

# Practical Advice for the Real Estate Industry Affected by Coronavirus

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As with all businesses and markets globally, the real estate industry is facing unprecedented disruption, uncertainty and challenge resulting from the novel coronavirus (COVID-19).

This advisory offers practical insight into the issues that we are hearing about most frequently in the early days of the COVID-19 pandemic, as well as the new laws, regulations and other government action affecting the real estate industry.

## Title Insurance

There are many jurisdictions where recording offices are already closed. Nevertheless, title insurance companies such as First American Title Insurance Company and Fidelity National Title Insurance Company are continuing to issue title policies to facilitate purchase, sale and financing transactions involving real property by requiring sellers and buyers to execute a new COVID-19 affidavit and indemnity as part of the closing document package. This new affidavit and indemnity requires the seller or, in the case of a financing transaction, the borrower, to indemnify the title company against any liability resulting from an encumbrance or other objectionable matter being recorded against such property prior to the title company recording the deed or mortgage. This new affidavit and indemnity allows our industry to continue to transact despite the inability of the parties to actually have deeds, mortgages and other documents recorded in the land records. One question we've heard is for how long title companies will continue this practice and whether it will continue to be offered for large transactions, as underwriters have already begun taking on what could grow to be an enormous additional exposure to liability.

## *Force Majeure*

A *force majeure* clause is a provision in commercial contracts that excuses a party's performance due to certain unforeseen circumstances (often referred to as "Acts of God"). The Acts of God provision appears in many different types of contracts including construction agreements, property management agreements (e.g., performance tests), purchase and sale agreements and lease agreements (e.g., delivery of possession). While the majority of commercial contracts contain a force majeure clause, the precise wording must be carefully reviewed to determine whether the COVID-19 crisis excuses any party from its obligations to perform under such contract. See Kelley Drye & Warren Client Advisory, [Force Majeure and Contractual Obligations in the Midst of Coronavirus](#) (March 20, 2020).

## Insurance

All insurance policies should be reviewed to determine what coverage, if any, is available to provide compensation for financial losses stemming from the virus. Generally, most standard form insurance policies held by real estate companies and property owners do not provide business interruption insurance coverage for losses related to a viral pandemic; however, certain policies written on non-standard forms may include such coverage. Tenants should be asked to review their insurance policies as well for the same purpose. Faced with a wave of upcoming claims, insurers will have strong incentives to review all claims with heightened scrutiny and require strict compliance with seemingly minor policy conditions. Therefore, it is critical for policyholders to understand the terms of their policies and to comply with all of the requirements that the policy places on them, including providing timely notice.

## Eviction Halts and Other Government Action

Many jurisdictions across the United States, including Maryland, Virginia, DC and New York, as well as HUD, Fannie Mae and Freddie Mac have all halted evictions in one form or another, including in many cases the eviction of commercial tenants. As federal, state and local governments continue to develop their responses to the COVID-19 crisis, landlords will frequently be in uncharted territory in determining how to deal with tenant defaults. Industry leaders and trade associations, such as the International Council of Shopping Centers (ICSC), are calling on the federal government to guarantee or directly pay for business interruption coverage for retailers, restaurants and other tenants as well as landlords. No action has been taken by the federal government yet with respect to business interruption coverage, but we will continue to monitor the situation and provide updates.

To help our clients better understand and respond to this unprecedented situation, we are monitoring the state level actions that may affect property owner, lender, landlord and tenant rights, and our colleagues in Kelley Drye's Government Relations section are circulating a daily COVID-19 Washington Update that includes the most recent developments from around the federal government, including with respect to evictions. Please let us know if you want to receive these daily updates. See Kelley Drye & Warren Client Advisory, [COVID-19 Washington Update: March 20, 2020](#).

## Borrowers

We've received many questions from borrower clients who are trying to determine how to best deal with debt service payments on the assumption that rental income will be severely curtailed. We suggest taking a proactive approach with your loans. While the majority of lenders are currently focused on establishing procedures for operating their businesses remotely and keeping their employees healthy, we suggest that borrowers take proactive steps to speak to their loan officer or servicer about any debt service relief early before the lenders face the inevitable tsunami of defaults that is about to occur. Additionally, we suggest borrowers review the terms of their loan documents to determine whether any financial or other covenants may be breached as a result of tenant closures, declining rents, the inability to complete required capital improvements, etc.

## Kelley Drye's COVID-19 Resource Center

Like the virus itself, the legal landscape is rapidly changing and dynamic, with new laws, regulations and government action being proposed, passed and implemented daily. To stay abreast of the crisis, please visit the Firm's [COVID-19 Response Resource Center](#), which is constantly being updated to reflect the evolving legal landscape that is affecting most areas of the law as well as the scores of questions we've received from clients.

While there are many unknowns for the future of the real estate industry, what we do know is that the lawyers at Kelley Drye, as we have done for more than 180 years, are prepared to provide the sophisticated and practical legal advice necessary to ensure that you and your business successfully navigate the new challenges brought about by this global crisis. If you would like assistance in dealing with any threat to your property or business related to the COVID-19 pandemic or otherwise, please contact your relationship partner.

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