



AMERICAN  
BANKRUPTCY  
INSTITUTE

## 2020 Virtual Winter Leadership Conference

# **A Catch-22: Dilemmas for Landlords in the Era of COVID-19**

Presented by the Real Estate and  
Unsecured Trade Creditors Committees

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## A CATCH 22: DILEMMAS FOR LANDLORDS IN THE ERA OF COVID-19

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## OVERVIEW OF COMMERCIAL REAL ESTATE ISSUES

- I. A Look at Covid-World Real Estate
- II. Setting the Table – Code Sections and Current Applications
- III. Venue Considerations
- IV. Recent Developments in Commercial Real Estate Cases
- V. Force Majeure Clauses
- VI. Evictions and Foreclosures During COVID-19
- VII. Lease Restructurings and the Landlord / Tenant Relationship
- VIII. Landlords as Debtors



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## I. COVID-WORLD REAL ESTATE: RETAIL BANKRUPTCIES IN 2020

With two months left in the year, there were more retail bankruptcies in 2020 than in the past eight years, according to S&P Global.

Repko, Melissa, and Lauren Thomas. "As Pandemic Stretches on, Retail Bankruptcies Approach Highest Number in a Decade." CNBC, CNBC, 3 Aug. 2020, www.cnbc.com/2020/08/03/with-pandemic-retail-bankruptcies-approach-highest-number-in-a-decade.html.

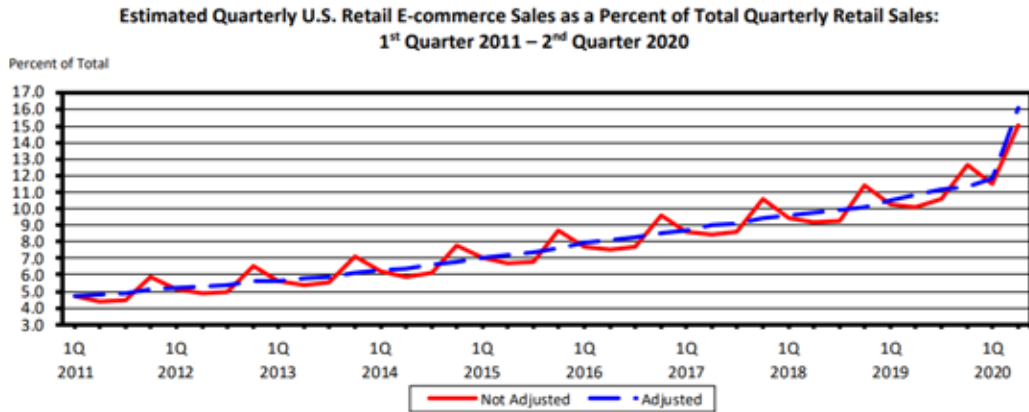
Sozzi, Brian. "A Scary Number of Retail Companies Are Facing Bankruptcy amid the Coronavirus Pandemic." Yahoo! Finance, Yahoo!, 12 Sept. 2020, finance.yahoo.com/news/a-scary-number-of-retail-companies-are-facing-bankruptcy-amid-the-coronavirus-pandemic-180604964.html?guccounter=1.



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## I. COVID-WORLD REAL ESTATE: A SHARP INCREASE IN ONLINE RETAIL SALES IN LINE WITH THE PANDEMIC



The Quarterly Retail E-Commerce sales estimate for the third quarter of 2020 is scheduled for release on November 19, 2020 at 10:00 A.M. EST.

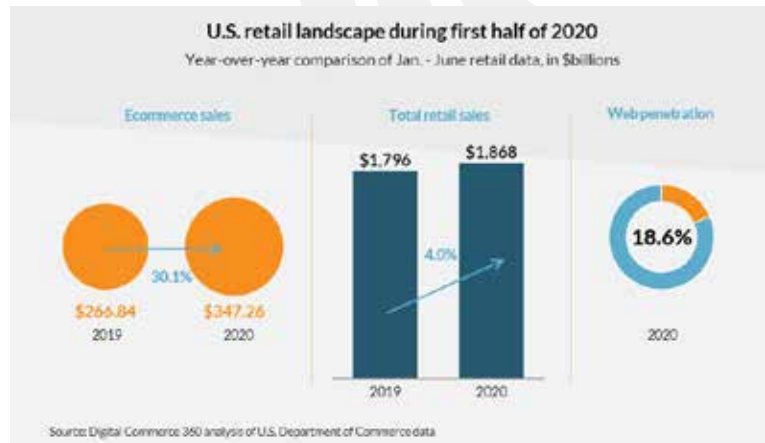
Quarterly Retail E-Commerce Sales 2nd Quarter 2020, U.S. Census Bureau News, 18 Aug. 2020. [www.census.gov/retail/nrts/www/data/pdf/ec\\_current.pdf](http://www.census.gov/retail/nrts/www/data/pdf/ec_current.pdf).

