CADWALADER

Springing Forward

March 30, 2021 | Issue No. 22

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Making Sure the Ground Tenant Builds

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Once the building on a ground-leased property is completed, the ground landlord has a very secure rent stream. While the rent under the ground lease is based on the value of the unimproved land, if the ground tenant defaults and the tenant's lender does not step up and cure the default, the landlord's remedy is to terminate the lease and to retain ownership of the land and the building free and clear of the tenant's interest, which would typically far exceed the value of the land. As a result, ground lease defaults are few and far apart.

But what about the period before the building is built? During this period, the landlord's interest is far less secure. The tenant in most instances will be a single-purpose entity with no material assets other than its interest under the ground lease. At that point, if the tenant were to default, the landlord's remedy would be to terminate the lease and recover possession of the land. This might entail drawn-out litigation with the tenant, dealing with a tenant bankruptcy, and perhaps recovering possession of the property with liens for taxes and mechanic's liens filed for initial work that might have been commenced.

So how does the ground landlord protect itself? One method, which is most commonly used when the landlord is a governmental authority, is for the landlord and tenant to enter into a so-called "pre-lease agreement" or "agreement to lease," pursuant to which the landlord and tenant agree to enter into a ground lease in a fully negotiated and agreed-upon form upon the tenant's satisfying specified conditions within a specified timeframe. These conditions would typically include the tenant's closing on its debt and equity construction financing. They might also include the tenant's entering into agreements with architects, engineers, and a general contractor or construction manager, the awarding or buying out of a specified percentage of subcontracts, completion (or completion to a specified stage) of the plans for the building, etc. While having the above in place does not guaranty that the building will be built or give the landlord the ability to cause the building to be built, it should give the landlord comfort that the likelihood is that the building will be built, particularly where the participants are experienced and resourceful players. The tenant, however, could view a pre-lease agreement (particularly if the landlord is not a governmental authority) as imposing an additional risk, since it will have to spend substantial time and money in order to put into place all of the pieces necessary to satisfy the conditions to entering into the lease, without having the lease itself in place. It would have only a covenant of the fee owner to enter into the lease, which is not self-enforcing. The tenant's concern can, to an extent, be addressed by structuring the pre-lease agreement as an escrow agreement, pursuant to which a third-party escrow agent holds in escrow the executed lease, as well as a memorandum of the lease and any ancillary documents necessary to record the memorandum, pending the tenant's satisfying the conditions to their release.

In ground lease transactions that do not use a pre-lease agreement, the lease itself will often require that the tenant satisfy conditions similar to those described above prior to commencing construction and further provide for termination of the lease if they are not satisfied within the required timeframe. This is intended to prevent the tenant from starting to build unless and until the pieces are in place that make it likely that the construction, once commenced, will be completed. This does not, however, give the landlord assurances that the tenant will voluntarily surrender possession if the conditions are not timely satisfied. For that, the landlord might require that the tenant post a letter of credit in an agreed amount to secure its obligations under the lease, including its obligation to surrender the premises if it is unable to satisfy the conditions to commencing construction. The lease might provide for return of the letter of credit when the conditions are satisfied, or at a later point when substantial completion or some other construction-related milestone is achieved.

Another typical requirement is a completion guaranty in favor of the landlord, posted by a creditworthy affiliate of the tenant, pursuant to which the guarantor guaranties to the landlord that the building will be completed. At first blush, such a completion guaranty might not seem to impose significant additional exposure because, in most cases, the project's construction lender will require the posting of a completion guaranty running in its favor. Since the building only needs to be built and paid for once, it might seem that, provided the two completion guaranties are crafted so as to avoid duplicate recoveries, a second guaranty in favor of the landlord would add little to the guarantor's overall exposure. This, however, is not the case. Under a completion guaranty running in favor of a construction lender, unadvanced amounts of the construction loan allocated to construction costs, as well as any reserves held for that purpose, will typically be credited against the guarantor's obligations. A completion guaranty under a construction loan is essentially a guaranty of cost overruns and the guarantor will have no liability thereunder to the extent that the building can be completed for the amount allocated in the project's construction budget (see my article, "**Exposure and Remedies under Completion Guaranties**," *REF News and Views*, November 22, 2019, for a detailed discussion of the guarantor's exposure under a construction loan completion guaranty). The ground landlord, however, is not funding the construction and has no access to the unadvanced loan proceeds or reserves. Accordingly, the landlord will want its completion guaranty to cover the entire cost of construction, without any credit for unadvanced loan proceeds or reserves. This presents the guarantor with a risk of an entirely different magnitude.

