



The
Strong Firm
Attorneys P.C.



CORONAVIRUS COMMUNITY UPDATE



BUSINESS
LAW



REAL ESTATE
LAW



OIL, GAS &
ENERGY LAW



ESTATE PLANNING
& PROBATE



COMMERCIAL
LITIGATION



BUSINESS
MEDIATION



EMPLOYMENT
LAW

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SPRING 2020 STRONG POINTS NEWSLETTER

Founded in 2004 by Attorney Bret L. Strong, The Strong Firm P.C. is dedicated to serving the legal needs of The Woodlands, Greater Houston and beyond. Since The Woodlands business attorneys at The Strong Firm understand the business environment at a local, state and national level, we are able to give people practical, knowledgeable advice on all aspects of their business transactions and disputes.

We understand that in a tough, competitive, global marketplace, timely and cost-effective legal advice about business transactions taking place throughout the state and the world is important. Our business law firm in The Woodlands, Texas stands ready to help you and your business tackle legal issues ranging from the common to the complex every step of the way. We are dedicated to providing you with high-quality, personalized service that is unparalleled in the legal market.

The articles and other information contained in this newsletter are not legal advice, and this letter is not a solicitation for legal employment if you are currently represented by an attorney in a given matter. You should consult with an attorney of your choosing for advice regarding your individual situation. We invite you to contact us and welcome your calls, letters, and emails. Your receipt of this newsletter and/or contacting our firm does not create an attorney-client relationship.

To retain our services please contact us and we will send you a written engagement letter for your consideration and execution in order to hire our firm and create the attorney-client relationship. Please do not send confidential information to us until such an attorney-client relationship has been established.

Not certified by the Texas Board of Legal Specialization



DAVE & BUSTER'S GRAND OPENING

On January 15, 2020, Eric R. Thiergood, Sr., Kristen Bates, and Christina Harugthy had the pleasure of attending the VIP Grand Opening Celebration for Dave & Buster's, located at Metropark Square in Shenandoah, Texas, as guests of The Woodlands Area Chamber of Commerce and Leadership Montgomery County (LMC). At the celebration they had the opportunity to experience the new Eat + Play combination with complimentary food, drinks, and games, and socialize with other Chamber members and business colleagues.



MEALS ON WHEELS MILES FOR MEALS 5K/10K

Brittany Sloan, Kristen Bates, and Christina Harugthy participated in the 4th Annual Meals on Wheels Miles for Meals 5k/10k Fun Run, presented by Kevin Baker Homes & Real Estate, and held at B-52 Brewery. The Strong Firm P.C. also had the pleasure of sponsoring lunch for the Woodlands Bar Association Fun Run participants. The proceeds from this event fund the services Meals on Wheels Montgomery County provides to our homebound seniors, including meal delivery, transportation, safety checks, and more.



EOC VIP RECEPTION

The Strong Firm P.C. was honored to sponsor and attend the VIP Reception, held at the Glade Cultural Center, to kick off the 34th Annual The Woodlands Area Chamber of Commerce Economic Outlook Conference. Pictured from left to right is Eric R. Thiergood, Sr., Christina Harugthy, Kristen Bates, Lisa Prado, Brian Albert, and Bret Strong (not pictured), who attended the VIP Reception, along with many of the firm's friends, business colleagues, and clients in the community.



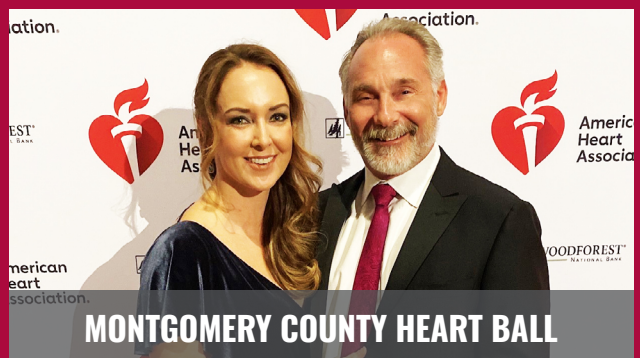
TRUIST WELCOME RECEPTION

Eric R. Thiergood, Sr., Brittany Sloan, and Christina Harugthy attended the 'Welcome to Truist' cocktail hour hosted by BB&T Wealth & Commercial Team on February 19, 2020, during which the recently merged BB&T and SunTrust, now Truist, unveiled their new logo and the future of the Bank.