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## I. COVID-WORLD REAL ESTATE: ONLINE SALES GROWTH

- The online shopping surge, sparked by the pandemic, is forever changing consumer habits.
- Traditionally, online sales accounted for less than 20% of retail sales.
- What will the market look like at 25%, 30% or more?



Unglesbee, Ben. "Retail Is 'Scrambling' to Keep up with Accelerated Disruption in the COVID-19 Era." *Retail Dive*, 25 Aug. 2020. [www.retaildive.com/news/retail-is-scrambling-to-keep-up-with-accelerated-disruption-in-the-covid/584100/](http://www.retaildive.com/news/retail-is-scrambling-to-keep-up-with-accelerated-disruption-in-the-covid/584100/).

Ali | Aug 25, Fareeha. "Ecommerce Trends amid Coronavirus Pandemic in Charts." *Digital Commerce 360*, 26 Aug. 2020. [www.digitalcommerce360.com/2020/08/25/ecommerce-during-coronavirus-pandemic-in-charts/](http://www.digitalcommerce360.com/2020/08/25/ecommerce-during-coronavirus-pandemic-in-charts/).

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## I. COVID-WORLD REAL ESTATE: A DECLINE IN STORE SALES, NOT DEMAND

- In a recent report from the retail team at Moody's, analysts estimate that mall store footprints could shrink by 20% in five years.
- In the second quarter, earnings for mall-based retailers fell 256%.
- Analysts are projecting online sales to "shoot above" 25% of all retail sales over the next five years.
- Who will fill the vacant locations?



Unglesbee, Ben. "Retail Is 'Scrambling' to Keep up with Accelerated Disruption in the COVID-19 Era." *Retail Dive*, 25 Aug. 2020. [www.retaildive.com/news/retail-is-scrambling-to-keep-up-with-accelerated-disruption-in-the-covid-19-era/584100/](http://www.retaildive.com/news/retail-is-scrambling-to-keep-up-with-accelerated-disruption-in-the-covid-19-era/584100/).

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## I. COVID-WORLD REAL ESTATE: REDUCING BRICK AND MORTAR FOOTPRINT

- With shift to online sales, there's no need to keep underperforming locations at pre-pandemic market rents
- Significantly reduced foot traffic effectively transforms some brick and mortar locations to expensive storage spaces
- Through August, at least 7,500 retail stores have closed in 2020



Peterson, Hayley. "More than 7,500 Stores Are Closing in 2020 as the Retail Apocalypse Drags on. Here's the Full List." *Business Insider*, Business Insider, 17 Aug. 2020. [www.businessinsider.com/stores-closing-in-2020-list-2020-1](http://www.businessinsider.com/stores-closing-in-2020-list-2020-1).

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I. COVID WORLD REAL ESTATE: TUESDAY MORNING

“The prolonged and unexpected closures of our stores in response to COVID-19 has had severe consequences on our business...The complete halt of store operations for two months put the company in a financial position that can be effectively addressed only through a reorganization in Chapter 11.”  
 – Steve Becker, CEO

“Tuesday Morning Corporation Files Chapter 11 to Pursue Financial and Operational Reorganization.”  
 Tuesday Morning Corp., 27 May 2020, ir.tuesdaymorning.com/news-releases/news-release-details/tuesday-morning-corporation-files-chapter-11-pursue-financial.