Is there a way to structure a ground lease completion guaranty so that it provides the landlord with a sufficient level of comfort that the building will be completed while limiting the guarantor's risk to a tolerable level? While the risk of cost overruns that a construction lender covers with a completion guaranty is primarily a back-end risk (*i.e.*, that the construction loan will not be sufficient to fund completion of the building) the ground landlord's risk is more of a front-end risk. Once the tenant's construction lender has advanced a substantial portion of its loan, the landlord should have a substantial level of comfort that the lender will see to it that the project is completed, in order to avoid a default under the ground lease, the resulting termination of the ground lease and the forfeiture of the lender's investment. Similarly, once the project's equity financing has been fully expended, the project's equity investor may well be willing to contribute additional funds and take other measures to assure completion of the project and avoid a forfeiture of its investment. As a practical matter, the ground landlord's risk is that the project will not proceed to the point at which the providers of the equity and debt financing are sufficiently committed.

Could an acceptable ground lease completion guaranty be structured so that it need not remain in effect over the entire course of construction and perhaps guaranty less than the total cost of construction? One alternative, assuming that the financing is structured to require full expenditure of the equity capital before any substantial debt funding, would be to provide that the guaranty will terminate upon full expenditure of the equity. The guarantor could protect itself by requiring that at the outset of the project the equity investor deposit the full amount of its commitment in an account controlled by the guarantor or its affiliate. This could potentially result in an increase in the cost of the equity capital, but the tenant might conclude that the risk mitigation is worth the cost. An alternative, although somewhat lesser, level of protection could be obtained through a reimbursement agreement with the equity investor and/or its creditworthy affiliate, pursuant to which it agrees to reimburse the guarantor for certain calls under the guaranty, which could include any calls resulting from the equity investor's failure to fund its committed capital. The landlord, however, might not think that it has sufficient protection until the construction lender funds to a specified level. While the potential forfeiture of the equity resulting from a termination of the ground lease might motivate the equity investor to contribute additional funds and take other measures to complete, there is usually a long way to go between full funding of the equity and completion of construction. And, because equity is in a first loss position, in a deteriorating market an equity investor might conclude that some or all of its investment will be lost and that there is little reason to throw good money after bad. The debt financing has priority over the equity and the lender can be more confident of recovering its investment.

If the landlord were to accept a completion guaranty that terminates when the equity is fully funded and a specified portion of the construction loan has been funded, that would reduce the guarantor's exposure in the sense that its guaranty would terminate at a point in time prior to completion of construction, but unless the guaranty also capped the dollar amount of the guarantor's liability, the guarantor would nevertheless be liable for the entire cost to complete if the construction lender never funded or stopped funding before it funded the amount that triggers termination of the guaranty. So, to put a firm limit on the guarantor's exposure, the completion guaranty would have to include a cap on the dollar amount of the guarantor's liability once the equity has been funded into the project. Although this would not necessarily assure the landlord that it can look to its guarantor until the lender has funded to the point that it is committed to completing the project, the limited completion guaranty, combined with the protections afforded by a pre-lease agreement or a letter of credit as outlined above, provides the ground landlord with substantial assurances, is far better than simply having the obligation of a single-purpose ground tenant to build, and in appropriate ground lease transactions might be enough.

LIBOR Update

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By **William Lo**
Associate | Real Estate

LIBOR has been a key interest rate benchmark for many decades, used as the principal reference rate to several hundred trillions of dollars in derivatives, bonds, loans and securitizations. However, when the LIBOR manipulation scandal unraveled itself in 2012, widespread problems with regard to the reliability of LIBOR were identified.

