

Real Estate Industry Alerts Tracker - March 30, 2020 Issue

Jennifer A. Bedoya, Robert D. Bickford Jr., Chris Drewes, Karyn Corlett Fulton, Brian P. Foley, Deron L. Green, Stephen G. Hauck, James F. Jacobus, Paul A. Keenan, Dean E. Loventhal, Aaron D. Rosenfeld, Allan J. Weiner

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A green banner with the text "Kelley Drye Real Estate" in white, "INDUSTRY ALERTS" in black, and a white arrow pointing to the right.

Kelley Drye Real Estate
INDUSTRY ALERTS

Recording Office Closures

The Coronavirus epidemic has caused multiple recording office closures. ALTA has been continuously updating the operating status of the various recording jurisdictions on its site, which you may find [here](#).

The ALTA site contains the following information:

- Operating Status (Open, Closed, Partially Open)
- Posted Reopening Date (if available)
- Search Status (Online, Walk-Ins, Unavailable)
- Title Plant Data Available (Yes/No)
- Recording Status (eRecording - All or Limited, Walk-Ins, Drop-Offs, Mail, Unavailable)
- County Plan (staffing, reopening plan, how the backlog/queue of recordings will be processed)
- State/Local Website URL for more information

Business Interruption Insurance Coverage – It's a thing

Business interruption insurance, which is typically included as a part of a commercial property insurance policy, is generally designed to cover losses resulting from “direct physical loss or damage to property” resulting from natural disasters (fire, flood, etc.) and such coverage therefore may not cover pandemics such as COVID-19. However, it is important that companies review their policies, as some business interruption policies may provide extended coverage for infectious diseases and

pandemics even without direct physical damage. Coverage may be limited to the time period after the government declared the pandemic, and losses would need to be attributable to the pandemic (as opposed to other causes for slowdowns in business). Our insurance experts here at Kelley Drye have been working with companies in reviewing their policies and are available to help determine whether your business interruption policy provides coverage under the current circumstances.

You can register [here](#) for Kelley Drye & Warren's upcoming webinar on "COVID-19 Financial Remedies: Force Majeure, Business Interruption Insurance Coverage and Contractual Provisions."

- [Insurance Coverage for Coronavirus-Related Event Cancellations](#)

Tenants are invoking 'Force Majeure' lease provisions

Several national retail chains have advised their landlords nationwide that they are invoking the "force majeure" provisions in their leases to temporarily close all stores as a result of COVID-19 and governmental recommendations and requirements enacted to contain the spread. The question as to the applicability of "force majeure" to excuse performance under a lease should be evaluated on a case by case basis given relevant provisions vary among leases. The most common "force majeure" provisions include "acts of God" and "government action." An "act of God" is typically construed to mean a catastrophe caused by forces of nature, such as an earthquake, hurricane or tornado. If the contract provides specific examples of what constitutes an act of god for purposes of "force majeure" and does not include closures due to nationwide pandemics, arguably the provision would not be triggered. A better argument could be made for invoking force majeure if the contract is not specific, or contains a much broader range of events that would constitute an act of god. As far as "government action", while "COVID-19" is not a "government action" in the technical sense, a case could be made that governmental restrictions and closure orders would fit the meaning of "government action" to excuse performance since the COVID-19 outbreak resulted in government regulations and executive orders to close down businesses.

- [COVID-19 and Force Majeure Clauses Under District of Columbia, Virginia and Maryland Law](#)
- [Force Majeure and Contractual Obligations in the Midst of Coronavirus](#)
- [Insurance Coverage for Coronavirus-Related Event Cancellations](#)

Borrowers Beware – Loan Default and Recourse Liability Traps

Lease Amendments: Mortgage borrowers should carefully review their loan documents before agreeing to amend a lease or waive any provision of a lease. The expected deluge of requests to landlords from tenants for rent forgiveness or deferment and other lease modifications may trigger prior lender consent requirements under mortgage loan documents. It is common for borrowers to be required to obtain a lender's consent to renewals, amendments and modifications of certain leases or "major leases" as well as to waivers under such leases or any modifications that shorten the lease term or reduce the rent to be charged. Failure to obtain such consent can result in a default that may be difficult to cure once an amendment or waiver has been agreed to. Additionally, an unauthorized lease modification or waiver may trigger specific recourse carve out provisions

resulting in borrower and guarantor recourse for lender losses and may under some mortgage loan documents constitute an impermissible transfer likely resulting in full recourse liability for a borrower and guarantor.

Inability to Pay Debts: Borrowers should use care in their communications with mortgage lenders and others regarding their financial positions. There exists a real risk that current market conditions will result in tenants not making their rent payments, thereby creating a cash crunch for many mortgage borrowers/landlords. Many mortgage loan documents provide for full recourse to borrowers and guarantors if a borrower admits, in writing or in any legal proceeding, its insolvency or inability to pay its debts as they become due. Such provisions at a minimum, risk giving a lender leverage in any negotiations regarding loan workouts or restructurings.