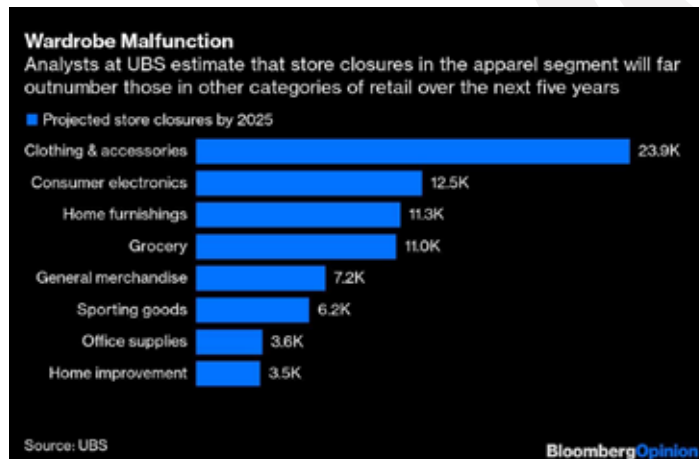


- Tuesday Morning closed about 200 stores while in bankruptcy and will emerge with about 500 stores.
- Tuesday Morning benefited from the trend of Americans spending to make their homes more livable.
- Plan/BK exit proposed with publicly traded shares.

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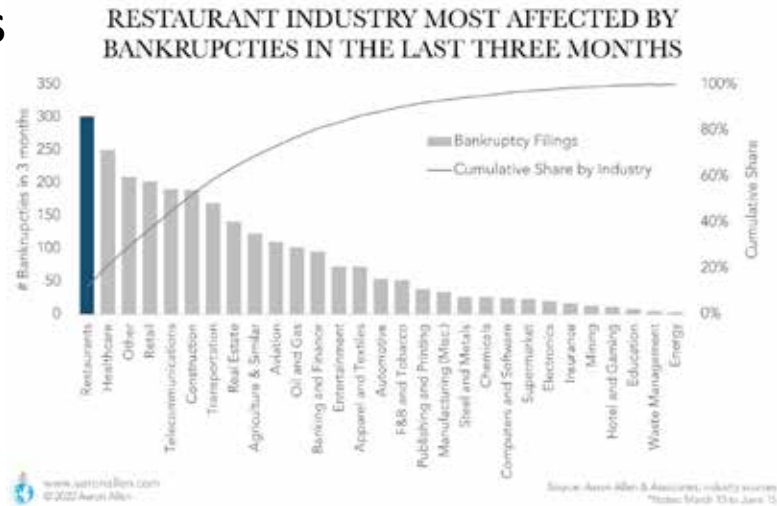
I. COVID-WORLD REAL ESTATE: “THE REPORTS OF MY DEATH HAVE BEEN GREATLY EXAGGERATED.” – MARK TWAIN



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## I. COVID-WORLD REAL ESTATE: RESTAURANTS

- Indoor dining is either non-existent or at reduced capacity, prohibiting restaurants with previously small profit margins to match previously expected revenue forecasts
- More than 2,800 businesses in NYC have permanently closed, at least one-third of which were restaurants



## I. COVID-WORLD REAL ESTATE: FRIENDLY'S – CHAPTER 22

Similar to its peers, the company bluntly blamed the pandemic for the Chapter 11 filing.

*"Unfortunately, like many restaurant businesses, our progress was suddenly interrupted by the catastrophic impact of Covid-19, which caused a decline in revenue as dine-in operations ceased for months and re-opened with limited capacity,"* said CEO George Michel.



- 130 corporate and franchise locations
- Chapter 22
- Planning 363 Sale

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## I. COVID-WORLD REAL ESTATE

**LIVE YOUR LIFE, DO YOUR WORK, THEN TAKE YOUR HAT.  
– HENRY DAVID THOREAU**

- Bar Louie
- Brio
- California Pizza Kitchen
- Chuck E Cheese
- Friendly's
- Garbanzo
- Le Pain Quotidien
- Rubio's
- Ruby Tuesdays
- Sizzler
- Sweet Tomatoes
- Too Jays
- Maison Kayser



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## I. COVID-WORLD REAL ESTATE: OFFICE SPACE

- Mandatory and voluntary work-from-home orders swiftly reduce the demand for office space
- Temporary order has changed the future outlook of office space
  - Morgan Stanley CEO, James Gorman, suggests his firm could operate in the future with “much less real estate.”
  - “We’ve proven we can operate with effectively no footprint.”



