



THE IMPACT OF CORONA VIRUS 2019 (COVID-19) ON MARIN COUNTY REAL PROPERTY

Marin County Bar Association Real Property Section

March 26, 2020



PANEL

- Joel Gumbiner, Williams & Gumbiner, LLP, Speaker
- Len Rifkind, Rifkind Law Group, Speaker
- Mee Mee Wong, MCBA Executive Director, Host

FEAR OR ANXIETY TO ADDRESS COVID-19?

- Anxiety: Worry, nervousness, unease, concern, apprehension regarding uncertain outcomes. Healthy, normal, Darwinian compliant for survival.
- Fear: Unpleasant emotion, often *paralyzing* that someone or something is dangerous and likely to cause pain, or a threat.
- “The only thing we have to fear is fear itself—nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance.” Franklin D. Roosevelt, 32nd President of the United States

\$2 TRILLION RELIEF PACKAGE PASSED BY US SENATE 3/25/20

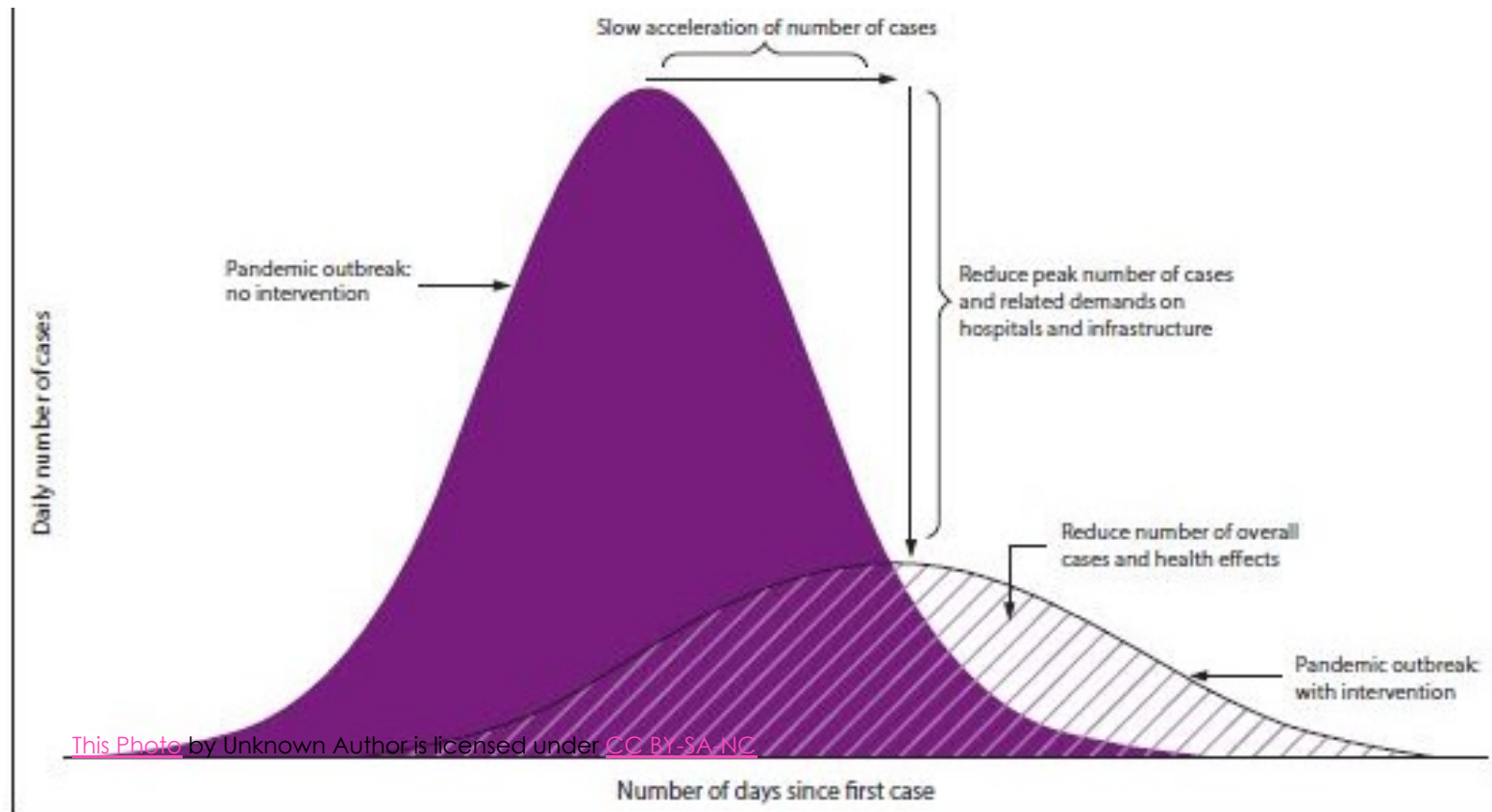
- 3/25/20 Senate passed unanimously a \$2T aid package.
- \$1,200 cash payments to individuals earning up to \$75K.
- \$2,400 to couples earning up to \$150K.
- \$500 to every child in households earning up to \$198K.
- \$600 *weekly* unemployment insurance for up to four months.
- \$150B to health care industry
- \$500B to state and local governments and hard-hit industries.
- \$360B in loans to small business up to 500 employees.

