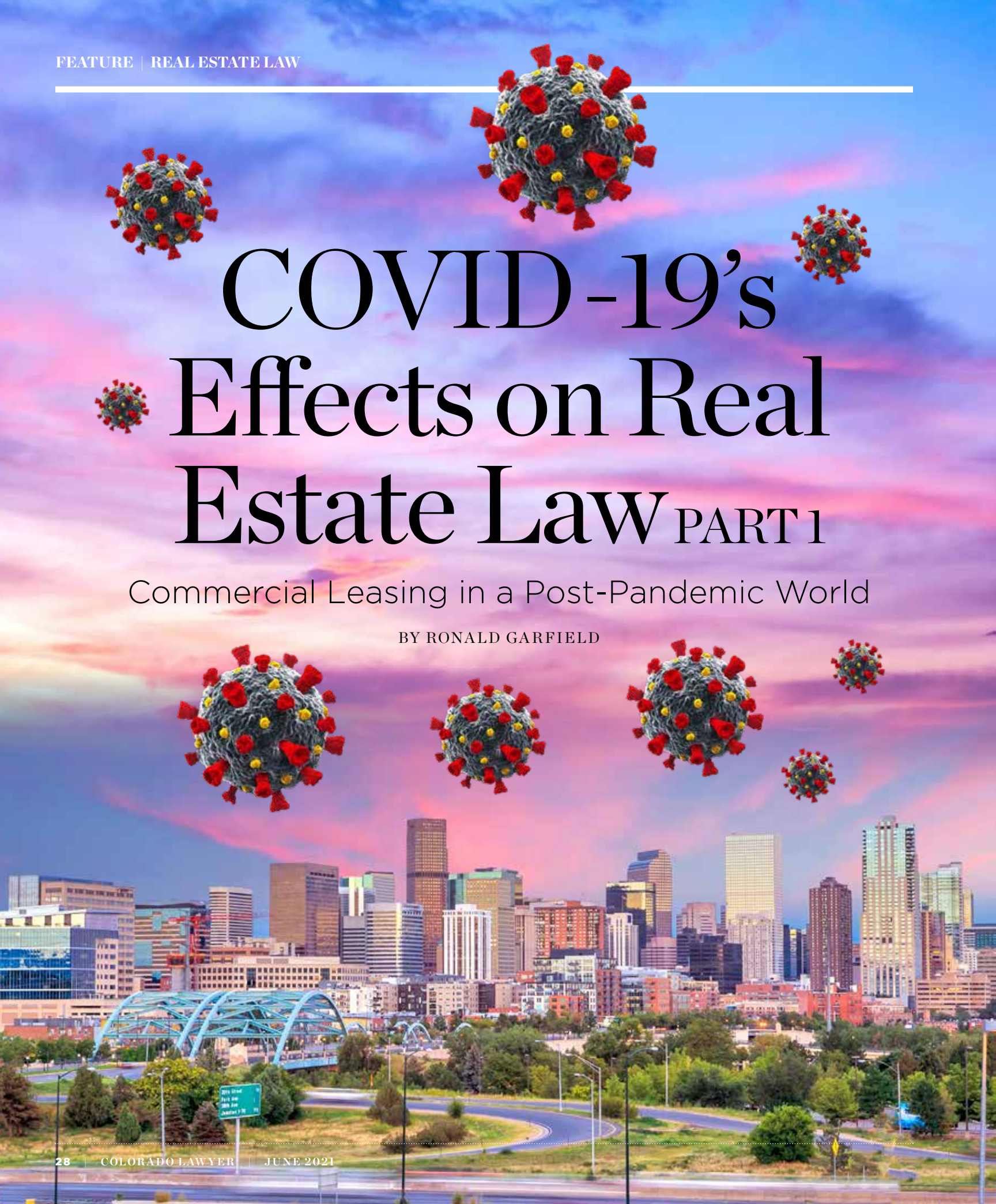

COVID-19's Effects on Real Estate Law PART 1

Commercial Leasing in a Post-Pandemic World

BY RONALD GARFIELD

This three-part series examines how COVID-19 and associated legal developments have affected real estate law. Part 1 features commercial leasing, part 2 will cover business interruption insurance, and part 3 will provide an update on eviction law in light of the pandemic.

In his book *Ten Lessons for a Post-Pandemic World*,[1] Fareed Zakaria postulates that the world today and the world to come make pandemics more likely. The continued encroachment of human activity into animal habitats, urbanization, global travel, animal agriculture, climate change, deforestation, and biodiversity loss have created a perfect storm for animal-to-human transmission. Many commentators hypothesize that the COVID-19 virus passed zoonotically from bats to humans, or from bats to an intermediate host species and then on to humans.[2] An alternative theory is that the virus escaped from a laboratory in Wuhan that conducts research on bat coronaviruses.[3] The World Health Organization has not yet endorsed any theories on the source of COVID-19 and continues to investigate. Lessons learned from the COVID-19 pandemic and earlier pandemics, such as the importance of social distancing, masking, and now rapid testing, coupled with our ability to produce vaccines in record time, will certainly make a difference in the fight against future viruses. But these practices provide no assurance that the world is safe from another pandemic.

Hopefully, by the end of the year, the economy will emerge from this pandemic, but it is unknown whether business as usual will return or if relationships such as commercial leasing will change significantly. The possibility of a future pandemic or a wave of a mutated COVID-19 virus beyond the scope of currently available vaccines may affect how parties negotiate leases going forward. Most leases already address the rights of parties regarding potential future events such as condemnation, force majeure, casualty loss, and assignment or subletting. But these provisions are typically silent on pandemics. This has forced parties to seek redress for pandemic losses under force majeure provisions, which has resulted in numerous disputes over the scope of these provisions. It thus makes sense for practitioners to address now the respective rights and obligations of parties to commercial leases in the event of pandemics and similar events.

