts were solely for personal gain and not in the best interest of CLC. Finally, the court held that P&M breached the Operating Agreement when it failed to provide a proper permanent loan notice prior to the maturity date of the Construction

	Loan and failed to provide a permanent loan impasse Notice – the requirements of both were clearly outlined in the Operating Agreement. The court also evaluated whether PMLC and P&M were alter egos. Applying Delaware law, the court said plaintiffs must prove that (1) P&M was a mere instrumentality of PMLC and (2) P&M was formed or pervasively used by PMLC to commit fraud or something like fraud. Regarding the first prong, the court continued by stating that multiple factors are required, some of which include: (i) the subsidiary is adequately capitalized; (ii) it is solvent; (iii) corporate formalities were observed; (iv) a controlling shareholder siphoned company funds; and (v) in general, the subsidiary simply functioned as a façade. The second prong requires proof of fraud or fraud-like conduct. The court agreed with the state court that the plaintiffs did not prove by a preponderance of the evidence any of the detailed factors, and as such, P&M and PMLC were not alter egos of each other.
Mountain Courtyard Suites v. Wysong, 452 F. Supp. 3d 1275 (D. Utah 2020)	
Issue:	(1) Whether the potential buyer of commercial property breached: (i) the express terms of the purchase and sale agreement; and (ii) the implied covenant of good faith and fair dealing; (2) Whether the claims brought by the potential seller of commercial property breached were barred by its failure to release the earnest money deposit prior to filing suit.
Facts:	In February 2018, Jeffery Wysong ("Wysong") submitted an offer to purchase a commercial property from Mountain Courtyard Suites ("MCS") and deposited $100,000 as earnest money into an escrow account in connection with the offer; the parties then executed a purchase agreement (the "Agreement"). The Agreement stated that the purchase price was $5,950,000, and specified that this price would be paid with: $100,000 earnest money deposit; $3,00,000 from a new loan; and $2,850,000 cash at settlement. The Agreement also stated that Wysong's obligation to purchase under the Agreement was conditioned on, among other things, Wyson's approval of (i) a physical condition inspection of the property; and (ii) the terms and conditions of any mortgage financing referenced in the relevant section of the Agreement. An addendum to the Agreement provided that Wysong's offer was subject to him obtaining acceptable financing on or before May 1, 2018 and that he had to remove all contingencies, including the finance contingency in writing, or the Agreement would be null and void. An additional section of the Agreement, Section 16, outlined the seller's remedies if the buyer defaulted: (i) the seller could retain the earnest money deposit as liquidated damages; or (ii) the seller could return the deposit and sue buyer to specifically enforce the Agreement or to pursue other remedies available at law. This Section also outlined buyer's remedies if the seller defaulted. On April 2, 2018, Wysong waived the physical-condition contingency in exchange for a $250,000 reduction in the purchase price. On April 27, 2018, the parties

	extended the finance contingency by 30 days, made $10,000 of the earnest money deposit nonrefundable, and released this portion of the deposit to MCS. On May 30, 2018, Wysong purported to issue a signed addendum to the Agreement cancelling the contract due to his inability to obtain financing. On May 31, a broker involved in the transaction sent an email to another broker, along with the escrow agent, stating that the property was in such disrepair that Wysong canceled the contract. Four months later, MCS sold the property to another buyer for $5,100,000. It then initiated this action claiming that Wysong breached the express terms of the Agreement along with the implied covenant of good faith and fair dealing and sought liquidated damages of $90,000, general and consequential damages in an amount to be determined at trial, along with attorney fees and other relief the court may grant. Specifically, MCS alleged Wysong breached the express terms of the Agreement by (i) failing to apply for a loan in the amount of $3,000,000; and (ii) terminating the Agreement based on the property's physical condition despite waiving the physical-condition contingency in exchange for the reduction in the purchase price. MCS moved for summary judgment and made clear it sought "general damages" of $600,000 – the difference between the purchase price that it would have received from Wysong and the purchase price it received from the other buyer. MCS did not release its interest in the earnest money deposit before bringing suit against Wysong. Wysong similarly moved for summary judgment.
Holding:	The U.S. District Court for the District of Utah held that Wysong had broad discretion in seeking financing and thus did not appear to breach the Agreement when he sought financing in amounts greater than $3,000,000 as the Agreement contained no such requirement or forbade Wysong from applying for a loan in a higher amount. Instead, the court determined that Wysong had the right to cancel, in his sole discretion, the Agreement if he could not secure suitable financing, as this act was part of his due diligence. Wysong provided testimony that his approach to seeking financing was reasonable and complied with industry standards, which the court determined created a genuine issue of material fact sufficient to foreclose summary judgment for MSC. The court then determined that MCS's argument – that Wysong allegedly breached the contract by canceling based on the physical condition of the property – was misplaced as the only supporting evidence MCS introduced was the email that one broker involved with the transaction sent to another broker and the escrow agent. Instead, the court found that Wysong's exclusive broker (and agent) most likely provided proper written notice to the escrow agent that Wysong cancelled the Agreement due to an inability to obtain financing. Additionally, and more importantly, the court determined that Wysong provided an unambiguous written notice of cancellation, in accordance with the Agreement, when he issued the signed addendum stating he was cancelling due to his inability to obtain financing. Therefore, the court denied MSC's motion for summary judgment on this issue. Turning to Wyson's arguments, the court agreed that MCS's failure to release the earnest money deposit constituted an election to claim the deposit as liquidated damages pursuant to Section 16 of the Agreement. Further, as MSC failed to release the earnest money prior to filing suit, it was barred, in accordance with Utah law,

