Thursday, November 4, 2021
2:15 PM – 3:30 PM

Seminar 14

Seeing Through the Fog: Drafting Leases That Clients, Lawyers, And Judges Will All Understand Clearly

Presented to

2021 U.S. Law Conference
San Francisco Marriot Marquis
San Francisco, California
November 3-5, 2021

by:

Howard K. Jeruchimowitz
Shareholder
Greenberg Traurig, LLP
77 West Wacker, Suite 3100
Chicago, Illinois 60601
Jeruchimowitzh@gtlaw.com

Amy Williams
Managing Member
Williams Legal Advisory Group LLC
169 Ramapo Valley Road, Suite 106
Oakland, NJ 07436
awilliams@williamsadvisors.com

I. Introduction

Landlords and tenants alike often are confounded when their leases are challenged in court and judges or juries interpret the leases differently that how the parties contemplated them. Surprisingly, this might be the first time a judge might even encounter a lease other than the judge's own lease from the past. But, like any contract, the challenge for landlords, tenants and practitioners is to try to draft a document that is as clear and comprehensive as possible to guide the court to only one conclusion, but yet one that also protects the landlord's or tenant's rights depending on which side you are representing. This seminar will explore the drafting of leases and provisions of those leases that have proved most challenging in court. Based on those experiences, landlords, tenants and the lawyers they work with can learn from the fog of the courtroom and make lease interpretation and enforcement easier and more predictable for the future. This article (i) examines general concepts of how courts interpret contracts generally, and will apply those one-size-fits all rules to your leases (even though retail leases are a very unique type of contract), (ii) explores examples of some of the frequently-disputed clauses, including co-tenancy clauses, use protections and exclusive provisions, liquidated damages, rent acceleration and penalties, and self-help remedies; (iii) discusses lease provisions implicated by COVID-19 and how courts have treated landlord's and tenant's rights during the pandemic; (iv) looks at boilerplate provisions in the leases that parties rarely negotiate or even understand that could come back to haunt them later; and (v) analyzes how implied covenants not even in the leases themselves may bind the parties.

II. Lease Interpretation In Court

Transactional lawyers tend to view their contracts as the first and last word on a dispute between the parties. Simply, they look to the "four corners" of a contract, which is a common law legal doctrine we all learn in law school and that guides courts in determining the meaning of a written instrument. In a well-written contract, in fact, there should be no reason to go beyond those four-corners because there is simply nothing ambiguous, unclear, or unstated. There are no scenarios unaddressed or gaps and the parties' intentions are perfectly aligned and crystal clear. The truth is, however, if there is a dispute under a contract, that dispute exists because the parties do, in fact, have a differing view under the contract - - at least as has been articulated.

Court typically try to resolve disputes by staying "within four corners" of the contract, but will turn to parol evidence (i.e., other outside evidence, not contained in the contract) if the court finds that contract terms are ambiguous or if the contract is not fully integrated. In fact, only a minority of states continue to strictly abide by the four corners rule, because it viewed as outdated and excessively restrictive by the majority of jurisdictions. In fact, even if your contract contains boilerplate language such as "Entire Agreement", "Integration", and/or "Merger" sections, expressly indicating that the parties desire and intend to have the four corners doctrine apply, a court can

still go outside of the four corners if it finds an ambiguity and believes parol evidence is necessary to construe the contract or determine the parties' intentions.

It is important to remember that parol evidence is extrinsic evidence, such prior or contemporaneous information, which is used to explain or modify the contract at issue, which for the purposes of this seminar is a retail lease. Accordingly, the parol evidence rule only applies to past or contemporaneous negotiations or agreements, and not to subsequent agreements. Of course a number of exceptions to the general rule now exist including for those partially integrated contracts, contracts with separate consideration, to establish defenses to the contract, and to resolve ambiguities within the contract.

The Restatement (Second) of Contracts Section 213 provides:

Effect Of Integrated Agreement On Prior Agreements (Parol Evidence Rule)

(1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.

(2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.

(3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.

Notably, evidence of prior or contemporaneous agreements or negotiations is not admissible to contradict a term of the contract at issue. Essentially, the lease that the parties choose to sign supersedes any prior inconsistent agreements, so evidence of a prior agreement is, therefore, irrelevant to interpreting the term of the current writing (otherwise the parties would not have signed the current writing).

That said, that same evidence (i.e., a prior contradictory agreement) may be properly considered on the preliminary issues whether there is an integrated agreement and whether it is completely or partially integrated. The parol evidence rule applies only when a contract is completely finalized, or "integrated." Section 209 of the Restatement (Second) of Contracts defines an integrated agreement as follows:

(1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.

(2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.

(3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.

A signed lease may include an explicit boilerplate provision stating that that there are no other agreements between the parties, but such a provision may not be conclusive. When a contract is fully integrated, parol evidence is inadmissible even to add terms not inconsistent with the writing. Ironically, in determining whether an agreement is completely or partially integrated is to be determined by the court as a preliminary question and may itself involve application of the parol evidence rule. Specifically, in the instance of a partially integrated agreement, extrinsic evidence of prior negotiations or agreements is allowed to supplement, but not contradict, the contract.

Sometimes, terms in a contract have an ambiguous or missing/silent/undefined meaning, and outside evidence is needed to clarify. Courts will allow parties to introduce parol evidence to demonstrate the meaning of these ambiguous/missing/silent/undefined terms. Additionally, independent collateral agreements (agreements which co-exist side by side with the integrated agreement at issue) are allowable under the parol evidence rule where the independent collateral agreement does not contradict the written and finalized contract and it does not contain terms included in the present agreement (i.e. contains terms on a different but likely related subject matter).

Resolving any ambiguity within a contract term is a threshold question of law for the court to decide. *Duane Reade Inc. v. St. Paul Fire and Marine Ins. Co.*, 411 F.3d 384, 390 (2d Cir. 2005); *Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992). Courts generally will try resolve any ambiguity through analysis of the four corners of the contract alone, thereby actually concluding that there is not, in fact, an ambiguity, but simply a provision requiring interpretation by reference to other parts of the contract. *Sun Oil Co. v. Madeley*, 626 S.W. 2d 726,728 (Tex. 1981).

Ambiguity typically requires a finding that the contract language is reasonably susceptible of more than one meaning, applying a reasonable person standard to this analysis (and not the parties own subjective interpretations). *Lightfoot v. Union Carbide Corp.*, 110 F. 3d 898, 906 (2nd Cir. 1997). However, a parties understanding of the given term at the time of contracting (i.e. their subjective contemporaneous definition) may be important if the term is a word with a double meaning and can prove its ambiguous nature. Only if a court has first made the determination that a contract is ambiguous, may the court consider the parties' interpretation, intentions, and potentially admit extraneous evidence to determine the true meaning. *Nat'l Union Fire Ins. Co. v. CBI Indus.*, 907 S.W. 2d 517, 520 (Tex. 1995).

Additionally, is the issue of essential omitted terms, namely, when the parties to a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, and that term, under the circumstances, must be supplied by the court. The fact that an essential term is omitted may indicate that the agreement is not integrated or that there is partial rather than complete integration. In such cases the omitted term may be supplied by parol evidence (e.g., prior negotiations or a prior agreement). However, omission of a term does not necessarily show that integration was not complete, particularly if the binding contract discharges prior inconsistent agreements.

Courts are often hesitant to supply missing terms via parol evidence and instead often elect to stay within the four corners of the document, apply a standard of plain meaning to the express terms of the contract, and deduce the parties' intent from the express written language of the document.

III. Implied Covenants

A. General Overview

Implied covenants are obligations that are deemed to exist, even if not expressly stated. They are terms that are found to be a part of every contract, unless expressly disclaimed by the parties in the lease. The implied covenant is used by courts to help achieve a result that fulfills the court's idea of the reasonable expectations of the parties and to give the contract a spirit it could deem violated even if an action is not purely prohibited.

Although the express covenant is an obligation explicitly provided for in a written agreement or actually articulated in an oral contract, the implied covenant is not stated in the contract but implied to govern the performance of the parties to act in a reasonable manner. The types and elements of implied covenants that exist vary from state to state but developed over time as the courts and legislatures of the states worked to mitigate the harsh effects of the ancient common law of independent covenants between landlords and tenants. The most often articulated implied covenants applied by the courts include: (1) the implied covenant of good faith and fair dealing; (2) implied covenant of failure to operate; (3) implied covenant of quiet enjoyment; (4) implied covenant to maintain commercial property; and (5) implied rights/restrictions.

B. Examples Of Implied Covenants

1. Implied covenant of good faith and fair dealing

Generally speaking, the implied covenant of good faith and fair dealing is implied by law in every contract for both its performance and its enforcement, unless disclaimed by the parties. *See Frittelli, Inc. v. 350 North Canon Drive, LP*, 202 Cal. App. 4th 35, 135 Cal. Rptr. 3d 761 (Cal. Ct. App. 2011) ("It is well established that the tenant under a commercial lease may agree to limit the scope of the covenant of quiet enjoyment, whether express or implied as well as the implied covenant of fair dealing."). The covenant is read into contracts to supplement express contractual covenants to prevent a contracting party from engaging in conduct which frustrates or injures the other party's rights to the benefits of the contract. However, there is usually no implied covenant where the lease does not impose such an obligation. Implied covenants are not meant to add duties agreed to by the parties. *See, e.g., Weco Supply Co. v. Sherwin-Williams Company*, 2012 U.S. Dist. LEXIS 110659 (E.D. Cal. 2012) (where the parties entered into a written agreement for the distribution of Sherwin-Williams paint products, the court found that Sherwin-William did not breach the implied covenant of good faith and fair dealing by selling directly to end users outside its retail stores because the agreement specifically allowed Sherwin-Williams to sell directly to end users

and there was nothing in the agreement that limited it to retail stores, stating that: "In other words, a claim for breach of the implied covenant of good faith and fair dealing must be based on a specific contractual obligation").

The covenant also generally requires each party to do everything the contract presupposes the party will do to accomplish the agreement's purposes. This implied covenant is not disclaimed through an integration clause. Some jurisdictions find a breach of the implied covenant of good faith to be an independent and additional cause of action to breach of the contract while others hold that the implied covenant is merely part of the same breach of contract claim.

Of the implied covenants, this is the most commonly used covenant alleged in cases. Some examples of how the implied covenant of good faith and fair dealing have been used:

- **Implied covenant to use discretionary power.** *See Thrifty Payless, Inc. v. The Americana at Brand, LLC*, 218 Cal. App. 4th 120, 160 Cal. Rptr. 3d 71 (2013) (the California Court of Appeals reversed the lower court's demurrer of tenant's claims, including the implied covenant of good faith and fair dealing, for tenant's increase in the pro rata expenses at the shopping center, stating that: "Merely charging higher rates for these items than estimated during negotiations does not ostensibly breach the express language of the lease. However, Thrifty has alleged Americana has breached [the lease] by improperly exercising its discretion in allocating costs between retail and nonretail space; this conduct as alleged can constitute both a breach of contract and breach of the implied covenant."); *Best Buy Stores, L.P. v. Manteca Lifestyle Cente*r, 2010 U.S. Dist. LEXIS 47193 (E.D. Cal. 2010) (District Court found in denying motion to dismiss that Best Buy can allege the implied covenant of good faith and fair dealing for failing to build the shopping center as exhibited in the site plan attached to the lease, stating that: "Although the lease does provide defendant with the discretion to construct the Shopping Center 'at various times, and in various phases or sections,' this does not preclude plaintiff from pleading a claim for breach of the implied covenant of good faith and fair dealing").