“Morgan Stanley - Crunchbase Company Profile & Funding.”  
Crunchbase, [www.crunchbase.com/organization/morgan-stanley](https://www.crunchbase.com/organization/morgan-stanley).

Rebong, Kevin. “Much Less Real Estate: Morgan Stanley CEO On Firm’s Future.” *The Real Deal New York*, 17 Apr. 2020, [therealdeal.com/2020/04/17/morgan-stanley-on-firms-future-much-less-real-estate/](https://therealdeal.com/2020/04/17/morgan-stanley-on-firms-future-much-less-real-estate/).

Grant, Peter, and Emma Tucker. “Manhattan Offices Are Nearly Empty, Threatening New York City’s Recovery.” *The Wall Street Journal*, Dow Jones & Company, 23 Sept. 2020, [www.wsj.com/articles/manhattan-offices-are-nearly-empty-threatening-new-york-citys-recovery-11601371800](https://www.wsj.com/articles/manhattan-offices-are-nearly-empty-threatening-new-york-citys-recovery-11601371800).

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## I. COVID-WORLD REAL ESTATE: REGUS

- Flexible-term office company filed for chapter 11 on August 17 - nearly 100 locations nationwide.
- Occupancy rates lowered, leaving buildings with operating deficits. The business model does not work in a pandemic.
- Regus is accelerating its plan to trim 4 percent of its global portfolio in direct response to Covid-19. Most are in urban cities.



Regus Logos, [www.logolynx.com/topic/regus](http://www.logolynx.com/topic/regus).

Rebong, Kevin. "Much Less Real Estate": Morgan Stanley CEO On Firm's Future." *The Real Deal New York*, 17 Apr. 2020, [therealdeal.com/2020/04/17/morgan-stanley-on-firms-future-much-less-real-estate/](http://therealdeal.com/2020/04/17/morgan-stanley-on-firms-future-much-less-real-estate/).  
Grant, Peter, and Emma Tucker. "Manhattan Offices Are Nearly Empty, Threatening New York City's Recovery." *The Wall Street Journal*, Dow Jones & Company, 29 Sept. 2020, [www.wsj.com/articles/manhattan-offices-are-nearly-empty-threatening-new-york-citys-recovery-11601371800](http://www.wsj.com/articles/manhattan-offices-are-nearly-empty-threatening-new-york-citys-recovery-11601371800).

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## I. COVID-WORLD REAL ESTATE: CASE STUDY: DECLINES IN NEW YORK REAL ESTATE

- Average asking rents along Manhattan's 16 prime retail corridors declined for the eleventh consecutive quarter, dropping to \$688 per square foot in the second quarter
- Manhattan retail asking rents dropped below \$700 for the first time since 2011



"CBRE: New York City Retail Sector Adapt to New Reality." *CBREUS*, [www.cbre.us/about/media-center/nyc-retail-q2-2020](http://www.cbre.us/about/media-center/nyc-retail-q2-2020).

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## I. COVID-WORLD REAL ESTATE: MARKET OPPORTUNITIES FOR LANDLORDS

- Some of the largest commercial landlords are using the current depressed market to diversify their holdings to include business interests outside their traditional business-lines.
  - J.C. Penney Company, Inc. (“JCP”)
  - Brooks Brothers Group, Inc. (“Brooks Brothers”)
  - Lucky Brand Dungarees LLC (“Lucky”)
- Why are landlords making these investments?
  - Keeping/attracting tenants
  - Opportunities for investment outside of core business

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## II. SETTING THE TABLE – CODE SECTIONS AND CURRENT APPLICATIONS

- Rent abatement
- Gap period rent
- Lease negotiations to lease rejections in a blink
- Varying notice timelines and procedures



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## II. LEASE ASSUMPTION/ REJECTION TIMING

Bankruptcy Code section 365(d)(3):

*The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. **The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period.***



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## II. RENT DEFERRAL AFTER 60 DAY PERIOD EXPIRES:

- Legislative history of § 365(d)(3): “[a]t the end of this period, the amounts due during the first 60 days would be required to be paid.” 130 Cong. Rec. S8994-95 (daily ed. June 29, 1984) (remarks of Senator Hatch).
- *In re Simbaki Ltd.*, 2015 Bankr. LEXIS 1142 \*19 (Bankr. S.D. Tex. 2015): “The Bankruptcy Code prohibit[s] the Court from extending [debtor]’s time for performance of its rent obligation because it did not arise within 60 days after the order for relief.”



