



EDITORS

Robert A. Jacobs
Kara I. Rakowski
Aaron Shmulewitz

SPECIAL COVID-19 EDITION

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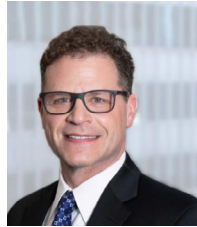
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Message from the Managing Partners



The COVID-19 pandemic and the resultant federal, state and city emergency orders are a first for our nation, state and city, and have affected virtually every facet of daily life. We, like you, are concerned for the health and safety of our families, colleagues, clients and their families. The fear and uncertainty, coupled with a quarantine, closure of courts

and administrative agencies, and near-shutdown of the city, have and will continue to reverberate and impact all of us with unknown economic and business consequences.

Unprecedented times call for unprecedented measures. Belkin Burden Goldman, LLP wants our clients and the real estate community to know that we are standing **SIDE BY SIDE WITH YOU**. Although we are working remotely, we are there for you. Whether you need (i) help preparing a COVID-19 residential or commercial Rent Deferral Agreement, (ii) review of a lease or contract to determine whether a force majeure clause applies to your situation, (iii) advice and counsel as to how to manage your building, whether a cooperative, condominium, residential or commercial, relating to services, the impact of closing amenities, a tenant unable to pay its rent, how to handle cleaning, or what to do when a tenant self-quarantines or tests positive for COVID-19, (iv) assistance in obtaining a loan pursuant to the Federal Paycheck Protection Program; or (v) to just hear a reassuring voice to provide you with counsel, we are there for you.

We have created teams across our transactional, administrative, cooperative/condominium and litigation departments to provide you with sage advice in facing novel COVID-19 issues. For example, our clients have asked and we answered in creating proprietary residential and commercial Rent Deferral Agreements specifically tailored to address COVID-19 issues. We have also put together a multidisciplinary team of attorneys from different departments at the firm to assist clients in completing their Paycheck Protection Program applications and answer any questions that they may have about the process. We have and will continue to provide our clients with email blasts alerting them to the latest facts and issues so they can better navigate this new reality.

We have prepared this special edition of our newsletter to help you address many of the issues you are facing on a day to day basis. We appreciate your continued confidence and loyalty. As always, we will continue to be there for you.

Sincerely,

Dan Altman and Jeffrey L. Goldman

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COVID-19 Rent Deferrals—The Time to Act is Now

BY LEWIS A. LINDENBERG AND
JEFFREY L. GOLDMAN



The Coronavirus has impacted our personal and business lives in ways not previously imaginable. This article will address the impact of the Coronavirus on owners' ability to collect rent in the near future from both commercial and residential tenants. We will explain why rent deferral agreements provide both owners and tenants with viable options to address the current untenable situation caused by the Coronavirus. In the short term, many owners want to help and recognize that in certain circumstances, rents cannot be immediately paid. Considering that the Courts are closed for the time being, the preservation of the right to collect rent in the immediate future is paramount.

On March 27, 2020 the President signed into law The Coronavirus Aid, Relief, And Economic Security Act ("Cares Act"). This law provides economic relief to small businesses which may include loans through the Small Business Administration ("SBA"). As of this writing, no directive or federal, state or city law suspends the obligation for the payment of rent. When Governor Cuomo was asked on March 30, 2020 whether rent was still due from tenants, he indicated that although eviction proceedings are stopped, *rent is still owed*.

The following suggestions are the result of a culmination of many conversations with clients over the past few weeks. No two situations are alike and each requires a case by case review. The terms of rent deferral agreements, both for commercial and

residential tenants, can vary: a percentage reduction in current rent, a reduction of the current commercial base rent but the payment of additional rent [e.g., water charges or real estate taxes] and the balance or deferred rent can then be paid back in such increments and over whatever period of time is agreed upon.

A critical factor to consider is the economic benefit of the certainty of having a tenant [whether residential or commercial] remain in possession paying rent, even at a reduced level, in these challenging times and thereafter. Does the lease expire shortly? What are the anticipated market conditions? Will the new normal of working remotely from home impact the office market with tenants requiring less space? Consideration must also include whether a lease has a guarantor, the financial strength of that guarantor and whether the guaranty permits the owner to proceed against the guarantor without first taking action against the tenant.