LATEST COVID-19 CASES

3/25/20

- World: 480,446 cases, 21,571 deaths
- US: 69,197 cases, 1,046 deaths (NY has half the cases in the US)
- California: 3,169 cases, 67 deaths (93% increase since 3/22/20)
- Marin County: 60 cases, 0 deaths. (Lack of testing) Estimate is 1% or 3,000

FLATTENING THE CURVE



SHELTER IN PLACE

- On March 19, 2020, pursuant to Exec. Order N-33-20, Gov. Newsom ordered the entire state to shelter in place, excepting 16 critical infrastructure sectors identified by the Federal Government.
 - Allowed (Partial list)
 - Food markets, pharmacies, health care, gas stations, banks, laundromats.
 - Public works.
 - Residential housing construction (not second homes, vacation rentals).
 - Essential commercial.
 - Landscaping, maintenance.
 - Not Allowed:
 - Legal work, excepting criminal, and emergency restraining orders/injunctions excepted.
 - Dine in restaurants, bars, entertainment venues, gyms, public events.

FEDERAL, STATE AND LOCAL RESTRICTIONS ON EVICTIONS AND FORECLOSURES

- Federal. All Federal regulators (OCC, Federal Reserve, CFPB, FDIC, National Credit Union Administration, Conference of State Bank Supervisors) directed to take action to reduce hardships for consumer borrowers.
- FHA, Fannie Mae and Freddie Mac issued moratoria on evictions and foreclosures through mid-May.
- California. Gov. Newsom authorized local suspensions of evictions related to COVID-19.
- Local: Marin, Sonoma, Alameda and Santa Clara Counties passed moratoria resolutions on evictions. On 3/24/20, Marin County BOS resolution prohibits evictions, both residential and commercial, based upon COVID-19 financial impacts until May 31, 2020. (See draft tenant letter requesting info/rent deferment addendum).

INSURANCE COVERAGE

- Is insurance coverage available for COVID-19 related claims?
- First Party Claims. Does COVID-19 constitute physical damage triggering coverage?
- Civil Authority has directed involuntary closure of businesses triggering coverage?
- Event cancellations?
- Third Party Claims?
- Test legal cases.



FORCE MAJEURE

- Does COVID-19 constitute impossibility, impracticability, and frustration of purpose in contracts, specifically non-payment on lease/loan payments?
- Non-payment due to force majeure is a difficult claim.

CONTRACTUAL PERFORMANCE EXCUSED

- “Performance is excused when it is prevented or delayed by operation of law or by an irresistible, superhuman cause” The parties may make special provision for adjustment of rights in event of impossibility arising from any cause. Civ. Code §§ 1511, (1),(2).
- “Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.” Rest. 2d, Contracts, §261.

IMPOSSIBILITY AND FRUSTRATION OF PURPOSE

- “[M]odern cases recognize as a defense not only objective impossibility in the true sense, but also impracticability due to excessive and unreasonable difficulty or expense.” *Christin v. Superior Court* (1937) 9 Cal.2d 526, 533.
- Governmental War Regulation: Tenant claiming right to terminate lease restricting use of the premises to the sale of new automobiles and petroleum products, on theory of frustration because of federal restrictions on production of new automobiles, did not sustain burden of proving that value of the lease had been totally or nearly totally destroyed. *Lloyd v. Murphy* (1944) 25 Cal.2d 48.
- The doctrine of “commercial frustration” may be invoked whenever official governmental action prevents hirer from using property for primary and principal purpose for which it was hired, even though other incidental uses might remain available for thing hired. *20th Century Lites, Inc. v. Goodman* (1944) 64 Cal.App.2d Supp. 938. [Neon signs installations prohibited by the war].

