Lease Condemnation Clause: Hero or Dud?

Leasing During the COVID-19 Pandemic

PANELISTS:

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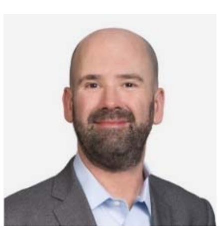

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Takings Cases and Cases to Watch

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Precedent[1]

1. *Penn Cent. Transp. Co. v. New York City* (1978) 438 U.S. 104. In holding there was no governmental taking in the application of New York's Landmark Preservation Law, which prohibited proposed development of Grand Central Terminal, the Court applied a three-pronged balancing test and found as follows: (1) the law did not interfere with the present uses of the building, but allowed the owner to continue using it as had been done in the past, permitting the owner to profit from the building and obtain a reasonable return on its investment, (2) the law did not necessarily prohibit occupancy of any of the air space above the landmark building, since under the procedures of the law, it was possible that some construction in the air space might be allowed, and (3) the law did not deny all use of the owner's preexisting air rights above the landmark building, since under a transferable development rights program, it was possible for the owner to transfer the development rights it was foreclosed from using as to Grand Central Terminal to other neighboring properties which it owned.

2. *Lucas v South Carolina Coastal Council* (1992) 505 US 1003. A public agency must pay compensation regardless of the public purpose behind the regulation whenever it denies the property owner all economically beneficial or productive use of the land; but, compensation may be excused where defenses apply.

3. CACI Jury Instructions: CACI No. 3500 *et seq.* re eminent domain. CACI jury instructions are always a good source of authority and can be helpful sources of information in crafting arguments.

[1] There is a vast in-depth history of case law defining regulatory takings law. The reader should be cautious and take into consideration the multitude of authorities on this subject. This handout is by no means meant to capture all authorities that may be instructive in this area of law.

Ongoing Takings Cases to Watch

4. *JD Bols v. Newsom, et al. (S.D.Cal. May 8, 2020; Case No. 20-cv-00873).* Inverse condemnation takings case. Takings arguments, among others, asserted by landlord regarding effect of eviction moratoria and stay-at-home Executive Orders. Takings arguments against the State and local public entities based on Executive Orders to stay home and/or Public Health Orders restricting operations of certain businesses. Case ongoing.

5. *Larry Kramer Vineyard Properties LLC, et al. v. City of Palm Springs (C.D. Cal.; Case No. 20-cv-02050).* Inverse condemnation takings case. Inverse condemnation claims asserted based on allegations of road closures and expanded outdoor dining into the right-of-way. Allegations may give rise to substantial impairment of access claims. Case ongoing.

Eviction Moratoria Takings Cases

6. *Elmsford Apartment Associates, LLC v. Andrew Cuomo* (S.D.N.Y. June 29, 2020) Case No. 20-cv-4062.) Eviction moratoria ruled to NOT be a taking, but appeals pending. Applying the *Penn Central* balancing test, the Court found that (1) the landlords were not deprived of all reasonable economic use of their property, (2) there was no significant interference with landlord's distinct, investment-backed expectations, and (3) the character of the governmental action did not transform the action into a taking.

7. *San Francisco Apartment Association, et al. v. City and County of San Francisco (CPF-20-517136*). Among other claims and allegations, Plaintiff's Petition challenged San Francisco's eviction moratorium. The Petition alleged that the moratorium amounted to a taking by devaluing the properties at issue. The Court rejected the challenge finding that the moratorium did not compel any uncompensated physical occupation of property or otherwise give rise to takings claim.

Other Interesting and Potentially Instructive Authority

8. *Ljk Studio 417, Inc., et al. v. The Cincinnati Insurance Co* (W.D.Mo. Case No. 20-cv-03127-SRB). Business interruption insurance coverage case. Order Denying Motion to Dismiss on August 12, 2020 based on insured argument that COVID-19 physically occupied the business at issue triggering business interruption coverage. Case ongoing.

