

## Key Considerations for Louisiana Lease Parties in the Age of COVID-19

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### OVERVIEW

To slow the spread of the novel coronavirus, Governor John Bel Edwards and Mayor LaToya Cantrell have issued stay-at-home orders mandating that residents leave their homes only for "essential purposes," including groceries and non-elective medical needs. These orders have also forced many businesses, including malls, gyms, bars, casinos, movie theaters, and hair and nail salons, to temporarily close. Restaurants, though permitted to remain open, have been forced to transition to take-out-only operations. Though recently enacted, these orders have already had a profound impact on parties to Louisiana commercial leases.

At its most basic level, a Louisiana lease is a contract whereby a lessor gives a lessee the right to use a thing for a limited duration in exchange for the lessee's payment of rent. La. Civ. Code art. 2668. Yet, in the age of COVID-19, commercial lease parties may find it increasingly difficult to perform even their most basic lease obligations. Many commercial lessees faced with non-existent or diminished revenue streams will likely struggle to pay rent. On the other hand, commercial lessors may be faced with claims that they have failed to provide their lessees with leased premises suitable for their lessee's commercial operations.

This e-alert discusses key commercial lease provisions and Louisiana law principles that parties to Louisiana commercial leases should be aware of as they deal with the fallout of the COVID-19 pandemic. Importantly, this e-alert provides Louisiana lease parties with a general overview of relevant commercial lease concepts. Circumstances and lease language will differ from situation to situation. Therefore, Louisiana lease parties should consult with competent Louisiana counsel for guidance before engaging with the other party to their lease.

### START BY REVIEWING YOUR LEASE

If a COVID-19-related issue arises between a lessee and lessor, each party should begin by carefully reviewing their lease agreement to determine whether it governs their respective rights and obligations in the context of that issue. Below are a few relevant concepts that commercial leases often address.

#### Force Majeure

As a starting point, lease parties should review their lease to determine whether it contains a "force majeure" clause addressing non-performance in certain circumstances. Generally speaking, a force majeure clause works to excuse a contractual party for non-performance of an obligation if that party's performance is prevented by, or if its non-performance is caused by, an event, condition, or other circumstance that is out of that party's control, such as a natural disaster, or potentially, a pandemic.

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Which events constitute "force majeure," and which obligations are excused by such events, will depend on the specific language used in the clause. For example, in the context of leases, many force majeure clauses do not excuse the performance of monetary obligations (such as the payment of rent).

Moreover, many force majeure clauses require the party claiming excuse to notify the other party of the force majeure event causing the inability to perform. A force majeure clause may also require the party claiming excuse to take steps to mitigate the effects of the force majeure event. A party claiming excuse will want to comply with any such requirements.

#### Continuous Operations

Many commercial leases, especially those under which the lessor is paid a percentage of the lessee's revenues, require the lessee to conduct business operations at the leased premises for a minimum number of hours per day or week. Yet, what if a lessee cannot stay open for the requisite number of hours because a government order has shut down or limited the lessee's operations, or because the lessee's employees are subject to 'stay-at-home' orders and cannot come to work, or because the lessee must close for a few hours each day to sanitize its premises to keep customers and employees safe?

Whether a lessee is in breach of an obligation to continuously operate under these circumstances will likely depend on the presence of an applicable force majeure clause (discussed above). Failing the presence of an applicable force majeure clause, lease parties should consider whether the Louisiana Civil Code articles on impossibility of performance might apply to excuse the lessee's performance.

#### Rent Abatement

Parties to commercial leases should review their leases for a rent abatement clause. Generally speaking, a rent abatement clause allows a lessee to temporarily avoid or reduce rent payments where the leased premises cannot be used because of fire or some other casualty. In most cases, rent abatement clauses are phrased such that they only apply in the case of physical damage. However, some lease language may allow for a broader reading, such that the clause could apply to situations where a lessee cannot use its leased premises because of a government order or a pandemic.