FRUSTRATION OF PURPOSE

- Where the parties assume that a certain object or effect will be attained, and this becomes impossible, performance by the injured party is excused. This defense has sometimes been explained on the theory of implied conditions and failure of consideration. (*Autry v. Republic Productions* (1947) 30 Cal.2d 144). [Enlistment in military prevented performance of contract].
- “Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.” Rest. 2d, Contracts, §265.

OPERATION OF LAW

- There is no liability for breach of contract whose performance has been made impossible by operation of law. *Baird v. Wendt Enterprises, Inc.* (1967) 248 Cal.App.2d 52 [Building permit expired before close of escrow, buyer refused to close].
- A contract which contemplates the doing of a thing, at first lawful, but which afterwards and during the running of the contract term becomes unlawful, ceases to be operative upon the taking of effect of the prohibitory law. *Industrial Dev. & Land Co. v. Goldschmidt* (1922) 56 Cal.App. 507. [Prohibition case].

CONTRACTUAL DUTY IS DISCHARGED

- Where the promisor reasonably apprehends impossibility or serious danger to life or *health*, he or she may be excused from commencing performance, and in some situations may be wholly discharged. 1 Witkin, Summary of California Law, 11th Ed, Contracts, §856 (2019), cited Corbin and Williston.
- Temporary impossibility usually suspends the obligation to perform during the time it exists. *Id.*, at §858.
- Temporary impossibility of indefinite duration will sometimes be sufficiently permanent to justify termination of the contract. *20th Century Lites, supra.*

REVIEW OF DOCUMENTS

- Careful review of all documents necessary to raise or defend FM claims.
- Financing and Lease Agreements.
 - FM clause?
 - Reps and warranties.
 - Recitals.
 - Covenants
 - Events of default
 - Termination rights.
 - Limitations of liability
 - Indemnity
 - Liquidated damages.

COMMERCIAL TENANTS

- 1. Review lease to determine if rent required if building closes.
- 2. Failure to pay rent may affect option rights.
- 3. File an insurance claim for business interruption and await case law (if the courts ever reopen).
- 4. In Marin County, there is an eviction moratorium until May 31, 2020. Rent deferral, not rent holiday.
- 5. Landlords fear mass rent strike. No court relief available, except for emergency restraining orders.
- 6. Negotiate rent deferral agreement. (See exemplar provided).
- 7. Retail. No likely replacement and high TI costs.

RESIDENTIAL TENANTS

- 1. Seek all governmental benefits that may be available. Cash stipend, unemployment coverage.
- 2. Rent deferral, not rent holiday.
- 3. Will need objective documentation that tenant has suffered “financial impact” arising from COVID-19 to be entitled to rent deferral.
- 4. Can still be evicted for non-rent issues, under applicable just cause rent eviction provisions.
- 5. Understand property management can only provide mandatory habitability repairs at the present time. Cosmetic issues will have to wait.

COMMERCIAL LANDLORDS

- 1. Carefully review tenant financial capacity to ascertain if business will survive closure. (Most small bus. Closed more than 30 days never reopen).
- 2. Assist tenants to obtain potential governmental financial support.
- 3. Clear communications with tenants regarding reduced property management services while shelter in place remains in effect.
- 4. Rent deferrals addenda will be the norm.
- 5. Carefully review leases for FM provisions.
- 6. Compliance with eviction moratoria.
- 7. Communications with lender(s) seeking forbearance, bearing in mind long term business relationships.

RESIDENTIAL LANDLORDS

- Marin County. Eviction moratorium in place until May 31, 2020. BOS likely to extend if necessary.
- Rent deferral addenda. Presently rent not paid in April or May 2020 will be due in June. Likely the Marin County BOS may extend if shelter in place remains in effect through April.
- Advising landlords to wait for tenant request for rent deferral. If a tenant requests, tenant to provide three months of bank account statements.
- Courts closed for now until April 8. California Supreme Court Chief Justice Tani G. Cantil-Sakauye ordered all trials continued 60 days from March 23, 2020. So, no eviction cases until June at the earliest and likely July.

RESIDENTIAL SALES

- No new residential showings should occur because of shelter in place restrictions.
- Can brokers meet fiduciary duty selling property which a buyer only views virtually, and inspectors not able to enter the property.
- Title companies, inspectors, operating far below normal capacity.
- CAR, Professional Publishing have developed COVID-19 Addenda.
- Disclosure Issue. If occupant of property tests positive for COVID-19.



LITIGATION IN THE AGE OF ZOOM

- See Attachment. “Can you hear me?”



QUESTIONS

- Send email to Mee Mee Wong, mwong@marinbar.org
- Use Chat Room Feature.