This article discusses the COVID-19 pandemic's effect on relationships between landlords and tenants in a commercial setting with a focus on retail tenants, including restaurants.[4] Related topics such as the Payroll Protection Program (PPP), COVID-related ligation, and WELL Building Standards are also covered. Portions of this article may be helpful in considering other lease relationships, such as those for office or residential space, and lender accommodations and insurance coverage for lost rents or profits, but they are not the main focus.

Pandemic Effects on Leasing

The COVID-19 pandemic caused a seismic shift in day-to-day workings between landlords and tenants. Governmental actions like shelter in place, lockdowns, capacity limits, required outdoor dining, and moratoriums on evictions became the order of the day. Some tenants simply stopped paying rent because they could not do business. Landlords could not evict tenants for nonpayment of rent because some courts would not entertain eviction actions, and some county sheriffs refused to process or serve any summonses in forcible entry and detainer actions. To address COVID-19 conditions, many leases were amended to forgive or defer rents, or some combination of both.

In the wake of government orders and consumer behavioral changes intended to slow the spread of COVID-19, some estimate that retail sales plunged nearly 20% from February to April 2020, and specific industries such as clothing and accessories and department stores suffered even worse.[5] Restaurants in particular have struggled to stay afloat. In December 2020, the National Restaurant Association (Association) wrote to members of Congress outlining some impacts of COVID-19 on the restaurant industry. The Association reportedly surveyed 6,000 restaurants, 87% of which reported a drop in revenue of at least 36%.[6] The Association also noted its estimate that by December 2020 up to 110,000 restaurants would close permanently or for a long term due to COVID-19 and its attendant impacts on dining out.[7]

The lessons learned during the COVID-19 pandemic will no doubt become a focus in future lease negotiations. Pre-pandemic commercial leases did not concentrate on force majeure provisions, many of which do not even expressly mention pandemics, public health orders, or epidemics. Rather, force majeure clauses typically list events such as floods, labor disputes, acts of God, wars, and civil unrest, with most stating that the occurrence of such events does not excuse timely payment of rent and providing relief only for non-monetary obligations such as business hours. The terrible toll that the pandemic has taken on businesses large and small, many of which were already struggling to compete with internet retailers, will surely give survivors pause if a new lease does not address pandemics as something very different than just another force majeure event. Landlords may also think twice about evicting responsible tenants or soften their attitudes toward tenants who encounter problems not of their own making.

Congress Responds

At the outset of the COVID-19 pandemic, Congress responded with a flurry of legislation, including the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Notably, the

CARES Act established the Payroll Protection Program (PPP), which is now into a second round of authorization from Congress and continues to provide qualified small businesses with funds to pay payroll costs, including benefits. Funds can also be used to pay interest on mortgages, rent, and utilities. The funds are provided through grants (i.e., loans to be forgiven) administered by the Small Business Administration.

Some landlords insisted, as condition of rent relief, that eligible tenants apply for a PPP loan and use a portion of their loan proceeds for rent. Yet some of these same landlords simultaneously pursued PPP loans for their own property management companies, making insurance claims for lost rents or seeking loan modifications from their lenders, all without considering how such efforts, if successful, could allow for more equitable treatment of tenants. On the other hand, some tenants demanded that eligible landlords apply for PPP loans to meet their mortgage obligations in the face of rent shortfalls.

State Approaches

States also reacted to the pandemic with legislative remedies. Some states, for example California, did not hesitate to legislate far more aggressively than Colorado to protect commercial tenants. California SB 91, as extended, prohibits landlord legal proceedings to collect past due rent or evict commercial tenants until June 1, 2021; it converts past due rents to a simple civil debt, the nonpayment of which cannot be the basis of an eviction action; and relying on federal funds, it allows landlords compensation for 80% of lost rents if the remaining 20% owed by the tenant is forgiven.[8] Eligibility for these federal funds is based on income and COVID-19 impact: Any unpaid rent must be owed by an individual making less than 80% of the area median income for the calendar year 2020, or at the time of the application, and applicants must attest, under penalty of perjury, that they have suffered hardship as a result of COVID-19.[9] The desired impact of SB 91 is to incentivize local governments to follow the state's guidelines regarding fund distribution established in the bill.[10] Local governments that opt to establish their own distribution system will not receive any further tenant assistance funding from the state.[11]

There has been no Colorado legislative response for commercial tenants. However, Colorado has provided some landlord relief for qualifying residential properties for qualifying tenants that are unable to pay rent by reason of COVID-19 under the Property Owner Preservation Program (POP).[12] Under POP, landlords apply for assistance on behalf of their tenants only.[13] To qualify, the property must not be in foreclosure, must meet basic health and safety requirements, and must have rents below the POP maximum, which varies by county.[14] For example, the maximum allowable monthly rent for a one bedroom rental in Denver County is $1,874 as compared to Kit Carson County, at the far eastern border of the state, where the maximum is $1,106.[15] Reasonable fees described in the lease are eligible for reimbursement, excluding late fees, legal fees, and fees related to insufficient funds.[16] Landlords and tenants who are related are not POP eligible.[17] Tenants are also eligible for rent assistance in Colorado through the Emergency Housing Assistance Program (EHAP).[18] EHAP differs from POP in that tenants are responsible for their applications.[19] While POP eligibility is based on number of bedrooms, EHAP eligibility is based on size of the household.[20] To use the same counties for comparison, a single individual in Denver and Kit Carson counties making under $54,950 and $39,800 per year, respectively, is eligible.[21] Units already receiving rental assistance through a voucher program are not EHAP eligible.[22]

COVID-19-Related Litigation

Notwithstanding attempts by the federal and state governments to provide economic relief, litigation over leases erupted early on. COVID-19 litigation has primarily concerned three areas: the applicability of force majeure provisions to the pandemic, the enforceability or overreaching of governmental mandates, and claims against insurance companies by landlords and tenants for compensation for lost rents or lost profit coverage. A survey of these cases in Colorado and from other states provides context for crafting future commercial lease provisions to address pandemics.