	from seeking "general damages" or any remedy other than the earnest money, even though the earnest money was held by an escrow agent. Additionally, MCS could not unilaterally retain the deposit as liquidated damages absent a judicial order establishing this right. However, the court denied Wysong's motion for summary judgment insofar that MSC's claims were viable concerning its right to the earnest money deposit. Finally, the court rejected MSC's arguments regarding Wysong's alleged breach of the covenant of good faith and fair dealing by determining that, pursuant to Utah law, MSC could not obtain additional remedies under the Agreement, as the remedy for both an express breach of contract and a breach of the implied covenant are the same. There were no special circumstances involved, such as insurance contracts, and the breach involved in this dispute was properly contemplated by the Agreement.
Rsrvs. Unlimited, LLC v. Newtek Small Bus. Fin., LLC, No. CV 19-1061 KG/KK, 2020 WL 6158135 (D. N.M. Oct. 21, 2020)	
Issue:	(1) Whether a seller misrepresented terms of a small business loan agreement, executed for the purchase of commercial real estate, to buyer; (2) Whether seller breached the terms of the purchase and sale agreement.
Facts:	In November 2018, Plaintiff Reservations Unlimited, LLC ("Reservations") secured a Small Business Administration ("SBA") guaranteed loan through Defendant Newtek Small Business Finance, LLC ("Newtek") to finance the purchase of a commercial property in Red River, New Mexico. The SBA Authorization (the "Authorization"), which constituted SBA's approval of the loan, created a contract between Newtek and SBA; Reservations signed a certification acknowledging this contractual arrangement and specifically stating that the Authorization created no third-party rights or benefits to it as borrower. The loan was allegedly contingent on obtaining a minimum appraised value of $380,000 or more for the property. The purchase agreement provided that, if the buyer or buyer's lender obtained an appraisal less than the sales price in the purchase agreement, the buyer and seller could amend the sales price to reflect the appraisal, or the buyer could elect to terminate the agreement and then receive a refund of the earnest money. When Newtek informed Reservations it approved Reservations's application for an SBA loan, it sent a letter whereby Newtek specified the loan was subject to the terms and conditions set forth therein, one of which was the "[s]atisfactory review and approval of an appraisal of the property [] with a fair market value of $380,000." In December 2018, Reservations contacted Newtek and requested a copy of the appraisal; Newtek, through one of its agents, responded that it would release the appraisal after the sale closed, but indicated that if the appraisal was lower than $380,000, it would allegedly inform Reservations. Newtek's appraisal management firm, Asset Valuation Services, LLC, appraised the fair-market value of the property at $220,000. Newtek never informed Reservations of the $160,000 difference in value, and the sale closed shortly thereafter. Reservations properly and timely

	initiated suit alleging negligent misrepresentation, negligence, fraudulent/intentional misrepresentation, and breach of contract.
Holding:	The U.S. District Court for the District of New Mexico concluded that Newtek owed no legal duty to Reservations, and dismissed Reservations's claims for negligent misrepresentation, negligence, and fraudulent/intentional misrepresentation. Under New Mexico law, a defendant must owe a legal duty to be liable under such claims, and the existence and scope of a defendant's duty of care is a question of law. There is no legal duty imposed, generally, in an ordinary lender-borrower relationship. Rather, "special circumstances" (i.e. a lender undertaking activities outside the normal course of business with a borrower to establish a joint venture), or the existence of a fiduciary or confidential relationship, must exist to provide for such a duty. The court held that Reservations's failed to allege any facts suggesting Newtek owed Reservations a duty of care, and despite Reservations's argument that Newtek had made an explicit promise in its contract to disclose the appraised value of the property, its argument ignored the legal precedent that the duty giving rise to tort claims, such as misrepresentation and negligence, must exist independent of any contractual obligations. In its breach of contract claim, Reservations alleged that the Authorization created a binding contract between it and Newtek. The court, however, determined that the plain language of the Authorization, which expressly stated that the agreement existed between Newtek and SBA and created no third party rights or benefits to Reservations, coupled with Reservations's signing of the certification acknowledging that it received no third party rights or benefits from the Authorization, were fatal to this argument. Further, despite New Mexico courts' abandonment of the "four-corners" standard for contract interpretation and willingness to hear evidence regarding the circumstances surrounding the making of the contract, Reservations did not allege facts demonstrating an alternative interpretation of the relevant clauses in the Authorization and certification or allege any ambiguity existed. As such, the court held the clauses were unambiguous and were conclusive that the Authorization did not serve as a contract between Reservations and Newtek. Reservations then alleged that the letter Newtek sent following the approval of Reservations's application for an SBA loan created a contract in which Newtek needed to obtain an appraisal for the property with a value of $380,000. The court, applying New York law due to New Mexico's choice-of-law rules regarding contracts, determined that the letter did create a promise, and not a condition, as the letter failed to include any conditional language. As New York courts interpret "doubtful" contractual language as a promise rather than a condition, the court held that it was plausible Reservations could prove the appraisal provision in the letter was a contractual promise. Reservations also attempted to subject Newtek's agent, who allegedly indicated that Newtek would inform Reservations of the value of the property if the appraisal was lower than $380,000, to personal jurisdiction. The court concluded that Reservations failed to establish either general or specific jurisdiction over the agent, and continued by holding that even if it had, New Mexico recognizes the fiduciary shield doctrine, which provides that a corporation's contracts generally cannot be attributed to