UNITED WAY: WOMEN WHO ROCK

The Strong Firm P.C. had a wonderful time attending and sponsoring the 2020 United Way Women Who Rock Luncheon that supports young mothers who want to continue their education through the United Way Young Mother's Child Care Scholarship. Bret and Angela Strong, pictured above, were pleased to attend the event along with Eric R. Thiergood, Sr., Laura Dumas, Kristen Bates, Brittany Sloan, Lisa Prado, Beth Kovacs, and Christina Harugthy of The Strong Firm P.C. and Jennifer Wertz of A Strong CPA, LLC.



MONTGOMERY COUNTY HEART BALL

Bret L. Strong, Managing Shareholder of The Strong Firm P.C., and his wife Angela Strong, Managing Shareholder of A Strong CPA, LLC, had the pleasure of attending the Montgomery County Heart Ball, as guests of Christin Allphin, Executive Vice President at Woodforest National Bank. Montgomery County Hospital District was recognized at this year's Heart Ball for the vital work they do and the care they provide to the underserved population in our community. The proceeds raised from the event benefit the American Heart Association and all the life saving advancements the organization provides to so many individuals.

STRONG POINTS: SPRING 2020

WHAT DOES “COMMUNITY” LOOK LIKE DURING SOCIAL DISTANCING?

I will not say these times of COVID-19 are unprecedented times. That is being overused and is obvious. What is unique to these COVID-19 days, in my opinion, is the extent to which some are looking to government for decisions and related comfort from uncertainty rather than trying to find or create our own level of comfort. So how do you find comfort and “community” when you are being told by others to stay away from everyone? Some thoughts:

Community Should Be Where It Always Has Been.

What I have found helps ground me in these times of daily reporting of positive tests and deaths, is the solace that our Creator is in control and ongoing faith in God and goodness of man. I find comfort in looking past the hype and knowing that in times of chaos the underlying good of mankind and faith will pull us through. Government is trying its best to get you through this crisis, but that comfort is temporary. We all need to be smart about social interaction and follow guidance, but I believe we need to look to a higher being and a faith community and the comfort of those near you whom love and support you for calm.

Calm Is Both Hard and Easy To Find.

It is crazy out there. Uncertainty abounds. I have found more peace lately in a long run or bike ride than I have in a long time. I think it's because it allows me to focus my existence in the simple beauty of God's creation rather than that which man is trying to control, but over which has limited control (currently). It is very calming to “distance” through nature and know that there is no coronavirus along a natural trail or path, but rather thousands of examples of beauty in creation. Calm is not found on the evening news or Facebook. More people appear to be getting outside and I hope it is for calm and communion with nature.

Leadership Is Essential.

I have found in these strange virus times some incredible examples of true leaders that are not on the daily news or reporting on the statistics on the virus (although many of the medical leaders are amazing minds that will lead us through this). The true leaders are out doing things in their businesses, towns, and homes to help try to focus long-term, create some comfort, and sustain community at a time when that seems impossible; they are giving money and support to charity with the time and resources available. People are transforming businesses to try to sustain and help others; sports figures are supporting those that usually support them while they play a game for a living; and people are checking on people (from a distance) like never before to make sure they are “ok”. Leadership is NOT granted by title; it is how you live your life. Do not wait on others. Do what is good for mankind.

My belief is community in times of distancing is in your faith, your family, and your inner being. Take the time to find that place for the overall good of yourself and others.



Bret Strong
Managing Shareholder

STRONG POINTS: WINTER 2019-2020

SBA'S ECONOMIC INJURY DISASTER LOANS: COVID-19 UPDATE

As discussed in our March 17, 2020 blog post, entitled "SBA's Economic Injury Disaster Loans in Response to COVID-19," Texas Governor, Greg Abbot, requested an Economic Injury Disaster Declaration from the U.S. Small Business Administration ("SBA") which would allow Texas businesses to access the SBA's Economic Injury Disaster Loans ("EIDLs"). EIDLs are aimed at assisting small businesses who are suffering substantial economic injury as a result of the Coronavirus (COVID-19) in the form of long-term, low-interest loans to qualifying businesses across the country. Governor Abbott recently declared his Economic Injury Disaster Declaration request was granted by the SBA, thereby, permitting all eligible Texas small businesses to apply for the SBA's EIDL program. Governor Abbot announced:

"Small businesses are the foundation of our state's economy and they need all the help they can get as the ripple effects of COVID-19 impact their everyday operations. [The] decision by the U.S. Small Business Administration to make Economic Injury Disaster Loans available to qualifying small businesses across Texas is a vital lifeline for Texas small business owners who are doing their best to adapt to these trying times."