- **Bad faith conduct.** Sometimes the court finds the conduct by the landlord or tenant so egregious that equitable relief is afforded a party based on an implied breach of the covenant of good faith and fair dealing. See *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates*, 182 N.J. 210, 864 A.2d 387 (2005) (New Jersey Supreme Court reversed the appellate court affirmance of lower court judgment in favor of landlord for a tenant's purported failure to exercise a purchase option in a lease after the tenant gave timely notice of its intent but failed to make payment believing the payment was not due until closing and landlord never tells tenant of its misunderstanding). In the court's own words:

  > We are not eager to impose a set of morals on the marketplace. Ordinarily, we are content to let experienced commercial parties fend for themselves and do not seek to "introduce intolerable uncertainty into a carefully structured contractual relationship" by balancing equities. But as our good faith and fair dealing jurisprudence reveals, there are ethical norms that apply even to the harsh and sometimes cutthroat world of commercial transactions. Gamesmanship can be taken too far, as in this case. We do not expect a landlord or even an attorney to act as his brother's keeper in a commercial transaction. We do expect, however, that they will act in good faith and deal fairly with an opposing party. Plaintiff's repeated letters and telephone calls to defendant concerning the exercise of the option and the closing of the ninety-nine-year lease obliged defendant to respond, and to respond truthfully. In concluding that defendant violated the covenant, we do not establish a new duty for commercial landlords to act as calendar clerks for their tenants. We do not propose that attorneys must keep watch over and protect their adversaries from the mishaps and missteps that occur routinely in the practice of law. The breach of the covenant of good faith and fair dealing in this case was not a landlord's failure to cure a tenant's lapse. Instead, the breach was a demonstrable course of conduct, a series of evasions and delays, that lulled plaintiff into believing it had exercised the lease option properly. Defendant acted in total disregard of the harm caused to plaintiff, unjustly enriching itself with a windfall increase in rent at plaintiff's expense. In the circumstances of

> this case, defendant's conduct amounted to a clear breach of the implied covenant of good faith and fair dealing.
>
> We are mindful of the potential pitfalls in enforcing the covenant of good faith and fair dealing. If courts construe the covenant too broadly, it "could become an all-embracing statement of the parties' obligations under contract law, imposing unintended obligations upon parties and destroying the mutual benefits created by legally binding agreements." We have warned that "'an allegation of bad faith or unfair dealing should not be permitted to be advanced in the abstract and absent an improper motive.'" "'Contract law does not require parties to behave altruistically toward each other; it does not proceed on the philosophy that I am my brother's keeper.'" We stress that while a commercial party does not have to act with benevolence towards an opposing party, it cannot behave inequitably.

- **Implied covenant of exclusivity and implied covenant to refrain from destructive competition.** Courts have grappled with two implied covenants when a tenant believes it was to be the only tenant of that purpose in a shopping center or in close proximity to that shopping center and the landlord subsequently leases to a competitor of the tenant. See Eastern Shore Markets, Inc. v. J.D. Associates Limited Partnership, 213 F.3d 175 (4th Cir. 2000) (the United States Court of Appeals for the Fourth Circuit, applying Maryland law, rejected the notion of an implied covenant of exclusivity, but recognized the potential for a claim based on an alleged breach of the implied covenant to refrain from engaging in destructive competition, finding that "under Maryland law, the intentions of parties as expressed in the lease providing for rent calculated in part as a percentage of sales, combined with the circumstances surrounding the lease's formation, may give rise to an implied covenant to refrain from competition that is destructive to the mutual benefit of the contracting parties."

2. Implied covenant of failure to operate

Covenants relating to the failure to operate come in a number of forms. Some leases expressly require the tenant to continuously operate once open for certain operating hours or duration with even specific requirement how it must be open. Operating covenant, when drafted correctly and understood by the courts, have been treated as top priority. As an Illinois federal district court once stated:

> In fact, any analysis of the dynamics of shopping center operations and their leases really places such operating covenants at the very top of the priorities scale. It is a truism that shopping centers rely for their success on the synergistic effect of their leases, both those running to key or anchor tenants (often department stores) and those running to more specialized lessees occupying smaller premises: Anchor tenants are looked to for the generation of foot traffic and hence of business for the other lessees, and in turn the anchor tenants hope for spillover business from persons who initially come to the center to shop at one or more smaller stores and who decide that, once there, they might as well see what the department store may be offering (sort of the equivalent of impulse buying at the supermarket). That phenomenon, coupled with the related fact that percentage rentals rather than guaranteed lease rentals make the difference between a successful center and a marginal or even failing center, make the prospect of an anchor tenant "going dark"—ceasing to operate—a calamity.

Rouse-Randhurst Shopping Center, Inc. v. J.C. Penney Co., 171 F. Supp. 2d 824, 828 (N.D. Ill. 2001).

Some courts, however, have evaluated claims that such terms are implied by other clauses, such as percentage rent clauses, or implied based on other factors. The courts usually disfavor implied covenants. For example, the Minnesota Court of Appeals dealt with whether a lease created an implied covenant for a drug store to continue to operate in the shopping center for the duration of the lease. *See Plaza Assocs. v. Unified Dev., Inc.,* 524 N.W.2d 725, 728-30 (Minn. Ct. App. 1995). The court aptly summarized:

> As a general rule, the law does not favor implied covenants. *Walgreen Ariz. Drug Co. v. Plaza Ctr. Corp.,* 132 Ariz. 512, 647 P.2d 643, 646 (Ariz. Ct. App. 1982); *Keystone Square Shopping Ctr. Co. v. Marsh Supermarkets, Inc.,* 459 N.E.2d 420, 423 (Ind. Ct. App. 1984) (citing *Sheets v. Selden,* 74 U.S. 416, 19 L. Ed. 166 (1868)). The courts will imply a covenant if necessary to effectuate the intent of the parties. But the implication must result from the language employed in the instrument

or be indispensable to carrying the intention of the parties into effect." *Closuit v. Mitby,* 238 Minn. 274, 282, 56 N.W.2d 428, 432-33 (1953).

***

The question of whether a commercial lease implies a covenant of continuous operation for a specific use is one of first impression in Minnesota, but numerous cases in other jurisdictions have refused to imply this covenant. They base this approach on the general disfavor for implying terms into a contract that has been negotiated between two parties. *Walgreen Ariz. Drug Co.,* 647 P.2d at 646. Courts are reluctant to impose the burden of a continuous operation clause in the absence of express language because it may "require the lessee to continue operating a business for a long period of time even if that business is incurring substantial losses." *Sampson Inv. v. Jondex Corp.,* 176 Wis. 2d 55, 499 N.W.2d 177, 181 (Wis. 1993).

Factors courts look at that weighed against an implied covenant for continuous option: (a) The implication of an operating covenant is less likely where the tenant is paying a "substantial" base rent and a relatively small percentage of gross receipts. (b) When base rent is "substantial," an implied covenant is less likely if there is a correlation between the base rent and the fair market value of the lease at the time. (c) The active and extensive negotiations of a lease by sophisticated parties also weighs against finding an implied covenant in a lease "since the parties were free to include whatever provisions they wished." (d) The failure of a landlord to use an express operating covenant where it has included the covenant in the lease of other tenants, which further weighs against finding an implied operating covenant because it makes clear that the landlord knew how to employ such a clause. (e) A provision in a lease giving a tenant broad assignment or sublease rights is another factor preventing the implication of an operating covenant because it is inconsistent with an implied obligation to remain and do business. (f) An implied covenant is less likely where there is no language detailing the scope of the business operation or the identity of the operator. (g) An exclusive right to operate one's business in the shopping center does not indicate an implied covenant to use the space for the full term of the lease.

Here are some cases where the court refused to imply a covenant to continuously operate, In *Oakwood Vill. LLC v. Albertsons, Inc.,* 104 P.3d 1226 (Utah 2004), where a Tenant decided to "go dark," but continued to pay rent and the lease lacked certain provisions indicating an obligation to operate, the court refused to find that there was an implied covenant to continuously operate.

In the case, Plaintiff landlord and Defendant tenant entered into a lease containing an exclusive that prevented Landlord from leasing space in the shopping center to other supermarket tenants. The lease also provided that the parties would work together to develop the center "as an integrated retail sales complex for the mutual benefit of all real property in the Shopping Center." After 21 years of operating in landlord's shopping center, Tenant moved to another center to become the anchor tenant there. After it relocated, tenant "went dark," while continuing to pay its ground rent, but kept the space empty. Landlord filed suit against tenant for breach of lease and argued that the lease contained an implied covenant of continuous operation that required tenant to remain open during the entire term of the lease. Landlord sought declaratory relief allowing it to terminate the lease and to re-enter, re-let the premises and obtain damages. The trial court dismissed the suit and Landlord appealed.

The court found that there was no express or implied covenant of continuous operation and that it would have to look at the language of the lease and the conduct of the parties. The court noted the following which led to its conclusion:

1. There was no percentage rent provision in the lease. This substantially undermined landlord's position that there was an implied covenant of operation The absence of the provision from the lease strongly suggested that the parties never intended the lease to bind Tenant to operating a grocery store continuously at the shopping center. *Id.* at 1234.

2. There was no "use of premises" provision in the lease that supported landlord's argument that tenant had a duty to generate consumer traffic in the shopping center by operating their supermarket store. *Id.*

3. The provision in the lease allowing tenant to sublet or assign the lease without consent and no restriction on the type of sublessees or assignees, undermines landlord's claim that Tenant was supposed to operate on the premises for the entirety of the lease term.

4. The provision in the lease permitting tenant to own and install "in the Leased Premises such fixtures and equipment as it deems desirable" and to remove "Tenant's personal property from

the Leased Premises at any time," a provision commonly seen in combination with a right to sublet or assign the lease, is not consistent with a duty of continuous operation. *Id.* at 1235.

5. The lack of any provision allowing landlord to reenter and re-let the premises in the event that the tenant vacates weighs against a finding of an implied covenant of continuous operation.

6. The lease did not impose a legal duty on tenant to erect any structure on the premises and that, having constructed a building, tenant is under no legal obligation to occupy the building. The court explained that the lease stated: "[i]n the event any building on the Leased Premises is damaged or destroyed by a casualty, Tenant shall either repair or restore the building, or remove the rubble and leave the ground in a sightly condition" *Id*. at 1235. This suggests that the parties contemplated a scenario that tenant would pay rent on bare ground. Drafters should include provisions in their contracts compelling construction and reconstruction in the event of destruction and specifying the time frame for completing such activities.