	employees of the corporation when the individuals' acts were carried out solely in their representative capacities. As Reservations failed to assert that Newtek's agent had any connection to New Mexico outside of her work with Newtek, the court dismissed its claims against her without prejudice.
Russell v. Treanor Invs. L.L.C., 466 P.3d 481 (Kan. 2020)	
Issue:	(1) Whether the language of an amended operation and easement agreement ("OEA"), which governs two adjacent properties, gives the developer of a condominium on one of the properties authority to amend the OEA without the consent of the condo owners; (2) Whether a proposed change to the OEA that allows for a doubled building footprint and new type of commercial use materially alters the character of the properties.
Facts:	Two owners of adjacent properties entered into an OEA that in part, limited building footprint and prohibited grocery store use. The OEA stated that it "may be amended by, and only by, a written agreement signed by all of the then current Owners." The OEA also accounted for future subdivisions, stating, "if any such Owner shall transfer, convey or ground lease its interest in any portion of a Parcel in such a manner as to create multiple Owners of a Parcel, then such multiple Owners shall designate one of their number [to] act on behalf of all such Owners in the performance of the provisions of this OEA." One of owners subsequently sold its property to 8th & New Hampshire, L.L.C. ("Developer"). Developer executed a First Amendment to the OEA with the other owner allowing for the construction of condos and retail space. The other owner later sold to Treanor Investments, L.L.C., which wanted to constructed a building that would exceed the maximum footprint and contain a grocery store. All parties agreed that the proposed building would require an amendment to the OEA. Brian Russell, a condo unit owner, ("Condo Owner") claimed condo owner consent was needed to amend the OEA. Developer claimed that it was the "responsible Owner" and thus authorized to consent to amendments on the Condo Owners' behalf. The district court ruled for Developer, and the court of appeals affirmed.
Holding:	The Supreme Court concluded that the OEA's plain language unambiguously provided that—in the event of division of property—multiple owners would designate a single owner to act on behalf of the others. Thus, Developer was authorized to amend the OEA. The Supreme Court also concluded that the change would not materially alter the properties' character. Doubling the size of a preexisting building and engaging in a previously prohibited commercial use would not alter the fundamental nature of the development. The supreme court expressed some frustration that the district court analysis focused solely on restatements, rather than Kansas law. Regardless, Condo Owner did not provide enough evidence to demonstrate material change.

<table>
<tr><td colspan="2">Safeway Stores 46, Inc. v. Wy Plaza, L.C., No. 19-CV-143-R, 2020 WL 6688606 (D. Wy. Oct. 20, 2020)</td></tr>
<tr><td>Issues:</td><td>(1) Whether the doctrine of laches barred lessee’s claim to recover lease payments it mistakenly paid to defendant-lessor over a period of 18 years;

(2) Whether the cause of action associated with annual “percentage rent” payments accrued annually, or at the time the lease was signed, and whether it was therefore barred by the statute of limitations;

(3) Whether the lessor was in breach of contract by not deducting certain payments from lessee’s rent after lessee constructed an addition to their building;

(4) Whether the lessor violated the covenant of good faith and fair dealing by failing to inform the lessee of its right to deduct certain rent payments; and

(5) Whether lessee’s claims in equity are barred by the existence of a valid contract.</td></tr>
<tr><td>Facts:</td><td>Safeway Stores (“Lessee”) and WY Plaza (“Lessor”)’s predecessor-in-interest executed a lease (the “Lease”) in 1980. Lessee subsequently operated a grocery store at that location for over four decades.

Per the terms of the Lease, the lessee paid a monthly fixed minimum rent and an annual “percentage rent” payment derived from sale proceeds exceeding the minimum rent in a calendar year. The Lease also permitted the lessee to construct an addition to their retail space. Following the completion of such an addition, the Lease permitted Lessee to deduct from “percentage rent” an amount equal to the balance of an “amortization account.” The “amortization account” was to be created and to include the balance of the addition, with interest to be accrued. The lease also provided that following construction of an addition, the parties needed to execute a Lease Modification Agreement setting forth terms that included the cost of the addition and the expansion of the leased premises, as well as a new minimum monthly rent.

Lessee completed an addition in May 2001, and Lessor purchased the shopping center six months later. In March 2002, Lessor and Lessee (together, the “Parties”) executed a Lease Modification Agreement in accordance with the Lease. In February 2010, Lessee sent Lessor a letter claiming it had mistakenly overpaid rent from 2005 to 2008 by failing to deduct the annual minimum rent from “percentage rent” but did not claim the overpayment was associated with the “amortization account” or the property expansion. The Parties executed an estoppel certificate under which Lessee received an offset against the percentage rent from 2009 to 2012.settled a year later through rent offsets over the following four years.

In November 2018, Lessee sent Lessor another letter seeking recovery of mistaken rental overpayments exceeding $1.1 million and claimed that it had failed to deduct the amortized balance of the addition costs from 2005 to 2017. Lessee blamed the overpayment on an accounting department error and a paralegal’s improper completion of an internal form. Lessor denied Lessee’s claims, and asserted the 2010 estoppel certificate had resolved Lessee’s percentage rent claims moving forward. In</td></tr>
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	May 2019, Lessee paid rent under protest and reserved its rights and remedies. In July 2019, Lessee sued Lessor for breach of contract, among other causes of action.
Holdings:	The United States District Court for the District of Wyoming held that the doctrine of laches barred Lessee's claims. The court determined that for 17 years, Lessee failed to exercise its rights under the Lease, which constituted an inexcusable delay. The court noted that Lessee, a sophisticated entity, extended the Lease numerous times during this 17-year period and was previously involved in a Lease dispute with Lessor that settled. It concluded that Lessee's failure to fully read the Lease and address this issue previously was inexcusable. Further, the court determined that Lessor would be prejudiced due to the difficulty it would face procuring witnesses and evidence as well as the significant financial harm it would incur. The court then determined the Lease was an installment contract as it: (1) provided for the payment of a fixed minimum rent each month; and (2) required the annual payment of "percentage rent," which was calculated based on sales proceeds in each calendar year of the lease term. As Lessee always paid rent both monthly and annually, the cause of action accrued and the statute of limitations ran from the date of breach for each rent payment. As such, the court held the statute of limitations did not bar Lessee's claims arising post-2012. Although the claims were not barred by the statute of limitations, the court held that Lessor did not breach the contract because the Lessor did not have an affirmative duty to deduct the "amortization account" from the "percentage rent." Rather, the Lease merely allowed the Lessee to withhold "percentage rent." Further, the court held that Lessor did not breach the covenant of good faith and fair dealing because the contract did not obligate Lessor to deduct the "amortization account" from "percentage rent" without a request by Lessee. The court added that it would not imply a duty not contracted between two sophisticated parties. (5) Finally, the court rejected Lessee's claims for "money had and received" and "money paid by mistake" as equitable claims based on unjust enrichment and restitution. The court noted that these equitable quasi-contract remedies only exist where no valid contract is found to exist; under the circumstances of this lease dispute, the Lease was a valid contract between two sophisticated entities.
ELEVENTH CIRCUIT	
2800 Chamblee Diamond, LLC v. Fitsum, No. A21A0348, 2021 WL 2100402 (Ga. Ct. App. May 25, 2021)	
Issue:	(1) Whether the stipulation in the lease prohibiting competition is ambiguous and unenforceable; and (2) Whether tenant's offerings were within the lease's permitted use.
Facts:	Yohannes Fitsum and AJTJ Investment, LLC ("Tenant") entered into a lease with a landlord to operate a coin laundry in the landlord's retail center. The lease contained a stipulation that prohibited Tenant from attempting to sell any product or services that would be in direct competition with the other tenants in the retail center. Once