9. *Roman Catholic Diocese of Brooklyn v. Cuomo (592 U.S. ___ (2020)); Harvest Rock Church, et al. v. Newsom* (592 U.S. ___ (2020)). Restrictions on religious services violate the First Amendment. Provides insight into the Court's thinking about COVID-19 restrictions, religious and otherwise.

Sampling of Condemnation Lease Clauses

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CONDEMNATION CLAUSES AND COVID-19: INTRODUCTION AND A SAMPLING OF COMMONLY SEEN LEASE CLAUSES AFFECTING LANDLORD AND TENANT RIGHTS TODAY

INTRODUCTION

Below is a listing of issues and things for parties to look for in lease clauses when assessing risk to a lease or potential relief with respect to COVID-19 orders that have affected tenants' use of premises in a myriad of ways.

All language is directly from actual leases (sources varied) in place in the last 3 years, all pre-COVID. Changes to the language were made only to anonymize identifiable client/lease information. Emphasis and highlighting are added to call attention to aspects of the language that one might focus on to make one argument or another. These are not, by any means, sample clauses, but may be used as building blocks by landlord and tenant lawyers to construct the best possible tenant and landlord clauses going forward to correct the deficiencies seen in these.

The lesson in these clauses is that, while one can see that there is a lot of variance in the language used in leases, much of the intent and effect of the varying language below is commonplace and yet very unclear. This creates uncertainty that will be costly to resolve as an afterthought. While much of the language opens doors to tenants who might want to raise condemnation as a defense to leases or assert a proactive argument that they are entitled to rent abatement or terminate a lease they no longer want, the success of such arguments is by no means assured by most of the clauses we have seen.

It is very unclear how such claims will fare. Claims and defenses will be very lease and fact specific. Combined with the muddy state of regulatory takings law – especially around a pandemic – these clauses raise more questions than they provide definitive answers for landlords, tenants or their lawyers to rely on.

We do not yet know – and may never know, if the regulatory public health orders of last spring (or as may yet lay ahead) amount to regulatory "takings". And, if they do, how courts will view lease language that is vague in light of the often state-wide shut down orders directed at non-essential businesses especially, and, less so, shelter-in-place orders directed at the entire population of some states.

While eviction moratoria are the hotly contested subject of some taking's lawsuits now, those are different than the closure of businesses by government that occurred for the public good. Inverse condemnation actions for deferred rents under eviction moratoria are brought by landlords and have little to do with tenants, nor will they provide tenants any additional relief – such as rent abatement or lease termination rights.

On the other hand, contractual remedies may exist. Most, if not all, lease provisions do not appear to require an inverse condemnation claim or lawsuit to be started, much less completed, as part of the definition of a "taking" that triggers rent relief. Instead, rooted deep in leases entirely between private parties, these clauses, often ill reviewed and left for the later interpretation of the parties and their counsel, seem to require little for automatic terminations and abatements to occur as solely a contractual matter. These clauses may provide entirely contractual relief and require only private determination of whether a taking has occurred, which may be made by judicial determination under the Code of Civil Procedure Section 1265.130.

The implications and consequences of this are monumental, yet they may be all tenants have to help them out of tough situations, though, unlike moratoria, the criteria for asserting rights under these clauses have little to do with the COVID impact on a particular tenant. This means that the clauses could be asserted by powerful tenants and, if they are, such assertions will have to be either settled quietly and quickly to avoid greater large-scale harm or be fought to the death by landlords with portfolios of what might be very damaging language addressing takings. In addition, if tenants are successful in terminating leases or getting relief from landlords due to their takings clauses, this would certainly be the basis of the next wave of inverse condemnation lawsuits as a result of losses that landlords could suffer.

But the only clear thing is how unclear leasing law has become in the time of COVID-19.

SAMPLING OF ACTUAL LEASE CLAUSES:

1. **Definitional issues:**
   - Most of these clauses in leases are very short on definitions of "taking" or "eminent domain, relying on what we expect are simple and ascertainable legal definitions that really are not easy or simple at all.
   - More likely, a lease definition of a taking does not have a test for determining if something is a taking at all, and leaves open the possibility that all manner of regulatory, temporary or permanent civic acts will implicate this clause.