In *Piggly Wiggly S. v. Heard*, 261 Ga. 503 (1991), the court founds that an obligation to pay percentage rent will not automatically create an implied covenant to continuously operate. Plaintiff landlord and tenant supermarket entered into a lease agreement in 1963. As part of the lease, Tenant would pay an annual base rent, as well as a percentage rent of the annual gross sales exceeding $2,000,000. The lease was renewed on the same terms for an additional seven years in 1979, with options to renew for two additional three year terms. Tenant was acquired by a new corporation. In the second term, tenant vacated the premises and moved into a nearby shopping center. Tenant continued to pay the base rent, but refused to sublease the vacant store, even though there were interested parties. Landlord sued for breach of lease. The trial and appellate courts found for landlord and held that the lease contained an express continued use covenant and an implied covenant of continued operation.

The Georgia Supreme Court, however, reversed the lower court's ruling. The court concluded that the lease did not contain an express or implied covenant of continuous operation. The court found that the lease's provision for free assignability by tenant without landlord's consent weighs strongly against construction of the contract which would require tenant to continuously operate its business. Also, the existence of a substantial minimum base rent, and a provision for percentage rental payments suggests the absence of an implied covenant of continuous operation: "when the rental to be received under a lease is based on a percentage of the gross receipts of the business, with a substantial minimum, there is no implied covenant that the lessee will operate its business in the leased premises throughout the term of the lease." (Case citations omitted).

However, in *Hornwood v. Smith's Food King No. 1*, 105 Nev. 188 (Nev. 1989), a court may find that there is an implied covenant to operate continuously when an anchor tenant brings in a significant amount of consumer traffic to a shopping center. Plaintiff landlord and tenant supermarket entered into a 30 year lease. The lease contained a provision for a $92,398 minimum annual rent, about 2.7 million dollars in total rent over the 30 year span of the lease. There was also a provision for percentage rent based on sales generated during the previous calendar year. Tenant paid percentage rent for 1979 and 1980 but stopped paying percentage rent due to insufficient sales volume. Tenant closed its business and stopped operating in 1986 without notifying landlord. After closing the store, tenant continued to pay minimum rent and landlord did not act to evict tenant immediately. Eventually landlord filed suit against tenant arguing that tenant breached its lease by ceasing operations and vacating the demised premises before the lease expired. The trial court held that tenant breached an implied covenant of continuous operation by ceasing operations with approximately 20 years remaining on the 30 year lease. The court found that the shopping center decreased in value over $1 million after tenant stopped operating, but that the diminution of property value was not foreseeable and compensable. Also, the court held that, because tenant continued to pay minimum rent, landlord was not entitled to an award of compensatory damages for breach of lease. The landlord appealed.

The court upheld the trial court's decision that there was an implied covenant of continuous operation. The court noted that the tenant was a sophisticated business entity and that its role as an anchor tenant significantly impacted landlord's shopping center. Without tenant, the financial viability of the shopping center is impacted, and this was foreseeable. The court found that the trial court erred in ruling that the diminution in value was unforeseeable and remanded the case for an assessment of the landlord's damages, including attorney's fees and costs.

3. Implied covenant of quiet enjoyment

Although the implied covenant of quiet enjoyment may differ slightly depending on the jurisdiction, there are some similar elements to this implied covenant. The covenant of quiet enjoyment is implied in every lease if not expressly stated. It typically involves the landlord having good title and giving a free and unencumbered lease of

the premises for the term of the lease. The breach of the covenant amounts to an eviction though that eviction need not be actual. This would constitute a constructive eviction which is typically defined as a disturbance of grave and permanent character that would render the premises unfit for the business for which it was rented and would deprive the tenant of its enjoyment of the premises. Usually, the premises must be rendered untenantable and not just uncomfortable. Although a covenant of quiet enjoyment is implied in every lease, when the parties expressly provide for it in the lease, there is no need to imply the covenant. The implied covenant, however, may be applicable to the extent it does not contradict the language used by the parties in the lease or impose obligations not contemplated by the parties. Parties, however, can contract away any such implied covenant. *See, e.g. Hassan Khanbabpour v. H.C. M,* 2009 Cal. App. Unpub. LEXIS 427 (2009).[1]

In Jaraysi v. Sebastian, *Plaza, LLC v. Taher*, 318 Ga. App. 469, 733 S.E.2d 785 (2012), the court found that although the implied covenant of quiet enjoyment exists in every lease, there must be evidence of actual or constructive eviction and if the lessee remains on the premises and operates it, there is no actual or constructive eviction or a substantial interference with the lessee's right to use and enjoy the leases premises. The lessee was a former tenant of the landlord's shopping center and had used the leased space as a night club. There was an unfinished office building across the street from the shopping center which the lessee understood was to have been completed in May of 2006. The lessee sent a letter to the landlord asserting that the criminal activity in the parking lot and in the unfinished office building caused him to lose business and constituted a constructive eviction. After sending such a letter, lessee claims the landlord orally agreed to accept less rent and started paying the less rent. After 10 months of the reduced rent payment, landlord rejected the reduced rent and the lessee moved out of the premises. The landlord obtained possession and subsequently sued for the unpaid rent.

The Appellate Court rejected the covenant of quiet enjoyment as defense. The court found (i) it is implied in every lease, (ii) that landlord has good title and gives a free and unencumbered lease of the premises for the term stipulated, (iii) to constitute breach of the covenant of quiet enjoyment, an eviction or equivalent disturbance by title paramount must occur, (iv) the disturbance must be "of such grave and permanent character as would render the premises unfit for tenancy, and is such as would actually deprive and would legally import the intent to deprive the tenant of their enjoyment, it amounts in law to an eviction of the tenant"; (v) the covenant of quiet enjoyment obligates the landlord to protect the tenant only against the landlord's own acts and not against the acts of strangers that disturb the tenant in its quiet enjoyment and possession of the premises. The Appellate Court affirmed that there was no evidence in the record that any of the landlord's conduct prevented the lessee from using his premises for a nightclub. Despite the increase in criminal activity, incomplete office building, and need for improved lighting, the lessee remained on the premises and operated his nightclub until April 2010 when the landlord refused to accept the reduced rent. The Appellate Court found that such conduct does not amount to an actual or constructive eviction or a substantial interference with his right to use and enjoy the leased premises, which were not rendered untenantable.

In *Pollock v. Morelli*, 245 Pa. Super. 388, 369 A.2d 458 (1976), the court found that changes made by the landlord that made the lessee's business less visible and less convenient to customers and compelled the lessee to relocate the business is a breach of the covenant of quiet enjoyment, but that the damages were limited because it was a new business. The lessee purchased a dry-cleaning business and entered a seven-and-a-half-year lease. The lessee's store's windows and overhead sign were easily visible to potential customers using the shopping center. Conveniently for shoppers, the dry-cleaning store was next door to a large supermarket. Approximately ten months into the lease, the landlord, without prior notice to the lessee, made structural changes to the shopping center creating a "mini mall" that enclosed and surrounded the lessee's establishment. Lessee was no longer occupying an outside store with visible display windows next to a parking lot. Instead they now have a six and one-half year lease for one of eleven shops in a mall which extends over what had formerly been the small parking area. A store is located directly in front of the cleaning establishment and access is now gained by entering a set of double doors into the mall and proceeding down a hallway. The display windows are only visible from inside the mall and can be completely viewed only when a customer has passed through the double doors, traveled the full length of the hallway and turned the corner. The sign once directly over the store is now outside the mall over the discount center which is the store directly in front of the lessees. The nearest parking spaces in the remaining parking area are now 100 feet away. Those changes made lessee's business less visible and less convenient to customers. The lessees sought an injunction to compel lessees to relocate their business together with an award of damages.

The lower court held that appellee had not breached the implied covenant of quiet enjoyment in the lease and denied the lessee's damages for relocation. The court affirmed the order sustaining the demurrer of the landlord, noting that there was no allegation that the premises were entered or the tenant's possession disturbed by the

---

[1] For other cases that hold this principle in California, see *Frittelli, Inc. v. 350 North Canon Drive, LP*, 202 Cal. App. 4th 35, 135 Cal. Rptr. 3d 761 (Cal. Ct. App. 2011) and cases cited therein.

landlord. The lower court defined the covenant of quiet enjoyment as ensuring only that the tenant would not be disturbed by good title in the possession of the demised premises.

The Pennsylvania Superior Court reversed and found that the landlord's structural changes substantially interfered with anticipated use of the premises and constituted a breach of the implied covenant of quiet enjoyment. The court stated: "In view of the decisions of the court of this Commonwealth and other jurisdictions which recognize a tenant's right to the use of the leased property without disruption by the landlord, it is clear that a remedy exists in favor of the appellant-tenants in the present case due to the landlord's activity in making structural changes detrimental to the tenant without obtaining his consent." Because the lessee's business was new, the measure of anticipated profits was too speculative to provide a basis for damages. The court limited the lessee's damages to recovering relocation expenses. The dissent agreed that there was a breach of the covenant of quiet enjoyment but disagreed that the lessee was precluded from lost profits and would have remanded the case for a trial on damages.

4. Implied covenant to maintain commercial property

Some leases contain implied or hidden obligations to maintain commercial property or operate the property in a certain manner, such as "first class" or "reputable" manner.

In Wallington Plaza, LLC v. Taher, 2011 N.J. Super. Unpub. LEXIS 1807 (N.J. Super. Ct. App. Div. July 7, 2011), the tenant may be excused from paying rent if landlord fails to maintain the condition of the premises in a first-class manner, especially if the lease provides that the tenant is obligated to maintain a first-class business. Plaintiff landlord owned a small commercial shopping center and entered into a lease agreement with tenant jewelry store for a lease term of ten years. Under the terms of the lease, tenant agreed to operate business in a "first class and reputable manner." Tenant left the premises six months before the lease expired. Landlord filed suit for unpaid rent, property taxes, and common area maintenance charges. Tenant filed a counterclaim alleging landlord breached the lease by failing to maintain shopping center. The court found that the tenant was not obligated the pay rent through the end of the lease term as the landlord failed to maintain the premises in a first-class manner. Even though the lease obligated only tenant to operate its business in a "first class and reputable manner," the court found that the landlord also had a responsibility to keep the premises in a reasonable condition if the tenant has the obligation to operate a first-class business. On appeal, Landlord argued that the trial court erroneously concluded that tenant was relieved from the obligation of paying rent pursuant to the lease because of the vacant stores in the shopping center. However, the appellate court affirmed the trial court.

In *Legacy Vill. Investors LLC v. Z Gallerie*, No. CV 09 6860552009 2009 Ohio Misc. LEXIS 538 (Ohio C.P. 2009), Plaintiff landlord filed a complaint against tenant Z Gallerie after landlord became aware that it was conducting a liquidation sale. As part of the lease, there was a continuous operation clause which required Tenant to be fully stocked and open, prohibited auctions, and obligated Tenant to conduct its business in a first class and reputable manner. Landlord found out that tenant was not continuously operating and filed a complaint seeking a temporary restraining order. The court found that a liquidation sales was in violation of the requirement to operate in a first class and reputable manner.