As a result of this, the global regulatory community introduced reform efforts with the aim to help rebuild the public's trust in the reliability and robustness of reference rates, including LIBOR. Since then, the Financial Conduct Authority had announced that after 2021 it will no longer compel participating banks to submit their LIBOR data. What this largely means is that from the end of this year LIBOR may disappear and floating rate loans that currently reference LIBOR would be expected to transition to a floating rate based on so-called "risk-free reference rates" (or RFRs). In the case of Sterling-denominated commercial loans, the relevant risk-free reference rate being strongly promoted by the Sterling Working Group (which was set up by the Bank of England to help develop alternative referencing rates) is the Sterling Overnight Index Average (or SONIA).

This article looks at the key differences between LIBOR and SONIA and how these rates may impact legacy loans and new loans going forward.

Key differences between LIBOR and SONIA

There are three key differences between LIBOR and SONIA that will impact how the rates are used in order to calculate interest under commercial loan facilities:

> **1. Historic vs. predictive**: SONIA is a backward-looking single-day rate. It is the interest rate paid yesterday on "risk-free" overnight deposits between financial institutions as published by the Bank of England. By contrast, LIBOR reports the rate at which funds are made available between certain banks for the specific forward-looking tenors (for instance, one week, one month, three months, etc.). In short, LIBOR is based on a projection, whereas SONIA is based on historical data.
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> **2. Calculation**: Broadly, LIBOR is determined by calculating the average rate at which a group of specified leading banks can borrow funds from each other in the wholesale London lending markets. However, with SONIA, it is determined by a compounded average in order to reflect as a single percentage rate per annum the cumulative effect of the application of a series of individual daily readings of SONIA to any notional sum over a given period.
>
> **3. Economic concept measured**: SONIA is designed to be a (nearly) risk-free rate. As a consequence, SONIA does not incorporate any credit or liquidity premium. By contrast, LIBOR is designed to provide an indication of the average rates at which submitting banks could obtain wholesale unsecured funding for set periods and incorporates both a credit premium (to reflect term bank credit risk) and a term liquidity premium (to reflect the risk inherent in longer-dated funding).

As visible from these key differences, the transition away from LIBOR into SONIA does ultimately represent an important shift in the debt finance landscape, and will alter the way in which interest on commercial loans is calculated, as well as requiring a change of approach by the finance and treasury functions of borrowers.

What does this all mean for calculation of interest?

Currently, the LIBOR element of interest calculated on a loan for any period under a loan facility (being an Interest Period) is largely determined at the start of the relevant Interest Period based on the matching forward-looking LIBOR rate. The interest payable for that Interest Period will therefore be known in advance. This provides cash flow certainty for all parties.

This will in theory no longer be possible with SONIA, as it is a backward-looking overnight rate rather than a published forward-looking rate. Instead, with SONIA, the floating element of interest for an Interest Period is determined by reference to a compounded average of SONIA during that Interest Period. This gives rise to the issue that if interest is determined “in real time” during an Interest Period, the amount of interest payable by the borrower will not be known until the end of the Interest Period (or, in fact, the day after). Given that interest is payable on the last day of the Interest Period, this approach would not be practical or administratively workable for either lenders or borrowers.

In order to address this issue, the market at present is moving towards a “lag approach” whereby the compounded average of SONIA for an Interest Period is calculated over a lagged period (often called the Observation Period) which begins a specified number of days (*e.g.*, 5 Business Days) before the first day of that Interest Period and ends the same number of days before the last day of that Interest Period. The net effect is that the compounded average SONIA rate applicable to the Interest Period (and, therefore, the interest payable in respect of that Interest Period) is known on the last day of the Observation Period, being a specified number of days before the last day of the Interest Period. This is intended to give the borrower sufficient time to arrange its interest payment.

What happens with existing loans and legacy loans?

It would be advisable to review existing facility agreements as soon as possible in order to determine two key points:

> **1. Transition mechanics**: This looks at whether the loan facilities already include any pre-emptive provisions catering for the transition to SONIA and, if so, whether these are appropriate (and whether they will work in practice). For borrowers, particular caution needs to be given to any transition provisions that provide their lenders with a wide degree of discretion to unilaterally impose a LIBOR replacement methodology; and
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> **2. Fallback provisions**: What are the relevant fallback provisions which will apply if LIBOR ceases to be available and no alternative rate is adopted? Absent of any effective transition provisions and/or a consensual transition, the floating rate element under syndicated and bilateral loans may fall back to each individual lender's cost of funds. This is problematic for a variety of reasons, including the difficulty of calculating the relevant cost to the lender of a particular loan.