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	operating the coin laundry, Tenant immediately began selling the same snacks that the prior tenant (also a coin laundry) had offered. Later, Tenant began selling coin operated amusement machines and lottery tickets. In response to the sale of coin operated amusement machines and lottery tickets, the landlord demanded that Tenant cease and desist from selling such products. A month later, the landlord sold the retail center to 2800 Chamblee Diamond, LLC ("2800 Chamblee"), who then exercised its right to terminate the lease and retake possession of the coin laundry because Tenant had failed to cure the default. Tenant filed suit for declaratory relief and injunctive relief, arguing that the stipulation is void and unenforceable because it lacks a geographic area or territory as required by Georgia law and that Tenant's use of the premises is permitted under the lease. The trial court granted Tenant's request for declaratory and injunctive relief, finding that by prohibiting Tenant's competition with other tenants "in the retail center," the stipulation is ambiguous because "in the retail center" could identify the tenants at issue or provide a geographical restriction. The trial court also found that Tenant's sale of coin operated amusement machines and lottery tickets were permitted within the use of coin laundry. 2800 Chamblee appealed the trial court's holdings.
Holding:	The appellate court found that the stipulation was not ambiguous and that it provided a geographic restriction by limiting it to within the retail center. The appellate court read the lease as a whole and noted numerous references to the shopping center where the coin laundry is located. Therefore, the only reasonable interpretation of the stipulation is that it prohibits competition with tenants of the shopping center in the geographical area of the shopping center. The appellate court affirmed in part the trial court's ruling that Tenant's offerings were within the lease's permitted use. Although the lease provides that the property may be used for coin laundry and for no other purpose, the initial landlord knew of and approved, and therefore waived, Tenant's sale of the same snacks, drinks, and other items that were sold by the prior tenant. This waiver was assumed by 2800 Chamblee. However, the prior landlord and Tenant agreed that Tenant would not expand the items it sold. Therefore, the appellate court found that Tenant's sale of coin operated amusement machines and lottery tickets was outside the permitted use of the lease.
Acquisition Tr. Co., LLC v. Laurel Pinebrook, LLC, 301 So.3d 397 (Fla. Dist. Ct. App. 2020)	
Issue:	(1) Whether the tenant appropriately exercised its right of first refusal ("ROFR"); (2) Whether a prospective buyer has standing to challenge the performance of a purchase contract resulting from the tenant's exercise of ROFR.
Facts:	Laurel Pinebrook, LLC ("Landlord") owned a commercial shopping center. Its lease with Publix Super Markets, Inc. ("Tenant") gave Publix a ROFR. Landlord and Acquisitions Trust Company, LLC ("Prospective Buyer") entered into negotiations, and Prospective Buyer gave Landlord a nonbinding letter of intent. Landlord notified

	Tenant of the offer and executed a purchase contract with Prospective Buyer, subject to Tenant's ROFR. Tenant exercised its ROFR "upon the same business terms and conditions contained in the letter of intent" from Prospective Buyer, and Landlord terminated the deal with Prospective Buyer. Tenant and Landlord negotiated further. Tenant ultimately purchased the property for the same price as Prospective Buyer but with different terms regarding due diligence, closing, representations and warranties, and brokerage commissions. Prospective Buyer sued Landlord and Tenant, arguing Tenant did not properly exercise the ROFR as the terms were different. The circuit court ruled for Landlord and Tenant, holding that Prospective Buyer had no standing to challenge the contract between Landlord and Tenant because Prospective Buyer's rights under its contract with Landlord had terminated.
Holding:	The court found that Tenant appropriately exercised its ROFR, as Tenant did not attempt to modify any terms when first notifying Landlord of its decision to exercise the ROFR. The later changes were part of a mutual exchange, in which both parties agreed to change contract terms *after* the ROFR had been exercised. In fact, a provision in both contracts specifically states that parties may modify terms. The court also ruled that Prospective Buyer did not have standing to challenge the performance of the contract between Landlord and Tenant. Prospective Buyer's rights to the property were extinguished.
Alterman Properties LLC v. Sunshine Plaza Associates Ltd., 856 S.E.2d 91 (Ga. Ct. App. 2021)	
Issue:	(1) Whether the easement requires retail owners to pay for maintenance of security, landscaping, and electricity for parking lot lights and a pylon sign; (2) Whether the shopping center owner's affidavit and summary of expenses is sufficient to prove damages resulting from non-payment of maintenance expenses; and (3) Whether the affidavit and exhibit from grocery store owner is admissible to prove a smaller ownership percentage.
Facts:	Sunshine Plaza Associates, LTD ("Sunshine") is the owner of a shopping center. Alterman Properties, LLC ("Grocery") owns a grocery store within Sunshine's shopping center. Sunshine retained ownership of the common areas of the shopping center, including parking and entrances to the center. The parties' predecessors executed an easement that required Grocery and other retail owners in the shopping center to pay their share of common area maintenance expenses for "lighting, paving, policing, cleaning, and necessary marking of parking areas in proportion to the square footage owned by each of the owners." Alleging that Grocery had not paid such maintenance expenses from 2014 to 2018, Sunshine filed suit against Grocery. The trial court granted partial summary judgment to Sunshine and Grocery appeals, contending that (1) the easement does not require payment of "security,"

