

Legal Considerations for Commercial Leases in the Reopening States (Georgia, Tennessee, and South Carolina)

As Tennessee, Georgia, and South Carolina start reopening their economies, landlords and tenants know their state government's mandate to shut down non-essential businesses will not continue. Attorneys have written much about the possible legal effects these government mandates may have on contractual obligations contained in commercial leases between landlords and tenants. This article is part of a series that will discuss considerations that tenants and landlords should take into account during this transition while the pandemic continues to exist.

Inadequacy of Force Majeure

Many attorneys have opined that tenants could avoid payment of rent by seeking protection through force majeure provisions. Force majeure provisions address events that can be neither controlled or anticipated and include acts of nature (i.e., floods, hurricanes) and acts of people (i.e., labor strikes, riots, wars). Force majeure provisions typically provide a specific list of events that will excuse performance under a contract. Commercial drafters typically do not include a viral pandemic as a force majeure event. Even if viral pandemics were to be included, force majeure provisions invariably excuse only non-monetary obligations of a party—not the payment of rent. If a tenant's claims under force majeure will not suffice, the "fallback" legal argument to excuse a tenant's obligation to pay rent then becomes the common law defenses of impossibility, impracticability, and frustration of commercial purpose. However, courts rarely grant relief under such causes of action because the factual circumstances warranting such relief are so uncommon. That will, of course, not deter attorneys from defending commercial tenants against a landlord's action to evict for non-payment of rent during COVID-19.

Common Law Defenses to Excuse Payment of Rent Now Look Much Weaker With Reopening of Non-Essential Businesses

In an action for relief under impossibility, impracticability, or frustration of commercial purpose, a strong argument for a tenant would be that a governmental order to shut down its business makes the tenant's use of the premises illegal. Many leases contain provisions that require each party to comply with applicable local, state, and federal law. In a scenario where a tenant has closed its business in response to a shutdown order, the tenant cannot operate its business without violating the law. If the lease has a definition of use that is narrow — which is nearly always the case in landlord-friendly leases — then the tenant cannot operate a different business on the premises even if it is financially possible to do so. In a situation where the tenant's specific use — say, a nail salon — is expressly prohibited by a shutdown order, then there is a strong basis for a court to provide relief under any of the common law remedies that excuse the performance of a party to a commercial lease. With certain states now reopening, state and local governments are withdrawing orders mandating the shutdown of non-essential businesses, which means the strongest argument for relief under these common law remedies is disappearing.

Reality of Reopening

With the reopening of non-essential businesses, the aspirational goals of state and local governments is that local economies that turned off like a switch during COVID-19 can somehow be turned on just as quickly. The reality is that although businesses are beginning to reopen, consumers are not rushing to gather in public spaces. We are starting to see servers at restaurants in Georgia, Tennessee, and South Carolina with face masks and latex gloves, tables spaced at least six feet apart, and dining spaces capped at 50% capacity — which appears to be the “new normal.” This raises the issue of economic viability for restaurants and other retail establishments that depend on foot traffic for business. **In the next article of this series, we’ll discuss what steps landlords and tenants can take to survive the economic fallout of the pandemic.**

Josh Crowfoot and [Michael Stewart](#) advise Chambliss’ commercial real estate clients on a wide variety of developments, including projects in the hospitality, warehouse, office, retail, multi-family, health care, and vacation rental sectors. They represent regional and national real estate development and real estate finance clients on every side of the transaction, whether they are a seller, buyer, lender, landlord, tenant, or investor. Please feel free to reach out to one of them or your relationship attorney to discuss your real estate needs.

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