   - **Examples of issues with definitions from actual leases**:

     If the Premises or any portion thereof are taken under the power of eminent domain or sold under the threat of the exercise of said power (collectively "**Condemnation**"), this Lease shall terminate as to the part taken as of the date the condemning authority takes title or possession, whichever first occurs.

     - The defined term relies on other undefined terms for definition.
       a. What is being "taken"?
       b. What doe the exercise of "the power of eminent domain" look like? Can it be regulatory?
       c. What does it mean for a condemning authority to "take possession"? Does that mean taking it for itself or a third party as in physically occupying? Or does it mean
       d. This seems to allow for partial termination for a partial taking. What is a partial "taking"?

"**Permanently Taken**" shall mean any ***taking*** that likely will remain in effect for a period in excess of twelve (12) months.

In the event the whole or any substantial part of the Shopping Center or of the Premises is permanently taken or condemned by any competent authority for any public use or purpose (including a deed given in lieu of condemnation) and is thereby rendered untenantable, this Lease shall terminate as of the date title vests in such authority, and Monthly Base Rent and Rent Adjustments shall be apportioned as of the Termination Date and Landlord shall refund any overpayment of Monthly Base Rent and Rent Adjustments made for any period after the taking occurs, which obligation shall survive the expiration or termination of the Lease.

If the whole of the Premises is taken for any public or quasi-public use under any Laws or by right of eminent domain or by private purchase in lieu thereof, this Lease shall terminate, effective on the date physical possession is taken by the condemning authority, and the Rent shall be paid up to that day with a proportionate refund by Landlord of such Rent as may have been paid in advance for periods subsequent to the date of the taking.

2. Degree of Specificity as to what must occur, what can happen next and how.

- Clauses vary very widely on what must be "taken" to provide relief. We see use, operations, parking, access, floor area, a Building, Project and other variations on those themes.

- Clauses also vary as to whether partial takings or temporary takings trigger relief- in many cases they do, though often it is rent abatement as opposed to termination. The specificity as to how partial a taking can be to trigger any relief can vary from unstated to specific percentages.

- Another highly variable is whether relief is absolute (termination) or partial (abatement).

- Also, whether relief is automatic or mandatory, or whether a party must assert relief or provide notice, and whether it is elective varies.

- When a claim must be asserted if within a certain period - may be a major issue. Most leases, especially older ones and even on Landlord forms, tend to provide automatic relief without deadlines in at least some circumstances.

- This language is important to an analysis if a tenant has relief from lease enforcement due to a "taking".

- Who must act in order to enact a taking- in some cases the word "quasi-governmental" is used with respect to who is doing the taking.

- While automatic termination is logical relief for a full permanent taking in the traditional sense, leases often have very loose language permitting termination as relief for partial or temporary takings.

- **Examples of language specifying what must be taken for relief and/or how that relief may occur**:

  By percentage/within certain time/termination/notice: If more than 10% of the floor area of the Premises, or more than 25% of the parking spaces situated within the parking area, is taken by Condemnation, Lessee may, at Lessee's option, to be exercised in writing within 15 business days after Lessor shall have given Lessee written notice of such taking (or in the absence of such notice, within 15 business days after the condemning authority shall have taken possession) terminate this Lease as of the date the condemning authority takes such possession.

  By materiality/termination: Either party may terminate this Lease if any material part of the Premises is taken or condemned for any public or quasi-public use under Applicable Law, by eminent domain or private purchase in lieu thereof (a "**Taking**"). Landlord shall also have the right to terminate this Lease if there is a Taking of any portion of the Building or Property which would have a material adverse effect on Landlord's ability to profitably operate the remainder of the Building.