Force Majeure Provisions

Several jurisdictions outside of Colorado have addressed force majeure provisions.[23] Because retail tenants have endured the brunt of the economic impacts precipitated by the pandemic, retail tenants and their landlords should pay particular attention to the results of these cases to better prepare for future national emergencies without the need for judicial intervention.

Force majeure provisions are typically interpreted in accordance with their purpose to limit damages where the parties' reasonable expectations and the contract performance have been frustrated beyond the parties' control.[24] Thus, when parties define the events they believe would give rise to relief from contractual obligations, the courts give effect to their intent.[25] Because existing force majeure provisions rarely identify pandemics as force majeure events, the majority of the pending litigation relates to whether broad examples of force majeure events should encompass the COVID-19 pandemic.

For instance, in *JN Contemporary Art, LLC v. Phillips Auctioneers, LLC*, the litigants argued over whether COVID-19 qualified as a "natural disaster" under a force majeure provision.[26] Ultimately, the court determined that the COVID-19 pandemic and the attendant government imposed restrictions allowed the defendant to invoke the force majeure provision because "it cannot be seriously disputed that the COVID-19 pandemic is a natural disaster."[27] The important takeaway here is not the court's interpretation of the term natural disaster; rather, practitioners should note that the force majeure provision at issue did not unambiguously define the circumstances in which it could be invoked, so the parties had to resort to expensive litigation.

A related takeaway from recent litigation is the need to address the breadth of relief afforded by, and future performance of, contractual obligations in connection with force majeure events. This is because force majeure provisions in commercial leases typically carve out the payment of rent from the contractual obligations relieved when a force majeure event occurs.

Therefore, even if commercial tenants could successfully argue that a pandemic qualifies as a force majeure event, the tenant's obligation to pay rent would likely continue. In fact, even where a force majeure provision relieves the obligation to pay rent courts have been hesitant to let tenants off the hook altogether. In *In re Hitz Restaurant Group*[28] a bankruptcy court determined that a restaurant tenant was relieved of its obligation to pay rent under a force majeure provision in its lease due to a public health order prohibiting in-person dining. The bankruptcy court nevertheless held that the force majeure provision relieved the restaurant only of its obligation to pay rent to the extent its ability to do so was hindered by the public health order; because the public health order still permitted carry-out, curbside pick-up, and delivery services, the restaurant tenant was not "off the hook entirely."[29]

Governmental Mandates

Since March 2020, based on executive orders from Governor Polis and public health orders from the Colorado Department of Public Health and the Environment (CDPHE), the state, counties, and municipalities have issued emergency orders that have constantly changed the landscape of how businesses can operate, depending on their designation as "critical" and the severity of the spread of COVID-19 both locally and statewide. Businesses across the state have filed lawsuits challenging some of these restrictions, both on constitutional grounds and for violations of rulemaking under the Colorado Administrative Procedure Act.[30] These cases included a variety of claims, including constitutional claims, CRCP 106 review claims, declaratory and injunctive relief claims, and judicial review claims under CRS § 25-1-515.

For example, a recent case brought in Pitkin County District Court requested judicial review of a public health order that closed all in-person dining within Pitkin County.[31] Among other claims, the plaintiff alleged a claim under CRS § 25-1-515(1), which allows "[a]ny person aggrieved and affected by a decision of a county or district board of health or a public health director" to seek judicial review. CRS § 25-1-515(1) outlines circumstances that constitute prejudice to an appellant, including when the decision violates constitutional rights, is unsupported by substantial evidence, or is arbitrary or capricious. The statute requires a court to review the record upon which the public health decision was based, conduct an evidentiary hearing if needed, and either "affirm the decision or [] reverse or modify it if the substantial rights of the appellant have been prejudiced . . . ."[32] The plaintiff in the Pitkin County case alleged that the public health order banning in-person dining was unsupported by substantial evidence and was arbitrary and capricious.[33]

Although this and other Colorado cases were voluntarily dismissed before being decided on their merits, likely due to the relaxation of restrictions and plaintiffs' desire to spend their time and money on their businesses rather than litigation, the relaxation of restrictions and mandates does not render the claims moot under recent US Supreme Court precedent. In *Roman Catholic Diocese of Brooklyn v. Cuomo*[34] the Court considered a request for injunctive relief from capacity limits on religious gatherings imposed by executive order where the same limits were not applied to secular businesses. The Court stated that the regulations "single out houses of worship for especially harsh treatment" and held that even though the restrictions were relieved after the case was filed, "injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange . . . . The Governor regularly changes the classification of particular areas without prior notice." This case leaves the door open for challenges to government mandates to remain viable despite a change in restrictions.

Businesses in Los Angeles County, California, also succeeded in achieving injunctive relief against the enforcement of public health orders that eliminated outdoor dining and restricted takeout hours on the basis that the Los Angeles County Department of Public Health failed to conduct an appropriate risk/benefit analysis in issuing such orders, and this was an abuse of discretion.[35] Commercial landlords and tenants both benefited thereby as restaurants and bars were able to continue outdoor dining services. Colorado landlords may want to consider supporting such challenges by tenants because successful challenges would ensure that the tenant remains viable. On the other hand, landlords may not wish to have their tenants spending money on legal fees when they are struggling to pay the rent.

