



Update to COVID-19's Effect on Commercial Litigation

1. Landlord–Tenant: Evictions and Foreclosures

On April 23, 2020, the Connecticut state judicial branch ordered an immediate stay of the service of all issued executions on evictions and ejectments through June 1, 2020, which extends the previous stay order by one month.

The judicial branch also ordered that all foreclosure sales scheduled for June and through July 18, 2020 are cancelled in order to prevent a potential gathering of individuals at the auction site. The court, on its own, opened the judgment in all relevant foreclosure matters to set a new sale date of July 25, 2020, with committees for sale not allowed to incur additional fees or costs before June 24, 2020. The court did, however, suspend the need to get a new appraisal or to advertise by newspaper. This order amended a prior order extending all foreclosure sales to June 6, 2020.

In another alert, we highlighted that portion of Governor Lamont's Executive Order 7X, which pertained in part to evictions of residential renters. In particular, these protections: (1) prohibit landlords or their representative from delivering a notice to quit or serving or returning a summary process action prior to July 1, 2020, except for serious nuisance; (2) require landlords to grant tenants an automatic, sixty (60) day grace period for payment of rent due in April 2020; (3) require landlords to grant tenants a sixty (60) day grace period, upon request, for payment of rent due in May 2020, provided the tenant notify the landlord of certain hardships on or before the ninth (9th) day after such rent is due; and (4) allow a tenant to apply all or part of a security deposit paid in excess of one month's rent to April, May or June rent, provided the tenant notify the landlord of certain hardships resulting from the COVID-19 pandemic.

Commercial landlords currently are still able to serve a notice to quit on breaching tenants to begin the eviction process. The court system, however, has still not resumed in-person operations. (Starting May 4, 2020, the courts will start ruling on certain motions that do not require in-person attendance by the parties or attorneys, but will not yet be handling other matters.) Thus, even if the parties timely file all pleadings necessary to get to a summary process trial, such cannot occur until the courts reopen for in-person business.

2. Force Majeure and Impracticability/Impossibility/Frustration of Purpose

Another issue affecting landlords and tenants are parties invoking “force majeure” clauses in contracts to avoid paying rent. Outside of the landlord–tenant context, parties are using these clauses to avoid performing other types of contracts, particularly contracts for services. Typically, these clauses excuse parties from performance of contracts where there is “an event or effect that cannot be reasonably anticipated or controlled.” Merriam-Webster’s Collegiate Dictionary. These clauses, however, do not in every instance excuse parties from performing their end of a contract, even where there may be language excusing performance due to “governmental action,” such as a governor closing down particular parts of a state’s economy. Because these clauses are contractual provisions, the precise language of each contract matters in determining whether a party can avoid paying rent or providing the contracted-for service.

Where a contract does not have a force majeure clause (and even sometimes where it does), some parties have been using the related doctrines of “impossibility,” “impracticability,” or “frustration of purpose” to avoid performing their contractual obligations. Despite their different names, these three concepts—at least in Connecticut—are treated largely the same. Under these doctrines, a party trying to claim that some event has prevented—and thus excused—its performance must demonstrate the following:

1. An event made performance impracticable;
2. The nonoccurrence of that event was assumed by the parties in making the contract;
3. The impracticability resulted without fault of the party seeking to be excused; and
4. The party had not assumed a greater obligation than the law imposes.

Here, parties claiming that they should be excused might have an easier time establishing the first and third factors, although this is not guaranteed for every contract. COVID-19 has certainly made some contracts difficult to perform and its occurrence cannot be attributed to either contracting party. Whether the parties did not assume the event or a greater obligation than the law imposes will depend more on the language of each individual contract. Even absent a force majeure clause, parties may contract that performance is obligated on one side or both regardless of circumstance. And although parties in longer-term contracts almost certainly did not provide for the nonoccurrence of COVID-19 in their contracts, they may have used general language that would cover COVID-19, such as “pandemics” or “health crises.”

Other issues that may affect how a court treats these arguments might include whether there was total or complete force majeure or frustration of a contract. For instance, a restaurant may remain open for takeout or a retailer might remain open for curbside pickup, but neither is likely to be operating at full capacity. As for leases, a commercial tenant may not be able to use a space for its chief purpose during the COVID-19 crisis but is likely to be using that space for storage of its goods and fixtures. A court may need to consider these and other factors in determining whether some partial payment or performance is due under these types of circumstances.

Moreover, even if a party is excused from performing during the course of COVID-19, the party may not be totally excused from performing after the economy reopens. This is particularly relevant in services contracts. Where the parties contracted for the use of a facility for certain dates within the timeframe of the COVID-19 crisis, force majeure or impracticability might totally excuse performance; however, where the parties contracted for a task to be performed but without a particular end date, force majeure or impracticability is not as likely to excuse the party from performing after the crisis has passed.

Please feel free to contact the following individuals at Updike, Kelly & Spellacy, P.C. who are part of the UKS COVID-19 Response Team with respect to creditor's rights and bankruptcy matters.

[Thomas A. Gugliotti](#) is a shareholder and chair of the firm's Creditors' Rights practice. He focuses his practice on various forms of creditors' rights litigation in both state and federal court, including commercial foreclosures and evictions. He can be reached at (860) 548-2661 or tgugliotti@uks.com.

[Evan S. Goldstein](#) is a shareholder and member of the firm's Bankruptcy and Creditors' Rights, Commercial Litigation, and General Corporate Counsel practice groups. He has experience representing secured creditors in state and federal court and in workouts, both in and out of court. He can be reached at (860) 548-2609 or at egoldstein@uks.com.

[Paul N. Gilmore](#) is a shareholder and member of the firm's Bankruptcy and Creditors' Rights, Commercial Litigation, Appellate Law, and Intellectual Property practice groups. He handles trials and appeals in state and federal courts, and represents clients in diverse industries, solving complex legal problems with a paramount focus on achieving the client's business objectives. He can be reached at (860) 548-2641 or pgilmore@uks.com.

[Kevin J. McEleney](#) is a shareholder and member of the firm's Bankruptcy and Creditors' Rights and Commercial Litigation groups. He has experience representing secured and unsecured creditors in various bankruptcy courts. Outside of bankruptcy, he assists creditors negotiating workouts for matured or defaulted debts. He also litigates business and commercial issues in state and federal court. He can be reached at (860) 548-2622 or kmceleney@uks.com.

Updike, Kelly & Spellacy, PC would like to thank associate Matthew Stiles for his contributions to this article.

Disclaimer: The information contained in this material is not intended to be considered legal advice and should not be acted upon as such. Because of the generality of this material, the information provided may not be applicable in all situations and should not be acted upon without legal advice based on the specific factual circumstances.