  Use it or lose it relief - with time deadlines/termination and automatic abatement: If Lessee does not terminate this Lease in accordance with the foregoing, this Lease shall remain in full force and effect as to the portion of the Premises remaining, except that the Base Rent shall be reduced in proportion to the reduction in utility of the Premises caused by such Condemnation.

  Automatic abatement for any taking of "Floor Area": If any portion of the Floor Area shall be taken by condemnation or conveyed in lieu thereof and this Lease is not terminated, the square footage of the total Floor Area shall be reduced by the number of square feet taken, and the Fixed Minimum Rent, Additional Rent and Tenant's Pro Rata Share thereafter shall be reduced proportionately.

  Laundry list of potential "takings" triggering relief: If during the Term: (i) more than five percent (5%) of the Floor Area is permanently taken by eminent domain or conveyed in lieu thereof (collectively "**Taken**"); (ii) more than five percent (5%) of the Necessary Common Area is permanently Taken; (iii) the number of automobile parking spaces is permanently reduced within the Shopping Center to a number which produces a parking ratio less than the ratio required by this Lease as a result of being permanently Taken; (iv) any truck well and/or loading dock area or the access thereto which services the Premises is permanently Taken and no reasonably acceptable substitute is provided; (v) as a result of being permanently Taken, any curb cut, means of ingress or egress or turn lane on a road adjacent to and serving the Premises is so altered as to materially and adversely affect the flow of traffic to or from the Shopping Center; or (vi) a material obstruction to the view of the Premises or its signage will result from any post taking construction of any roadway or otherwise; then, in any of the foregoing events, Tenant, at its option, may terminate the Lease as of the day possession shall be taken by the acting governmental or quasi-governmental authority ("**Date of Taking**"). Such option to terminate shall be exercisable by Tenant giving written notice to Landlord within thirty (30) days after the Date of Taking, which notice shall provide for a termination date ("**Termination Date**") not later than ninety (90) days after the Date of Taking. Tenant shall pay rent up to the Termination Date, and Landlord shall refund such Fixed Minimum Rent and Additional Rent as have been paid in advance and which cover a period after the Termination Date.

Abatement as relief for ill-defined taking leading to "likely" disruption: During any period of time that, by reason of any taking, whether permanent or temporary, there is any material interference with access to or visibility of the Premises, or Tenant's operations in the Premises, there shall be a fair and equitable abatement of the Base Rent, Additional Rent and all other charges payable hereunder, taking into account the extent to which Tenant's operations likely will be disrupted by such taking.

Suitability for operations and requires Landlord Notice: If so much of the floor space of the Premises is taken as aforesaid such that the remaining floor space is no longer suitable for the operation of the Permitted Use, either party shall have the right to terminate this Lease upon notice in writing given to the other party within thirty (30) days after the date on which Landlord notifies Tenant that such taking is to unconditionally occur.

3. Tenant killer in COVID-19 arguments around condemnation: time to assert relief:

- In attempting to use the casualty clause for Tenant relief, limits on time to assert the relief have proven killer, at least with respect to the first round of closures. Too much time passed before lawyers and their clients stopped staring at force majeure clauses. But this need not be the case if closures are ongoing or if there are more closures or partial closures.

- **Examples of language specifying time periods for asserting relief**:

  The terminating party shall provide written notice of termination to the other party within forty-five (45) days after it first receives notice of the Taking.

  The termination shall be effective as of the effective date of any order granting possession to, or vesting legal title in, the condemning authority.

4. **Other relief – restoration and condemnation awards- in addition to termination or abatement, or waivers of other relief shows up in some leases**.

   - In addition to termination or abatement, some leases specify obligations for repair of damage or restoration of affected areas, including Premises that are often otherwise solely tenants' responsibility. Not usually in play in regulatory takings.

   - In some leases, the ability to go to court to ask for termination as a result of a taking is required to be waived.

   - Most leases allocate any condemnation awards between Landlords and Tenants with most favoring Landlords with respect to any amounts awarded for the property interest.