Insurance Claims

In the wake of COVID-19, many commercial landlords and tenants have looked to insurance coverage to compensate for lost profits. The University of Pennsylvania Carey Law School has tracked 1,557 COVID-19 insurance suits nationwide from March 16, 2020, to February 2, 2021, through an online analytics tool.[36] At the height of these filings in May and June, there were as many as 78 per week, but filings have dwindled because plaintiffs have been largely unsuccessful in their suits.[37] A great number of these suits were dismissed due to exclusionary language in the policy.[38] Of the 1,531 policies that the University of Pennsylvania has been able to code, 859 policies contained either explicit or hidden language excluding virus coverage, 539 policies contained either no virus exclusion language or specific coverage for communicable disease, and only 133 policies contained specific coverage for coverage for communicable disease.[39] Accordingly, 233 cases were fully dismissed with prejudice, 32 cases were fully dismissed without prejudice, 45 motions were denied, and three were partially dismissed with prejudice.[40] Out of the COVID-19 insurance suits filed, 94% sought compensation for lost business income in the form of business interruption insurance.[41] Whether business interruption insurance is approved or denied hinges on whether there is damage to property rendering it unusable.[42] Jurisdictions throughout the United States have been split on whether the damage required needs to be physical or if a COVID-19-related business closure also qualifies for coverage.[43]

To date, the trend nationwide has been for courts to find in favor of insurance carriers.[44] The first ruling on business interruption insurance is believed to have taken place in Michigan on July 2, 2020, where the judge held that physical loss requires more than losing access or the

ability to use the property.[45] The US District Court for the Western District of Texas, District of Columbia Superior Court, and US District Court for the Northern District of Georgia have all followed suit.[46]

On the other end of the spectrum, a New Jersey Superior Court judge held that physical property damage was not required to bring a business interruption claim.[47] The US District Court for the Western District of Missouri and the North Carolina Superior Court have agreed with the New Jersey Superior Court's position.[48] With no controlling case law in Colorado to date, commercial tenants may be hopeful that the reasoning in *Western Fire Insurance Co. v. First Presbyterian Church*, where a property was ruled uninhabitable after gas seeped onto the premises, will control.[49] However, this is likely an overly optimistic position because there is no evidence of actual infiltration of COVID-19, thus distinguishing the *Western Fire* situation from the present COVID-19 circumstances.

One positive result of COVID-19 insurance litigation has been efforts to streamline the litigation process in response to the backlog of pandemic cases. As discussed in a recent *Colorado Lawyer* article, in August 2020, the US Judicial Panel on Multidistrict Litigation (JPML) denied two 28 USC § 1407 motions to centralize business interruption litigation in the Eastern District of Pennsylvania and Northern District of Illinois.[50] However, the JPML ultimately allowed for a multidistrict litigation to be created for some insurers, such as Society Insurance Co., in October 2020.[51] The result of this action was the transfer of over 30 Society Insurance Co. cases to the Northern District of Illinois.[52] The JPML likely took this action because the cases were already geographically concentrated, spanning over only six states.[53] Efforts to geographically concentrate the caseload of insurers with more of a national presence, such as Cincinnati Insurance Co. and Hartford Financial Services Group Inc. have been unsuccessful so far.[54] Additionally, the Institute for the Advancement of the American Legal Systems (IAALS) at the University of Denver initiated a project in May of 2020 to create streamlined discovery protocols in business interruption suits.[55] The stated goal of introducing these new protocols is to reduce cost and conflict among business interruption suits at the state and federal level.[56] Beyond the disclosure protocols, IAALS is also looking to establish case management guidelines and other case guidance protocols for COVID-19 litigation.[57]

Landlord Responses

The landlord response to COVID-19 has ranged from no tenant relief at all, especially where a landlord wanted an early end to an unfavorable lease, to a combination of rent abatement and rent deferral with reasonable repayment provisions, typically without interest, on deferred amounts. Because of COVID-19's long-lasting effects, some landlords have recently revisited or further extended rent relief. And some landlords that started out offering no relief have softened their attitudes due to the lack of court access described above or the realization that finding a replacement tenant in the midst of the pandemic would be difficult.

Going forward, for retail leasing generally, landlords and tenants may want lease provisions, separate from force majeure provisions, that include a formula to address closures or occupancy restrictions in the event of another pandemic. Suggested optional provisions are included in the Appendix to this article. There are at least two formulas to measure the effect of a pandemic on retail tenants. The first assumes the lease is fixed rent only with common area maintenance, real estate taxes, and the landlord's insurance costs passed through to the tenant. The second formula addresses percentage rent leases. The suggested provisions can be used together or in part as appropriate.

Restaurant Tenants

During pandemic conditions, outdoor dining took on an entirely new meaning. Pre-pandemic outdoor seating was considered a nice amenity that some restaurants could provide, but with the pandemic's onset, outdoor seating for many restaurants became a matter of survival. Many leases describe the leased premises (especially basement or second floor) without including any areas for outdoor seating or curbside service. When outdoor seating became more important to restaurants, many tenants first had to obtain the landlord's permission and a lease amendment to expand the areas where restaurant operations could take place.

In addition, in many cases local governmental authorities were also involved to license restaurant operations in public rights-of-way. While obtaining government licenses is beyond the scope of any lease, leases can pre-approve the expansion of restaurant operations and include provisions requiring the landlord to join in or cooperate with obtaining such licenses. Due diligence for any new leases, especially restaurants, should include the ability to expand outdoor seating and the availability of a pickup location for takeout or curbside sales. New construction of street-level restaurants might include a street-level takeout window, and basement or second-floor restaurant space might include a street-level dumbwaiter.

