

Current Developments and Hot Tips

**Mortgage Lending Institute of
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This edition of this Hot Tips paper is again a collection of developments, cases and events which we think are relevant to lawyers who practice in the area of commercial real estate finance, transactions and development. Some are reports of new developments and some are reminders of law and practice that we think might be useful to you. We are certain that we have overlooked many developments that you would like to see covered, but we have picked those things to report which we think would be helpful to most of you and maybe even entertaining in some ways. We have tried not to step on the toes of the contributors to this seminar who so skillfully inform us of developments in Texas cases.

I. Real Estate Related Implications of the Covid Pandemic – Beyond the Usual

There has been much chatter in the legal and business press and a great deal of litigation about the real estate implications of the Covid Pandemic of 2020-2021. Last year we reported on the controversies about interpretation and application of doctrines of constructive eviction, force majeure and impossibility of performance. We also reported on the controversy about whether business interruption insurance would be available to tenants or landlords in the context of the governmental ordered shutdowns. And we mentioned briefly the beginnings of numerous cases about the various eviction moratoria and whether those were constitutional or legal under various doctrines. Controversies and cases on all those fronts continue, but developments about those issues are being covered in various seminars and programs. We see some other issues which need to be thought about and we bring you these “hot tips”.

A. Rent Deferral Agreements Mean Complexity when Commercial Property is Sold

Immediately after the first “shut downs” ordered in late March, retail tenants stopped rent payment as they were unable to operate their stores and generate income with which to pay rent. A number of bankruptcy filings followed. The economy seemed to recover some and some of the deferred rent was paid so that some of the deferral agreements ended. But recently, increasing illness levels and talk of possible closings or restricted occupancy levels may again raise the subject and may again result in rent deferral agreements.

What happens to the deferred rent obligations in the event that the property rented is contracted to be sold? Is that receivable held by the seller to be transferred to the buyer or is the receivable to be retained by the seller? If the seller retains the receivable, what remedies will the seller retain? The buyer certainly does not want the seller to have any lease termination rights, and may not even want the seller to have the option to sue the tenant, who is now the tenant of the buyer and whose good health the buyer assumed when it bought the property. Conversely, if the seller conveys the receivable, does the seller get the full par value of that sum from the buyer and if not, there is a negative impact on the true price. Some arrangements have been suggested as to how collections of the deferred rents might be shared between buyer and seller. The seller might not be happy to leave collections in the

hands of the buyer who will have conflicting motivations in dealing with the tenant and might not be very enthusiastic in efforts to collect rent or enforce remedies if the deferred rent is not collected.

The seller will likely have to make some representations and warranties to the buyer about the rents and leases. The unusual rent deferral arrangement may be overlooked by the seller or its staff and so the seller may misrepresent some material matter to the buyer.

In these deals, there is a fairly standard request for and signature of estoppel letters for the benefit of the buyer and possibly its lender. If those are generated without knowledge of or consideration of the deferral arrangements, it is possible that the terms of the letter will not match the terms of the renovated arrangement between landlord and tenant, and so misrepresentations can occur.

And then, there may be “standard terms” in the purchase and sale agreement which can lead to future conflict because they do not adjust for deferred rent arrangements. Those terms might include the closing prorations (of the current rent, any deferral payment, or both?), the post closing adjustments clause which may overlook how unusual rent payments are to be dealt with when received by the buyer after closing, etc.

B. CFPB Debt Collector Rule.

This item relates only to residential leases and lease evictions as best we can tell, but it is something that you might need to watch out for. In April 2021, the Consumer Financial Protection Bureau issued an emergency rule which could create liability for attorneys who engage in eviction proceedings if they take renters to court without informing the renters of their rights under any federal, state or local eviction moratorium. This rule was enacted as an emergency final rule – meaning it is effective without the usual notice and comment period of usual administrative rule making. The rule does not apply to landlords, but to debt collectors, which may include attorneys for the landlords.

The complexity arises from the moving target of what is the status of eviction moratoria for which notice is to be given. The legal status of the CDC eviction moratoria seems to change daily. Litigation over the enforceability of the various state programs is ongoing. Various cities and counties have their own programs. Some controversies exist between states and their counties or cities about the legality of the eviction moratorium in question. CFPB is to issue a standardized form of notice to be given, but how can any notice be “standard” in the ever and rapidly changing situation which varies from locale to locale and day to day? Consumer advocates of course have praised this action by CFPB as creating another impediment to evictions of people impacted by the Covid Pandemic. No surprise in that.

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