Considerations for new facility agreements

When negotiating new facility agreements, there are a few points worth considering:

> **1. Adjustment spread**: As compounded SONIA does not incorporate any liquidity or credit risk premium, it is likely to result in a lower floating rate than LIBOR. However, this means that Lenders may seek to increase the margin or add a “credit adjustment spread” to cover the difference between SONIA and LIBOR in order to maintain their interest rate return.
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> **2. Operational and treasury functions**: Borrowers and their internal corporate treasury teams will need to ensure that the new methods of interest calculations are recognised and to regularise their systems in order to accommodate any new methodologies for the calculation and payment of interest. In particular, even with the inclusion of observation periods, this transition may require more active and stricter management of cash towards the end of Interest Periods to ensure that there are sufficient funds to meet interest payments. Borrowers should also be wary of the differences in methodology for interest calculation between different currencies depending on the relevant RFR involved, and whether existing reference rates are continually being used (for instance, for Euro denominated loans, EURIBOR will continue to be published).
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> **3. Break costs**: Currently, break costs are charged when borrowers repay an amount during an Interest Period, but with SONIA, in theory, it will no longer be relevant as loans will no longer be priced against a forward-looking term interest rate benchmark. As such, lenders may require additional or increased prepayment fees.

Conclusion

LIBOR discontinuation was first announced in 2017, yet the “market” approach to transitioning out to a new RFR such as SONIA is still a complex and developing area. Even in a series of announcements and guidance made as recent as March 5 by the FCA, the ICE Benchmark Administration (IBA) and the International Swaps and Derivatives Association (ISDA) did not provide definitive guidance regarding how all loans and derivatives will fall back. For instance, some of the most notable announcements included that one- and three-month USD LIBOR will be published through June 30, 2023, while all GBP LIBOR settings will be published through December 31, 2021. However, it was left open as to the possibility that the most common USD LIBOR and GBP LIBOR may nonetheless continue to be published under a “synthetic” methodology beyond those dates.

That said, whilst the desire to wait for market conventions to crystalise is understandable, time is ultimately running short. As such, to avoid any unpredictable pitfalls and exposure to unnecessary risks, we continue to advise our clients to remain proactive in their considerations towards a transition away from LIBOR. This would include reviewing existing loan agreements as well as opening engagement with lenders and borrower clients to agree on best ways forward.

COVID-19 Update: Federal Eviction Moratorium Struck Down

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By **Jessica Wong**
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On February 25, 2021, the United States District Court in the Eastern District of Texas ("Texas Court") granted summary judgment in favor of the plaintiffs in *Lauren Terkel et al. v. Centers for Disease Control and Prevention et al.*, **[1]** holding that a nationwide eviction moratorium issued by the Centers for Disease Control and Prevention ("CDC") to mitigate the spread of COVID-19 exceeded the constitutional authority granted to the CDC.

On September 4, 2020, the CDC issued an order, the Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19**[2]** (the "Order"), under Section 361 of the Public Health Service Act, which was originally scheduled to expire on December 31, 2020 and was subsequently extended until March 31, 2021.**[3]** The Order was intended to mitigate the spread of COVID-19 within shared living spaces and the spread of the virus in between the States. Under the Order, any landlord, owner of a residential property**[4]** or other person with the legal right to pursue eviction was barred from evicting any "covered person"**[5]** from a residential property during the term of the Order. Any person who violates such Order is subject to a criminal penalty of up to one year imprisonment followed by one year of supervised release and a fine of up to $250,000. Prior to issuance of the Order, the federal government had never previously invoked its commerce power to impose a nationwide eviction moratorium. The Order did not apply to any State, local, territorial or tribal area which had a moratorium on residential evictions in place that provided an equal or greater level of protection than those set forth in the Order. The Order also did not preclude the tenant's obligation to pay full contractual rent under its lease.

The plaintiffs**[6]** in the lawsuit are owners or managers of residential properties that sought to evict one or more tenants for nonpayment of rent but were prohibited from doing so based on the Order. The defendants named in the lawsuit were the United States, CDC, U.S. Department of Health and Human Services ("HHS") and three HHS officials responsible for the Order. The primary question in the lawsuit was whether the CDC had the authority, through the "legislative powers" granted to Congress in Article I of the Constitution, which could be delegated to a federal agency, to issue a national eviction moratorium.