Eric R. Thiergood, Sr.
Shareholder

The SBA's EIDLs offer loans up to \$2 million to provide economic support to small businesses to combat the temporary loss of revenue they are currently experiencing as a result of COVID-19. EIDLs can be used by Texas small businesses to pay for various operating expenses including trade payables, payroll, fixed debts, and other expenses that businesses may be struggling to pay due to the effects of COVID-19.

EIDLs will carry an interest rate of 3.75% for small businesses and 2.75% for non-profit organizations and contain long-term repayment schedules in an effort to keep payments affordable with maximum terms of up to 30 years. The exact loan terms are determined on a case-by-case basis, based upon each borrower's ability to repay once the business is stabilized. As noted in our article posted on March 30, 2020 businesses and non-profit organizations with credit available elsewhere are not eligible for EIDLs. In a conference call with Texas SBA officials, the SBA made it clear that the meaning of having "credit available elsewhere" is not a test with an exact definition set in stone, but rather is evaluated on a case by case basis. Businesses who are not sure if they will have sufficient resources to weather the COVID-19 storm are encouraged to apply.

Eligible Texas small businesses can apply for an EIDL directly with the SBA by visiting:

<https://www.sba.gov/funding-programs/disaster-assistance>

For additional information, Texas business owners can contact the SBA disaster assistance customer service center at 1-800-659-2955 (TTY: 1-800-877-8339) or by e-mail to disastercustomerservice@sba.gov.

STRONG POINTS: WINTER 2019-2020

SBA'S ECONOMIC INJURY DISASTER LOANS: COVID 19 UPDATE

The SBA has been made aware of fraudsters who are attempting to take advantage of small businesses during this unprecedented time of need by claiming they are able (or in some cases required) to apply for an EIDL on behalf of the small business, for a fee, of course. The SBA has made it abundantly clear to businesses that any such efforts to require small businesses to pay a fee to apply for an EIDL are improper and possibly fraudulent and should be reported.

The early feedback we have been receiving from SBA officials and some small businesses is that the system is, understandably, being heavily visited during peak use times of 7:00 am CST to 7:00 pm CST, so business owners are encouraged to visit the above website during off peak hours when possible. While SBA officials have assured us that they are processing applications as quickly as possible, as of the drafting of this update, the SBA is targeting a completion time from completed application to distribution of funds of approximately four (4) weeks.

While the SBA representative we spoke with has indicated the SBA would like to cut down the turnaround time as much as possible, he acknowledged that the SBA's resources are being challenged in unprecedented ways by COVID-19 and compared what the SBA is currently facing to the disaster relief requests they would receive if every county and parish in every state in the U.S. was hit with hurricane level devastation all at the same time. The same SBA representative advised that people have reported problems with the website when they attempted to complete the application using the Google Chrome web browser and advised instead using the latest version of Internet Explorer or Google's Edge web browsers, when possible.

The Strong Firm P.C. is working around the clock to keep our clients apprised of the latest news as it relates to small and midsize businesses with topics ranging from SBA loans, as discussed herein, to employment law, estate planning, real estate, oil, gas and energy, and all other business matters, as impacted by COVID-19. We are committed to do so until our clients and community have made it through this enormous challenge that has impacted our local community, our nation, and the world.



Eric R. Thiergood, Sr.
Shareholder



EMPLOYMENT LAW

The Strong Firm P.C. **represents** national corporation in ensuring its proprietary & confidential information is protected from public disclosure



REAL ESTATE LAW

The Strong Firm P.C. **represents** seller in \$1.2mm commercial property sale to nationally recognized car sales company



BUSINESS LAW

The Strong Firm P.C. **represents** local multifamily developer in the refinancing/ cash out of a \$22mm commercial loan



REAL ESTATE LAW

The Strong Firm P.C. **provides** representation to lender in \$6mm owner-occupied real estate credit facility



BUSINESS LAW

The Strong Firm P.C. **guides** business through complicated and overdue restructuring



REAL ESTATE LAW

The Strong Firm P.C. **counsels** buyer in \$1.2mm commercial property purchase for medical office building development