In *Carlson Real Estate Co. v. Soltan*, 549 N.W.2d 376 (Minn. Ct. App. 1996), Plaintiff landlord filed suit against Tenant convenience store/gift shop for breach of lease for failure to operate during the hours specified in the lease. Tenant was located below a restaurant, another one of landlord's tenants. Tenant experienced leaks and odors from the restaurant and landlord fixed the issue and cleaned tenant's store. Tenant's store was closed for about four months while repairs were completed. After it reopened, tenant complained of ongoing leaks and odors and closed the store a month later. Landlord asked the tenant to reopen the store, and tenant did so, but their relationship deteriorated. Landlord argued that tenant threatened and verbally abused store patrons, the restaurant's employees and guests, as well as other tenants. Landlord argued that this constituted a breach of the Lease, requiring the tenant to operate its business "in good faith and in a reputable manner."

The court found that the tenant was obligated to conduct its business in good faith and in a reputable manner even when Landlord breached the lease. Landlord's breach was not a direct cause of or a justification for tenant to not conduct its business according to the reputable manner provision. The trial court found that the provision of the lease that required Tenant to operate its business "in good faith and in a reputable manner" established a general standard of conduct and that Tenant breached that provision. The court found that the record provided evidence of Tenant swearing at employees, customers and patrons was evidence of failure to operate the business in a reputable manner The Appellate Court affirmed the trial court and interpreted the plain meaning of the provision in the context of the entire agreement and affirmed that the phrase "in good faith and in a reputable manner" imposes a standard of conduct. The appellate court reasoned that the alleged breach by the landlord

(failure to repair leaks) would have permitted tenant to terminate the lease or bring an action to enforce its rights, but it did not permit Tenant to breach the lease by failing to conduct business in a reputable manner.

5. Implied rights/restrictions

Finally, there are random cases where courts have implied certain rights or restrictions. Some rights parties rely on are not expressly in the lease but may be implied from attachments to the lease or are related to the shopping center itself. One common attachment that leads to litigation is the site plan, even though landlords usually intend the site plan to be attached as a draft, for illustrative purposes only.

For example, in the *Best Buy Stores, L.P. v. Manteca Lifestyle Center* case, 2010 U.S. Dist. LEXIS 47193 (E.D. Cal. 2010), Best Buy paid 50% rent based on its interpretation of the co-tenancy provision in the lease. That provision required 60% of the gross leasable area of the shopping center to be open and operating including at least two or more of the following tenants: (1) JC Penney, (ii) Bass Pro; and (iii) a cinema. There was a site plan attached to the lease which identified the Best Buy location in relation to other buildings in the promenade, detailed the square footage of each building and included a table summarizing the space and listed the gross leasable area as 743,908 square feet. When Best Buy opened, J.C. Penny, Bass Pro and the cinema were open, but only 320,000 square feet of the Promenade was open. Best Buy argued that the 60% percent threshold of the gross leasable area of the shopping center as depicted on the site plan was not met. The owner argued that the co-tenancy was satisfied, because based on certain language in the lease, buildings not fully constructed were not included in the "Shopping Center" for purposes of the condition Thus, Landlord argued that more than sixty percent of buildings that had been fully constructed were open and operating at the time plaintiff opened for business. The Landlord moved to dismiss Best Buy's complaint. The District Court denied the motion to dismiss at that stage in the case because it determined there were potential conflicting definitions for "gross leasable area" and "shopping center" in the lease. The District Court reasoned that under plaintiff's interpretation, the "gross leasable area" of the shopping center could be interpreted to refer to the amount of leasable area included in the site plan, stating "[i]t is therefore plausible that the gross leasable area of the Shopping Center was meant to be defined as a static number based on the amount of leasable area available in the proposed buildings in the Site Plan."

Another example of the import of a site plan was in *Chesterfield Exchange, LLC v. Sportsman's Warehouse, Inc.*, 572 F. Supp. 2d 856 (E.D. Mich. 2008). In this case, Sportsman's was found to have a right to rescind its lease after Sam's Club, a key tenant for Sportsman's moving into the shopping center, failed to enter into lease in the shopping center. After protracted negotiation, which included Sportsman's relocating its proposed space for the planned building of a Sam's Club, Sportsman's ultimately agreed to sign a lease with Chesterfield. Although the executed lease did not contain any provision conditioning the lease on the opening of Sam's Club, the Lease contained an Exhibit B styled "Depiction of *Shopping Center* and Premises," The box showing Sam's Club still described it as "proposed." In addition, the legend contained a disclaimer, which read:

> "This drawing is for general information purposes only. Any and all features, matters and other information depicted hereon or contained herein are for illustrative marketing purposes only, are subject to modification without notice, are not intended to be relied upon by any party and are not intended to constitute representations or warranties as to the ownership of the real property depicted hereon, the size and the nature of improvements to be constructed (or that any improvements will be constructed) or the identity or nature of any occupants thereof.

The lease also contained an integration clause, which read as follows: "This Lease contains all of the agreements made between the parties regarding the subject matter hereof, and may not be modified or amended in any manner, except by an agreement in writing signed by all of the parties hereto, or their respective successors in interest."

Sportsman's sought to rescind the lease and for money damages for the planned location of its store. Landlord Chesterfield relied on the integration clause and the fact that the lease did not contain a requirement that the lease was conditioned on a Sam's Club. The District Court agreed that the integration clause applied therefore binding the parties to the lease including the exhibits as the complete expression of the agreement. To try and vitiate the integration clause, Sportsman's argued it was a victim of fraud in the inducement to sign the lease or at least negligent or innocent misrepresentation, and therefore parol evidence should be allowed to show that it was duped into signing the lease by the promise of a Sam's Club store as a cotenant. The court disagreed, finding that, at the time Sportsman's signed the lease, there was no fraudulent or negligent misrepresentation. Rather, the court allowed parol evidence to clear up an ambiguity as to the word proposed on the site plan attached as exhibit to the lease. The court had previously found that the disclaimer language was illegible and had no legal effect. As to the word "proposed" on the site plan, the court found it ambiguous because it could mean "possible" or "likely," but it also has been construed to mean "planned" or "intended". The court found that based on the undisputed evidence in the case, the word "proposed" meant "intended" because the conduct of the parties pointed in that direction. The

court found that it was the fact of forthcoming Sam's Club that rekindled the lease negotiations and caused Sportsman's to be willing to incur the cost of relocating and redesigning the building to accommodate that inclusion. However, the court also required Sportsman to prove that its reliance on a future Sam's Club was so substantial of an unfulfilled term that rescission of the lease could be allowed. The court found that Sportsman's met that burden stating: "In this case, there is no doubt that a major consideration propelling Sportsman's to commit to space in the plaintiff's shopping center was the presence of a big box anchor tenant. In fact, all the evidence suggests that the promise of a pending Sam's Club was material to Sportsman's decision to sign the lease." The court, therefore, concluded that "when it was clear that the Sam's Club was not going to be built, Sportsman's had the option to rescind the lease."

Finally, in *Eastern Shore Markets v. J.D. Associates Limited Partnership*, 312 F.3d 175 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit, applying Maryland law recognized the potential for a claim based on an alleged breach of the implied covenant to refrain from engaging in destructive competition. On appeal, the Court of Appeals for the Fourth Circuit reversed the dismissal, stating that, "under Maryland law, the intentions of parties as expressed in the lease providing for rent calculated in part as a percentage of sales, combined with the circumstances surrounding the lease's formation, may give rise to an implied covenant to refrain from competition that is destructive to the mutual benefit of the contracting parties." The court focused on the "circumstances surrounding the lease's formation," including a "shopping-center site plan, which was made part of the lease, and its inclusion of [the plaintiff's] store as the only grocery store in the shopping center," which was attached to the plaintiff's complaint. Significantly, the appellate court rejected the argument that the terms of the lease and site plan demonstrated that the parties understood that the plaintiff would be the only grocery store and, therefore, created an implied covenant of exclusivity based on the implied covenant of good faith and faith dealing as that covenant must be bargained for and written in the agreement. Rather, the court found that an enforceable promise to refrain from destructive competition arose because the shopping center site plan, which apparently limited competition, was incorporated into the lease.

Another area on implied rights are implied easements. For example, in *South Beaver Historic Bldg. Group, L.L.C v. Harton*, 2007 Ariz. App. Unpub. LEXIS 211 (2007), the Arizona Court of Appeals affirmed the lower court's summary judgment finding an implied easement based on prior use for the operators of one parcel that operated businesses for over 25 years as tenants in the North property to use the back entrance of their stores that intersected with the parking lot of the adjacent South property, which exceeded the boundaries of a recorded easement. The court recognized that the undisputed evidence showed that the operators needed truck access directly to their back doors for deliveries, garbage pickup, and repairs and the only feasible way to do that was to have access beyond the express rectangular easement. The undisputed facts evidence that the alternative means would have blocked the operators' front entrances as the court found that " [t]he need for direct access to the back of the North Property without going through the front of the South Beaver businesses, disrupting their customers by blocking the entrances and making the customers eat alongside garbage cans, and making service personnel block a public street and extend long equipment to clean filters in the rear of the businesses, meets this test." *See also Granite Properties Ltd. P'ship v. Manns*, 117 Ill.2d 425, 512 N.E.2d 1230 (1987) (*implied* easement found to *use* driveway at rear of *shopping center* for deliveries when it would have been difficult and disruptive for semi-trailer trucks to make deliveries in different manner).

As can be seen in all of the cases above, a common theme is that the parties will be surprised to find that the court will entertain implied rights and the cases recognize such implied rights even if the leases do not expressly provide for them. Often, these cases are fact determinative to achieve a just result. Courts will often fin these implied results if the lease does not expressly provide otherwise.

IV. Frequently Disputed Clauses

A. Cotenancy Clauses

Co-tenancy clauses provide a given tenant with certain remedies, generally in the form of reduced rent and sometimes the ability to terminate its lease, in the event a key tenant or some key tenants (typically, but not always, the anchor tenants in a shopping mall/center), or a specific number of tenants or gross floor area, at the given shopping center/retail space cease operating, for a specified period of time. The (1) designated "required" co-tenants within a given lease should be well-defined (to avoid any claim of only partial integration, and, thereby admission of parol evidence), (2) the minimum period of closure, the notice right, and cure period of any, such be specified, (3) carve-outs from co-tenants operating requirements should be stated (such as force majeure, remodeling, assignment), (4) the tenant's remedies if a cotenancy failure occurs should be defined both in scope and timing, and (5) future conditions should be addressed (e.g., substitute co-tenants, "technology evolutions" of uses if applicable, tenant's own potential cessation of operation, future change in GLA).