WELL Building Standards

Another result of COVID-19 has been an evolving mind-set regarding how commercial real estate should be built. For example, the WELL Building Standard is a performance-based building standard that monitors the health and wellness impacts that real estate has on its occupants based on medical research.[58] The International WELL Building Institute (IWBI), the public benefit corporation that manages and administers the WELL Building Standard, released a publication addressing how to use WELL Standards to address issues related to COVID-19.[59] These strategies include promoting clean contact through larger, more sanitary sinks; improving air quality; maintaining water quality; managing and creating organizational resilience; supporting movement and comfort, including work from home; strengthening immune systems; fostering mental resilience; and championing community resilience and recovery.[60] Highlights of these strategies include using larger sinks in public bathrooms to help prevent the concentration of germs and Circadian-rhythm-friendly lighting designed to aid the occupant's sleep cycle.[61] One year into the COVID-19 pandemic, many have asked

themselves what the "new normal" will look like. If this trend continues to grow, an emphasis on occupant health and well-being will be the cornerstone of future real estate developments. Perhaps new construction could include restricted access or locked-off common areas when there are pandemic conditions. Other options might be to locate all bathrooms inside leased spaces rather than having common bathrooms accessed through hallways. Or, given sufficient space, additional construction could emphasize standalone individual spaces that do not require common areas or common bathrooms. And new construction might include internal air handling using ultraviolet air purification systems.

Conclusion

Pandemic conditions are not covered well by typical force majeure provisions. This is because pandemics can affect different types of businesses in different ways, government responses can fluctuate over the course of a pandemic, and, unlike most other force majeure events, a pandemic does not result in physical damage to the premises.

But pandemic-specific provisions can be added to leases to provide for a fair response and minimize disputes between landlords and tenants. The lessons learned the hard way from the COVID-19 pandemic should motivate landlords and tenants to devise equitable rent modifications and other solutions that protect both parties from economic catastrophe. The time to act is now; a pandemic is no longer an abstraction or something that only happens in Hollywood movies. CL

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Optional Lease Provisions

These provisions are suggested for practitioners interested in treating pandemics or epidemics separately from more general commercial lease provisions. They can be customized to better suit the particulars of any commercial lease negotiations.

Lease Without Percentage Sales

Health Crisis. For purposes of the following provisions, the term "Health Crisis" means a pandemic or epidemic, whether worldwide or limited to a state, county, or locality, of an infectious disease that results in, or could reasonably be expected to result in, governmental action mandating closures, occupancy restrictions, or other restrictions such as limited business hours that, if imposed, would materially and adversely affect Tenant's business operated in the Premises. All events other than a Health Crisis shall be governed by force majeure provisions appearing elsewhere in this Lease. Upon the occurrence of a Health Crisis and notwithstanding anything in this Lease to the contrary, Rents shall be adjusted as follows:

(a) If closures or restrictions on occupancy levels or hours of operation for the Premises are mandated due to federal, state, county, city, or local action (Occupancy Restrictions), Base Rent shall, so long as the Occupancy Restrictions remain in place and directly affect the Premises, be adjusted proportionally and in lockstep with such Occupancy Restrictions. For purposes of determining the Adjusted Base Rent while Occupancy Restrictions are in effect, Base Rent will be temporarily reduced by the same percentage as the applicable Occupancy Restrictions, expressed as a percentage of the required reduction in physical space or hours of operation due to the Occupancy Restrictions. The calculation is expressed as follows: Base Rent (BR) x Occupancy Restrictions (OR) = Adjusted Base Rent (ABR). For example: A 50% restriction on occupancy mandated by the Occupancy Restrictions would result in ABR equal to 50% of Base Rent until the Occupancy Restrictions are modified or lifted. Similarly, a 40% reduction in business hours would result in ABR equal to a 40% reduction of Base Rent (leases without required business hours or more extensive hours of operations shall be considered to have business hours of 10:00 a.m. to 5:00 p.m.). ABR shall be pro-rated as to the date on which the Occupancy Restrictions commence and the date on which the Occupancy Restrictions end or are modified. If there are Occupancy Restrictions as to both business hours and capacity, both calculations shall be made and the reduction shall be the average of both.

(b) When the Occupancy Restrictions cease, the difference between (1) the ABR actually paid while the Occupancy Restrictions were in effect and (2) the unadjusted Base Rent that was due for the entire time that the Occupancy Restrictions were in effect (collectively, Deferred Rent) shall be calculated and the Deferred Rent will be paid by Tenant to Landlord in equal monthly sums fully amortized, without interest, over the remaining months of the Lease Term, or the next 24 months, whichever is sooner, with the first such payment due on the first day of the month following the month during which the Occupancy Restrictions ceased.

(c) Each time Occupancy Restrictions change, new ABR calculations shall be made to remain in lockstep with the changed Occupancy Restrictions.

(d) Regardless of any rent relief provided herein, at all times during the Lease Term, or any extension, Tenant shall remain obligated to timely pay all other charges that are due

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under the Lease, whether or not considered Rent (including Tenant's proportionate share of Landlord's insurance, common area expenses, and real estate taxes). [Alternative provision: So long as Occupancy Restrictions result in ABR, and provided that payments of ABR are timely made, such payments shall also satisfy and be accepted by Landlord in lieu of payment of all other charges that are considered Rent, including but not limited to Tenant's proportionate share of Landlord's insurance, common area expenses, and real estate taxes.]

(e) If the Occupancy Restrictions mandate a 100% closure for the Premises (i.e., Tenant is completely restricted from opening its business to the public), Tenant's obligation to pay the Base Rent shall be completely abated so long as the 100% Occupancy Restriction remains in place and directly affects the Premises (Full Restricted Period). [Optional provision: If the Full Restricted Period exceeds ____ days, commencing on the first day following the day that exceeds ____ days, Tenant shall resume paying ____% of Base Rent as it becomes due and the remaining _____% of Base Rent shall be deferred (Full Restricted Deferred Amount) until the first day of the month following the month in which the Full Restricted Period ends (Full Restricted Deferral End Date). From and after the Full Restricted Deferral End Date, the Full Restricted Deferred Amount shall be paid commencing on the first day of the following month by Tenant to Landlord in equal monthly sums fully amortized, without interest, over the remaining months of the Lease Term, or over the next 24 months, whichever is sooner.]