LITIGATION

The Strong Firm P.C. **obtains** favorable settlement for subcontractor with lien for unpaid work



REAL ESTATE LAW

The Strong Firm P.C. **provides** representation to seller in the \$55mm sale of a high-end multifamily development



LITIGATION

The Strong Firm P.C. **aids** client in post-judgment garnishment to satisfy substantial judgment

STRONG POINTS: SPRING 2020

COVID-19 FORECLOSURE & EVICTION RELIEF FOR HOMEOWNERS

In March 2020, our economy came to a screeching halt as COVID-19 swept through our countries, states, cities, and homes. Businesses have been ordered to close, and individuals told to stay home to stop the spread of the virus. National, state and local officials are taking necessary steps on a daily basis to protect businesses and individuals from this unprecedented economic impact. The efforts taken to provide mortgage relief are particularly important to individual homeowners during these uncertain times.



Kristen Bates
Senior Associate

On March 18, 2020, the U.S. Department of Housing and Urban Development Secretary, Ben Carson, authorized the Federal Housing Administration to implement an immediate foreclosure and eviction moratorium for single family homeowners with FHA-insured mortgages for the next 60 days. The Federal Housing Finance Agency, HUD, U.S. Department of Agriculture, Fannie Mae and Freddie Mac have all announced a freeze on foreclosures and evictions for at least 60 days, as well as forbearance and disaster relief options for homeowners who cannot afford their mortgage payments.

On March 19, 2020, the Texas Supreme Court issued an order stopping all eviction proceedings for the next 30 days, until April 19, 2020. There are exceptions, however, for criminal activity or if the tenants "pose an imminent physical threat."

The Texas Department of Housing and Community Affairs (TDHCA) announced that it will suspend evictions and foreclosures for residents impacted by the coronavirus who are part of any of the programs the TDHCA oversees, including: Homebuyer Assistance Program, Bootstrap Loan Program, and the Homebuyer Rehabilitation Assistance Program.

In addition, private mortgage institutions are starting to follow in line by offering forbearance and relief options for homeowners. If you have questions about options available to you in terms of mortgage, foreclosure or eviction relief, you are encouraged to communicate with your bank or mortgage servicer about the latest options available. There is no doubt that in the coming days and weeks more information will be disseminated about mortgage, foreclosure, and eviction relief as we all continue to deal with the repercussions of the COVID-19 outbreak.

STRONG POINTS: SPRING 2020

GENERAL GUIDANCE FOR EMPLOYERS DURING COVID-19

The Strong Firm is committed to helping our clients and community navigate through these uncertain and trying times, and this includes helping business owners navigate through emerging employment issues during this crisis. The following is some General Guidance for Employers During the COVID-19 Pandemic to better protect your workforce and business, and stay responsive to employee and business needs:

Require employees who are ill to stay home.

- ✓ The federal Equal Employment Opportunity Commission (EEOC) has published Pandemic Preparedness guidance that provides that, during a pandemic, employers are permitted to ask employees the reasons for their absence from work, including if the employee is experiencing certain symptoms (such as cough or fever). The EEOC updated this guidance on March 18, 2019 to specifically address frequently asked questions and answers from employers related to inquiries they can make related to COVID-19 issues. A link to this updated guidance follows:

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

- ✓ If you learn that an employee has tested positive for COVID-19, immediately advise your workforce and any effected other contacts (such as clients, customers, vendors), without disclosing any identifying information about the positive employee.
- ✓ Also, immediately contact your local public health agency for assistance in determining the appropriate next steps, including appropriate cleaning measures, other notices that may be needed to impacted persons, and potential quarantines or shut down.
- ✓ Require a doctor's note to return to work after exhibiting symptoms of the Coronavirus. The EEOC's Pandemic Preparedness guidance provides that an employer may require employees who missed work during a pandemic to provide a doctor's note certifying their fitness to return to work.

Require employees to give notice of illness of members in their immediate household or of others with whom they have close contact (per the CDC's Interim Guidance for Businesses and Employers).

- ✓ Then assess the risk of contagion (see the Interim U.S. Guidance for Risk Assessment and Public Health Management of Healthcare Personnel with Potential Exposure in a Healthcare Setting to Patients with Coronavirus Disease).

Consider requiring employees who have traveled to stay home for 14 days.