Staples Office Superstore East, Inc. v. Flushing Town Center III, L.P., 90 A.D. 3d 638 (Sup. Ct. N.Y. 2011)

This case demonstrates the importance of the specific language within a cotenancy clause of a lease as it related to the use of the term "national retailer." Specifically, the lease at issue required the landlord to lease the premises adjacent to tenant's leased premises to a "national retailer having not less than 100 stores and occupying not less than 100,000 square feet." The lease did not contain a definition for "national retailer." At the time of the letting, the adjacent space was leased to BJ's Wholesale Club, which then operated in 15 states. Thus, the court was left to interpret for itself what was meant by "national" and, in doing so, applied the "plain and ordinary" meaning of the term "national" and found that the retailer's business needed to "nationwide in scope," and determined that a retailer who stores were located in only 15 states, none of which were further west than Ohio, did not satisfy this required (even though such retailer otherwise satisfied the 100 stores, and 100,000 square foot requirements).

Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc., 232 Cal. App. 4th 1332 (Cal. Ct. App. 2015)

This is a case concerning the enforceability of cotenancy provisions generally and demonstrates how a court will determine if a cotenancy provision is unconscionable or an unreasonable penalty. Here, tenant's obligation to open and pay rent was conditioned on a co-tenant operating a store for no less than 76,000 square feet of floor area within the same shopping center by the commencement date of the defendant tenant's lease. This opening co-tenancy requirement was not satisfied because the required co-tenant filed for bankruptcy and had closed for business prior to the commencement date of the defendant tenant's lease. Despite this, defendant tenant took possession of the space, but then declined to open for business, never paid rent, and thereafter terminated the lease pursuant to the co-tenancy provisions of the lease, citing the plaintiff landlord's inability to cure by finding an acceptable replacement retailer for the originally named required co-tenant during the 12-month cure period (landlord had secured an acceptable replacement, but such replacement would be unable to open for business during the required 12-month cure period). The trial court in this case found that the provisions authorizing rent abatement and termination were unconscionable or, alternatively, an unreasonable penalty and thus unenforceable.

On appeal, the appellate court reversed the trial court and determined that co-tenancy provisions were not unconscionable, noting the sophistication and experience of the parties and lack of unconscionable economic pressure. The appellate court also rejected the landlord's contention that tenant's form lease and tenant's insistence on the co-tenancy provisions, was not a contract of adhesion. Most importantly in modifying the lower court's judgment, but not completely reversing it, the appellate court bifurcated the rent abatement remedy and the lease termination remedy as a matter of California law, finding that the rent remedy could be exercised even if the termination remedy was not, each remedy was triggered was different events, and each remedy had different consequences on the landlord-tenant relationship. In this case, the appellate court found that the rent abatement remedy for the co-tenancy failure was an enforceable penalty because paying $0 had no reasonable relation to the co-tenancy failure, but defendant tenant still retained its termination right if the landlord was unable to secure a replacement tenant in the 12-month period). Thus, the tenant was required to pay the rent (i.e., that portion of the remedy was unenforceable), but was allowed to terminate the lease.

DN Reynoldsburg v. Shoe Show, Inc., 2020 WL 5797828 (S.D. Ohio, 2020)

In this ongoing case, plaintiff landlord, the owner of a shopping center, is claiming that defendant tenant, is required to pay full rent under the applicable lease, while the tenant is claiming that opening co-tenancy (from 2016) was never satisfied and it can pay 5% of gross sales pursuant to the lease until the three bargained for particular retailers (Sports Authority, TJ Maxx, and Maurices) open at the shopping center. Sports Authority of course, filed for bankruptcy in 2016 and never opened at this particular shopping center, and the landlord has relet the former Sports Authority space to a furniture store.

On a summary judgment motion, plaintiff pointed to the replacement anticipated co-tenant provision in the lease and claimed that defendant tenant's interpretation of the lease would permit tenant to pay percentage rent for the duration of the lease (up to 25 years), which would be an unenforceable penalty given that it would result in a $2.6 million windfall for defendant over the life of the lease, based on Sports Authority bankruptcy. The court took issue with this argument and stated that such provisions are not categorically prohibited as penalties under Ohio law, especially where the landlord freely negotiated the lease, noting that a lease provision permitting the payment of rent as a percentage of gross sales is not a measure of damages, but an allocation of risk, tied to the profitability of the tenant. (Citing *Midamco, L.P. v. Fashion Bug of Solon, Inc.*, 116 Ohio App. 3d 854 (Ohio Ct. App. 1996)).

Ultimately, the court concluded that the contract was missing a term on the issue of whether a co-tenant could be replaced before that co-tenant opens for business, stating "[t]he parties did not come to an agreement as to what would happen if one of the original co-tenants never opened. . . . the language of the contract does not speak to the present situation where an original co-tenant is to be replaced before ever occupying the space or

opening for business. Here, the contract is not ambiguous because it is susceptible to two reasonable interpretations, it is simply silent as to the issue before this Court." Ohio courts, taking the majority rule on the matter of silence on a specific issue within a contract, and will not formulate a new contract for the parties. Thus, it was necessary for the court to deny summary judgment because of a genuine issue of material fact.

Practice Pointer: Replacement co-tenants provisions in leases should not just address if a co-tenant "ceases" operating, but should be drafted to capture if such co-tenant never itself opens and/or ceases operating before the subject tenant itself opens.

B. Use and Protective Restrictions

A protective restriction enables a tenant to use its premises for an intended specific use, and restricts a landlord's ability to permit other tenants within the shopping center from using those other tenants' premises for the same or a similar use (effectively limiting the number and type of uses, and therefore potential tenants, it may lease to at its shopping center). There is a fundamental difference between landlord covenants, which are binding agreements on only the landlord's conduct, and exclusive use rights, whereby a landlord agrees to be the third party indemnitor for the conduct of all its tenants (and even other occupants with whom it may not have privity). Tenants, therefore, typically want exclusive use rights, whereas landlords want to grant no use protections, but if they grant any, they want to grant only landlord covenants.

Interstate Realty Co., L.L.C. v. Sears, Roebuck & Co., 2009 WL 1286209 (N.J. U.S.D.C. 2009)

Here, Landlord agreed that it would "not lease . . . for the sale of certain items or services which would normally be sold in a 'Sears Hardware Store,'" with such items being defined as "including, without limitation, the sale of hardware materials, tools and supplies, paint, plants, and power and non-power lawn and garden equipment, tools and supplies."

At the time of signing the lease in 1995, tenant's parent company had operated 108 "Sears Hardware Store" locations nationwide. By 2002, Tenant's parent company has begun converting roughly 80 of its "Sears Hardware Stores" to "Sears Appliance and Hardware Stores." The tenant here eventually changed its use at the subject premises and started to operate as "Sears Appliance and Hardware Store" and attempted to expand what it was selling. Prior to 2002, however, tenant had not sold or carried dishwashers, washers, dryers, compactors, ranges and refrigerators, but as of 2006 had begun to carry those products in addition to ovens, sinks, and outdoor grills. Tenant became aware of landlord's lease negotiations with another prospective tenant that intended to sell appliances and ancillary products customarily sold in appliance stores and then attempted to claim that it had exclusive rights governing the sale of appliances at the shopping center, because they were normally sold at "Sears Appliance and Hardware Stores." Landlord, disputed this claim and contended that it only applied to the sale of hardware store items.

The court in this case found that there was no specific-time period identified within the lease and that the list of products normally sold should be determined at the relevant time - here, at the time the new lease was being negotiated. That said, the court also noted that the lease would determine whether the tenant could unilaterally change the name of its store and/or the products it sold. On this point, the court noted that the name "Sears Hardware Stores" was in quotations each time it appeared in the relevant section of the lease, which demonstrated the parties' intention to limit tenant's protected rights to those products normally sold in stores with the name "Sears Hardware Store." When the store at issue transformed into a "Sears Appliance and Hardware Store," tenant did not lose its protections on what is normally sold at "Sears Hardware Stores," but it did not automatically gain protections over an additional world of products now normally sold at "Sears Appliance and Hardware Stores."

This case demonstrates the pitfalls of a landlord granting only a landlord covenant, but then erroneously referring to such limited covenant as an "exclusive use" within the text of the lease. This lease and this case could have been an opportunity to educate judges and courts about the narrowness of a landlord covenant, but instead, presented a court with lease document that, by its own terms conflated the two concepts. It is no wonder judges are confused by these concepts when the transactional lawyers cannot draft the provisions clearly themselves. Be certain to have the concept clear in your mind within each lease - - is this lease a landlord a covenant or an exclusive use and then make sure that the entire section is drafted consistently throughout.

Wheatley v. Dixie Mall 2003, LLC, 482 S.W. 3d 760 (Ark. App. Ct. 2016)

In this case, the parties entered into a lease agreement with a permitted use provision that stated, tenant could "use the Premises for a batting cage area and speed or agility training (provided, however, Tenant shall not use free weights or exercise machines on the Premises, or sell memberships for such speed and agility training),

and for the limited incidental retail sale." In 2015, landlord learned tenant was offering strength-and-conditioning classes, fitness-training classes, and exercise machines. At the same time, another tenant at the shopping center was also offering health, weight-loss, and fitness classes and had a lease that contained certain use protections. Landlord sent the first tenant two written notice of violations of its permitted use (which contained use restrictions), but tenant failed to comply with the notices, so the landlord served a lease termination notice, which was an express remedy under the lease if the tenant violated the use provision and did not cure within 24- hours following written notice. Tenant argued that landlord failed to comply with the notice requirements under a different section of the lease (relating to change in use and tradename), which provided a 30-day notice period.

The court here had no trouble finding the substantive issue in favor of the landlord, namely, that the use was not permitted, and further found that the longer notice period only applied if and when the tenant was seeking a change in use, and not under the circumstances here.

Practice Pointer: Whether this lease had referred to a change in use provision or a default provision or any other section of the lease with a potentially longer or different cure period, whenever in a lease, no matter the provision, if a lease provides for the giving of a notice, the lapse of a cure period, and then the availability of some remedy, including the simple phrase "notwithstanding anything contained in this Lease to the contrary" in that provision, together with citing to the provision of the lease that you are then invoking in your notice letter, should maximize the likelihood that the cure period you are seeking to invoke and the remedy you are seeking to avail yourself of will be enforced in lieu of other potentially available and/or cumulative cure periods and/or remedies under the lease (which quite often do exist).

C. Liquidated Damages, Rent Acceleration, Penalties

Liquidated damages are a pre-determined, stipulated amount of damages within a contract that apply upon the occurrence of an event, which can include a breach of contract by one party, if such event or if a breach occurs at all. They are favored by the parties to a contract for "certainty" purposes, but they are only enforceable under circumstances where the parties can only estimate the damages, such estimate is reasonable, and the circumstances in which liquidated damages are utilized does not violate public policy. Liquidated damages that constitute a penalty are not unenforceable. Courts are generally willing to uphold liquidated damages provisions between commercial parties in written contracts so long as the amount bears some reasonable proportion to the probable loss, but the amount of the loss itself is not incapable or would be difficult to estimate or calculate, and neither party wielded greatly unequal bargaining power at the time of contracting. In retail leasing, liquidated damages are most often seen as a measure of damages when a tenant that is subject to an operating covenant goes dark, but if can found in a multitude of circumstances.