The plaintiffs argued that the Order exceeded the federal government's constitutional authority and the authority to issue such a moratorium is not within the limited powers granted to the federal government under the Constitution and sought a permanent injunction setting aside the Order and halting the enforcement of the Order. The Defendants defended the authority of the CDC to issue the Order under the Commerce Clause which authorizes Congress to "regulate Commerce…among the several States" and in the alternative, the Necessary and Proper Clause of Article I of the Constitution**[7]** which gives Congress the power to make "all Laws which shall be necessary and proper for carrying into Execution" other federal powers.

In determining whether such authority exists under the Commerce Clause, the Texas Court first determined if the Order fell within one of the three categories of activity that the Supreme Court has held allows regulation under the Commerce Clause: (1) "the use of the channels of interstate commerce", (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce" and (3) "those activities that substantially affect interstate commerce."**[8]** The parties agreed that if the Order was authorized, it would be under the third category also known as the substantial-effects test. Such substantial-effects test is based on "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce."**[9]** While the standard applied in the substantial-effects test gives certain deference to Congress to determine regulatory effectiveness, any court reviewing a Commerce Clause question must make an "independent evaluation" of the legal effect of such facts and findings."**[10]** The Texas Court utilized the four "significant considerations" test enumerated in the Supreme Court's decision in *United States v. Morrison*, 529 U.S. 598, 616 (2000) to determine whether Congress's power extended to the applicable activity based on a local activity's substantial effect on interstate commerce, which required analysis of "(1) the economic character of the intrastate activity; (2) whether the regulation contains a "jurisdictional element" that may "establish whether the enactment is in pursuance of Congress' regulation of interstate commerce"; (3) any congressional findings regarding the effect of the regulated activity on commerce among the States; and (4) attenuation in the link between the regulated interstate activity and commerce among the States."**[11]**

In considering the first item, the parties disagreed on whether the Necessary and Proper Clause should be considered. While the government argued that it should not be, the Texas Court noted that the "Supreme Court has repeatedly grounded the substantial-effect test in the Necessary and Proper Clause."[12] To analyze the economic character of the applicable activity, the Texas Court assessed "the nexus between the local activity and interstate commerce or federal regulation thereof." The Texas Court determined that "[r]eal estate is inherently local" and noted that [r]esidential buildings do not move across state lines."[13] In addition, since the Order did not preclude the payment or collection of rents or other amounts due under the lease, the Texas Court found that the Order did not have any impact on the parties' financial relationship and therefore should not be categorized as economic. The decision provided that while an individual's residence in a property can have a commercial origin, that is not sufficient to cause such regulated activity to be categorized as economic.

With respect to the other parts of the test, since the government had acknowledged that the Order "does not limit its application based on a connection to interstate commerce", the Texas Court found that the Order did not have the jurisdictional element necessary to satisfy the second prong of the test. In their analysis of the third prong of the test, the Texas Court noted that the government's briefs referred to findings by the CDC about the public health benefits of the Order in fighting COVID-19[14], but found that such findings were not adequate to demonstrate how federal regulation of commerce between the States would be negatively impacted without the Order. Finally, in analyzing the attenuation between interstate commerce and the regulated activity, the Texas Court found that the government failed to provide any findings demonstrating that residential eviction of a tenant had a substantial effect on interstate commerce. In addition, the fact that the Order was applicable regardless of whether the applicable tenant moved between States further undermined this prong. The Texas Court further stated that the attenuation analysis requires preservation of "the distinction between what is national and what is local in the activities of commerce."[15] The Texas Court found that the Order which impacted remedies in the protection of individual property rights crossed into an area which is typically a state concern. In particular, the Texas Court noted that while a quarantine order would prevent individuals infected with the virus from spreading it across state lines, the Order did not include any such quarantine provision and eviction of an individual from a residential dwelling does not on its own have a substantial effect on interstate commerce.

