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CLIENT ALERT

Simon Says: The Gap Owes Millions in Unpaid Rent

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As shopping centers and businesses affected by the COVID-19 pandemic begin to reopen across the country and most landlords and tenants work toward mutually agreeable solutions, the first domino in the standoff between retail landlords and tenants has fallen: Simon Property Group, the country's largest shopping mall operator, is suing The Gap, one of its largest tenants, for allegedly failing to pay almost $66 million in rent.

The lawsuit, filed Tuesday in Delaware state court, is emblematic of the issues facing many commercial landlords and tenants struggling to recover from the effects of government-mandated closures and restrictions on travel and business operations. And while not all retail businesses have been equally impacted, most have been forced to temporarily shut their doors, reduce operations, furlough/lay-off employees, and/or go out of business, not to mention suffer steep declines in revenue.

In its complaint, Simon alleges that Gap, a company whose brands include Old Navy, Banana Republic, Intermix, and Athleta, refused to pay rent and other charges due under its leases at Simon-owned shopping centers for the months of April, May, and June 2020. While Gap has not yet articulated its arguments for not paying rent in a public document, based upon a reading of a notice sent from Simon to Gap, Gap is contending that, as a result of Simon's temporary closure of shopping centers triggered by the pandemic, the obligation to pay rent under its leases is temporarily suspended or excused based on one or more of the following defenses: (i) *force majeure*, (ii) Simon's failure and/or inability to satisfy a condition precedent to Gap's obligation to pay rent, and/or (iii) Simon has prevented or denied Gap from accessing its leased premises at the shopping centers.

It is worth noting that the Delaware court's analysis of the issues in the case are largely dependent on the specific lease language negotiated between Simon and Gap and the state law that applies to the individual leases. And while the theories advanced by both parties are not necessarily novel, their application in the midst of the pandemic is unprecedented.

Tuesday's suit certainly is not the first for unpaid rent in the midst of the current crisis, but it is one of the most significant as it involves two titans of retail and the attempted consolidation of issues under individual leases in one forum. As such, the Delaware court's decision is likely to function as a test case for the retail industry as a whole. If the court adopts Simon's logic, retail tenants already suffering from steep declines in revenue could face an uphill battle obtaining rent relief and/or other redress from their landlords, resulting in a potential litany of additional lawsuits and permanent business closures. On the other hand, landlords will argue that excusing tenants from temporarily paying rent and other charges due under leases as a result of the pandemic could have a detrimental impact on landlords' ability to pay property taxes, maintenance and operating expenses, and/or loan payments and could ultimately put landlords at risk of being unable to continue operations and generate revenue, or worse, losing their shopping centers.

If you have any questions regarding this case, its potential impact on your business, or about your organization's options for dealing with its own leases as they relate to the pandemic, please contact one of the authors of this alert or another member of Winston & Strawn's Real Estate Group.

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