[Optional provision (f): During the time that any of the modified rent obligations set forth above are in effect, Tenant shall within 7 days following the end of each month report to Landlord the gross amount of all curbside, home delivery by carrier (e.g., USPS, UPS, FedEx) or other means, and all online sales. From the gross sales reported there shall be deducted credit card charges and sales tax (Net Sales). Copies of any sales tax reports filed with any local governmental authority shall be provided to Landlord during such time. As an additional Rent obligation while modified rent obligations are in effect, Tenant shall pay to Landlord an amount equal to ____% of Net Sales, said payment to be made simultaneously with the filing of any sales tax report or within ____ days following the month end, whichever is sooner. In no event shall percentage rent hereunder plus ABR exceed Base Rent that would be due in the absence of a Health Crisis).]

(g) During the continuance of any Health Crisis, any lease provision regarding business hours, or requirements to keep the premises lighted or to be fully stocked with inventory, shall be waived.

(h) For purposes of these provisions, "Deferred Amounts" shall mean all payments due or to become due to Landlord that are with respect to the Lease: (1) amounts to be paid to Landlord not otherwise provided for under the Lease and (2) amounts that are payable on different or deferred dates than as set forth in the Lease. Without limit to any other rights or remedies, all Deferred Amounts shall be accelerated and immediately become due and payable in full upon occurrence of: (1) a failure to pay when due any Deferred Amounts within 3 business days following written notice from Landlord or (2) as to matters other than Deferred Amounts, any Tenant breach of any representations, warranties, covenants, or Lease terms not cured within a grace or cure period allowed.

[Optional provision (i): To the extent that Landlord or Tenant has insurance coverage for lost rents or profits, such party agrees to timely file and make all commercially reasonable efforts to recover on such claim (Claim). The parties agree that any recovery on the Claim shall be paid or credited as applicable first to make Landlord whole on abated rent, and then as a credit against Deferred Amounts as they become due.]

[Optional add to (i): With respect to any Claim Tenant may have, Tenant hereby appoints Landlord as Tenant's agent with limited authority to pursue the Claim as Tenant's agent, and Landlord hereby accepts such appointment and shall keep Tenant timely and fully informed as to Landlord's efforts in such regard, including by providing Tenant with copies of any correspondence sent to or received from the carrier or any claims manager or adjuster on behalf of the carrier, and notice of any recovery or denial of the Claim. Landlord shall, in Landlord's sole commercially reasonable discretion but after consultation with Tenant, abandon or settle the Claim on such basis as Landlord shall determine. If the carrier denies the Claim, Landlord may pursue further at Landlord's expense (including legal fees and costs) litigation or other remedies to obtain a recovery, provided, however, that Landlord shall be under no obligation to pursue such Claim beyond a denial by the carrier. If Landlord elects not to further pursue the Claim, Landlord's agency on behalf of Tenant shall automatically terminate.]

[Optional provision (j): Should Tenant decide [Tenant shall be required] to pursue any governmental financial assistance that Tenant is eligible to receive as a business affected by the Health Crisis, including from federal, state, city, and local agencies (collectively, Governmental Financial Assistance), Tenant shall keep Landlord informed of all such submittals and progress related thereto. If Tenant obtains any Government Financial Assistance, Tenant shall promptly disclose this to Landlord and fully, accurately, and promptly respond to Landlord's requests for information relating to the same. If Tenant receives Government Financial Assistance where a portion may be applied to the payment of rent, or if Tenant's application for such assistance stated or represented that the Governmental Financial Assistance or portion thereof would be used for the payment of rent, such Governmental Financial Assistance shall be applied in the following order of priority: (1) paid to Landlord to the extent of the abated Rent to offset the same, and (2) paid to Landlord to the extent of the difference between the scheduled Rent without any lease modifications and rent as modified herein.]

Percentage Sale Lease

Use the Health Crisis definition and paragraphs (a) through (d) of the Lease Without Percentage Sales and add the following:

(e) In addition to ABR, Tenant shall pay Landlord monthly Percentage Rent calculated as follows: To the extent that ____% of monthly Gross Sales, less deductions allowed by the Lease, exceed ($____ monthly) [or monthly Adjusted Base Rent], Tenant shall pay such excess to Landlord with such payment due at the same time and with the same reporting as the Percentage Rent would be due absent any Heath Crisis. [Alternative provision for payment over time: In addition to ABR, Tenant shall pay to Landlord monthly Percentage Rent calculated as follows: To the extent that ____% of monthly Gross Sales less deductions allowed by the Lease exceed ($____ monthly) (or monthly ABR), such amounts shall be calculated at the end of the Occupancy Restrictions and shall be payable to Landlord commencing on the first day of the following month in equal monthly sums fully amortized without interest over the remaining months of the Lease Term, or over the next 24 months, whichever is sooner. In no event shall percentage rent hereunder plus ABR exceed the Base Rent that would be due in the absence of a Health Crisis.]

[(f) (As an alternative to (e) and in lieu of paying any percentage rent during the Health Crisis, add 10% or some other percentage as the parties may agree to the ABR derived by the paragraph (a) calculation.]

(g) If the Occupancy Restrictions mandate a 100% closure of the Premises (i.e., Tenant is completely restricted from opening its business to the public), Tenant's obligation to pay the Base Rent shall be completely abated so long as the 100% Occupancy Restriction remains in place and directly affects the Premises (Full Restricted Period) [Optional provision: If the Full Restricted Period exceeds ____ days, commencing on the first day following the day that exceeds ____ days, Tenant shall resume paying ____% of Base Rent as it becomes due and the remaining ____ % of Base Rent shall be deferred (Full Restricted Deferred Amount) until the first day of the month following the month in which the Full Restricted Period ends (Full Restricted Deferral End Date). From and after the Full Restricted Deferral End Date, the Full Restricted Deferred Amount shall be paid commencing on the first day of the following month by Tenant to Landlord in equal monthly sums fully amortized, without interest, over the remaining months of the Lease Term, or over the next 24 months, whichever is sooner.]