For residential tenants, while the options are the same, drafting a rent deferral agreement must be done carefully to avoid claims of preferential rent, change to the legal regulated rent, and so that decisions and agreements do not give rise to claims of discriminatory conduct or violations of the human rights law.

Our firm has 31 years of experience drafting these agreements and have built in protections for owners such as (a) conditioning deferral on a commercial tenant filing a claim under its business interruption insurance policy, and (b) requiring any tenant that receives reimbursement for rent from any city, state or federal program [e.g., SBA loan and/or the Cares Act] to pass the benefit to the owner relating to any deferred rent.

The best time to prepare is now so you are ready when the calls or emails begin—if they have not already—from your commercial and residential tenants.

If you need assistance in any facet of this process, please feel free to contact either Jeffrey L. Goldman at jgoldman@bbgllp.com or Lewis Lindenberg at llindenberg@bbgllp.com.

Mr. Goldman is Chair of the Firm's Litigation Department and Co-Managing Partner; Mr. Lindenberg is a partner in the Litigation Department.

Court and Agency Practices in Response to Coronavirus



BY SCOTT
LOFFREDO

The Coronavirus Pandemic has caused Governor Andrew Cuomo,

New York State Courts and various Government agencies to issue various orders, directives, policies and notices advising of court closures, extensions of deadlines, tolling of statutes and stays of all residential and commercial evictions. Below is a comprehensive summary of the relevant information through March 31, 2020:

1. Statutes of Limitations

N.Y.S. Executive Order 202.8

- Located [here](#).
- Governor Cuomo tolled all statutes of limitations set forth in the CPLR, Family Court Act, Criminal Procedure Act, and the Uniform Courts Act (among others) from March 20, 2020 through April 19, 2020.

2. Stay of all Evictions

N.Y.S. Executive Order 202.8

- Governor Cuomo has stayed enforcement of all residential and commercial evictions for a period of ninety (90) days from March 20, 2020.

3. New York State Uniform Court System Suspension of all Non-Essential Matters

Administrative Order of Chief Judge Lawrence Marks Dated March 20, 2020 found [here](#).

- Consistent with Governor Cuomo's Executive Order, Chief Judge Lawrence Marks issued an Administrative Order effective March 20, 2020 that until further notice no filings shall be accepted "by a county clerk or a court in any manner not included on the list of essential matters" which was specified by Judge Marks to be:

A. Criminal Matters

- Arraignments and bail applications
- Reviews and writs
- Temporary orders of protection
- Resentencing of retained and incarcerated defendants
- Essential sex offender registration act (SORA) matters

B. Family Court

- Child protection intake cases involving removal applications
- Newly filed juvenile delinquency intake cases involving remand placement applications, or modification thereof
- Emergency family offense petitions/temporary orders of protection
- Orders to show cause
- Stipulations on submission

C. Supreme Court

- Mental Hygiene Law (MHL) applications and hearings addressing patient retention or release
- MHL hearings addressing the involuntary administration of medication and other medical care
- Newly filed MHL applications for an assisted outpatient treatment (AOT) plan

- Emergency applications in guardianship matters
- Temporary orders of protection (including but not limited to matters involving domestic violence)
- Emergency applications related to the coronavirus
- Emergency Election Law applications
- Extreme risk protection orders (ERPO)

D. Civil/Housing matters

- Applications addressing landlord lockouts (including reductions in essential services)
- Applications addressing serious code violations
- Applications addressing serious repair orders
- Applications for post-eviction relief

E. All Courts

- Any other matter that the court deems essential.

4. Civil Court Suspends the Filing of Any Non-Essential Eviction Proceedings

Civil Court Directive 207

- Located [here](#).
- Judge Anthony Cannataro, Administrative Judge of the City of New York, citing to the Executive Order of the Governor and the subsequent Order of Hon. Lawrence Marks issues Directive 207 directing the clerks of all civil court to only accept filings for "essential matters" defined by Hon. Lawrence Marks as (i) addressing landlord lockouts (including reductions in essential services); (ii) applications addressing serious code violations; (iii) applications addressing serious repair orders; (iv) applications for post-eviction relief.

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- Filing of any matters seeking eviction is considered non-essential and will not be accepted.