- **<u>Examples of language specifying what must be taken for relief and/or waiver of other relief</u>**:

A. <u>Restoration</u>:

If Tenant does not terminate this Lease, Landlord shall promptly and diligently restore the Premises and the Common Areas of the Project to as near their condition prior to such taking or conveyance as is reasonably possible (but in any event to a good and usable condition).

Landlord, at its sole expense, shall make all necessary repairs or alterations so that the remaining Premises shall constitute a complete architectural unit.

If only a part of the Premises is subject to a Taking and this Lease is not terminated, Landlord, with reasonable diligence, will restore the remaining portion of the Premises as nearly as practicable to the condition immediately prior to the Taking.

B. <u>Sole remedy/waiver of right to petition the court</u>:

The remedies provided in this Section shall be the sole and exclusive remedy in the event of a permanent Taking, notwithstanding any applicable Laws to the contrary; and the parties hereby waive any such Laws.

The remedies provided in this Section shall be the sole and exclusive remedy in the event of a permanent taking, notwithstanding any applicable Laws to the contrary; and the parties hereby waive any such Laws.

With regard to any taking, condemnation or eminent domain impacting the Premises, Tenant hereby waives the effect of Section 1265.130** of the California Code of Civil Procedure.

Tenant hereby waives any and all rights it might otherwise have pursuant to Section 1265.130 of the California Code of Civil Procedure**, or any similar or successor Applicable Laws.

**California Code of Civil Procedure- CCP 1265.130:
Where part of the property subject to a lease is acquired for public use, the court may, upon petition of any party to the lease, terminate the lease if the court determines that an essential part of the property subject to the lease is taken or that the remainder of the property subject to the lease is no longer suitable for the purposes of the lease.

C. <u>Allocation of condemnation award</u>:

Any taking or condemnation that likely will remain in effect for a period in excess of twelve (12) months shall be deemed permanent for purposes of this Lease. Notwithstanding anything to the contrary herein set forth, in the event the taking is temporary (for less than twelve [12] months), Landlord may elect either (i) to terminate this Lease or (ii) permit Tenant to receive the entire award attributable to the Premises in which case Tenant shall continue to pay Rent and this Lease shall not terminate.

The entire award or compensation in any such condemnation proceeding, whether for a total or partial taking, or for diminution in the value of the leasehold or for the fee, shall belong to and be the property of Landlord. Without derogating the rights of Landlord under the preceding sentence, Tenant shall be entitled to recover from the condemning authority such compensation as may be separately awarded by the condemning authority to Tenant or recoverable from the condemning authority by Tenant in its own right for the taking of trade fixtures and equipment owned by Tenant and for the expense of removing and relocating its trade fixtures and equipment, and for the diminution in value of its leasehold.

Condemnation awards and/or payments shall be the property of Lessor, whether such award shall be made as compensation for diminution in value of the leasehold, the value of the part taken, or for severance damages; provided, however, that Lessee shall be entitled to any compensation paid by the condemnor for Lessee's relocation expenses, loss of business goodwill and/or Trade Fixtures, without regard to whether or not this Lease is terminated pursuant to the provisions of this Paragraph. All Alterations and Utility Installations made to the Premises by Lessee, for purposes of Condemnation only, shall be considered the property of the Lessee and Lessee shall be entitled to any and all compensation which is payable therefor. In the event that this Lease is not terminated by reason of the Condemnation, Lessor shall repair any damage to the Premises caused by such Condemnation.

Landlord shall be entitled to receive the entire award (or sale proceeds) from any such taking, condemnation or sale without any payment to Tenant, and Tenant hereby assigns to Landlord Tenant's interest, if any, in such award; provided, however, Tenant shall have the right separately to pursue against the condemning authority a separate award in respect of the loss, if any, to Tenant Additions paid for by Tenant without any credit or allowance from Landlord so long as there is no diminution of Landlord's award as a result.

All compensation awarded for a Taking shall be the property of Landlord. The right to receive compensation or proceeds is expressly waived by Tenant, provided, however, Tenant may file a separate claim for Tenant's Property and Tenant's reasonable relocation expenses, provided the filing of the claim does not diminish the amount of Landlord's award.