Based on the foregoing determinations, the Texas Court found that "[s]uch broad authority over state remedies begins to resemble, in operation, a prohibited federal police power."[16] The Texas Court entered summary judgment granting declaratory judgment in favor of the plaintiff that the nationwide eviction moratorium in the Order exceeded the authority of the CDC, but did not issue an injunction because the Texas Court anticipated that the CDC would comply with the judgment. The CDC and the government have not yet indicated if they will appeal the decision. The judgment of the Texas Court does not implicate or affect any eviction moratorium that has been issued by state and local governments in response to the COVID-19 pandemic.

While it is possible that this decision will be appealed, there are a few reasons it might not. First, the moratorium at issue expires March 31, 2021 so an appeal would mostly likely be moot unless the Order is further extended. Second, the Texas Court's reasoning was very detailed and explicitly stated that the economic underpinnings required pursuant to the Commerce Clause were either tenuous or non-existent, making any appeal difficult. Finally, with the rollout of the various vaccines, the need for this moratorium may not be as exigent as when initially enacted. We will continue to keep you apprised of further developments, if any, of this case.

[1] See Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas.

[2] 85 Fed. Reg. 55,292 (Sept. 4, 2020).

[3] Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 502, 134 Stat. 1182, 2078-79 (2020) and 86 Fed. Reg. 8,020, 8,021 (Feb. 3, 2021).

[4] "Residential Property" means any property leased for residential purposes, including any house, building, mobile home or land in a mobile home park, or similar dwelling leased for residential purposes, but excludes any hotel, motel, or other guest house rented to a temporary guest or seasonable tenant as defined under the laws of the applicable State, territorial, tribal or local jurisdiction.

[5] A "covered person" means any tenant, lessee or resident of a residential property who provides a declaration to their landlord, owner of the residential property or other person with a legal right to pursue eviction, which provides (i) the individual has used best efforts to obtain all available government assistance for rent or housing, (ii) the individual either (x) expects to earn no more than $99,000 (or $198,000 if filing a joint tax return) in Calendar Year 2021, (y) was not required to report any income in 2020 to the IRS, or (z) received a stimulus check pursuant to Section 2201 of the

Cares Act, (iii) the individual is unable to pay the full rent or make a full housing payment due to a substantial loss of household income, loss of compensable hours of work or wages, a layoff, or extraordinary out-of-pocket medical expenses, (iv) the individual is using best efforts to make timely partial payments that are as close to the full payment as the individual's circumstances may permit, taking into account other nondiscretionary items and (v) eviction would likely render the individual homeless, or force the individual to move into and live in close quarters in a new congregate or shared living setting, because the individual has no other available housing options. 86 Fed. Reg. at 8,020, 8,021.

[6] The plaintiffs in the lawsuit include Lauren Terkel, Lufkin Creekside Apartments, Ltd.; Lakeridge Apartments, Ltd. and MacDonald Property Management LLC. Two of the original plaintiffs, Pineywoods Arcadia Home Team Ltd. and Weatherford Meadow Vista Apartments did not represent that tenants of their properties had presented a declaration pursuant to the Order, which resulted in their claims being dismissed without prejudice for lack of standing.

[7] Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas.

[8] *United States v. Lopez*, 514 U.S. at 558-59.

[9] *Id.*, at 557.

[10] Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas quoting *Lopez*, 514 U.S. at 562.

[11] Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas quoting *Morrison*, 529 U.S. at 609-613.

[12] Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas.

[13] *Id.*

[14] The government noted: "[H]ousing stability helps protect public health because homelessness increases the likelihood of individuals moving into close quarters in congregate settings, such as homeless shelters, which then puts individuals at higher risk to COVID-19" Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas.

[15] Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas quoting *Lopez*, 514 U.S. at 567.

[16] Case Number 6:20-cv-00564 in U.S. District Court for the Eastern District of Texas.

COVID-19 Update: Governor Cuomo Extends Eviction Protections for Small Businesses That Demonstrate a Financial Hardship

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By **Eunji Jo**
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In December, New York Governor Andrew Cuomo signed the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, which provided a moratorium on residential eviction and foreclosure proceedings until May 1, 2021. This act, however, did not provide any extensions of the moratorium on commercial evictions and foreclosures originally provided by Executive Order 202. The latest extension of the commercial ban (pursuant to Executive Order 202.91) expired on February 22, 2021. On February 22, 2021, Governor Cuomo issued Executive Order 202.95, which generally continued "the suspensions and modifications of law and any directives, unless superseded, modified or otherwise expired, made by Executive Order 202" for thirty days until March 24, 2021. Other than this blanket extension, commercial eviction and foreclosing protections had not been addressed.