5. Supreme Court New York County Court Practices

A “Notice” was sent to all active E-Filed cases in NY County citing to Judge Marks’ Order stating the following:

- Essential applications will be heard at 60 Centre Street—80 Centre and 71 Thomas are closed.
- Fully briefed motions scheduled for oral argument will be marked for submission unless otherwise informed by the sitting Justice (who may schedule oral argument by phone).
- Foreclosure sales and conferences have been adjourned.
- Motions in Part 130 will be adjourned 30 days. Working copies should not be submitted to room 130 unless already fully briefed they’ll be submitted.
- No automatic rescheduling of oral arguments until further notice.

6. Appellate Division 2nd Department *Emergency Extension Order*

- March 17, 2020 Order of Justice Alan Scheinkman located [here](#).
- All deadlines indefinitely suspended and motions after March 17, 2020 indefinitely adjourned.

7. Appellate Division 1st Department *Emergency Extension Order*

- March 17, 2020 Order of Justice Rolando Acosta located [here](#).
- With exception of matters perfected for May 2020 or June 2020 terms, all other deadlines are indefinitely suspended.

- With exception of motions related to the May 2020 or June 2020 term, all motions to extend time are granted across the Board to the extent of suspending deadlines indefinitely.

8. DHCR ADVISORY OPINION 2020-1

- Located [here](#).
- All agency matters not “final” before March 13, 2020 are extended for purposes of filing submissions by 30 days. The agency will be re-evaluating the need for any further extensions of time. These include:
 - Any time provided by ORA notice, bulletin, or regulation to respond to or file any application or administrative proceeding.
 - Excepted from these extensions are: written responses to harassment complaints and service complaints identified by ORA as involving emergency conditions, tenant’s applications for a rent reduction that cite emergency conditions such as a vacate order issued by a municipal agency, fire damage requiring a vacatur, no water (apartment wide), inoperable toilet, collapsed or collapsing ceiling or walls, collapsing floor, no heat/hot water (apartment wide), broken or inoperative apartment front door lock, all elevators inoperable, no electricity (apartment wide), window to fire escape (does not open), water leak (cascading water, soaking electrical fixtures), window-glass broken (not cracked), broken/unusable fire escapes, air conditioner broken (summer season).
 - Any time to otherwise file what would have been, as of the effective date of this opinion, a timely petition for administrative review (PAR) from an order of an ORA rent administrator.
 - Any time provided to respond to an individualized TPU investigation into a single apartment review will be extended,

unless TPU otherwise expressly requests a response after the issuance of this Advisory opinion.

- All Agency hearings, conferences, and continuances of those hearings and conferences are postponed. Parties will be advised of a subsequent rescheduled date which may include alternative means to hold those hearings and conferences.
- Public requests for documents under the Freedom of Information Law (FOIL) may continue to be filed online at openfoil.ny.gov. All records access requests, by owners, Advisory Opinion 2020-1 (March 18, 2020) 2 of 2 tenants, and authorized representatives, may continue to be filed through email at [OR ARecords@nysdcr.org](mailto:ARecords@nysdcr.org) but not in person.

9. Loft Board Tolls Deadlines Through April 19, 2020

- Located [here](#).
- On March 25, 2020, the Loft Board issued a “Service Notice” advising that “the deadlines for filing documents with the Loft Board, as required by the Loft Board’s rules, are extended until April 19, 2020.
- The Loft Board’s notice states that “Loft Board customers are being urged to wait until April 19th to file any documents that must, according to the Loft Board’s rules, be filed in person or by mail. Where the law and rules allow submission via other methods, communications and documents should be submitted by email to nycloftboard@buildings.nyc.gov. Effective Wednesday, March 25, 2020, customers who wish to file documents before April 19th may either mail or drop-off their documents in the designated drop-off box located in the lobby of 280 Broadway, New York, NY. Drop-offs are accepted on Thursdays from 9:00 am to 4:00 pm.”

Building Owners, Co-Ops and Condos Should be Eligible for SBA Loans Under CARES Act



BY AARON SHMULEWITZ

On Friday, March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, And Economic Security (“CARES”)

Act; the text of the Act can be accessed [here](#).