#### Early Termination

Some commercial leases contain early termination clauses giving the lessor, the lessee, or both parties, the right to terminate the lease before the end of the lease's term under certain circumstances. For example, a lessor may have the right to terminate the lease early if the lessee defaults under the lease. Or, a lessee may have the right to terminate the lease early if the lessee's business does not perform as well as expected, and the lessee is not making enough money to pay rent. Lessors and lessees should review their leases carefully to determine whether either party has early termination rights, the circumstances under which such rights apply, and whether any notice requirements or other restrictions apply to the exercise of such rights.

#### **BEAR IN MIND GENERAL PRINCIPLES OF LOUISIANA LEASE LAW**

Commercial leases range from the short and simple to the lengthy and complex. Yet, even the lengthiest and most complex leases cannot cover every imaginable situation. And, while most general principles of Louisiana lease law can be modified or waived by the parties to a lease, whether such principles are indeed modified or waived depends on the language of the lease. As such, parties to Louisiana leases should bear these general principles in mind.

#### Substantial Impairment and Warranty Against Vices or Defects

Under Louisiana Civil Code article 2682, a lessor owes its lessee the duty to maintain the leased premises in a condition suitable for the purpose for which it was leased. Furthermore, Louisiana Civil Code article 2715 provides that where a lessee's use of its leased premises is substantially impaired, without the fault of the lessee, the lessee may be able to obtain a reduction in rent or termination of the lease,

depending on the circumstances.

Relatedly, unless a lease contains a valid waiver, a lessor warrants that the leased premises is suitable for the purpose for which it was leased and is free of vices or defects that prevent its use for such purpose. This warranty extends to vices or defects arising after delivery of the leased premises that are not caused by the lessee's fault. La. Civ. Code art. 2696. The warranty also encompasses vices or defects that the lessor does not know about. However, a lessee's recovery could be reduced if it knows any such vices or defects and fails to notify the lessor. La. Civ. Code art. 2697.

#### **Warranty of Peaceful Possession**

The lessor also has the duty to protect the lessee's peaceful possession of the leased premises. La. Civ. Code art. 2682(3). More specifically, "[t]he lessor warrants the lessee's peaceful possession of the leased thing against any disturbance caused by a person who asserts ownership, or right to possession of, or any other right in the thing." La. Civ. Code art. 2700. This warranty cannot be waived by a lessee. Importantly, however, the lessor's duty generally does not extend to disturbances caused by a person who does not claim a right in the leased premises. In such a case, the lessee's only recourse is against such person. La. Civ. Code art. 2702.

Whether particular government orders and other specific COVID-19-related impairments to uses of certain leased premises constitute "substantial impairments," "vices or defects" or "disturbances" under the aforementioned Civil Code articles are issues that will almost certainly be litigated in Louisiana courts in the near future.

#### **Duty to Notify**

Importantly, Louisiana Civil Code article 2688 requires the lessee "to notify the lessor without delay when the thing has been damaged or requires repair, or when [the lessee's] possession has been disturbed by a third person" and further provides that "the lessor is entitled to damages sustained as a result of the lessee's failure to perform this obligation." Lessees and lessors alike should be aware of this obligation to communicate as they deal with COVID-19-related impairments to uses of leased premises.

#### **TAKE HOME**

As COVID-19-related issues arise between parties to Louisiana commercial leases, those parties should start by reviewing their leases to determine whether those leases govern the parties' rights and obligations. Parties to Louisiana commercial leases should also bear in mind the rights and obligations of lessors and lessees under the Louisiana Civil Code's articles on leases, such as the lessor's duty to maintain the leased premises in a condition suitable for the lessee's purposes, the lessor's warranty against vices or defects, the lessor's warranty of peaceful possession, and the lessee's duty to notify the lessor of damage and disturbances.

Stone Pigman lawyers are ready and available to assist Louisiana commercial lease parties with COVID-19-related issues.