Recent Landlord-Tenant Cases, and Other Potentially Helpful Authorities

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Force Majeure/Impossibility Cases

1. *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 346 n.82 (Bankr. S.D. Fla. 2020). The bankruptcy court ruled, under the particular set of facts before it, that it considered tenant's unpaid rent an "administrative expense" which tenant could defer for a period of time, but tenant could not abate rent, nor did the force majeure clause at issue excuse payment of rent.

2. *Backal Hosp. Grp. LLC, V. 627 W. 42ND Retail LLC*, 2020 N.Y. Misc. LEXIS 4050, at *11-13 (N.Y. Sup. Ct. Aug. 3, 2020). The court rejected an impossibility defense raised by tenant based on the following paragraph in the lease:

> If the fixed rent or any additional rent shall be or become uncollectible by virtue of any law, governmental order or regulation, or direction of any public officer or body, Tenant shall enter into such agreement or agreements and take such other action (without additional expense to Tenant) as Landlord may request, as may be legally permissible, to permit Landlord to collect the maximum Fixed Rent and Additional Rent which may, from time to time during the continuance of such legal rent restriction be legally permissible, but not in excess of the amounts of fixed rent or additional rent payable under this Lease. Upon the termination of such legal rent restriction, (a) the Fixed Rent and Additional Rent, after such termination, shall become payable under this Lease in the amount of the Fixed Rent and Additional Rent set forth in this Lease for the period following such termination, and (b) Tenant shall pay to Landlord, if legally permissible, an amount equal to (i) the Fixed Rent and Additional Rent which would have been paid pursuant to this Lease, but for such rent restriction, less (ii) the Fixed Rent and Additional Rent paid by Tenant to Landlord during the period that such rent restriction was in effect.

The court ruled that per that paragraph, the parties had "contemplated a scenario in which performance of the lease terms by plaintiffs might become prohibited by a governmental order, and agreed that, if such a situation arose, they would reach an agreement regarding the collection of rent at the conclusion of the governmental restriction."

3. *Palm Springs Mile Assocs. v. Kirkland's Stores, Inc.*, No. 20-21724-Civ, 2020 U.S. Dist. LEXIS 163880, at *5 (S.D. Fla. Sep. 8, 2020). In denying a motion to dismiss brought by defendant tenant Kirkland on force majeure grounds, the court stated that Kirkland "fails to explain how the governmental regulations it describes as a force majeure event *resulted in* its inability to pay its rent. Kirkland, instead, argues that the force majeure clause does not require any showing that the county's regulations are linked to Kirkland's nonpayment. This argument misses the mark, though. The restrictions on non-essential activities and business operations must directly affect Kirkland's ability to pay rent." The court also observed that a fact-based force majeure argument was not appropriate for resolution on a motion to dismiss.

4. *In re Hitz Restaurant Group*, 616 B.R. 374 (N.D. Ill. June 2, 2020). The court held the Illinois Governor's executive order closing in-person dining triggered the force majeure clause in tenant's lease (see below) and allowed for a 25% rent abatement; the executive order still permitted restaurants to provide take-out, curbside pick-up, and delivery, so tenant was not entitled to a 100% rent abatement. debtor was not entitled to a 100 percent rent reduction caused by the force majeure clause. The 25% figure was based on tenant's concession that 25 percent of the restaurant's square footage, consisting of the restaurant's kitchen, could have been used for carry-out, curbside pick-up, and delivery purposes. The force majeure clause at issue read:

   > Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by. . . laws, governmental action or inaction, orders of government. . . . Lack of money shall not be grounds for Force Majeure.

5. Civil Code § 1511(1): "The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: 1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse; however, the parties may expressly require in a contract that the party relying on the provisions of this paragraph give written notice to the other party or parties, within a reasonable time after the occurrence of the event excusing performance, of an intention to claim an extension of time or of an intention to bring suit or of any other similar or related intent, provided the requirement of such notice is reasonable and just".
   a. This clause has been useful to excuse performance for construction or tenant improvement delays during earlier construction shutdown.