The purpose of the CARES Act is to stimulate the economy in various ways to address the extreme impact of the COVID-19 outbreak on businesses and individuals.

One key feature of the CARES Act is a loan program dubbed the “Paycheck Protection Program”. This program creates a fund of approximately \$300 billion for low-interest loans from the Small Business Administration (SBA) to employers, the primary purpose of which is to help such businesses pay various fundamental operating expenses during the next few months. The goal of the program is to incentivize such businesses to retain their employees during this period, thus indirectly seeking to stem unemployment, by providing for forgiveness of such loans based on the level of retention of employees by such an employer. In other words, the fewer employees that an employer lays off,

the greater will be the portion of such loan that the employer will not have to repay. FAQ’s for this program can be accessed [here](#).

Many building owners, and virtually all co-ops and condos, should be eligible to apply for such loans, which could prove to be of invaluable assistance in offsetting rent, maintenance and common charges lost in the coming months due to business shutdowns by building commercial tenants, and economic reverses by commercial as well as residential tenants and apartment owners that impede their ability to pay their monthly obligations.

Briefly, the Act provides that “any business concern” with, generally, fewer than 500 employees will be eligible to receive such a loan. The amount that can be borrowed will be an amount equal to the average monthly payment by an employer for payroll, mortgage, rent and any other debt obligation paid during the prior twelve months, multiplied by four (to a maximum of \$10 million).

The loan funds can be used for the employer’s payroll and employee benefits, mortgage expense, rent, utilities and any other pre-existing debt expense of the employer during the period ending June 30, 2020, as of now.

Most building owners and virtually all co-ops and condos would appear to be eligible for such loans.

Most buildings are owned by single-purpose entities, and all co-ops and condos are by definition single-purpose entities. Most such ownership entities, and virtually all co-ops and condos, have fewer than 500 employees. At least in New York City, most building employees are members of unions, a fact that militates against owners terminating employees easily and quickly. Thus, it would appear that most building owners, and virtually all co-ops and condos, are perfectly-situated to take advantage of this new program.

Such loans are available from various lenders on a list promulgated by the SBA. It would seem that the party best suited to prepare, submit and shepherd applications through to funding would be the managing agent of any such building owner, co-op or condo.

Needless to say, it is likely that the roll-out will be bumpy, confusing and frustrating. However, the ultimate reward would appear to make the effort worthwhile.

*Please contact **BBG** with any questions.*

Construction Work Authorized to Proceed—Essential vs. Non-Essential



BY RON MANDEL

On March 30, 2020, the NYC Department of Buildings (“DOB”) issued

a memorandum providing guidance concerning the type of construction activity that may continue during the COVID-19 public health emergency. The DOB identified “essential” vs. “non-essential” construction, in accordance with Governor Cuomo’s

Executive Order 202.6 and the Guidance on Executive Order 202.6 and subsequent orders published by the Empire State Development Corporation (“ESDC”), last updated on March 27, especially its Item 9.

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As clarified by the DOB memorandum, the ESDC Guidance document provides in relevant part:

- Essential construction may continue and includes work on affordable housing, utilities, infrastructure, hospitals or health care facilities, and homeless shelters.
- All non-essential construction must be suspended except in cases of emergency construction (including projects necessary to protect the health and safety of occupants or those projects that would be unsafe to remain at their level of completion).
- At every site, if essential or emergency non-essential construction continues, social distancing is mandated. Job sites

that cannot maintain distance and safety best practices must be shut down and enforcement activity will be taken by the State in coordination with the City of New York. There exists the potential for fines of up to \$10,000 per violation.

- For purposes of Executive Order 202.6, construction work does not include situations with a single worker on a job site.

On March 30, 2020, DOB also issued Buildings Bulletin 2020-004 providing guidance on requirements to secure construction for the duration of the State's orders. The Buildings Bulletin speaks to demolition sites, projects during their excavation and foundation phases, as well as work in existing buildings. It specifies that contractors and property owners may move

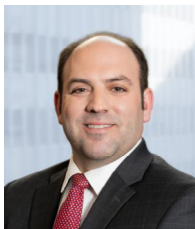
forward on select construction work (and required inspections) to ensure that project sites are safeguarded and maintained in such a manner as to protect the public and property throughout the period that operations are suspended.

