

Law & Accounting

Brace for the next wave of COVID-19-related disputes

Anyone who has spent significant time in commercial real estate knows that disputes, quite unfortunately, sometimes are inevitable. Thus, when the coronavirus pandemic threw Colorado's commercial real estate industry into upheaval in 2020, many feared the worst. And, for good reason; sectors that generally had been vibrant (for example, hospitality) and sectors that had not (for example, retail) largely came to a screeching halt, shuttering virtually overnight in the wake of various local and statewide shelter-in-place orders. As a result, many industry experts predicted an onslaught of real estate disputes finding their way into courts and arbitration, much like what transpired during the Great Recession.

Undoubtedly, a number of commercial real estate disputes did manifest themselves in the past year, with certain types of matters leading the way. For example, claims based on force majeure provisions, along with business interruption and other insurance policy claims, rose to levels not seen in recent years. Landlord/tenant disputes stemming from lease



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rescission, and disputes regarding delayed tenant improvement build-outs, also saw an increase. But, most likely as a combination of federal stimulus, state and local mandates (e.g., foreclosure and eviction moratoriums), and forward-looking business negotiations (e.g., rent deferrals and loan restructuring), the cataclysmic litigation scenario so many predicted simply did not materialize.

While a full tsunami of disputes did not come crashing down on the commercial real estate industry in 2020, however, does not mean 2021 will not prove different. Various indicators suggest a storm is looming on the horizon. Many COVID-19-related loan deferments, for example, will soon run their course, leading to the potential for defaults and foreclosure activity. Similarly, an end to rent deferral practices likely will result in an uptick

in commercial tenant defaults and evictions, yielding reduced occupancy rates in certain sectors. Perhaps most importantly, COVID-19 appears to have altered the commercial real estate landscape forever – at least with respect to retail and office – forcing many companies into bankruptcy and fundamentally changing how people work and live. Combined with those factors is the reality that a significant amount of commercial real estate debt is coming due over the next few years. A reduction in demand for the very assets servicing that debt undoubtedly will lead to challenges, and could lead to litigation.

With the prospect of increased disputes across the real estate industry in the months (and years) ahead, industry professionals should take action to prepare themselves.

■ **Know where things stand.** The written documents governing the parties' respective rights and obligations typically prove to be the foundation of any dispute – and dispute resolution – strategy. Leases, loan documents, transactional agreements and recorded documents will impact, if not drive,

immediate and longer-term goals. Regardless of what the industry professional thinks those documents might say, it is critical to review those documents with the aid of qualified legal counsel, to have an accurate sense of what options exist and what the best course of action may be.

■ **Strive to make proactive, not reactive, decisions.** If an industry professional has the sense that economic or other challenges are likely to arise, they should not wait to formulate a sound and holistic strategy to tackle the issue. While some disputes are inevitable, many can be avoided, or at least limited, simply by analyzing the core issues and considering a prudent approach before the problem fully manifests or worse, compounds, itself. Many lawyers provide counsel on risk avoidance and mitigation strategies in advance of litigation, as part of their portfolio of services. Seeking advice early may help avoid or limit the time and expense of a protracted dispute or court proceeding.

■ **Early communication is important, but should be measured.** If trouble is looming on the horizon, early communication often proves helpful as a risk-mitigation strategy. If nothing else, opening lines of communication between parties in a business relationship can reduce aggravation, stress and unnecessary friction. Early communication is not without risk, however. Well-intended written exchanges can come back to haunt a party, when used as evidence in a lawsuit or arbitration. Communicating early, but doing so in a mindful and measured way, should be considered.

As a final thought, while 2020 saw a number of disputes that found parties in time-consuming litigation, it also saw a number of disputes that resolved themselves short of court filings, with parties working together to identify practical solutions for the problems each was then facing as a result of the pandemic. For those disputes in the latter category, the parties' early diligence, proactivity and planned decision-making was often the key to their success. Those same strategies likely will be the key to success for those disputes that arise with the next wave of commercial real estate litigation. ▲

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