- ✓ Require employees to report where they are traveling and dates of travel for those employees taking time off for personal travel.
- ✓ The CDC's most recent guidance provides that employees "may be asked to stay home for a period of 14 days from the time they left an area with a widespread or ongoing community spread..."
- ✓ Notify employees they will be subject to this 14-day "stay at home" period if they intend to travel, or that their request for time off for travel will be denied because of the inability to return to work within a reasonable period of time or before the employee's PTO is exhausted.
- ✓ Require employees to report when individuals with whom they have close contact (such as same household members) travel to high-risk areas.



April Walter
Of Counsel

STRONG POINTS: SPRING 2020

GENERAL GUIDANCE FOR EMPLOYERS DURING COVID-19

Consider work-from-home options for all or a portion of your workforce.

- ✔ Ensure employees who are not accustomed to remote work are outfitted with the resources they will need, including (a) technological resources (such as computers, internet service, remote network connectivity, printers, monitors, telephone), (b) basic office supplies, and (c) critical work files/materials that are not available online or are difficult to work with in electronic form.
- ✔ Digitize any relevant files/materials not already in electronic form, and ensure such materials are saved to networks for access by all appropriate users.
- ✔ Consult with your IT staff or vendor about anticipated resource needs and limitations, and potential measures (such as cloud-based network/application gateways) to better safeguard corporate information from potential hackers and other security risks.
- ✔ Establish and communicate clear expectations for remote work, including how employees will receive new assignments, remain in touch with other personnel, report their working hours, deliver work product, etc.
- ✔ Encourage robust communication – the more communicating about current status of projects, needs, unanticipated difficulties, etc., the better.
- ✔ Consider pairing employees or groups of employees up for set (i.e., daily, twice daily, etc.) or ad hoc mentoring or brainstorming sessions by phone, video conference, text group, or electronic chat/messaging.

Consider establishing a COVID-19 Response Committee at your office to track emerging issues and concerns and promptly determine plans of action.

- ✔ Provide employees with easy to understand guidance on CDC guidelines for "social distancing," that are as applicable within the workplace as they are in public spaces.
- ✔ Regularly clean high-touch surfaces.
- ✔ Limit shared food in the office.
- ✔ Consider shortening business hours to reduce overhead and contacts.
- ✔ Consider mental health needs (see further discussion on this below).

Consider lay-offs and unemployment benefit rights.

- ✔ The Texas Workforce Commission (TWC) administers unemployment benefits in Texas. TWC has established a "COVID" page on its website (search "TWC" and "COVID"). On this page, there is a place to subscribe to COVID-related email updates.
- ✔ For those employees laid off in this crisis, the TWC is waiving the usual one-week waiting period for receiving benefits and waiving the usual work search requirements to continue to claim benefits every two weeks.
- ✔ While extended benefits periods were not announced as of the writing of this publication, in past financial downturns, the TWC has extended the usual 26-week limit for benefits to allow unemployed workers to continue to collect benefits beyond the usual limit.

Stay mindful of wage and hour laws.

- ✔ The federal Fair Labor Standards Act (FLSA) requires an employer to pay a salaried, overtime exempt employee their full weekly salary, regardless of the quantity of work performed, for any workweek in which the employee performed any work – otherwise the employer jeopardizes losing the overtime exempt status for that worker and similarly situated workers.
- ✔ There are two potentially applicable exceptions to this, but they are very narrow: (a) the employee is absent from work for one or more full days for personal reasons other than sickness or disability; or (b) for absences for one or more full days due to sickness or disability, so long as the deduction is made in accordance with a bona fide plan, policy or practice for providing pay for salary lost due to illness (i.e., pursuant to a sick pay plan).

STRONG POINTS: SPRING 2020

GENERAL GUIDANCE FOR EMPLOYERS DURING COVID-19

Consider mental health needs.

- ✓ Encourage employees to establish healthy limits on the amount of news coverage they are consuming on the crisis.
- ✓ Encourage employees to use paid time off benefits if they are concerned about reporting to work, so long as business needs are not compromised.
- ✓ Encourage employees to stay “virtually” connected, with continuous phone, email, text, or chat/messaging communications among and with workers who are telecommuting or quarantining.

We wish everyone well during these difficult days.

The foregoing message was for informational purposes only and was not intended to nor should it be construed as legal advice for any particular situation or circumstances. This discussion was meant as a general overview and cannot replace the guidance of legal counsel. Employers are encouraged to consult with experienced legal counsel before taking any employment actions that implicate federal, state or local employment laws, including, without limitation, the FLSA, Americans with Disabilities Act, Title VII, Texas Commission on Human Rights Act, Family and Medical Leave Act, National Labor Relations Act, or Worker Adjustment Retaining Notification Act.