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## II. RENT DEFERRAL AFTER 60 DAY PERIOD EXPIRES:

Some Bankruptcy Courts have been willing to use their broad equitable powers under section 105(a) of the Bankruptcy Code or 305(a) to fashion commercial rent relief for debtors struggling to make their commercial rent payments during this pandemic.



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## II. RENT DEFERRAL (CONT'D)

- Debtors' argument: After expiration of deferral, bankruptcy court has discretion as to the timing of payment, citing *In re Circuit City Stores, Inc.*, 447 B.R. 475, 508 (Bankr. E.D. Va. 2009) and *In re Midway Airlines Corp.*, 406 F.3d 229, 235 (4th Cir. 2005).
- *In re CEC Entertainment, Inc.* (Chuck E Cheese) (Bankr. S.D. Tex.): Court granted both rent deferral and rent abatement motions over multiple objections and after extensive briefing and multiple hearings.
- See also
  - *In re J.C. Penney Co. Inc.*, No. 20-20182 (DRJ) (Bankr. S.D. Tex. June 11, 2020);
  - *In re Craftworks Parent LLC*, No. 20-10475 (BLS) (Bankr. D. Del. May 21, 2020);
  - *In re Bread & Butter Concepts, LLC*, No. 19-22400 (DLS) (Bankr. D. Kan. May 15, 2020);
  - *In re Pier 1 Imports, Inc.*, 2020 WL 2374539 (Bankr. E.D. Va. May 10, 2020);
  - *In re Modell's Sporting Goods, Inc.*, No. 20-14179 (VFP) (Bankr. D. N.J. Mar. 27, 2020).

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## II. ASSUMPTION & REJECTION OF LEASES

- Determine the Desirability of Assumption or Rejection of the Lease
  - Consequences of Lease Assumption (and Possible Assignment)
  - Consequences of Lease Rejection
- Effective Date



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## III. VENUE CONSIDERATIONS

- Delaware is no longer the preferred venue for debtors with commercial retail space to shed or restructure
- Multiple jurisdictions are gaining in popularity for debtors seeking relief
  - ED of Virginia
  - SD of Texas
- Landlords should seek local counsel in the venue of filing



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## IV. RECENT DEVELOPMENTS IN COVID-19 REAL ESTATE CASES

- *In re Pier 1 Imports, Inc.* (E.D. Va.), filed February 17, 2020. Cases filed prior to pandemic and all locations were closed when extension motion was filed.
- *In re Art Van Furniture, LLC* (D. Del.), filed March 8, 2020. Cases filed prior to pandemic and all locations were closed when extension motion was filed. Case subsequently converted to Chapter 7.
- *In re Modell's Sporting Goods, Inc.* (D. N.J.), filed March 11, 2020. Cases suspended under §305(a) and payment of “non-essential” expenses deferred, including rent obligations, due to COVID-19.

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## IV. RECENT DEVELOPMENTS IN COVID-19 REAL ESTATE CASES

- *In re Chinos Holdings, Inc.*, filed May 4, 2020. All retail stores closed as of petition date and Debtors were uncertain as to when they would be able to reopen when extension motion was filed; many stores open by time of hearing.
- *In re Stage Stores, Inc.*, filed May 10, 2020. 567 of ~700 stores were to be imminently reopened; negotiated extension only applied to closed stores, and only until such time as stores were reopened. All stores re-opened by early June.
- *In re J.C. Penney Company, Inc.*, filed May 15, 2020. At time of extension motion, 305 stores (184 of which were leased) were open out of 846 total stores; rent paid for GOB locations. At time of motion, Debtors had over \$550 Million in cash.

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## IV. RECENT DEVELOPMENTS IN COVID-19 REAL ESTATE CASES

- *In re 24 Hour Fitness Worldwide, Inc.*, filed June 15, 2020. As of the petition date, Debtors had re-opened approximately 20 out of more than 300 fitness club locations. Built bankruptcy war chest from withheld payments to landlords and then won court approval to withhold post-bankruptcy payments to landlords.
- *In re CEC Entertainment, Inc.*, filed June 25, 2020. Extension motion stated that “many of their locations” were “completely closed or offered only takeout and delivery.” Granted on emergency basis, time to perform extended for full 60 days following further hearing.