(h) During the continuance of any Health Crisis, any lease provision regarding business hours, and requirements to keep the premises lighted or fully stocked with inventory, shall be waived.

(i) For purposes of these provisions "Deferred Amounts" shall mean all payments due or to become due to Landlord that are with respect to the Lease: (1) amounts to be paid to Landlord not otherwise provided for under the Lease and (2) amounts that are payable on different or deferred dates than as set forth in the Lease. Without limit to any other rights or remedies, all Deferred Amounts shall be accelerated and immediately become due and payable in full upon occurrence of: (1) a failure to pay when due any Deferred Amounts within 3 business days following written notice from Landlord or (2) as to matters other than Deferred Amounts, any Tenant breach of any representations, warranties, covenants, or Lease terms not cured within a grace or cure period allowed.

[Optional provision (j): To the extent that Landlord or Tenant has insurance coverage for lost rents or profits, such party agrees to timely file and make all commercially reasonable efforts to recover on such claim (Claim). The parties agree that any recovery on the Claim shall be paid or credited as applicable first to make Landlord whole on abated rent, and then as a credit against Deferred Amounts as they become due.]

[Optional add to (j): With respect to any Claim Tenant may have, Tenant hereby appoints Landlord as Tenant's agent with limited authority to pursue the Claim as Tenant's agent, and Landlord hereby accepts such appointment and shall keep Tenant timely and fully informed as to Landlord's efforts in such regard, including by providing Tenant with copies of any correspondence sent to or received from the carrier or any claims manager or adjuster on behalf of the carrier, and notice of any recovery or denial of the Claim. Landlord shall, in Landlord's sole commercially reasonable discretion but after consultation with Tenant, abandon or settle the Claim on such basis as Landlord shall determine. If the carrier denies the Claim, Landlord may pursue further at Landlord's expense (including legal fees and costs) litigation or other remedies to obtain a recovery, provided, however, that Landlord shall be under no obligation to pursue such Claim beyond a denial by the carrier. If Landlord elects not to further pursue the Claim, Landlord's agency on behalf of Tenant shall automatically terminate.]

[Optional provision (k): Should Tenant decide [Tenant shall be required] to pursue any governmental-based financial assistance that Tenant is eligible to receive as a business affected by the Health Crisis, including from federal, state, city, and local agencies (collectively, Governmental Financial Assistance), Tenant shall keep Landlord informed of all such submittals and progress related thereto. If Tenant obtains any Governmental Financial Assistance, Tenant shall promptly disclose this to Landlord and fully, accurately, and promptly respond to Landlord's requests for information relating to the same. If Tenant receives Governmental Financial Assistance where a portion may be applied to the payment of rent, or if Tenant's application for such assistance stated or represented that the Governmental Financial Assistance or portion thereof would be used for the payment of rent, such Governmental Financial Assistance shall be applied in the following order of priority: (1) paid to Landlord to the extent of the abated Rent to offset the same, and (2) paid to Landlord to the extent of the difference between the scheduled Rent without any lease modifications and rent as modified herein.] CL

NOTES

1. Zakaria, *Ten Lessons for a Post-Pandemic World* (W.W. Norton & Co. 2020).

2. *See, e.g.*, Rasmussen, "On the origins of SARS-CoV-2," *Nat. Med*. 27, 9 (2021), https://doi.org/10.1038/s41591-020-01205-5 ("Despite much noise to the contrary, there is no credible evidence that SARS-CoV-2 was ever known to virologists before it emerged in December 2019, and all indications suggest that, like SARS-CoV and MERS-CoV, this virus probably evolved in a bat host until an unknown spillover event into humans occurred.").

3. Segreto et al., "Should we discount the laboratory origin of COVID-19?" *Environ Chem Lett* (2021), https://doi.org/10.1007/s10311-021-01211-0 ("While a natural origin is still possible and the search for a potential host in nature should continue, the amount of peculiar genetic features identified in SARS-CoV-2's genome does not rule out a possible gain-of-function origin, which should be therefore discussed in an open scientific debate.").

4. This article was prepared primarily based on information available as of February 2021 and thus presents information available at that time. Case law, legislation, governmental mandates, and findings by scientists and health officials regarding COVID-19 remain in a state of flux. Therefore, this article should not be treated as the final word on commercial leasing in a post-pandemic world.

5. Deloitte, The retail evolution's great acceleration: How to maneuver in the pandemic-driven recession, https://www2.deloitte.com/us/en/pages/consumer-business/articles/retail-recession.html.

6. *See* Richter, "The Pandemic's Toll on the U.S. Restaurant Industry," Statista (Dec. 14, 2020), https://www.statista.com/chart/23765/impact-of-the-covid-19-pandemic-on-the-us-restaurant-industry (describing the National Restaurant Association's letter to Congress). *See also* Restaurant Industry in Free Fall; 10,000 Close in Three Months, PR Newswire (Dec. 7, 2020), https://www.prnewswire.com/news-releases/restaurant-industry-in-free-fall-10-000-close-in-three-months-301187291.html.

7. Richter, *supra* note 6.

8. SB 91, 2021 Leg., Reg. Sess. (Cal. 2021).

9. *Id*. *See also* Nemeth, "New COVID-19 bill includes federal funds for up to 80% of unpaid rent," Cal. Apartment Ass'n (Jan. 25, 2021), www.caanet.org/new-covid-19-bill-includes-federal-funds-for-up-to-80-of-unpaid-rent.

10. *Id*.

11. *Id*.

