



March 26, 2020

Friends:

In the wake of local colleges and universities closing, we understand that many of you have received calls and emails from tenants, tenants' guarantors and parents. Some are seeking to terminate their lease. This update is intended to provide you with some of the relevant legal background associated with your lease agreements and provide the reason why the tenants are not permitted to terminate their lease.

We previously sent you several updates addressing rent deferral due to a tenant's financial hardship associated with the effects of COVID-19 (layoff, furlough, shortened hours, business closed, etc.). We continue to recommend working with the tenant to develop a payment deferment or payment plan. This approach is supported by the National Multifamily Housing Council which recommends that rental property owners halt nonpayment-based evictions for 90 days, create payment plans, and waive late fees.

Despite your efforts to assist tenants and their families, you may have tenants (or their parents) who insist on terminating their lease because of the present state of emergency and/or the closure of their schools. The legal issues raised by tenants and their parents are described below.

### Force Majeure:

Your lease agreement may contain a *force majeure* clause. The principle behind *force majeure* is to protect the party to a contract who would be affected by occurrences beyond their control such as a tornado or a supply chain disruption or an earthquake or a labor strike. If you are using the standard NAA lease, your *force majeure* clause reads as follows:

**“FORCE MAJEURE:** If we are prevented from completing performances of any obligations hereunder by an act of God, strikes, epidemics, war, acts of terrorism, riots, flood fire, hurricane, tornado, sabotage, or other occurrence which is beyond the control of the parties, then we shall be excused from any further performance of obligations and undertakings hereunder, to the full extent allowed under applicable law.”

In this case, the clause is only designed to protect the landlord; the tenant does NOT enjoy the same protection. That is, the *force majeure* clause as written above will not serve as a basis for the tenant to terminate their lease.

A *force majeure* clause may be written to apply to both parties to the contract. Such a clause would be available to both the tenant and the landlord to excuse their performance under the lease agreement if a *force majeure* occurrence takes place and creates the party's inability to meet their contractual obligations. The language of a two-sided *force majeure* clause would be something like the following:

"No party shall be liable or responsible to the other party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement, when and to the extent such failure or delay is caused by or results from acts beyond the impacted party's reasonable control, including, without limitation, the following *force majeure* events: acts of God; flood, fire, earthquake; catastrophes such as epidemics or explosion; war, invasion, terrorist threats or acts, riot or other civil unrest...."

Under this language, a tenant whose inability to make rent payments has been caused the COVID-19 outbreak may be able to terminate the lease agreement. If it is unclear whether your lease agreement contains a *force majeure* clause, or what kind of clause your contract contains, please contact us to review it.

### **Doctrine of Impossibility / Frustration of Commercial Purpose**

Tenants may attempt to argue that they are entitled to terminate their lease agreement because performance (rent payment) has become impossible due to circumstances beyond their control. Some will argue the "circumstance" is the Covid-19 outbreak resulting in the loss of jobs or income. Other will argue the "circumstance" making performance impossible is the closure of the university. Our firm can assist you in drafting a response to tenants as to why this doctrine does not apply. The risk of losing income or having to withdraw from school is always present. Moreover, the closure of the university does not prevent either the landlord from providing housing or the tenant from paying rent.

Another argument they may make is that the purpose of the lease for student housing has been "frustrated" by the closure of the college or university the tenant attends. That is, an unforeseen event (the college or university closure due to COVID-19) has destroyed the object or purpose of the contract (renting an apartment to facilitate attending school). Here, we take the position that the purpose of the lease agreement is to provide housing – not education or "the college experience" – and that housing is still available and safe. The suggestion from the University of Tennessee that students should return to their permanent residences is not a mandate. Even if the tenant does return to their family for a period of time, it does not excuse their obligation to pay rent under the lease contract.

Our response to both of these arguments is that although the present circumstances have created difficulty for many tenants – financial and otherwise – they do not create a basis upon which to terminate the lease agreement. You have powerful tools at your disposal – repayment and forbearance agreements - that should be used to address residents’ concerns and to encourage them to honor their lease contracts. If you would like us to draft specific responses tailored to your needs, please let us know.

Mike King	<a href="mailto:mjk@painerwater.com">mjk@painerwater.com</a>	(865) 342-9970 (direct)
Barbara Doolittle	<a href="mailto:bkd@painerwater.com">bkd@painerwater.com</a>	(865) 342-9946 (direct)
Kendell Garrett	<a href="mailto:kmg@painerwater.com">kmg@painerwater.com</a>	(865) 342-9960 (direct)
Cathi Wormsbacher	<a href="mailto:crw@painerwater.com">crw@painerwater.com</a>	(865) 342-9949 (direct)

Sincerely,

*Mike*

Michael J. King  
**Paine Tarwater Bickers LLP**  
900. S. Gay Street, Suite 2200  
[Knoxville, TN 37902-1821](http://www.painetarwater.com)