Commercial leases routinely provide for a landlord remedy of lease termination following an uncured tenant default, as well as recovery of rent damages. Most leases include among those rent damages, future rent damage for anticipated loss of rental stream, for some or all of the what would have been the remaining term of the lease had the landlord not terminated the lease. Pure rent acceleration clauses enable a landlord to collect all rent payable after the termination of a lease, as a one-time lump sum payment. Variations including discounting this amount to present value, reducing this amount by fair market rental value for some or all of the remaining term, or stipulating in the lease that landlord will be entitled to accelerate rent for some finite period of time immediately following termination during which the parties stipulate and agree landlord will be unable to relet the space and get a replacement tenant to commence paying rent (in exchange for which neither tenant has the obligation to prove fair market rental value nor does landlord have to demonstrate any efforts to mitigate its damages).

Trustees of Columbia University in City of New York v. D'Agostino Supermarkets, Inc., 36 N.Y. 3d 69 (N.Y. 2020)

This case involves the enforceability of a liquidated damages provision in the context of a surrender agreement entered into after a lease termination. Landlord is a university that had rented space for use a supermarket under a 2002 lease. In 2016, tenant stopped paying rent under the lease and later that year the parties entered into a surrender agreement pursuant to which tenant agreed to make a lump sum payment and additional monthly payments, totaling the rent arrears (roughly $260,000). The surrender agreement further provided that if any payment was unpaid beyond five days following notice of default, then all rent that would have been due under the lease would be accelerated. After paying the lump sum payment, tenant failed to make the additional monthly payments and landlord commenced suit seeking to accelerate the rent under the lease.

All levels of the court (including New York's highest court), found this acceleration of rent, in this context, unenforceable, because, in this context, the damages at the time of the surrender agreement were ascertainable (i.e., the balance due of the stated amount due under the surrender agreement) and the accelerate rent amount far

exceeded the landlord's actual damages (i.e., being an amount over 7 times the amount that Landlord would have received if the surrender agreement had been fully performed). Specifically, the court noted that the landlord here had elected to enter into the surrender agreement instead of suing for a breach of the lease in the first instance (which would have allowed landlord to pursue future rent under the lease), but by doing so, landlord gained the ability to immediately reenter and relet the premises (and, thereby, derive income therefrom) without the need for litigation. As such, landlord had relinquished its right to acceleration under the lease and tenant was relieved it of obligation to pay any future rent. The surrender agreement was viewed as a new contract between the parties and the "accelerated rent" was viewed as a liquidated damages provisions solely as it related to the contractual obligations under that new contract (i.e., the surrender agreement) alone.

Practice Pointer: A lease amendment, accelerating the expiration date, can achieve the same result as was attempted here, without terminating the lease, prior to full payment of any agreed amount. A lease amendment continues the lease in full force and effect, with an acceleration of what is scheduled to be the expiration date to occur upon the happening of certain conditions precedent (i.e., payment and physical surrender). If the conditions do not occur, then the lease remains in effect, and landlord retains all right and remedies (and, for that matter, tenant retains is leasehold estate and the rights, as they may be, to assign and sublet).

Leeber Realty LLC v. Trustco Bank, 798 Fed. Appx. 682 (2nd Cir. 2019)

This case involves the enforceability of rent acceleration provision without any offset for reletting proceeds. Specifically, tenant argued that under the lease the rent acceleration clause was not enforceable because the landlord was not required to relet the premises or to apply the proceeds of reletting to the benefit of tenant. Here, the court held that the landlord is not required to mitigate damages in the event of a tenant breach, but did not apply the rent acceleration provision to the five-year extension option period, limiting acceleration to only the twenty-year initial fixed term. Despite the parties unambiguously exercising the option, the court construed the capitalized term "Lease Term" as used in the lease, not to include an "Option Term."

Note: Although black letter law (and in this instance, New York law,) does not require that commercial landlords have any obligation to mitigate their damages, in many jurisdictions, there is a statutory or common law duty to mitigation damages (or both), and often this cannot be waived by contract.

Valentine's Inc. v. Ngo, 251 S.W. 3d 352 (Mo. App. Ct. 2008)

In this instance, a tenant restaurant sought to enforce its lease's $100,000 liquidated damages provision against its landlord for allegedly violating the lease's non-compete clause and for its landlord leasing of additional space at the shopping center to another restaurant. Tenant had paid the majority of its necessary premises improvement expenses at an estimated cost of roughly $100,000. The non-compete clause and corresponding liquidated damages clause stated in part "[Landlord] agrees to not lease any space in the retail building ... to any other restaurant which serves steaks, seafood or pasta. In the event [Landlord] violates this non [-]competition clause it agrees to pay [Tenant] the sum of $100,000.00 as and for liquidated damages, it being acknowledged, that damages in the event of such a breach would be difficult, if not impossible to ascertain." After entering the lease and agreeing to the non-competition clause, landlord rented space in the same retail building to a Mexican-themed restaurant. Tenant presented menus that demonstrated that items such as steak and fish were offered, in addition to photo evidence of other steak and seafood entrees. Landlord argued that the liquidated damages clause was unenforceable as a penalty that far exceeded the actual damages tenant suffered.

The court found that the liquidated damages amount was approximately the amount of investment tenant anticipated it would need to make the improvements for its restaurant and tenant no longer had the benefit of being the only restaurant offering steaks and seafood, thereby being deprived of the benefit of its bargain. The court reasoned that in order to recover liquidated damages the tenant needed only to show that it suffered actual harm, but need not show any precise dollar amount, citing to the fact that Missouri courts have allowed "significant latitude in setting the amount of anticipated damages" in instances where the difficulty of proof of loss is great. Thus, the court found that the liquidated damages clause did not amount to a penalty and awarded the liquidated damages to tenant.

Star Development Corp. v. Urgent Care Associates, Inc., 529 S.W. 3d 487 (Mo. App. Ct. 2014)

This case addresses the enforceability of a late charge fee provision within a commercial lease. Here, landlord sought damages from a former commercial tenant for various items of rent, plus late charges after the tenant terminated a month-to-month tenancy following a holdover after the expiration a written shopping center lease. The lease between the parties required tenant to pay a late charge equal to 15% of any payment that was not made by the tenth (10th) day of any month. In determining whether such late charge provision was an

enforceable liquidated damages clause or an unenforceable penalty clause, the court pointed to the express language of the lease that stated the intent of the late charge was to compensate landlord for any administrative expenses it would incur if rent was not paid on time. The court also found that the 15% late charge assessed was a reasonable forecast of damages to compensate landlord for its administrative efforts in generating a report, discussing past due status, and attempting to contact tenant each month rent was late (for which tenant habitually was late). Such administrative efforts constituted the necessary "actual harm" element of the court's analysis supporting liquidated damages.

Additionally, tenant argued that landlord waived its right to collect the late charges when it accepted late rental payments without notifying tenant that its payments were late, or subject to the late charges, and without always seeking recovery of the late charges over the course of the five-year lease period which included 39 late rental payments. The court rejected this argument, noting that the provision contained no time limit on such recovery and the lease included a no-waiver boilerplate clause.

D. Self Help Remedies

1. Self-Help Remedies for Landlords in Commercial Leases

"Eviction through legal process is undoubtedly the most secure method." *Sol De Ibiza, LLC v. Panjo Realty, Inc.*, 29 Misc.3d 72, 75 (N.Y. Sup. Ct. 2010). Many leases, however, contain self-help remedies that allow landlords to re-enter the leased premises without resorting to court process upon a tenant's default, termination of the lease or abandoning the premises. This is often problematic, especially for national landlord that have form leases that contain these self-help remedies. Even if a lease contains such remedies, they may be unenforceable under state law no matter what the parties negotiated in the leases. For example:

- There are at least 11 states where there is a common law remedy for self help not abrogated by statue and often limited to what agreed to in the lease: Alabama, Alaska, Arizona, Hawaii, Maryland, Mississippi, New Jersey, New York, Ohio, Texas and Wisconsin.

  However, even in these states, self help is discouraged. *See Donegal Assocs., LLC v. Christie-Scott, LLC*, 248 Md. App. 448,472, 241 A.3d 1011 (2020):

  Based on this case law, a commercial landlord is permitted, although it is not encouraged, to resort to self-help to repossess premises and property within the premises in the following circumstances: (1) the tenant is in breach of a lease; (2) that authorizes the remedy of repossession; and (3) the repossession can be done peacefully.

- There are six states where self-help is limited to abandonment or other limited circumstances: Idaho, Missouri, Montana, North Dakota, Virginia and West Virginia.

- There are 20 states and the District of Columbia where the use of self-help is prohibited and commercial landlords are required to only use the judicial process to remove tenants, including Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Tennessee and Washington. As stated by the Illinois Appellate Court: "[T]he Forcible Entry and Detainer Act put an end to the practice of self-help and provides the sole means for settling a dispute over possession rights to real property." *Fortech L.L.C v. R.W. Dunteman Co.,* 852 N.E.2d 451, 459 (Ill. App. 1st Dist. 2006).

- There are 13 stats States where there are no statutes or reported court decisions that prohibit the use of self-help, including Colorado, Indiana, Iowa, Kansas, Kentucky, Nevada, New Hampshire, Oregon, South Carolina, South Dakota, Utah, Vermont and Wyoming.

Even in states where the self-help remedy is available, the landlord still may not want to exercise the remedy. First, courts are hostile to the landlord's use of self-help before a tenant can litigate its right to remain in possession. Second, courts will not allow the self-help remedy where it is not explicitly reserved in the lease. For example, in *Greaves Lane, LLC v. NBM Development, LLC*, the New York State court found that although New York allows the landlord to self-help if expressly reserved in the lease, the lease at issue allowed re-entry and removal only "by summary dispossess proceedings [or] by any suitable action or proceeding at law." 2002 WL 1868882, at *9-*10 (N.Y. City Civ. Ct. 2002). Third, landlords should be cautious in utilizing the remedy because

landlords who wrongfully evict commercial tenants prematurely from real property by force or other unlawful means may be liable for damages or compelled to restore possession of the property to the tenant. For example, in Wagner v. Weaver, the Ohio Court of Appeals affirmed the trial court's decision to award the commercial tenant the retail value of goods damaged by the landlord's wrongful eviction of tenant where the landlord elected to use self-help by changing the locks on the premises without giving notice to the tenant in violation of the landlord's own lease agreement. 2010 WL 892108 (Ohio App. 3d Dist. 2010). In In re 1345 Main Partners, Ltd., the bankruptcy court restored possession to the tenant because even though Ohio law allows a commercial lessor to resort to self-help repossession, the tenant's technical breach of withholding rent pending resolution of its dispute with the landlord concerning the landlord's removal of lights that the tenant installed did not permit the landlord to declare a forfeiture. 215 B.R. 536, 542 (Bankr. S.D. Ohio 1997).