April Walter
Of Counsel

STRONG POINTS: SPRING 2020

FORCE MAJEURE: BREAKING CONTRACTS OVER CORONAVIRUS

Within days of the World Health Organization declaring the Coronavirus (COVID-19) a pandemic, we saw events cancelled, public gatherings restricted to 10 people, businesses closed, travel restricted, and school cancelled for our children. With each day and each unprecedented change, businesses have been forced to look at their contractual obligations and potential inability to perform. Though generally glanced-over as "boilerplate" provisions, force majeure clauses are meant to cover occurrences outside the parties control (Acts of God, war, pandemics, etc.) and can potentially excuse parties from contractual performance in the event that such an occurrence is triggered.

Is the Coronavirus (COVID-19) pandemic a force majeure event?

Your favorite attorney answer: well, it depends. Unfortunately, there is no standard force majeure clause. Whether the Coronavirus pandemic is considered a force majeure event will come down to how it is defined in your specific contract. Did the contract provide a closed definitional list? (Ex. 1- Acts of God – fire, explosion, earthquake drought hurricane tornado; 2 – War; 3 – Strikes, Lockouts, Labor Disputes) Was a pandemic specifically mentioned within the definition? Then yes, this is a force majeure event. *TEC Olmos, LLC v. Conoco Phillips Co.*, 555 SW3d 176, 183 (Tex. Ct. App. 2018) ("there was no unforeseeability requirement when a specified force majeure condition . . . occurred that excused performance.") If a pandemic was not specifically mentioned, was there a broad catch-all definition, such as "unforeseeable circumstances beyond the parties' control"? See *In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012) (noting that, force majeure clauses are "construed narrowly and will generally only excuse a party's nonperformance that has been rendered impossible by an unforeseen event") If so, the judicial interpretation of "foreseeability" changes jurisdictionally and is highly fact-specific on whether the pandemic was foreseeable.

If Coronavirus (COVID-19) is a force majeure event, is the party excused from performance?

Many contracts also include language that states that the occurrence of the force majeure event must make performance of the contractual obligations impossible, impracticable or illegal. *OWBR LLC v. Clear Channel Comms., Inc.*, 266 F. Supp. 2d 1214, 1216 (D. Haw. 2003) (noting that the force majeure clause excused nonperformance where it was "inadvisable, illegal, or impossible") Some contracts will also require reasonable endeavors to be made to overcome the force majeure event. See, e.g., *Richard A. Lord*, 30 Williston on Contracts § 77:31 (4th Ed.) (noting that a party seeking the benefits of a force majeure clause must show that performance is impossible "in spite of skill, diligence, and good faith" to continue to perform) Some contracts also require prompt notice following a force majeure event. It is important for parties to understand exactly which circumstances trigger their force majeure clause so they may negotiate the most favorable terms going forward.

What if the contract does not contain a force majeure clause?

If the contract is silent as to force majeure, parties should look to common law doctrines to excuse performance. Through the principals of impracticability and impossibility, courts apply an objective assessment as to whether the excused performance is impracticable or impossible, regardless of whether the party, itself, thinks performance is impracticable or impossible. These doctrines may excuse nonperformance where a party establishes that: (1) an unexpected intervening event occurred; (2) the parties' agreement assumed such an event would not occur; and (3) the unexpected event made contractual performance impossible or impracticable. See, eg. *Restatement (Second) of Contracts* § 261 (Am. Law Inst. 1981) Under the doctrine of frustration of purpose, a Party must prove that: (1) an event substantially frustrates a party's principal purpose; (2) the nonoccurrence of the event was a basic assumption of the contract; and (3) the event was not the fault of the party asserting the defense. See, eg. *Hon. Michael M. Baylson et al.*, 8 Bus. & Com. Litig. Fed. Cts. § 89:36 (4th ed. 2019) The party would have the burden of proving that the circumstances of the pandemic so directly altered the contract that performance of the contract would no longer fulfill its purpose.