6. Civil Code § 1511(2): "The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: 2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary".

7. *Dorn v. Goetz*, 85 Cal. App. 2d 407, 411 (1948) ("Even more clearly with respect to leases than in regard to ordinary contracts the applicability of the doctrine of frustration depends on the total or nearly total destruction of the purpose for which, in the contemplation of both parties, the transaction was entered into.").

8. *Davidson v. Goldstein*, 58 Cal. App. 2d Supp. 909, 912 (1943) ("There can be no doubt about the proposition that where a lease restricts and limits the use of the premises let to a particular specified purpose and thereafter, because of the enactment of valid governmental statutes, decrees or regulations such use becomes unlawful, the subject matter of the contract is destroyed and the covenants of such lease will not be enforced against either party thereto. The rule is that where the lease is exclusive the subsequent passage of prohibitory laws terminates it. A change in the law during the term of the lease, however, which merely restricts but does not wholly prohibit the conduct of the business carried on, does not release the tenant from his obligation to pay rent.").

9. *Lloyd v. Murphy*, 25 Cal. 2d 48 (1944) (lessee is not excused from his duty to pay rent, when the purpose of the lease has not been totally destroyed or its accomplishment rendered extremely impracticable, or where it has been shown that the lease remains valuable to the lessee)

10. *But see 20th Century Lites, Inc. v. Goodman*, 64 Cal. App. 2d Supp. 938, 943-46 (1944) ("Such governmental proclamation having, without the fault of either party to the contract, frustrated the 'desired object or effect to be obtained,' the doctrine of commercial frustration is applied through the means of implying a condition to exist in the contract whereby under such circumstances as are here found, the parties shall be excused from any further performance of its terms."; court terminated lease in its entirety; suspension was not option under frustration of purpose doctrine

11. Analysis of remedy is critical – remedy would typically be lease termination, not abatement.

<u>Condemnation Clause Cases</u>

12. *Bridge Aina Le'a, LLC v. State Land Use Comm'n* 950 F.3d 610 (9th Cir. 2020). Although not a COVID case, the Ninth Circuit rejected the plaintiff's takings argument under *Lucas* and *Penn* central because the land retained substantial residual value (even with the zoning change at issue) which still allowed the plaintiff to use the land in economically beneficial ways, and any diminution in value was too small to interfere with the plaintiff's reasonable investment backed expectations.

13. Temporary taking unlikely where COVID regulations comprise part of a rsasonable regulatory process and valid governmental reasons justify their adoption. *Landgate, Inc. v. Cal. Coastal Comm'n*, 17 Cal. 4th 1006, 1021 (1998); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 329 (2002).

14. Analysis of remedy is critical – many condemnation lease clauses permit lease termination, but won't work with rent abatement demands.

Casualty Clause Cases

15. For casualty arguments, possible that interpretation of what is a “loss” or a “physical loss” in business interruption insurance litigation might be helpful.

16. *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-cv-02312-JST (N.D. Cal. Sep. 14, 2020) (granting motion to dismiss without prejudice and holding under California law that loss of use of premises due to stay-at-home orders is not “direct physical loss" because premises can eventually be retaken).

17. *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127-SRB (W.D. Mo. Aug. 12, 2020) (denying motion to dismiss and ruling under Missouri law that absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose, which could occur because of COVID).

18. *Widder v. Louisiana Citizens Property Inc. Corp.*, 82 So. 3d 294 (La. App. 2011). The court found the intrusion of inorganic lead made the premises uninhabitable without remediation, similar to earlier Chinese drywall cases which rendered premises uninhabitable without remediation, and thus constituted a direct physical loss. Questionable whether this analysis holds as to COVID, where the science is unclear whether the virus is transmittable by surface exposure and, even if surface transmission is a possibility, that possibility dissipates in time and does not require remediation.