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Shifting Realities of Real Estate Purchase and Sale Contracts in the Midst of a Global Pandemic

With the growing threat of coronavirus (COVID-19), the adverse impact on businesses and the U.S. and global economies remains uncertain. Every market sector has been directly impacted by the pandemic amidst measures being taken to curb its spread, and the real estate industry is no exception. The question becomes who shoulders the burden in a real estate transaction as state and local governments across the country face “shelter at home” orders and individual states are being designated federal major disaster areas.

Real estate practitioners, clients and industry experts face practical challenges to keep transactions moving forward as they face operating businesses while complying with various executive orders requiring citizens to “stay home or at their place of residence, except as needed to maintain continuity of operation of the federal critical infrastructure sectors.” [See [California Executive Order N-33-20](#)]. While the debate is very real on what is an “essential” versus “nonessential” service, each jurisdiction is beginning to offer guidance. [See California list of “essential critical infrastructure workers” identifying “Construction Workers who support the construction, operation, inspection, and maintenance of construction sites and construction projects (including housing construction)"]. The economic reality is that any “nonessential service” industry or business may be forced to downsize staff or close. In this changing business climate, we recommend immediately reviewing and identifying potentially adverse terms in purchase and sale agreements. This will allow the contracting parties to formulate feasible options to address these unknowns in a time when normal services are in a state of flux.

Business choices and risks will be dependent on what phase of the deal cycle the transaction is in. For example, those in the midst of negotiations to purchase or sell real estate are more likely able to avoid potentially adverse effects of the pandemic before the contract is signed. This may even allow for postponing execution to a later date to analyze the present crisis’s financial impact on the asset under contract. In contrast, those already obligated under an executed contract should re-review the existing terms to analyze the impacts of the present-day circumstances on obligations, and whether there are available remedies in the event there are obstacles to performance.

Unlike construction- development- and financing-related contracts that span specific time frames and typically include *force majeure* events, such as crises of health and human safety, real estate purchase and sale contracts customarily are silent on disasters outside of condemnation or destruction of the subject property. Therefore, the contract may not cover how to address circumstances such as the current pandemic, or provide abatement of parties’ obligations or termination rights for *force majeure* events. Further, the applicability of other contractual remedies such as the frustration of purpose is questionable and will be left to an arbitrator or the court when it comes to the

purchase and sale of real estate. Brownstein has released alerts addressing [*force majeure clauses and the frustration of purpose doctrine*](#) that offer additional insight pertinent to those contracts inherent in the development process.

Absent any deal-specific termination rights or contingencies, buyers and sellers under contract and beyond any diligence or feasibility period would be advised to operate as though they are obligated to move forward with the transaction or risk the opposite party pursuing its remedies. Even so, both parties should be prepared for unexpected delays and slower than normal response time from third-party providers, such as surveyors, zoning professionals, title insurance companies, contractors, current tenants of the property and even local governments. While delays in third-party deliverables or approvals may offer deadline extensions, such terms are negotiated on a deal-by-deal basis.

To help address transactional dilemmas caused by COVID-19, many professional organizations in varying jurisdictions have released new guidance relating to their form purchase contracts. For example, the California Association of Realtors (C.A.R.) has released an amendment to their form purchase agreement, C.A.R. Form CVA 3/20, which provides new options to the parties. The options include extension of closing to address the “unforeseen circumstances” of the pandemic, termination of the contract, or a carve-out to the buyer’s waiver of its financing contingency for COVID-19 impacts. Despite this offered guidance, any amendments to contracting buyers and sellers is voluntary.

Regardless, some suggested topics for review by the parties are covenants of the seller as it relates to current operations on the property, impacts of tenant defaults and late payments, timing of third-party deliverables and approvals, status of any necessary financing, and local government operations where the property is located.

Because most commercial real estate practitioners utilize customized contracts rather than forms, we advise consulting with an attorney to consider how best to navigate through these ever-changing times.

[**Click here to read more Brownstein alerts on the legal issues the coronavirus pandemic raises for businesses.**](#)

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