	"landscaping," and electricity for parking lot lights and a pylon sign, (2) Sunshine failed to prove damages because it did not provide actual invoices for the maintenance expenses, and (3) Grocery's affidavit and exhibit should have been admitted because it created material issues of fact regarding Grocery's ownership interest.
Holding:	The appellate court concluded that the trial court erred in finding that Grocery owed landscaping expenses because landscaping is not explicitly listed as a required expense under the easement and does not obviously fall within the required payments of "cleaning" or "paving." The appellate court upheld the trial court's findings that Grocery must pay for its share of (i) security because security is synonymous with policing, which is explicitly listed in the easement, and (ii) electricity for illuminating the pylon sign because "lighting" is explicitly listed as a required expense under the easement. The appellate court also concluded that Sunshine adequately proved its damages by submitting an authenticated summary of its maintenance expenses. Furthermore, the appellate court found that Sunshine was not required to provide the actual invoices of its expenses. The appellate court also concluded that Grocery's affidavit and exhibit demonstrating that Grocery's ownership interest was less than 25% was inadmissible parole evidence offered to vary the terms of a written easement. Because the affidavit and exhibit contradicted the express written terms of the easement, which is clear on its face, and given that Grocery has no personal knowledge as to the formation of the easement, there is no need to look outside the language of the easement in order to interpret the easement.
Fla. Holding 4800, LLC v. Lauderhill Mall Inv., LLC, No. 4D20-174, 2021 WL 1310861 (Fla. Dist. Ct. App. April 7, 2021)	
Issue:	(1) Whether an "as is" clause precludes damages claims; and (2) Whether the doctrine of *caveat emptor* precludes damages claims.
Facts:	Plaintiff ("Buyer") purchased a commercial building from defendant ("Seller"). The parties entered into a Purchase and Sale Agreement ("PSA") which contained an "as is" clause explicitly disclaiming any representations or warranties as to the condition of the property and stated that "Buyer represents that it is purchasing the Property in its "As Is" condition and based solely on Buyer's own inspection, investigation and evaluation[.]" The PSA also allowed Buyer to inspect the property and cancel the contract upon dissatisfaction. Buyer then retained an engineer to inspect the property, and still bought the property. After the sale, Buyer realized the property was growing mold, had a roof leak and HVAC failures. Buyer then sued Seller for (1) breach of implied covenant of good faith and fair dealing; (2) fraud in the inducement; (3) negligent misrepresentation; (4) negligence; and (5) unjust enrichment. The trial court granted summary judgment for Seller and Buyer appealed.

Holding:	The Court first concluded that even if oral representations or warranties were made regarding the physical condition of the property in negotiating the PSA, the express terms of the PSA, and specifically the "as is" clause, contradict and negate Buyer's claims, including the fraud claim. This is because "a party cannot recover in fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract." The court further concluded that *caveat emptor* – the buyer's duty to examine and judge value and condition of property - precluded Buyer's claims, and even though Buyer's manager submitted an affidavit stating that Seller actively concealed defects, the circumstances did not fall within one of the three exceptions to *caveat emptor*, which are (1) where some artifice or trick has been employed to prevent the purchaser from making independent inquiry; (2) where the other party does not have equal opportunity to become apprised of the fact; and (3) where a party undertakes to disclose facts and fails to disclose the whole truth. Because proper inspection would have revealed the defects, and because Seller did not impede or prevent inspection, Buyer was precluded from claiming damages by the doctrine of *caveat emptor* and was unable to establish an exception.
FM3 Liquors, Inc. v. Bien-Aime, *No. 3D20-1660, 2021 WL 1395217 (Fla. Dist. Ct. App. Apr. 14, 2021)*	
Issue:	(1) Whether a lease provision provided the tenant with an option to purchase the property; (2) Whether the tenant's letter purporting to exercise the purchase option is sufficiently definite to be enforceable.
Facts:	FM3 Liquors, Inc. and its principal, Franklin Marie ("Tenant"), entered into a lease of a commercial property with Stanley Bien-Aime ("Landlord"). In a section entitled "**LEASE PAYMENTS**," the lease included an "option to purchase property at the end of first year lease for $320,000." In a section entitled "**RENEWAL TERMS**," the lease stated: "Tenant will have first option to purchase property during lease term. Tenant will have 30 days to exercise its option with written notice to landlord." Tenant sent Landlord a letter that stated, in its entirety: "Pursuant to the paragraph titled **LEASE PAYMENTS** on page one of the Lease, my client, Franklin Marie, hereby exercises his option to purchase the Premises as defined therein for its 'market value or CPI.'" The timing of the letter is unclear from the face of the Court's opinion. Landlord brought an action against Tenant for immediate possession of the property after Tenant had been occupying the property for a decade pursuant to the lease. Tenant argued he was entitled to purchase the property. The lower court awarded Landlord immediate possession upon expiration of the lease term.
Holding:	The court ruled that the lease allows Tenant a one-time option to purchase the property at the end of the first year of the lease, as well as a right of first refusal to purchase the property if there is another potential buyer. The court also found that the

