



# DO I HAVE TO PAY RENT DURING THIS CRISIS?



HOSPITALITY  
INDUSTRY  
ATTORNEYS

**We will begin shortly.**

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\*This webinar is being recorded and will be available at [www.frla.org/webinars/](http://www.frla.org/webinars/).

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# SPEAKERS

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# PRE-COVID COMMERCIAL LEASING LANDSCAPE

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Not tenant friendly for many reasons...

- Landlords use their form leases which are VERY landlord-favorable and put all risks on the tenant.
- Tenants do not properly read or negotiate leases at the outset.
- Very hot market where tenants had little leverage in lease negotiations. Many leases signed under duress.
- Landlords generally tend to have more money and better lawyers, resulting in landlord-friendly rulings by the courts, which sets a bad precedent for future litigation.





## BUT THE LANDSCAPE IS CHANGING...

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- Brick and mortar retail is dying. The office sector may follow as people realize they can be productive from home. So there are fewer tenants looking to acquire space.
- More leases will be in default due to COVID-19. People are not lining up to lease new spaces right now.
- COVID-19 and the resulting forced closure of the global economy was unforeseen and unprecedented in earth's history. Annual events have been canceled, including events that have happened annually since the Middle Ages!
- “Social Distancing” has affected judges/courts as well as restaurants.



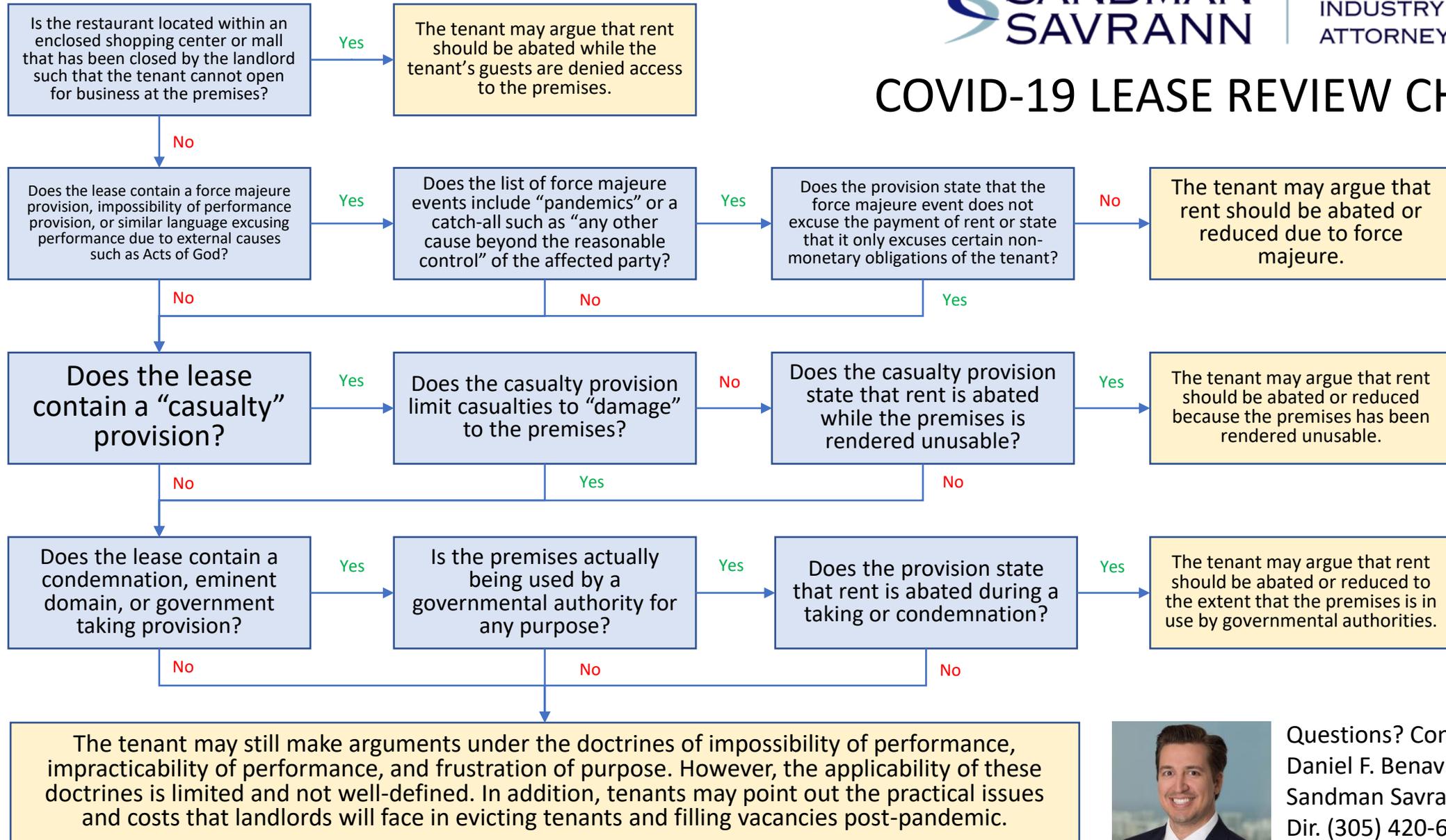


# EVERY LEASE IS DIFFERENT

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- Today we will discuss general defenses and language that may apply to some commercial leases.
- But every lease is different.
- These defenses may apply to some leases but not others.
- So it is critically important to read each and every sentence in the lease. Don't be afraid to be creative!!