Although we hope that development activity will return to normal soon, we are providing clients, their contractors, architects and engineers with guidance regarding compliance issues concerning the DOB and the Governor's restrictions.

Ron Mandel is a partner in the Firm's Transactional Department concentrating in land use, zoning and related areas, and can be reached at RMandel@bbgllp.com or 212-867-4466 (Ext. 424).

Force Majeure Effects on Commercial Leases

BY LEWIS A. LINDENBERG AND JOSHUA ZUKOFSKY



As businesses across New York are experiencing financial loss due to the impact of the COVID-19 pandemic, many commercial tenants are hopeful that force majeure provisions in their leases will excuse their obligation to pay rent and additional rent. Such hopes may be misplaced.

All owners should be analyzing their commercial leases to determine whether a force majeure (or "Act of God") provision exists and, if it does, the extent to which it may potentially provide for the relief of the rent payment obligation. As a starting point, if a lease does not include a force majeure provision, an owner should have some level of comfort that the tenant will not have a viable claim. The balance of this article will be spent analyzing the potential application of force majeure provisions in commercial leases.

In general contract analysis, an "Act of God" has included: terrorism, wars, natural disasters, and labor strikes. A force majeure provision will "excuse nonperformance due to circumstances beyond the control of the parties". *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900 (1987). When determining whether a party's performance has been excused, Courts limit the application of a force majeure provision to the specific acts considered under the lease. If the lease does not specifically provide for a "pandemic" or

"government prohibition" as trigger events, the loss of business alone will generally not be sufficient. *Urban Archaeology Ltd. v. 207 E. 57th St. LLC.*, 68 A.D.3d 562 (1st Dept. 2009). Beyond the fact that Courts will limit the application of a force majeure provision, most commercial leases provide that rent shall not be suspended, offset or abated under any situation.

If the language of the lease is unclear, or certain language might suggest that the current situation might warrant consideration of the application, the Courts will have to determine whether a global pandemic meets the criteria set forth in the lease as an "Act of God" and potentially act as a means for the rent to be reduced or abated. While this pandemic has affected businesses in ways that could never have been predicted or expected by any of the parties, pandemics are generally not something that were included as an "Act of God" in previous cases, and, thus, under

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strict contract interpretation will generally not act as a means to excuse a tenant's performance under the lease.

It is important for all owners of properties containing leased commercial, retail and professional space to begin reviewing

their leases and consulting with counsel to determine whether their leases include a force majeure provision, and whether any such provision contains specific language which could impact the tenant's obligation to pay rent, so as to try to address these issues proactively in this ever-changing legal climate.

Lewis A. Lindenberg is a partner, and Joshua Zukofsky is an associate, in the Firm's Litigation Department.

For information on legal issues surrounding force majeure and related topics, they can be contacted at 212-867-4466 or at llindenberg@bbgllp.com and jzukofsky@bbgllp.com, respectively.

Annual Meetings and COVID-19: The Season of Our Discontent



**BY AARON
SHMULEWITZ**

The COVID-19 virus outbreak in New York City will very likely impact the ability—and

desire—of New York City cooperatives and condominiums to hold their annual meetings this spring. (Most co-ops and condominiums hold their annual meetings in the spring, since most co-ops and condos have fiscal years that end December 31; many co-ops' and condos' bylaws actually call for the annual meeting to occur by a stated date, most often May 31 or June 30.)

I, and other co-op/condo attorneys, have been inundated by inquiries from numerous Boards and managing agents asking about the effect of postponing their annual meetings in light of governmental directives limiting the number of persons who can attend gatherings.

Boards and constituents should recognize that there is effectively no harm or exposure in postponing a building's annual meeting, including beyond an outside date explicitly stated in the bylaws, especially in light of the current emergency situation.

First, State law expressly provides that, at least with regard to co-ops, the failure to hold an annual meeting does not invalidate the subsequent actions of the corporation. While there is no such similar statutory provision for condos, it is highly likely that a Court would also find similarly in the case of a condominium that delayed its annual meeting, especially in light of the effective impossibility of holding such a meeting under current government directives.