	letter purporting to exercise the option was too vague to be enforceable. Thus, the lower court properly awarded Landlord immediate possession of the property.
In re: 929485 Fla., Inc., No. 8:19-bk-09424-CED, 2021 WL 1556133 (Bankr. M.D. Fla. April 20, 2021)	
Issue:	Whether a party to an executory contract, where the only remedy contemplated by the contract was specific performance, is entitled to money damages where the specific performance is rendered impossible.
Facts:	929485 Florida Inc. ("Debtor") owned commercial property occupied by two restaurants (the "Property"). In June 2015, Debtor and DN Equities ("Purchaser") entered into a contract whereby Purchaser would purchase the Property (the "Contract"). Purchaser paid $10,000 in earnest money, which was held in escrow. As a condition to closing, Purchaser's obligation to purchase the Property did not arise until the property was rezoned so that Purchaser could construct a 120-room hotel with first floor retail space and a parking garage. If the property was not rezoned or the rezoning was not to Purchaser's satisfaction in its sole discretion, Purchaser could cancel the Contract. Essentially, Purchaser was given unlimited discretion to close or cancel the Contract, whereas upon the rezoning and Purchaser's satisfaction, Debtor would be obligated to sell. In May 2016, Debtor, Purchaser and Sunset Waypoint, LLC ("Sunset") entered into an assignment contract whereby Purchaser assigned its rights in the Contract to Sunset. Soon thereafter, in September 2016, the City of St. Pete Beach (where the Property is located) adopted a resolution that created a moratorium on commercial development. By October 2019, the Contract had still not closed, and Debtor filed for Chapter 11 bankruptcy, and thereafter filed a motion to reject the Contract. Sunset consented to the rejection but then filed a claim for rejection damages in lieu of specific performance. Debtor filed its bankruptcy plan with the court, which included selling the property to one of the restaurant owners. Debtor used some of the sale proceeds to satisfy its mortgage debt.
Holding:	The court held that Sunset was not entitled to damages in lieu of specific performance under Bankruptcy Code § 502(c)(2) or Florida law because (1) Sunset's sole remedy was specific performance, (2) Sunset did not establish its right to specific performance because it was not a ready, willing and able buyer, (3) even if Sunset established its right to specific performance, Sunset does not have a "right to payment", and (4) Sunset is not entitled to the "benefit of the bargain" damages. The court first found that the Contract, which called for specific performance as the remedy for breach of contract because damages would be impossible to calculate, implicitly waived claims for monetary damages. The court therefore found that Sunset was limited to a claim for specific performance. The court next found that Sunset was not entitled to specific performance because it was not a ready, willing and able buyer. To be a ready, willing and able buyer under Florida law, one must show that it has either (1) the necessary cash in hand, (2) personal possession of assets and a credit rating that shows a reasonable certainty to

	command the requisite funds, or (3) a binding commitment by a financially able third party. Sunset was an LLC organized ten months after it was assigned the contract, operated no other business and had no independent funds. Plus, there was no indication that Sunset would waive the condition of rezoning in the Contract. Therefore, the record did not reflect that Sunset was a ready, willing and able purchaser entitled to specific performance. The court next found that even if Sunset was entitled to specific performance, it did not have a right to payment. To establish a right to payment in case of a breach of property sale contract, the non-breaching party must prove that the breaching seller obtained excess sales proceeds by way of its breach. Here, Debtor sold the Property for $100,000 more than the original purchase price contemplated by the Contract four years prior. The court found that this amount was not a significant enough profit to qualify for excess sales proceeds entitling Sunset to payment. Finally, Sunset was not entitled to loss of bargain damages, because such a claim must be predicated on bad faith breach, of which none was claimed here.
In re Lindsey, No. 20-13504, 2021 WL 1140661 (11th Cir. Mar. 25, 2021)	
Issue:	Whether the reformation of a warranty deed for sale of commercial property was the appropriate remedy when (1) the warranty deed didn't clearly reflect an agreement to transfer seller's entire interest in the property, and (2) seller was mistakenly omitted from the warranty deed in his individual capacity?
Facts:	In 2015, James Lindsey filed a voluntary petition for Chapter 13 bankruptcy relief. In his schedule of assets, Lindsey listed a "fee simple" interest in two parcels of real property, consisting of a commercial multi-tenant building and an adjacent vacant lot. The commercial building was subject to a mortgage held by Ameris Bank and on February 16, 2017, Ameris Bank filed an action in state court to foreclose its mortgage on the commercial building. While the state foreclosure case was pending, Lindsey entered into a purchase agreement with Duckworth Development. The parties to the agreement were Duckworth Development (the buyer) and "Kracor South, Inc. et al, a Florida Corporation" (the seller). The contract provided that the "[s]eller has the legal capacity to and will convey marketable title to the [p]roperty by statutory warranty deed ... free of liens, easements and encumbrances of record or known to [s]eller[.]" In the signature line for the seller, Lindsey printed his name followed by "Kracor-South" and listed his title as "Pres. James K. Lindsey." The contract was signed on April 6, 2017. On June 27, 2017, Lindsey filed with the bankruptcy court a motion to sell real property, seeking the bankruptcy court's permission to sell the parcels according to the terms of the contract "between [him]" and Duckworth Development. On July 25, 2017, the bankruptcy court granted Lindsey's motion and authorized him to sell the parcels according to the contract's terms. The bankruptcy court ordered that the net proceeds from the sale had to be sent to Lindsey's Chapter 13 trustee.