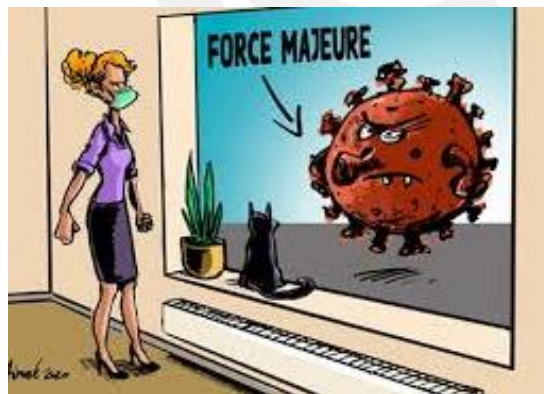
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## V. FORCE MAJEURE CONSIDERATIONS

- The concept of force-majeure, literally translated from French to mean “superior force,” dates back to Roman Law; became part of French civil law in the Napoleonic Code.
- Developed alongside the common law doctrine of frustration or impossibility of contract, as set forth by an English court in *Taylor v. Caldwell* in 1863, and similarly by the U.S. Supreme Court in a maritime case *The Tornado* in 1883.



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## V. FORCE MAJEURE CONSIDERATIONS (CONT'D)

- For a force-majeure clause to be relevant, a party's performance under the contract **must be prevented or substantially impeded on account of the force-majeure event, despite the party taking all reasonable steps to avoid the consequences of such event.**
- Examples of force-majeure events often include acts of God, war, terrorist events, fire, labor strikes, or other events that severely affect the parties' ability to perform under the contract or lease.

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## V. FORCE MAJEURE: RECENT BANKRUPTCY COURT DECISIONS

- *In re Hitz Restaurant Group*, 616 B.R. 374 (Bankr. N.D. Ill. June 2, 2020).
- Hitz Restaurant Group operated Giglio's State Street Tavern in Chicago, Illinois. Debtor filed voluntary Chapter 11 petition on February 24, 2020. Landlord moved to compel payment of March rent and for relief from automatic stay. Debtor argued that its obligation to pay any post-petition rent is excused by the lease's force majeure clause, providing:
  - *Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by . . . laws, governmental action or inaction, orders of government. . . . Lack of money shall not be grounds for Force Majeure.*



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## V. FORCE MAJEURE: RECENT BANKRUPTCY COURT DECISIONS (CONT.)

- Tenant ordered to pay full March rent, CAM and real estate taxes (under billing date approach) but only 25 percent of rent and charges for April, May and June.
- Court found the force majeure clause in debtor's lease was “unambiguously triggered” by Governor Pritzker's March 16, 2020 executive.
- Based on debtor's concession that 25 percent of the restaurant's square footage, consisting of the restaurant's kitchen, could have been used for carry-out, curbside pick-up, and delivery purposes, the debtor owed at least 25 percent of the rent amount to the creditor under 11 U.S.C. § 365(d)(3), even after application of the force majeure clause.
- Landlord's argument that Hitz should be obligated to pay its rent because it could have obtained sufficient funds to pay rent by applying for a Small Business Administration loan was rejected. “Nothing in [the force majeure] clause requires the party adversely affected by governmental action or orders to borrow money to counteract their effects.”

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## V. FORCE MAJEURE: RECENT BANKRUPTCY COURT DECISIONS (CONT.)



- In the CEC Entertainment case, better known under its “Chuck E. Cheese” trade name, the debtor filed a motion on August 3, 2020, to permit it to maintain occupancy of certain leased restaurant locations in California while paying its landlords less than the contractual rent.
- Two landlords objected to the debtor's motion, arguing that the debtor had failed to comply with the lease terms and the Bankruptcy Code, which requires debtors to pay the full amount of commercial rent if they want to remain in the leased property during the chapter 11 case.
- Following a hearing in September, the bankruptcy court granted the debtor permission to pay a substantially reduced rent amount on one of the California leases (the Gilroy lease), citing the relevant lease's force-majeure language.