On March 9, 2021, Governor Cuomo signed the COVID-19 Emergency Protect Our Small Businesses Act of 2021 (the "Act"), which provides eviction and foreclosure protections for small businesses. The Act applies to commercial tenants that are resident in New York, independently owned and operated, not dominant in their field and have fifty or fewer employees (individually, a "Small Business," or collectively, "Small Businesses"). The Act provides that no Small Business may be removed by any means prior to May 1, 2021, except pursuant to a formal eviction proceeding (*i.e.*, "self-help" evictions are prohibited). Any eviction proceedings pending on March 9, 2021, or commenced within thirty days thereof, will be stayed for at least sixty days.

Landlords are required to include a "Hardship Declaration" with every written notice required to be provided before the commencement of an eviction proceeding or with every notice of petition or summons and complaint served on a Small Business. The Hardship Declaration provides notice to the Small Business that if it has lost significant revenue or had significantly increased necessary costs during the pandemic, then it cannot be evicted until at least May 1, 2021, for nonpayment of rent or holding over. The landlord must also provide the Small Business a mailing address and e-mail address to which the Small Business can return the Hardship Declaration. If the Small Business confirms its financial hardship by signing and delivering the Hardship Declaration to the landlord, such Small Business cannot be evicted until May 1, 2021. However, the Small Business may still be evicted for violating its lease persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or causes a substantial safety hazard to others (collectively, "Unreasonable Behavior"). Pursuant to the Act, courts are prohibited from accepting any petition to commence an eviction proceeding unless the landlord files an affidavit of service, demonstrating the manner in which the landlord served a copy of the Hardship Declaration on the Small Business and an affidavit attesting either that (i) at the time of filing the landlord had not received a signed Hardship Declaration or (ii) although the Small Business returned a signed Hardship Declaration, the Small Business is engaging in Unreasonable Behavior.

Additionally, the Act provides protections against foreclosure for Small Businesses that own ten or fewer commercial units, whether directly or indirectly. The ten or fewer commercial units may be in more than one property or building as long as the total aggregate number of ten units are currently occupied by a tenant or are available for rent.

The Act does not apply to any mortgage loans made, insured, purchased or securitized by a governmental agency. Similar to the moratorium on eviction proceedings, any foreclosure actions against a Small Business pending on March 9, 2021, or commenced within thirty days thereof, will be stayed at least sixty days. The mortgagee is required to include a Hardship Declaration with every notice required to be provided to the Small Business prior to filing an action for foreclosure, and if the Small Business returns the Hardship Declaration to the mortgagee, the mortgagee cannot initiate a foreclosure action until May 1, 2021. The Act further provides a moratorium on actions to foreclose on delinquent taxes or to sell a tax lien relating to commercial real property until May 1, 2021, if the Small Business submits a Hardship Declaration. It also prohibits discrimination in the determination of whether credit should be extended to any Small Business that owns commercial real property or reported negatively to a credit reporting agency because such Small Business has been granted a stay of mortgage foreclosure proceedings, tax foreclosure proceedings or tax lien sales.

We will continue to keep you apprised of any further developments.

Recent Transactions

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Here is a rundown of some of Cadwalader's recent work on behalf of our clients.

Recent transactions include:

- Counsel to U.S. Bank, N.A. in the purchase of a $55 million participation of a $220 million construction loan from a syndicate led by Wells Fargo Bank, N.A. that was originated for the development of a build-to-suit medical-office building at 1101 Chestnut Street in the Center City district of Philadelphia for hospital operator Jefferson Health.
- Representation of the lenders in a $399.4 million financing in connection with the acquisition of up to 74 manufactured housing communities in 26 states.
- Representation of the lender in a $528.62 million financing in connection with the acquisition of up to 93 manufactured housing communities and 1 self-storage facility in 13 states.
- Representation of the lender in connection with the origination of a revolving credit facility in the amount of up to $250 million, subject to expansion up to $400 million, to finance multifamily properties.