	The closing occurred on July 7, 2017, and a warranty deed was executed between Kracor and Duckworth Development. After the sale, Lindsey didn't communicate with Duckworth for six months. Duckworth Development spent about $500,000 improving the parcels and leased portions of the commercial building to tenants. Lindsey didn't contribute to these improvements. On January 23, 2018, a title insurance agency prepared a report stating that the owners of the parcels were Duckworth Development and Lindsey. On February 7, 2018, Lindsey emailed Duckworth stating that Lindsey was the "50% owner" of the parcels. Lindsey wrote that he didn't approve any of the ongoing improvements at the property, and requested a halt to construction until an agreement between them was finalized in writing. On April 11, 2018, Duckworth Development brought an adversary proceeding against Lindsey and Kracor in Lindsey's ongoing Chapter 13 bankruptcy case, seeking reformation of the warranty deed and to quiet title. Duckworth Development alleged that the warranty deed mistakenly did not reflect the parties' agreement that Lindsey would sell his entire interest in the parcels. The bankruptcy court held that reformation of the warranty deed was appropriate, reasoning that (1) the parties had intended for Duckworth Development to purchase the parcels in fee simple and the warranty deed didn't reflect this agreement, and (2) the omission of Lindsey in his individual capacity from the warranty deed was a mistake caused by Duckworth Development's attorneys, and this mistake wasn't gross negligence. The bankruptcy court further held that Duckworth established it held valid title to the parcels. Thus, the bankruptcy court entered final judgment in Duckworth's favor. Lindsey moved for rehearing and the bankruptcy court denied its motion. Lindsey and Kracor appealed the bankruptcy court's judgment to the district court. The district court affirmed. Lindsey and Kracor timely sought appellate review of the bankruptcy court's judgment.
Holding:	The Court affirmed the district court's order of reformation of the warranty deed, finding that the parties intended for Duckworth Development to buy Lindsey's entire interest in the parcels. The court further found that the parties made a mutual mistake because the warranty deed omitted Lindsey in his individual capacity, contrary to the parties' intent for Lindsey to sell his entire interest in the parcels to Duckworth Development. Lastly, the court found that Duckworth Development's attorneys did not act with gross negligence in the mistake in the warranty deed.
In re Melbourne Beach, LLC, No. 6:17-bk-07975-KSJ, 2020 WL 5746816 (Bankr. M.D. Fla. July 27, 2020)	
Issue:	(1) Whether a member of the debtor entity who provided management services to the debtor is a "professional" under Bankruptcy Code Section 327(a); (2) Whether the member is an interested insider and thus precluded from receiving payment for his service.
Facts:	Brian West ("Manager") is a founding member of Melbourne Beach, LLC ("Debtor"), which owns and operates a shopping center. After extensive litigation

	regarding the ownership interests and management of Debtor, Manager filed for Chapter 11 bankruptcy in 2017. In a 2003 Management Agreement, and later (after the bankruptcy filing) in a 2019 Trustee Management Agreement, Manager was hired to provide property management services for Debtor. The agreements entitled Manager to a percentage of rental income as a management fee. Pirogee Investments, LLC and Yellow Funding Corp. ("Disputed Owners") argued that Manager is a "professional" under Bankruptcy Code Section 327, and thus cannot receive payment as an administrative expense because he is not "disinterested."
Holding:	The court found that Manager was not a professional person under Section 327 and was entitled to payment. Manager provided Debtor with traditional property management services both before and during the bankruptcy filing. There is no evidence of self-dealing. Manager did not have discretion or autonomy in the administration of the estate.
JF & LN, LLC v. Royal Oldsmobile-GMC Trucks Co., 292 So.3d 500 (Fla. Dist. Ct. App. 2020)	
Issue:	(1) Whether language in a lease requiring landlord consent for assignment precludes unapproved assignment of a separate but related purchase option; (2) Whether a material breach of an underlying lease justifies a landlord terminating the associated purchase option.
Facts:	Royal Oldsmobile-GMC Trucks Co. ("Royal") owned commercial property, and in 2010 entered into a lease whereby The Best Restaurant on 41, LLC ("Best Restaurant") would be the tenant for a five-year term with three options to extend the lease for five-year terms. Concurrently, Royal and Best Restaurant executed a purchase option rider (the "Option"), whereby on notice to Royal, Best Restaurant could purchase the property. The lease, but not the Option, required consent of the landlord to assign the contract. Nonetheless, without prior approval, Best Restaurant assigned both its interest in the lease and the Option to JF & LN, LLC ("JFLN"), although JFLN never actually took over the lease. On February 24, 2015, Best Restaurant gave Royal notice of its intent to exercise its option to purchase, and after Best Restaurant cured the defaults on its lease, Royal announced on April 30, 2015 that it accepted Best Restaurant's election to exercise its Option. The Option provided that the purchase price would be fair market value and if the parties could not agree, fair market value would be determined by appraisers. The parties did not agree on value and thus each hired an appraiser who appraised the property at vastly different prices.

	Meanwhile, Best Restaurant's checks for rent and ad valorem taxes were returned for insufficient funds. Royal then declared that Best Restaurant was in default and terminated the lease and the Option.
Holding:	After comparing the language of both the underlying lease and the Option, the court concluded that consent was not required to assign the Option, and thus the assignment was not void. The court first noted that while the lease included a provision whereby an assignment was void without prior written landlord consent, such provision was absent from the Option. Next, the court found that while the lease incorporated the terms of the Option, the Option did not incorporate the terms of the lease. Therefore, no consent was necessary to assign the Option. The court next found that the lease required that upon the tenant exercising its right to purchase under the Option, the tenant was to continue regular payment of rent until closing. Therefore, the court found that Best Restaurant's failure to timely pay July rent and ad valorem taxes was a material breach of the underlying lease which justified termination of the lease as well as the Option.
McIntosh Fish Camp, LLC v. Colwell, No. 5D20-1199, 2021 WL 1323529 (Fla. Dist. Ct. App. Apr. 9, 2021)	
Issue:	Does the merger clause in a contract for an as-is sale of commercial fishing camp property bars fraud-based counterclaims in foreclosure action?
Facts:	Co-Plaintiff Susan Monroe contracted with Martin and Mark Colwell (the "Colwells") to purchase commercial real estate containing a fish camp, recreational vehicle sites, mobile homes, and a house. The contract contemplated a 15-day due diligence period for Monroe to object to the property's suitability. The contract also specified that if Monroe did not object during the due diligence period, she would purchase the property in "as-is" condition and waive claims against the Colwells for any defects. The contract likewise included a merger clause, stating that "[t]he terms of this Contract constitute the entire agreement between [Monroe] and [the Colwells]." Monroe bought the property subject to a purchase money mortgage. For two years, she made payments on the accompanying promissory note. When she stopped, the Colwells filed foreclosure proceedings. Monroe and Co-Plaintiff McIntosh Fish Camp, LLC ("McIntosh") counterclaimed, alleging that the Colwells and their real estate broker conspired to induce Monroe into buying the property through fraud. Monroe alleges the following bases for fraud: (1) the Colwells told Monroe that she did not need her own lawyer or broker for the transaction and dissuaded her from hiring one; (2) the Colwells prevented Monroe from inspecting portions of the property; (3) the Colwells provided false information about the existence of appropriate permits; and (4) the Colwells failed to disclose pre-existing violations of zoning and governmental regulations, specifically, that they were illegally draining the property's septic system into Lake Orange.