GSE and States Provide Borrower Protections

Freddie Mac, Fannie Mae and several states have provided for various borrower protections in light of the COVID-19 pandemic. In general, these measures require that lenders postpone foreclosures and evictions, refrain from reporting late payments to credit rating agencies, waive certain fees and/or grant a forbearance on mortgage loan payments for a certain period of time.

The following are examples of such initiatives:

- **Freddie Mac:** Freddie Mac is taking the following mortgage relief actions to protect homeowners with Freddie Mac-owned mortgages who are directly or indirectly impacted by COVID-19: (a) providing mortgage forbearance for up to 12 months; (b) waiving assessments of penalties and late fees; (c) halting all foreclosure sales and evictions until at least May 17, 2020; (d) suspending reporting late payments that are related to forbearance to the credit bureaus; and (e) certain offering loan modification options.

Additional information from Freddie Mac may be found [here](#).

- **Fannie Mae:** Similar to Freddie Mac, Fannie Mae is providing borrowers with Fannie Mae-owned mortgages that are impacted by COVID-19 with the following protections: (a) forbearance on mortgage payments for up to 12 months; (b) homeowners in forbearance will not incur late fees; (c) foreclosure sales and evictions are suspended to 60 days; (d) after forbearance, servicers are required to work with borrowers on permanent workout options; and (e) suspending reporting late payments that are related to forbearance to the credit bureaus.

Additional information from Fannie Mae may be found [here](#).

- **New York:** Executive Order No. 202.9 (“**EO 202.9**”), issued on Saturday, March 21, 2020, grants the New York State Department of Financial Services (“**DFS**”) legal authority to issue emergency regulations to protect borrowers in the State of New York (both individuals and entities) facing financial hardships as result of Covid-19. DFS has issued guidance that urges ***licensed or regulated*** lending institutions to, among other things: (a) grant a forbearance on mortgage loan payments; (b) refrain from reporting late payments to credit rating agencies; (c) postpone foreclosures or evictions; and (d) waive late payments and on-line payment fees, in each case, for a period of 90 days.

Lending Institutions Covered: EO 202.9 applies to New York state-chartered banks and also likely applies to any foreign banks that are regulated by DFS. However, national banks and federal

branches and agencies of foreign banks, which are organized under federal law and are not subject to Section 39 of the New York Banking Law, are likely not subject to the 90-day forbearance order.

Violation of EO 202.9: Covered lending institutions that violate the 90-day forbearance order shall be deemed to be engaging in an “unsafe and unsound business practice” under Section 39 of the New York Banking Law. The penalties for such violation may be found [here](#).

The text of EO 202.9 may be found [here](#) and guidance from DFS may be found [here](#) and [here](#).

- **California**: California has reached an agreement with multiple financial institutions, including JP Morgan Chase, Citi, US Bank, Wells Fargo and a number of credit unions and state banks, which have all agreed on the following: (a) 90-day forbearance on mortgage payments for homeowners who can provide evidence that they’ve been impacted by the COVID-19 pandemic; (b) late payments would not be reported to credit rating agencies; (c) 60-day moratorium on initiating foreclosures or evictions; and (d) for at least 90 days, financial institutions will waive or refund late fees.

Additional information on California’s mortgage relief efforts may be found [here](#) and [here](#).

Key Provisions of the CARES Act

On March 27, 2020 President Trump signed into law the Coronavirus Aid, Relief and Economic Security Act (the “CARES Act”), which is a \$2 trillion dollar stimulus package aimed at providing economic relief to individuals, states and businesses that have been impacted by the COVID-19 pandemic.

The following are some of the key provisions of the CARES Act:

- One-time stimulus checks amounting to \$1,200 for individual tax filers, \$2,400 for those filing a joint return and \$500 for each child, up to certain income limits.
- An estimated \$250 billion to be spent on unemployment benefits, adding \$600 per week to every unemployment check for four months, expanding the program to cover contractors and the self-employed, and extending the program from 26 weeks to 39 weeks.
- \$500 billion in a fund to help distressed businesses, cities and states.
- \$349 billion in small business relief, largely in the form of “forgivable loans” for spending on payroll, rent and utilities.
- \$150 billion in direct aid to state and municipal governments.
- An estimated \$221 billion in other business tax breaks.
- \$340 billion in other spending, including \$117 for hospitals and veterans’ care.

For additional information on the CARES Act please see [Kelley Drye’s client advisory](#) and the full text of the CARES Act may be found [here](#).

Canceled - CREFC New York Conference

CREFC has canceled its 2020 Annual Conference that was slated to take place June 8-10 in New York City. It is planning on a more robust conference in early fall in New York City.

Additional information may be found [here](#).