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## V. FORCE MAJEURE: RECENT BANKRUPTCY COURT DECISIONS (CONT.)

- A key component of the court’s ruling appears to be that the force-majeure clause covered a “government restriction,” as well as CEC’s assertion that it could not operate its entertainment-themed businesses as intended under mandatory lockdown and social-distancing orders.

Compare to the result in *In re Seven Stars on the Hudson Corp.*, No. 19-17544-SMG (Bankr. S.D. Fla. Aug. 7, 2020).

- Because the force majeure clause in the lease expressly stated that a force majeure event did not excuse rent payments, rent was not excused notwithstanding the local governmental order that completely shut down Debtor/tenant’s trampoline park business.

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## V. FORCE MAJEURE: RECENT NON-BANKRUPTCY COURT DECISIONS

- Two decisions from the New York State Supreme Court decided within the last month that appear to be somewhat in conflict offer preliminary insight in how issues of “force majeure” clauses and “frustration of purposes” clauses may be interpreted in New York.

- *Dr. Smood New York LLC, v. Orchard Houston, LLC*, 2020 WL 6526996 (N.Y. Sup. Ct., Nov. 2, 2020).
- *The Gap, Inc., v. 170 Broadway Retail Owner, LLC*, 2020 WL 6435136 (N.Y. Sup. Ct., Oct. 30, 2020).



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## V. FORCE MAJEURE: LESSONS FROM PRIOR PANDEMICS

Pandemics and their related contractual issues are rare but not new. During the 1918 Spanish Flu pandemic, a case involving the *Citrus Soap Company* laid the foundation for future force-majeure cases under similar circumstances to those existing in 2020.

- The facts of the *Citrus Soap* case – which involved a government-imposed lockdown following a “second wave” of infections – will sound familiar.
- Although the 1918 Spanish Flu pandemic is perhaps the closest analogy to today’s COVID-19 outbreak, it is worth noting that other influenza outbreaks have led to invocations of force-majeure clauses.
  - The SARS epidemic
  - The H1N1 Swine Flu in 2009–10

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## V. FORCE MAJEURE: DRAFTING CONSIDERATIONS

- As in virtually all contractual matters, the precise language in any force-majeure clause will likely be determinative in any future dispute.
  - Although courts have held that impossibility or frustration of performance can excuse performance under a contract even where no force-majeure clause exists, the better course for all parties is to document in detail the specific events that could render contractual performance impossible.
- In light of the COVID-19 pandemic, careful attention should be given to events like government lockdowns, quarantines, and other mandatory government restrictions, including social-distancing rules that can adversely affect profits and sales.

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## VI. EVICTIONS AND FORECLOSURES DURING COVID-19

- Federal vs. State
- Commercial vs. Residential
- Moratoriums
- Public Policy



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## VI. COVID-19: FEDERAL GOVERNMENT MEASURES TO ADDRESS EVICTION AND FORECLOSURE ISSUES

- The CDC issued a temporary residential eviction moratorium in September, which will remain in effect until December 31, 2020.
  - Allows eligible residential tenants to opt into the program by submitting to their landlord a sworn declaration detailing their eligibility for the program and their inability to pay rent.
  - To be eligible, among other things, a tenant must earn no more than \$99,000 per year (or \$198,000 if filing jointly).
- **Does not impact commercial evictions**
- Does not apply if there is an applicable State/local moratorium on residential evictions that provides the same or greater level of public-health protection.

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## VI. COVID-19: SAMPLE STATE GOVERNMENTS MEASURES TO ADDRESS EVICTION AND FORECLOSURE ISSUES



- **Eviction & Foreclosure Moratoria:** No statewide eviction or foreclosure moratoria in effect, residential or commercial.



- **Eviction & Foreclosure Moratoria:** Existing executive orders create a moratorium on all residential and commercial foreclosures and evictions through January 1, 2021.

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## VI. COVID-19: SAMPLE STATE GOVERNMENT MEASURES TO ADDRESS EVICTION AND FORECLOSURE ISSUES



- **Eviction Moratoria**

- In September, Governor issued an executive order allowing municipalities and counties to continue to ban commercial evictions until March 31, 2021.
  - August: Tenant, Homeowner, and Small Landlord Relief and Stabilization Act of 2020 (the "CA Act") provided limited eviction protection for residential tenants.
- **Foreclosure Moratorium:** The CA Act also provides limited foreclosure protection for owners of residential units.
    - **There is currently no moratorium on foreclosure of commercial properties**
    - Owners of rental properties of four or fewer dwellings enjoy the "residential foreclosure" protection.