	The trial court concluded that the contract's merger clause, coupled with the doctrine of caveat emptor, barred Monroe and McIntosh's amended counterclaims, and granted summary judgment for the Colwells.
Holding:	The Court reversed the trial court's summary judgment order in part, holding that the merger clause in a contract for an as-is sale does not preclude purchaser's claims of fraud in the inducement. The Court further found that the caveat emptor doctrine was inapplicable where there was some fraudulent conduct that prevented the purchaser from making an independent inquiry to examine and judge the condition of the property.
Rauch, Weaver, Norfleet, Kurtz & Co., Inc. v. AJP Pine Island Warehouses, Inc., 313 So.3d 625 (Fla. Dist. Ct. App. 2021)	
Issue:	(1) Whether a plaintiff claiming breach of a restrictive covenant can prevail without proving statutory elements.
Facts:	In October 2014, Rauch, Weaver, Norfleet, Kurtz & Co., Inc. ("Broker") entered into an exclusive six-month listing agreement with AJP Pine Island Warehouse ("Seller") to procure a buyer for Seller's warehouse property. Broker would be paid a commission by Seller if Broker procured a buyer during the term of the agreement. Broker contacted Nancy Legault ("Legault") as a potential buyer, and the two parties entered into a confidentiality agreement by which Legault agreed not to disclose any financial information about Seller that it learned through Broker, and agreed not to negotiate directly with Seller, but instead go through Broker. Legault then made an offer to purchase the property, which was rejected by Seller. The listing agreement between Broker and Seller ended in April 2015. At this time, Seller engaged a new broker, that broker contacted Legault, Legault made another offer, and that offer was rejected. Eventually, Legault and Seller agreed on terms, and Legault purchased the property. Broker sued Legault for breach of the confidentiality agreement, arguing that (1) the agreement was a valid contract, (2) Legault breached by using the financial information it learned in its subsequent negotiations with Seller, and (3) Broker suffered damages by not receiving commission.
Holding:	The court held that Broker did not establish a prima facie case for breach of contract, because the claim was for a breach of a restrictive covenant, which by statute requires additional pleaded elements than a standard breach of contract cause of action. Under a standard breach of contract action, plaintiff must prove (1) a valid contract existed, (2) a material breach, and (3) damages. But under Florida Statute 542.335, where that contract is a restrictive covenant, (1) the restrictive covenant must be set forth in writing, signed by the person against whom enforcement is sought, (2) the party seeking to enforce it shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant, and (3) the party seeking to enforce the restrictive covenant shall plead and prove that the contractually

	specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction. The court held that because Broker did not plead the additional statutory elements, its claim must fail.
Seong Ho Hwang v. Gladden, *No. 3:16-cv-502-SMD, 2020 WL 521849 (M.D. Ala. Jan. 31, 2020)*	
Issue:	(1) Whether purchasers of land can sustain claims against a real estate agent for failure to discover or disclose restrictive covenants where purchasers were given actual and constructive notice of such covenants; and (2) Whether purchasers of unimproved land can sustain fraud claims notwithstanding the doctrine of *caveat emptor*.
Facts:	Drs. Seong Ho Hwang and Sin Ja Son ("Plaintiffs") purchased two adjoining vacant lots with the intention of erecting a chiropractic clinic. To do this, Plaintiffs found a consultant, who was not a licensed real estate agent and did not charge Plaintiffs for his services, to find them suitable property. The consultant found vacant property that was zoned for residential and commercial use. With Plaintiffs' approval, the consultant contacted a real estate agent ("Gladden", and collectively with Gladden's company of which he is the sole principal, "Defendants"). Gladden drew up the land sale contract on Plaintiffs' behalf. Gladden made no representations concerning the property to Plaintiffs. Included in the contract was an "AS IS" clause. In between executing the contract and the closing, Plaintiffs retained a title insurer to run a title search, which revealed restrictive covenants limiting the land use to residential only, which covenants were properly recorded. At closing, Plaintiffs were given a warranty deed which stated the property was subject to restrictive covenants. The title insurance commitment, also provided to Plaintiffs at closing, listed the restrictive covenants. Plaintiffs did not read any of this and proceeded with closing. After closing, Plaintiffs applied for and were denied a construction loan for their chiropractic facility due to the restrictions. Plaintiffs sued Gladden on nine counts, six of which are related to the land sale contract. Namely, Plaintiffs sued Gladden for breach of contract, negligence, wantonness, fraud, fraudulent concealment, and breach of statutory duties; all of these counts premised on the belief that Gladden should have discovered and disclosed the covenants.
Holding:	The court first found that Plaintiffs were on constructive notice of the restrictive covenants, because the covenants were properly recorded, and under Alabama law, "proper recordation of an instrument constitutes *conclusive notice to all the world* of everything that appears from the face of the instrument[.]" The court next found that not only were Plaintiffs bound by their constructive knowledge of the covenants, but they were also bound by their actual knowledge of the covenants, because purchasers of land cannot "close their eyes to avoid the discovery of the truth." Therefore,

	because Plaintiffs had both actual and constructive knowledge of the covenants, they cannot maintain claims against their agent for failure to discover or disclose them. The court next found that Plaintiffs' claims were further barred by *caveat emptor*. This doctrine applies to unimproved lots in Alabama, of which the subject property here was. Under the doctrine, it is the sole responsibility of purchasers to inspect the condition of the land, and sellers and agents will not be liable for the conditions post-closing. The court further found that while there are three exceptions to the preclusive nature of the doctrine, those exceptions do not apply to contracts containing "as is" clauses. Lastly, the court noted that while many other jurisdictions, an "as is" clause in a land sale contract will not preclude claims of fraud, Alabama law differs from those jurisdictions and precludes all claims of fraud in sale of unimproved lots with "as is" clauses in the contract.