# COVID-19 LEASE REVIEW CHART



Questions? Contact:  
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## Question 1 - ACCESS

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- Is the restaurant located within an enclosed shopping center or mall that has been closed due to COVID-19?
- If so, argue that rent should be “abated” while the tenant’s guests are denied access to the premises.





## Question 2 – FORCE MAJEURE

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- Does the lease contain a force majeure provision, impossibility of performance provision, or similar language excusing performance due to external causes such as Acts of God?
- Does the list of specified events include (or arguably include) pandemics? This has been interpreted narrowly.
- Does the provision state that the force majeure event does not excuse the payment of rent?
- Tenant may argue that rent should be abated due to force majeure.
- Force majeure provisions are not always good – must read the language carefully.





## Question 3 - CASUALTY

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- Does the lease contain a “casualty” provision?
- Does it only apply to damage? **Note** that local orders in Key West and Broward have stated that COVID-19 constitutes physical damage – so these orders should also be referenced.
- Does the casualty provision state that rent is abated while the premises is rendered unusable?
- If yes, tenant may argue that rent is abated.





## Question 4 - CONDEMNATION

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- Does the lease contain a condemnation (eminent domain or taking) provision?
- Is the premises actually being used by a governmental authority for any purpose? This may be required.
- Does the condemnation provision state that rent is abated while the premises is rendered unusable?
- If yes, tenant may argue that rent is abated.



## WHAT IF NONE OF THE ABOVE APPLIES?

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- “Frustration of Purpose” defense. Must show that:
  - The event was unforeseen by the parties;
  - The event was caused by a third party or outside force; and
  - The event makes performance of the contract contrary to the original understanding of the parties
- The remedy is probably “rescission” of the Lease, and may release the guarantor from liability.
- This defense rarely applies, but COVID-19 is a unique situation and Courts may be sympathetic.





## WHAT IF NONE OF THE ABOVE APPLIES?

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- “Impossibility of Performance” defense. Must show that:
  - An event has occurred that makes performance, or performance in the contemplated sense, impossible or impracticable;
  - The party seeking relief must not have been at fault in causing the event to occur;
  - Non-occurrence of the event must have been a basic assumption upon which the contract was made; and
  - The party seeking relief must not have assumed the risk of the event occurring.
- Again, this defense rarely applies (especially as to payment of rent, which is not “impossible”), but COVID-19 is a unique situation and Courts may be sympathetic.



# PRACTICAL CONSIDERATIONS FOR LANDLORDS

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- Litigation can be expensive.
- It will take time to evict tenants. Courts are backed up and future legislation may halt evictions.
- Inability to quickly fill vacancies post-COVID.
- Even if landlords can fill vacancies, any new tenants will almost certainly want better deal terms and lower rents than the existing leases.
- Broker fees and commissions.



# PRACTICAL CONSIDERATIONS FOR TENANTS

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- Litigation can be expensive.
- Winner (likely the landlord) usually recovers attorneys fees per leases.
- Jury trial is usually waived in leases.
- Personal guaranties may be triggered.
- Tenant may have other assets at risk such as a liquor license, equipment, security deposit, letter of credit, as well as sunk build-out costs, making it difficult to simply walk away.
- Tenant may receive PPP funding or other government assistance.
- Insurance may provide coverage for losses....



## ONE MORE THING - INSURANCE

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- If you have property or business interruption insurance, you may have coverage for COVID-19 losses.
- Do not be discouraged simply because your claim has been denied or you have a virus exclusion.
- Our firm has teamed up with many insurance plaintiffs' law firms across the US to review insurance policies for **free and with no obligation** to determine if there is coverage. If there is coverage, they will take your case on contingency, meaning that they only collect if you collect.
- If interested, send your insurance policies to [dbenavides@sandsav.com](mailto:dbenavides@sandsav.com).



## SUMMARY

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- Read your Lease! Use the tool.
- Determine if you have any defenses.
- Consider the practical considerations such as assets and personal guaranties, as well as potential sources of revenues and assistance during this crisis.
- Once you know where you stand, negotiate a deal with the landlord.
- We have provided a sample landlord letter and tool to assist with the above.
- If you need assistance reviewing your lease, we are offering to review individual leases for a \$500 fixed fee. Send leases to Daniel Benavides, Esq. at [dbenavides@sandsav.com](mailto:dbenavides@sandsav.com).





# QUESTIONS??

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