Brittany A. Sloan
Associate Attorney

STRONG POINTS: SPRING 2020

COVID-19 CONSIDERATIONS FOR COMMERCIAL PROPERTY OWNERS

The novel coronavirus (COVID-19) has wreaked havoc on the world and our nation, casting widespread uncertainty and hardship in seemingly every corner of the economy. With many commercial tenants in dire financial straits – particularly those who rely upon customer interaction (i.e. retail, restaurant, and entertainment) – commercial landlords are susceptible to both short- and long-term effects if they are not proactive in identifying and in mitigating such negative consequences. Points of consideration and general guidance for commercial landlords include:

"Downstream" Issues:

As mentioned above, many commercial tenants are or will be financially debilitated by this pandemic. Landlords should try to be proactive in attempting to limit their tenants' shortfalls, not only to prevent them from becoming/adding to the shortfalls of the landlord, but also to help a fellow member of the community in a trying time – a community which, after all, is a factor in the desirability of the leased property.



Cody Schlegel
Associate Attorney

- Landlords should be sure to review their leases and understand the contractual rights and obligations of both them and their tenant(s) in light of the current circumstances. Specifically, clauses related to continuous operation, force majeure, and insurance should be examined and analyzed carefully, as well as any others related to default, suspension, and termination.

- Landlords must communicate with the tenant and get an understanding of their situation and communicate your expectations in this time. It is typically better to know and plan for something than to be reactionary. Opening up a dialogue will allow landlords the opportunity to begin issue-spotting and to potentially begin working with the tenant to establish a plan to avoid issues such as a monetary default or bankruptcy.

- If tenants seek rent relief, and if the landlord has the immediate means to weather its own financial storm, landlords should consider short-term arrangements that provide temporary abatement, but which allow the landlord to recoup its short-term loss when the economy rebounds. Such arrangements can be structured in many ways and offer many different forms of recoupment (i.e. future rental rate increase, percentage rent, term extensions, etc.).

- The public outcry tends to lean towards forgiveness and abatement, something that is being reflected in current and projected government stimuli packages. Accordingly, landlords should be seeking professional guidance on governmental assistance/mandates that might affect tenant payments and potentially allow rent forgiveness.

- Don't forget to factor goodwill into decisions – social pressure and optics can be equally as debilitating as financial stressors.

STRONG POINTS: SPRING 2020

COVID-19 CONSIDERATIONS FOR COMMERCIAL PROPERTY OWNERS

Uncertainty in Enforcement:

Despite the above considerations, it is inevitable that there will be circumstances and tenants for which negotiations are futile and will thus require some sort of enforcement action. However, as with everything in this current environment, the availability and efficacy of such enforcement is just as uncertain.

- Both the federal government and the State of Texas have issued orders suspending residential eviction and foreclosure proceedings. Although these are currently limited to residential properties, the sentiment cannot go unnoticed, and a similar suspension may be foreseeable for commercial properties as well.
- Similarly, Fannie Mae and Freddie Mac (responsible for a large portion of the nation's \$11 trillion mortgage market) have also introduced forbearance options, which allow borrowers who have suffered economic hardship as result of COVID-19 to suspend mortgage payments for up to 12 months.
- Even if a government mandated suspension does not preclude commercial foreclosure or eviction, there is no guarantee that the courts will be able to process them in a timely manner. Many courts are either closed or limited to conducting "emergency" or "essential" operations and hearings, thus affecting the availability and timeliness of judicial enforcement actions available to commercial landlords.

"Upstream" Issues:

With tenant issues likely to affect Landlord income generation and the efficacy of enforcement procedures uncertain, it is equally important for leveraged commercial landlords to evaluate their exposure and be proactive in mitigating any unavoidable effects of the current environment. Just as they should be with their tenants, landlords need to be proactive in identifying and communicating with lenders to ensure that any "downstream" issues do not affect any loans they may have. Be sure to examine your loan documents, with particular emphasis placed on any clauses related to debt-to-income ratios, vacancy or tenant delinquency thresholds, or rental revenue income requirements on a monthly or annual basis.

Both landlords and tenants should consider seeking experienced counsel to help analyze their current situations and their paths forward. The Strong Firm P.C.'s offices remain open as a deemed essential business and will remain open for as long as it remains safe and legal to do so. Should our office close due to government mandate, we have the ability to seamlessly transition to remote operations and continue representing our clients at full capacity. As a firm, we will continue serving the needs of our clients and community as we all navigate through these trying times. We are committed to ensuring that our families, friends, clients, and community emerge from this transformative period as we were before – Strong.



Cody Schlegel
Associate Attorney