To say that most businesses were not prepared for the COVID-19 (coronavirus) pandemic would be quite an understatement. Although several countries had lived through and learned from the SARS and swine flu outbreaks, nobody was really prepared for what 2020 had in store. U.S. citizens hadn't lived through anything remotely similar since the 1918 Spanish flu pandemic.

From a legal perspective, the business world has learned a lot in a short period of time. The many hurdles business owners dealt with since the pandemic began—and the lessons they learned—could help all businesses be more resilient in the future. At the same time, many mistakes were made and we should learn from them.
In this article, let's take a look at how COVID-19 impacted commercial lease agreements and business interruption practices in particular.

**Commercial lease agreements**

During the COVID-19 pandemic, many businesses were unable to pay rent due to unexpected declines in revenue. As a result, many distressed commercial tenants wrote to their landlords requesting a temporary pause on rent payments. Eventually, the CDC announced a residential eviction moratorium that was most recently extended until March 31st, 2021.

Unfortunately, commercial tenants weren’t so lucky. Commercial lease agreements do not typically contain force majeure provisions, nor do they cover disasters such as a pandemic.

**What is a force majeure provision?**

“Force majeure” refers to a provision included in contracts that essentially removes liability in the occurrence of an event beyond the reasonable control of a party to the contract (e.g., natural and unavoidable catastrophes), and which prevents said party from performing its obligations under the contract.

In other words, a party’s ability to claim relief due to a force majeure event depends entirely on the express terms of their contract. As such, force majeure events must be specifically accounted for in the contract—which, again, is not typically the case with commercial lease agreements.

Keep in mind that simply having a force majeure provision in a contract may not be enough to excuse a contractual obligation. But as a preventative measure, it’s a good starting point.

Let’s bring this back to commercial lease agreements. Unless a temporary halt of rent payments is included in the contract, it’s entirely left to the discretion of the landlord. Demonstrating a history of making payments in full and on time and making a respectful, convincing request might go a long way (or it might not).

**What are impossibility of performance and frustration of purpose doctrines?**

Since the pandemic began, many attorneys have argued that New York laws excuse the payment of rent under COVID-19 conditions. Under the doctrine of impossibility of performance, a government-mandated lockdown, they argue, makes it impossible for many commercial tenants to pay rent.

The doctrine of frustration of purpose has also provided a legal basis to argue for pausing rent payments. As a result of unforeseen circumstances caused by the pandemic, most business owners are unable to:

1. Open their premises and conduct business.
2. Hire employees to work on their premises.

3. Allow customers onto their premises.

Consequently, there may be a frustration of purpose of the commercial lease agreement, and a commercial tenant’s rent payments may potentially be excused.

The question of whether it is legally viable to halt rent payments under the doctrines of impossibility of performance or frustration of purpose will continue to be heavily litigated in commercial landlord-tenant disputes so long as COVID-19 persists.

Takeaway: Moving forward, businesses can negotiate with their landlords to include force majeure provisions or unforeseeable emergency language that allows them to temporarily pause rent payments should such situations arise. We are seeing landlords add arbitration provisions, which may not be the best idea for tenants or landlords.

**Business contracts**

As soon as government-mandated shutdowns went into effect, cash flows dried up. Many business owners began to question the viability of their companies, reviewing virtually all of their existing contracts and subscriptions in an effort to save money during these difficult times.

Many B2B companies compromised and offered discounts to struggling clients because they couldn’t afford to lose their business.

**Keep contract outlines**

Business contracts can be long and overwhelming, but they are the legal roadmap for the structure of your relationship with the other party to the agreement. To help organize all the information in a contract, we recommend keeping a brief bullet-point outline for each one.

Each outline should include important information, such as:

- duration of the contract
- payment schedules
- delivery deadlines
- what is considered an event of default
- remedies in the event of default

Of course, not all contracts are created equal, so your outline should be tailored to the particular transaction in question.