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## VI. COVID-19: SAMPLE STATE GOVERNMENTS MEASURES TO ADDRESS EVICTION AND FORECLOSURE ISSUES

- **Eviction Moratorium: None**
  - Judicial moratorium on residential evictions expired in May 2020
  - Judicial orders seek to delay or avoid *residential* evictions
  - No protection from commercial eviction
- **Foreclosure Moratorium: None**



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## VII. LEASE RESTRUCTURINGS AND THE LANDLORD / TENANT RELATIONSHIP

Goals of renegotiating leases:

- Reduce occupancy costs to correlate with revenue
- Avoid an expensive bankruptcy
- Maintain relationship with landlords
- Create a solution appropriate for both parties



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## VII. LEASE RESTRUCTURINGS: PRE-PANDEMIC TERMS

- Pre-pandemic leases no longer reflect the relationship between revenue and appropriate rent
- Operating covenants refer to a world where demand is reflected by consumer choices, not health restrictions
- While sales are expected to return to normal, we don't know when that will occur
- Landlord Consideration: What length of time do I give to a tenant seeking a rent modification? Is a request for a rent reduction until 2027 too long?



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## VII. LEASE RESTRUCTURINGS: RENEGOTIATION STRATEGIES

- Percentage of sales model
  - Modifying rent to the greater of a reduced figure and a percentage of gross sales mitigates the missed-upside risk for landlords should sales figures return to normal quicker than anticipated.
- Exchanging lease term for reduced rent
  - So long as the location exhibits financial viability moving forward, committing to a longer lease will provide more negotiating room for immediate relief.
- Removing covenants that do not apply in the new landscape
  - Covenants dictating operating hours



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## VII. LEASE RESTRUCTURINGS: LANDLORD CONSIDERATIONS

- **Financial Disclosures:** For a landlord to engage in negotiations, they want the “full disclosure” approach. Tenants should be prepared to provide financial information that backs up their claim of distress.
- **Sales Spikes:** Sometimes, pent up demand for product may improve sales numbers.
- **Unanticipated Sales:** Certain industries came roaring back and tenant may not need concession after all (i.e., outdoor activities, home improvement).



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## VII. LEASE RESTRUCTURINGS: RENEGOTIATION STRATEGIES (CONT'D)

- Landlords may be required to get lender consent to modify lease terms
  - If landlord modifies a lease without lender consent, it may convert a loan from recourse to non-recourse.
  - If the landlord’s loan is in special servicing, it may be practically impossible to get a modification as there is no one to talk to at the special servicer or it will take months
- Co-tenancy – landlords buying retailers to keep them operating and to avoid triggering co-tenancy provisions
- As tenants are not paying rent, landlords are scrambling to find cash to pay their lenders.



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## VIII. THE DISTRESS IS TRICKLING UP: LANDLORDS AS DEBTORS

- Commercial tenants' inability to pay rent → damage to landlords
- *Retail*
  - Retail landlords PREIT and CBL recently filed for chapter 11 last month to stem the losses flowing from their retail tenants' financial distress.



Owns about 30 retail properties in mid-Atlantic



Controls more than 100 retail properties, including malls and shopping centers

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## VIII. THE DISTRESS IS TRICKLING UP: LANDLORDS AS DEBTORS

- Retail is not the only industry casualty of COVID. Landlords are in trouble in many sectors
  - Restaurants
  - Large office space
  - Conference spaces
  - Entertainment venues
  - Lots of others!
- What's Next?
  - Of course, upstream from many landlords are lenders...

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## LOOKING FORWARD

- Real estate landscape has fundamentally changed.
- It is unclear when society will shop at big retail stores, return to offices, and eat in restaurants in the same manner as before the pandemic.
- Renegotiating leases is a commonsense solution to overpriced rent.

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## PREDICTIONS AND WHAT TO EXPECT

- Uncertainty in next stimulus package
- Increased lender activity
- More filings to come or receiverships



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# THANK YOU



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