2. Self-Help Remedies for Tenants in Commercial Leases

The availability for self-help remedies to commercial tenants depends primarily upon whether the covenants in the lease are dependent or independent. Traditionally, covenants in leases are independent unless the lease expressly made them conditional and dependent. 15 Williston on Contracts § 44:42 (4th ed.) Under this view, a breach of a lease by a landlord does not justify the tenant in terminating the lease or refusing to pay rent. *Id.* For example, the Illinois Appellate Court held that even if the landlord breached the lease, such fact alone did not relieve the tenant of its obligations to pay rent. *See Village. of Palatine v. Palatine Assocs.*, LLC, 2012 IL App (1st) 102707, ¶ 87. Similarly, New York courts consider the obligation to pay rent pursuant to a commercial lease an independent covenant that cannot be relieved by allegations of a landlord's breach. See *Universal Commc'ns Network, Inc. v. 229 W. 28th Owner, LLC*, 926 N.Y.S.2d 479, 480 (1st Dep't 2011). On the other hand, some courts have instead adopted the rule of mutually dependent covenants formulated by Restatement (Second) of Property (Landlord and Tenant). *See e.g. Wesson v. Leone Enterprises, Inc.*, 437 Mass. 708, 709 (2002). Under this view, the tenant can terminate the lease and withhold rent if the landlord breaches the lease and thus deprives the tenant of the substantial benefit significant to the purpose for which the lease was entered. Id. In *In re Tiny's Cafe, Inc*., the court held that the tenant was entitled to withhold rent even where the lease expressly provided that the landlord's failure to maintain the roof "shall not be grounds for the tenant to stop paying rent." 322 B.R. 224, 227-29 (Bankr. D. Mass. 2005). The court held that it would not allow the landlord "to reap an unfair benefit from a clause of the lease that requires [tenant] to pay rent, indefinitely, while he refuses to fulfill his bargained for duty." Id. at 228.

However, even where a lease specifically provides for a self-help remedy upon landlord's breach, tenants should use caution before utilizing such remedy. For example, tenants often invoke a right to withhold the rent when they believe the landlord failed to make repairs or maintain the premises in good state of repair. This is risky. If the court finds that the tenant was not entitled to withhold the rent, the landlord may terminate the lease and evict the tenant. The following case illustrates the risk to the tenant. In *South Willow Properties, LLC v. Burlington Coat Factory of New Hampshire, LLC*, the court considered whether the tenant breached the lease by replacing the leaking roof without the landlord's permission. 159 N.H. 494, 496 (2009). The tenant maintained that the replacement of the leaking roof was landlord's responsibility, and because the landlord failed to make repairs, the tenant was authorized to replace the roof on the landlord's behalf and at the landlord's expense. The court disagreed and found that because the tenant itself caused damage to the roof, it had an obligation to repair it. *Id.* at 502. Moreover, the lease required the tenant to submit plans and specifications for the proposed work to the landlord and receive written approval before performing any structural work. The court found that the work bids submitted by the tenant were insufficient, and accordingly the demolition and replacement of the roof constituted a material breach of the lease and grounds for eviction. Id. at 502-03.

So despite what the lease states and how heavily negotiated the lease may be, landlords and tenants should know their jurisdiction before using a self-help remedy, even if provided for in the lease. Even when a state allows self-help, commercial landlords should negotiate carefully as the provisions will be evaluated strictly. Therefore, in states that allow self help, often the remedies will be limited to what was agreed to in the lease. The landlords and tenants should clear as those remedies for them to be enforced. Regardless, landlords should consider using the judicial process even if the state allows the self-help remedy because of potential damages for a wrongful self-help eviction. Similarly, commercial tenants should consider using the judicial process because of the risk that by improperly utilizing a self-help remedy, tenants themselves may be found in material breach of a lease and evicted.

V. COVID Clauses

COVID-19 has put our world on standstill and has watched it cripple many businesses. In the shopping center world, it has caused havoc in landlords having to close centers due to government orders and health protocols and force tenants (retail, restaurant, etc.) to close its stores and restaurants to in-person shopping guests. As a result, many tenants could not or refused to pay rent during the shutdowns. Many of the landlord and tenants

negotiated a resolution during this unprecedented time, such as usually rent deferrals and sometimes even rent abatements. However, not all landlords and tenants were able to agree leading landlords to seek collection of unpaid rent or even more aggressively seek to terminate the lease and evict the tenant, and on the flip side leading tenants to seek rent abatements from the court or even or aggressively seeking to rescind or reform the lease. This has resulted in courts having to either enforce rent payment provisions in leases or agree with tenants that a lease provision or equitable remedy excused it from the payment of rent during the shutdowns or even excused the tenant from the lease in its entirety.

A. Lease Provisions and Equitable Remedies That Have been In Dispute

The typical provisions that the landlords and/or tenants have relied on in these rent disputes are:

- Payment of Rent – Typically, these provisions contain language for payment of rent without any prior demand, notices, or rent statements therefor and without any offsets or deductions whatsoever (except as otherwise specifically set forth in this Lease).

- Use Provision – This provision could be important, for example, if the tenant is a restaurant for, example, where the use if for a full service sit-down restaurant, or the tenant require in-person store presence for an event barred by the shutdown.

- Force Majeure – Typically, this provision allows to excuse for performance if an act required under the lease in prevented from occurring, such as lockouts or government restrictions and public health orders, but these provisions usually favor the landlord because the prior force majeure provisions did not include, for the most part, an exception for epidemic or pandemics. *But see In re CEC Ent., Inc.*, No. 20-33162, 2020 WL 7356380, at *10 (Bankr. S.D. Tex. Dec. 14, 2020) (rejecting the argument that a force majeure clause did not include COVID-19 because the clause did not specifically refer to disease or pandemics because it was nonsensical for a force majeure clause to contemplate “unforeseen events” and then not apply that clause when an event wasn’t specifically contemplated). Also, the force majeure usually contains a provision whereby the provision shall not be applicable to delays resulting from the inability of a party to obtain financing or to proceed with its obligations under this Lease because of a lack of funds and shall not apply to an obligation of a party under this Lease to pay money when the same is due.

- Casualty, Condemnation – Tenants have mostly raised unsuccessfully that the shutdown was a condemnation that the government shut down resulted in a taking of its property since the Tenant was unable to use the premises. *See 1600 Walnut Corp. v. Cole Haan Co.*, No. 20-4223, * 8 82021 U.S. Dist. LEXIS 60156 (E.D. Pa. 2021) (Governor's executive orders to be valid uses of police power and not a taking under the exercise of eminent domain power).Tenants have also suggested that the casualty provision is triggered because there is damage in light of closures or shutdown order, but that would usually requires some damage to the property. Whether or not the casualty provision of a lease will be applicable during the coronavirus crisis – in light of building closures and shelter-in-place orders in place throughout the country – will depend on the specific language of the lease.

Some other provisions tenants have raised to try to abate rent or terminate the lease include the breach of the covenant of quiet enjoyment and landlord noninterference provision.

In addition to interpreting and enforcing lease provisions, tenants have raised equitable arguments to excuse the lease obligations including impossibility or commercial impracticability and frustration of purpose. The courts have not typically allowed these equitable remedies to excuse the tenant’s rental obligations under the lease especially when the landlord and tenant allocated the risk in the lease or the lease contains a force majeure clause that contains the standard language that does not excuse the payment of rent. But there have been exceptions and the tenants have prevailed in certain situations.

B. Case Update

Many courts have found in favor of the landlord relying on the force majeure provision in the lease allocating the risk to the tenant for the payment of rent. *See In re CEC Ent., Inc.*, 2020 WL 7356380, at *14 (Bankr. S.D. Tex. Dec. 14, 2020) (holding that the broad language carving out the payment of money demonstrated the parties’ intent that “unforeseen circumstances will not excuse” the failure to pay rent); *1600 Walnut Corp.*, 2021 WL 1193100, at

*1 (nonpayment of rent not excused where force majeure clause excluded "obligation to pay rent" and nonperformance "due to lack of funds"). New York courts, in particular, have found that the doctrines do not excuse the nonpayment of rent where the allocation of risk clauses were "drafted broadly" and unequivocal. *See* Victoria's Secret Stores, LLC v Herald Sq. Owner LLC, 70 Misc. 3d 1206[A], at * 2 2021 NY Slip Op 50010[U] (Sup. Ct. N.Y. 2021); Valentino U.S.A. v. 693 Fifth Owner LLC, 2021 N.Y. Misc. LEXIS 607 at *2; 2021 NY Slip Op 50119(U) (Sup. Ct. N.Y. 2021).

But there have been a few cases where the Court went out of its way to find that the force majeure clause did not allocate the risk to the tenant and abated rent during the shutdown. *See In re Hitz Grp*., 616 B.R. 374, 378 (Bankr. N.D. Ill. 2020) (even though the force majeure clause states that "lack of money" shall not be grounds for force majeure, the bankruptcy court found that the shutdown order was the proximate cause of inability to generate revenue and pay rent and therefore, the tenant was partially excused 75% of the rent for April, May and June 2020 during the shutdown as the court approximated that the restaurant could use 25% for carryout, curbside pickup and delivery purposes); *In In re Cinemex USA Real Est. Holdings, Inc.,* No. 20-14695-BKC-LMI, 2021 WL 564486, at *1 (Bankr. S.D. Fla. Jan. 27, 2021) (finding that the failure to pay money exclusion in the force majeure provision only limited the catch all provision and not the specific enumerated clauses like shutdown orders and abated rent for the shutdown period). Some observers have distinguished these cases as bankruptcy cases where the court has more equitable jurisdiction.

Courts may also find that the force majeure clause forecloses common law defenses like impossibility, impracticability or frustration of purpose. *See, e.g., Victoria's Secret Stores,* 70 Misc. 3d 1206[A], at * 2; Valentino U.S.A. v. 693 Fifth Owner LLC, 2021 N.Y. Misc. LEXIS 607 at *2. But some courts will view the specific language of any exclusionary clause to determine if the common law doctrines apply to nonpayment of rent. *See* In re Cinemex USA Real Est. Holdings, Inc., WL 564486, at *1.

Therefore, courts have found that common law doctrines like frustration of purpose did not rescue the tenant from having to pay rent. See *In re CEC Entm't., Inc.,* 2020 WL 7356380, at *15 (where the lease provides that the property can be used for "any lawful purpose" government orders shutting down a specific category of businesses would not "frustrate" the lease purpose*); Gap Inc. v. Ponte Gadea N.Y. LLC,* No. 20 CV 4541-LTS-KHP, 2021 U.S. Dist. LEXIS 42964, at *21 (S.D.N.Y. Mar. 8, 2021) (purpose of lease permitting GAP to operate a "first class retail business" was not frustrated because GAP could still provide curbside pickup of retail orders and to invoke frustration of purpose anyway: "It is not enough, however, that the transaction will be less profitable for an affected party or even that the party will sustain a loss.")*; Bedford LLC v. Equinox Bedford Ave, Inc.*, 2020 NY Slip Op 34296(U), ¶ 4, 2020 WL 7629593 (Sup. Ct. N.Y. 2020) (finding that "[a] gym being forced to shut down for a few months does not invalidate obligations in a fifteen-year lease."