If your business handles a number of contracts, we recommend having both physical and electronic copies of each contract. You should always have a copy of the fully signed contract handy.
Keep physical copies in a secure place where you can quickly refer to each contract (accordion folders are great for storage and organization). Electronic copies of fully signed contracts should be saved in password-protected files.

**Know your doctrines**

What if the COVID-19 pandemic is putting you at the brink of defaulting on your contract, there is no applicable force majeure provision, and the other party to the contract is not willing to renegotiate?

It may be time to see if the doctrines of impossibility, impracticability, or frustration of purpose can apply.

As we touched on above, the doctrine of impossibility of performance involves a situation where supervening circumstances make performance impossible. This doctrine is used as a defense against performing a contractual obligation (such as paying rent).

Under specific circumstances, this defense would be granted, and performance under a contract would be excused. For example, a painter would never be expected to finish painting a house that had just burned down.

The doctrine of **impracticability of performance** exists where there is “extreme, unreasonable, and unforeseeable hardship due to an unavoidable event or occurrence.” This is more than a mere change in the degree of difficulty or expense. It involves contractual obligations becoming excessively expensive, difficult to perform, or harmful.

The doctrine of frustration of purpose, which we touched on earlier, is another contract doctrine that might apply to you. Frustration of purpose requires the following:

1. A supervening event that has frustrated the mutual basic purpose of the contract
2. The event was unforeseen (not within the risks assumed under the contract)
3. The event was neither caused by nor within the avoidance or control of the party
4. The event renders the value of the performance essentially worthless

Although the parameters are specific, this doctrine might be a better fit for your business than impossibility of performance or force majeure where performance or payment is not “impossible,” but circumstances still warrant relief from performance.

**Takeaway:** Every contract requires its own careful, individual analysis.

**Business interruption insurance**
Many businesses have been forced to shut down (either permanently or temporarily) due to the COVID-19 pandemic and the ensuing government shutdown orders. Consequently, many of those businesses have filed a claim with their insurance provider for business interruption coverage.

Business interruption insurance provides a business with the revenue the company would have earned had the disaster not occurred. Coverage is usually provided as part of a property insurance policy or as part of a package policy. Business interruption coverage compensates the business for lost income if a company had to vacate the property due to disaster-related damage covered under the property insurance policy.

Typically, direct physical loss or damage (like a natural disaster) would trigger business interruption coverage. Business interruption coverage can also be triggered due to the actions of civil authorities. Most business interruption coverage policies for the actions of civil authorities contain the same standard language.

**What is a civil authority provision?**

Civil authority provisions aim to have business interruption coverage apply when there is damage to the property of another business that causes civil authorities to prohibit access to the area where the insured’s property is located.

For example, let’s say an earthquake hit Times Square (an unlikely scenario), and authorities such as the mayor of New York City or the governor of New York State order Time Square to be closed off. This area might include businesses that would be impacted by such a civil authority order, even if those businesses sustained little to no damage.

However, most civil authority provisions also require that the civil authority order is in response to direct physical damage from a cause covered by the insurance policy. As a result, it is likely that insurance policy providers will deny most COVID-19 related business interruption claims.

An overwhelming majority of those denials are because of the lack of physical damage due to a covered cause.

Insured businesses might try to obtain business interruption coverage by arguing that COVID-19 itself caused physical damage by contaminating a property. Unfortunately, most insurance companies explicitly exempt coverage damage due to viruses and bacteria and disagree that COVID-19 causes actual physical damage.

However, filing a business claim could be advantageous. If there is ever a change of the laws that go back to the date of your claim, you could be retroactively covered.

Regardless, businesses continue to file business interruption claims. After all, if you fail to tender a claim in the allowed time period, you may lose your claim forever. Denial of claim reserves your right to an appeal in the near future.

Takeaway: Many insurance companies are being sued by business owners for denying business interruption insurance coverage. If the courts rule favorably regarding
COVID-19 and physical loss or damage, businesses may be able to receive insurance coverage after an appeal.

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