12. https://cdola.colorado.gov/POP-documents.

13. *Id*.

14. *Id*.

15. https://drive.google.com/file/d/198vfqvzfNrBIFlRIEwXyuMcsUczIU-aq/view.

16. *Id*.

17. *Infra* note 12.

18. www.codola.colorado.gov/rental-mortgage-assistance.

19. *Id*.

20. *Id*.

21. https://drive.google.com/file/d/1lEPhDODzbZbadkZeMsSmr85qUZQpYXXX/view.

22. *Infra* note 18.

23. *See, e.g.*, *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 2020 WL 7405262 (S.D.N.Y. Dec. 16, 2020); *In re Hitz Rest. Grp.*, 616 B.R. 374, 377–78 (Bankr. N.D. Ill. 2020); *Palm Springs Mile Assocs., Ltd. v. Kirkland's Stores, Inc.*, 2020 WL 5411353 (S.D. Fla. Sept. 8, 2020); *The Gap Inc. v. Ponte Gadea New York LLC*, No. 1:20-cv-04541 (S.D.N.Y. Sept. 8, 2020); *Hibbett Sporting Goods, Inc. v. Weatherford Dunhill LLC*, No. 4:20-cv-00607-O (N.D. Tex. 2020).

24. *See JN Contemporary Art*, 2020 WL 7405262 at *6.

25. *Id*.

26. *Id*. *See also In re Hitz Rest. Grp.*, 616 B.R. at 377–78 (analyzing whether stay at home orders qualified as governmental action as the term was used in a force majeure provision).

27. *JN Contemporary Art*, 2020 WL 7405262 at *7.

28. *In re Hitz Rest. Grp.*, 616 B.R. at 379.

29. *Id*.

30. *See, e.g.*, *4842 Morrison Rd. Corp v. Tri-County Health Dep't*, No. 20CV31347 (Arapahoe Cty. Dist. Ct. Jul. 8, 2020) (challenging the restriction that performers had to remain 25 feet from the audience); *Bandimere v. Polis*, No. 20CV31073 (Jefferson Cty. Dist. Ct.) (constitutional challenge based on freedom of association and expression for orders limiting the capacity and sales at Bandimere Motor Speedway on July 4, 2020); *Cookies & Crema, LLC v. CDPHE*, No. 20CV30407 (Douglas Cty. Dist. Ct.) (challenging rulemaking authority as ultra vires); *The Tavern League of Colo. v. Polis*, No. 20CV32484 (City and Cty. of Denver Dist. Ct.) (challenging capacity requirements for restaurants as having no relationship to public health and safety).

31. *Pitkin Cty. Rest. All. v. Pitkin Cty.*, No. 2021CV30005 (Pitkin Cty. Dist. Ct.).

32. CRS § 25-1-515(1).

33. *Pitkin Cty. Rest. All.*, No. 2021CV30005.

34. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. __ (2020).

35. *Cal. Rest. Ass'n, Inc. v. Cty. of L.A. Dept. of Pub. Health*, No. 20STCP03881 (Ca. Super. Ct.).

36. Covid Coverage Litigation Tracker, Univ. of Pa. Carey Law School, www.cclt.law.upenn.edu.

37. *Id*.

38. *Id*.

39. *Id*.

40. *Id*.

41. *Id.*; Harckham, "COVID-19 and Business Interruption: How Insurance Can and Cannot Mitigate Losses," *Risk & Ins.* (Mar. 17, 2020), www.riskandinsurance.com/business-interruption-coronavirus.

42. Harckham, *supra* note 41.

43. *Id*.

44. Keen and Reich, "COVID-19 Shutdowns, Related Litigation Put Pressure on Business Interruption Insurers," *Nat'l L. Rev.* (Oct. 26, 2020), www.natlawreview.com/article/covid-19-shutdowns-related-litigation-put-pressure-business-interruption-insurers.

45. *Gavrilides Mgmt. Co. LLC v. Mich. Ins. Co.*, No. 20-258-CB (Mich. 2020). *See also id*.

46. *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. 2020); *Rose's 1, LLC v. Erie Ins. Exch.*, No. 2020 CA 002424 B, 2020 WL 4589206 (D.C. Super. Ct. 2020); and *Henry's La. Grill, Inc. v. Allied Ins. Co.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755 (N.D. Ga. 2020). *See also* Morgenthau, "COVID-19 and Business Interruption Claims," Ruebel & Quillen, LLC (Oct. 13, 2020), https://www.rq-law.com/news/covid-19-and-business-interruption-claims; Kauffman and Meyer, "New Pandemic Discovery Protocols for Business Interruption Insurance Litigation" 50 *Colo. Law.* 51 (Jan. 2021), www.cl.cobar.org/features/new-pandemic-discovery-protocols-for-business-interruption-insurance-litigation.

47. *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, No. BER-L-3681-20 (N.J. Super. Ct. 2020).

48. *Studio 417, Inc. v. Cincinnati Ins. Co.*, Case No. 6:20-CV-03127 (W.D. Mo. 2020); *North State Deli, LLC, v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super. 2020). *See also* Keen and Reich, *supra* note 44 at 53.

49. *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968). *See also* Morgenthau, *supra* note 46.

50. Kauffman and Meyer, *supra* note 46 at 53.

51. *Id*.

52. *Id*.

53. *Id*.

54. *Id*.

55. *Id*. at 54.

56. *Id*.

57. *Id*.

58. Knox, What is WELL?, U.S. Green Building Council (Apr. 2, 2015), www.usgbc.org/articles/what-well.

59. Strategies from The WELL Building Standard to Support in the Fight Against COVID-19, IWBI (May 14, 2020), https://resources.wellcertified.com/tools/strategies-from-the-well-building-standard-to-support-in-the-fight-against-covid-19.

60. *Id*.

61. *Id*.