But when the use language provides for a specific purpose, the closing of the store may trigger frustration of purpose. For example, in *UMNV 205-207 Newbury, LLC v. Caffé Nero Americas, Inc.* 2084CV01493-BLS2, 2021 WL 956069 (Mass. Super. Ct. Feb. 8, 2021), Caffe Nero's lease specifically provided that the premises could only be used "only to operate a café with a sit-down restaurant menu 'and for no other purpose.'" Because the shutdown prevented use of the property as a sit down restaurant, the frustration of purpose doctrine was satisfied. Or other courts have limited the time frame when it could abate the rent. *See In re Cinemex USA Real Estate Holdings, Inc.*, 2021 Bankr. LEXIS 200, at *13 (payment of rent would be excused only for the time where governmental orders prohibited opening, but not when the business could open, but chose not to because it would have been unprofitable).

Overall, leases for the most part have survived COVID-19 like other disasters or unforeseen circumstances in the past, such as other health emergencies or the 9/11 terrorist attacks. But the pandemic and resulting government shutdown has opened the door for certain circumstances depending on the jurisdiction, the lease language and factual circumstances of the case.

VI. Hidden/Boiler Plate Clauses

There are provisions in leases often not even looked at or negotiated, but often have important implications to the enforcement of an interpretation of disputed lease provisions. Parties should pay attention to these provisions when they negotiate their leases and when they evaluate their rights under them.

A. Procedural Boilerplate Clauses

<u>Construction</u>. This Lease shall be construed without regard to: (a) the identity of the party who drafted the various provisions hereof, and (b) the addition or deletion of text made during the negotiation of this Lease. Moreover, each and every provision of this Lease shall be construed as though all parties hereto participated equally in the drafting

thereof. As a result of the foregoing, any rule or construction that a document is to be construed against the drafting party shall not be applicable hereto.

Section Headings and Capitalized Terms. The section headings and capitalized terms in this Lease are for convenience only and do not in any way limit or simplify the terms and provisions of this Lease, nor should they be used to determine the intent of the parties or interpret the substantive provisions hereof.

Partial Invalidity. If any term, covenant, condition or provision of this Lease or the application thereof to any person or circumstance shall, to any extent, be found, held, or determined to be invalid or unenforceable, in whole or in part, then the remainder of this Lease, or the provision, as the case may be, or the application of such term or provision to persons or circumstances other than those as to which it is found, held or determined to be invalid or unenforceable shall not be affected thereby and each term, covenant, condition and provision of this Lease, or the provision, as the case may be, shall be valid and be enforced to the fullest extent permitted by law and equity.

No Waiver. The failure of either party to seek redress for violation of, or to insist upon strict performance of, any term, covenant or condition contained in this Lease shall not be deemed a waiver of such redress (unless expressly stated in this Lease) and shall not prevent a similar subsequent act from constituting a default or an Event of Default under this Lease nor prevent either party from seeking enforcement hereunder at any time. No endorsement or statement on any check or letter, notice, or correspondence accompanying a check for payment of rent shall be deemed an accord and satisfaction, and Landlord may accept such check or payment without prejudice to Landlord's right to recover the balance of such rent or other payment or to pursue any other remedy provided in this Lease, at law, or in equity. No agreement to accept a surrender of the Premises or this Lease other than at the natural expiration of the Term shall be valid unless in a writing signed by both Landlord and Tenant. The delivery of keys, any attempted abandonment of the Premises, and/or any attempt to deliver possession of the Premises by Tenant to Landlord or any agent or employee of Landlord shall not operate as a termination of this Lease, a surrender of the Premises, or an acceptance by Landlord of any such attempted surrender by Tenant.

Entire Agreement. This Lease contains the entire, only, and exclusive agreement between the parties and no oral statements or representations or written matter not contained in this instrument shall have any force or effect. This Lease is the exclusive manifestation of Landlord's and Tenant's mutual intentions and understandings and, to the fullest extent permitted under applicable law, there are no intentions, understandings, or agreements relating to the subject matter hereof that are implied. As a result and consistent with the foregoing, Landlord and Tenant hereby knowingly and intentionally waive, to the fullest extent permitted under applicable law, any and all implied covenants that are not expressly set forth herein, it being their mutual intention that this Lease memorializes all of their understandings, agreements, and intentions. This Lease shall not be amended or modified in any way except by a writing executed by both parties. All of the recitals set forth herein and exhibits attached to this Lease are incorporated into this Lease by reference are for all purposes a part of this Lease.

Independent Covenants. All obligations of Landlord hereunder are intended and shall be construed as independent covenants and not as conditions to full and complete payment and performance by Tenant. Notwithstanding anything contained herein to the contrary, in the event of any claimed failure(s) by Landlord to pay or perform hereunder, Tenant's sole and exclusive remedy shall be an action for damages (subject to all notice rights and cure periods as set forth herein), but in no event whatsoever shall any such alleged failure(s) by Landlord hereunder relieve Tenant of its independent covenants of payment and performance under this Lease or toll any of Tenant's independent obligations to pay or perform, all of which shall be unaffected by and independent of Landlord's covenants and obligations.

Definition of Hereunder, Herein, etc.. Unless the context clearly indicates to the contrary, the words "herein," "hereof," "hereunder," "hereafter," and words of similar import refer to this Lease and all of the Exhibits attached hereto as a whole and not to any particular section, subsection, or paragraph hereof.

B. Substantive Boilerplate Clauses

Rent Payment. . . . without any prior demand, notices, or rent statements therefor and without any offsets or deductions whatsoever (except as otherwise specifically set forth in this Lease) . . .

Force Majeure. If either party hereto shall be delayed or hindered in, or prevented from, the performance of any act required under this Lease by reason of Severe Weather (as hereinafter defined), acts of God, industry-wide inability to obtain labor or materials, strikes, lock outs, labor troubles, extraordinary government restrictions and public health orders, enemy action, civil commotion, war, revolution, or terrorism or other reasons of a like nature as those described above, but in all events beyond the reasonable control of the party delayed in performing works, doing acts, or fulfilling non-monetary covenants required under the terms of this Lease (any such extraordinary

delay, hindrance or prevention is referred to as "Force Majeure"), then performance of such act or the fulfillment of such non-monetary covenant shall be excused for the period of the delay, and the period of the performance shall be extended for a period equivalent to the period of such delay, except as otherwise specifically provided herein to the contrary. The provisions of this Section shall not be applicable to delays resulting from the inability of a party to obtain financing or to proceed with its obligations under this Lease because of a lack of funds and shall not apply to an obligation of a party under this Lease to pay money when the same is due. For the purposes of claiming a Force Majeure delay, weather patterns or activities must be such that they are not reasonably anticipated during the applicable season or period of time and, at a minimum, they must exceed the thirty (30) year return interval for such pattern or activity or event according to the National Oceanic and Atmospheric Administration the geographic area in which the Shopping Center is located (collectively, "Severe Weather").

Entry by Landlord. Landlord and Landlord's representatives may enter the Premises during normal business hours after reasonable written notice for the purposes of performing any work required of or permitted to be performed by Landlord under the terms of this Lease, confirming Tenant compliance with the terms and conditions hereof, and exhibiting the Premises to prospective mortgagees and, during the last _______ (___) months of the Term, to prospective tenants. In addition, Landlord and Landlord's representatives may enter the Premises outside of normal business hours after reasonable written notice for the purposes of performing any construction, alterations, replacement, renovation, and/or repair of any Common Areas and/or floor area located adjacent to or in proximity of the Premises where such access is reasonably necessary for the performance of such work in a commercially reasonable and cost-effective manner. In the event of an emergency, Landlord need only give such notice as is reasonable under the circumstances, but will give Tenant notice as promptly as is practicable under the circumstances (which may be after the fact). Landlord's exercise of its rights under this Section, if it all, are intended and shall be construed to be separate and distinct from Landlord's right and remedies under [insert cross-reference to default remedy section] above and Landlord shall have the full right and ability to exercise its rights under this without being deemed to have exercised its rights or remedies under [inset cross-reference to default remedy section] above.

Liquidated Damages for Failure to Operate/Violates Permitted Use. Tenant acknowledges and agrees that because of the difficulty or impossibility of determining Landlord's damages in the event Tenant breaches the Permitted Use, the Opening Covenant, and/or the Operating Covenant (each a "Breach of Tenant's Covenants"), whether by reason of loss of the anticipated Percentage Rent from Tenant or other tenants or occupants in or adjoining the Shopping Center, or by way of loss of value in the Shopping Center because of Landlord's diminished ability to lease, sell, or mortgage the Shopping Center or any portion thereof, or by the impact Tenant's breach may have on the rights, protections, restrictions, and obligations of other tenants or occupants in the Shopping Center, or due to adverse publicity or appearance by Tenant's actions, should any Breach of Tenant's Covenants occur, then Landlord may [insert specific liquidated damages remedy] . . .

Application of Rent. Landlord and Tenant acknowledge and agree that following any uncured rent default, Landlord, in its sole and absolute discretion, may apply any and all rent received by Landlord from or on behalf of Tenant (including amounts received pursuant to any guaranty) to current and/or past due amounts hereunder in such order and priority as Landlord deems appropriate and without the necessity of notice to Tenant, and Tenant knowingly and voluntarily waives any and all right to claim or assert that Landlord's application of amounts received, following any such uncured rent default, should be applied in any particular manner either under this Lease or as a matter of statutory or common law.

C. New Post-Covid Boilerplate Clause

Waiver of Certain Common Law Defenses. Landlord and Tenant acknowledge and agree that prior to the Effective Date, a global pandemic resulting from an outbreak of the novel coronavirus resulting in the worldwide spread of COVID-19 had been declared on March 13, 2020, which affected the operations of retail shopping centers generally throughout the United States. Subsequent thereto, parties to retail leases asserted in various courts defenses of frustration of purpose, impossibility, commercial impracticability, and other substantially similar common law and statutory legal and equitable theories pursuant to which such parties sought to void, in their entirety, leases to which they had been parties. Neither Landlord nor Tenant are willing to enter into this Lease with the lingering uncertainty that the other party hereto may assert such a claim or defense to avoid, in full, the entirety of its obligations under this Lease. Accordingly, each of Landlord and Tenant, in consideration for the covenants, conditions, and provisions of this Lease, and the obligations of the other party as set forth herein, by execution hereof, hereby knowingly, intentionally, and voluntarily waives any and all right to assert as a complete defense any statutory or common law theory, now or hereafter otherwise available, based in whole or part, on the COVID-19 pandemic (and/or any governmental restrictions, prohibitions, and/or health regulations relating thereto) to void this Lease in its entirety and/or seek its early termination; provided, however, that nothing in this Section is intended, or shall be construed, to limit, negate, or diminish the parties' right to assert any right relating to a Force Majeure delay in performance

under this Lease arising under or relating to the COVID-19 pandemic if such matter so constitutes a Force Majeure event hereunder.