Second, on March 20, 2020, Governor Cuomo issued Executive Order 202.8, which suspended the operation of Business Corporation Law sections 602 and 605, which typically require that a physical meeting of a corporation's shareholders occur annually. Thus, no actual meeting of a co-op's shareholders need occur during the period of emergency. (As above, while the Executive Order did not address condominiums, a similar outcome would be very likely if a condominium's decision to delay its annual meeting were ever challenged in Court.)

Moreover, BCL section 602 was—coincidentally—amended in late 2019 to allow corporations' annual meetings to include mechanisms for electronic

attendance (like a wide-scale video conference, or dial-in phone call), and electronic voting, by shareholders. The statute provides that the corporation's Board of Directors is to establish such provisions and mechanisms, and that shareholder consent is not necessary. Thus, if a Board can somehow devise a system to allow numerous shareholders to see or hear the meeting simultaneously (like universities are now doing with on-line classes through Zoom), that would satisfy the "attendance/quorum" issues. In addition, if a Board and its managing agent can implement an e-voting mechanism, that would satisfy that requirement as well. A Board could also announce that proxies can be emailed, or faxed, and/or that emails can be sent in lieu of a printed proxy form. (Once again, no similar provision was adopted yet for condos, but, it can be assumed, it is only a matter of time until one is.)

Having said the above, co-op Boards should be aware of one provision in the law (BCL section 603), which provides that if an election has not occurred for at least 13 ½ months, as few as 10% of the shareholders may demand that a special meeting of shareholders occur for the sole purpose of conducting an election. Upon receipt of such a demand, the Board must schedule such a special meeting to occur between 60-90 days thereafter. At such a meeting, however many (or few) shareholders show up would constitute a quorum—even

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10% or less would be sufficient to hold the election. However, since the law allows the Board to pick the date, that statute won't likely hasten the occurrence of the meeting any sooner. Since it would be likely that any voluntary delay by the Board would be until September or October, and the statute would result in roughly the same outcome, any such demand procedure by

shareholders would not have forced the meeting to occur any sooner than the Board would likely have established on its own.

In sum, Boards and managing agents should not fear postponing annual meetings until after the summer, at which time, hopefully, the industry, and life in general, will have returned to normal.

Aaron Shmulewitz heads the Firm's co-op/condo practice, and can be reached at ashmulewitz@bbgllp.com, or 212-867-4466.

Temporary Changes to Appellate Process During the Coronavirus Public Health Emergency



BY MAGDA CRUZ

New York appellate courts have effected a number of significant changes to their practice and procedure in response

to the partial state-wide closure of the courts due to the ongoing Coronavirus public health emergency. The following will summarize the changes affecting the appellate courts in the First Department (which covers cases in Manhattan and the Bronx) and the Second Department (which covers cases in the other boroughs, Long Island, Westchester, and other upstate counties).

A significant change is that oral arguments have been temporarily suspended and with few exceptions all perfected appeals will be made on submission until further notice. Counsel who wish to argue at the Appellate Division may request permission to do so but only via Skype. Such applications may only be made by email to the clerk of the respective Appellate Division. All appeals at the Appellate Terms (which hear appeals from the Civil Court and its Housing Part) will be on submission.

Another significant change is that in-person, hard copy filings are not permitted. Filings of briefs, records and motions may only be made on-line through the NYSCEF system. In the case of the Appellate Terms, which do not have an e-file system in place, filings may be made by overnight mail, but the filer is advised to first call the clerk's office to ensure that certain prerequisites that can only be met through the Civil Court can be timely completed or can be temporarily deferred.

Emergency applications for stays or other emergency relief can only be done via email to the email address designated by the clerk of the respective Appellate Division, with opposing counsel cc'd on the email. The clerk will then email counsel as to the time and manner in which the application will be heard.

Perhaps the most significant changes concern filing deadlines. The Second Department has suspended "indefinitely and until further directive of the Court" all perfection filings and other deadlines set forth in any rule or order of the Court. In addition, the Second Department has adjourned all pending motions, including

applications for an extension of time to perfect, pending a further directive of the Court.

The First Department (both Appellate Division and Appellate Term) has maintained its filing deadlines as set forth in its 2020 briefing calendar and in any pre-existing order for the May and June terms. But the deadlines for all subsequent terms have been suspended "indefinitely and until further directive of the Court."

It is important to note that the suspension of deadlines does NOT apply to **statutory** deadlines. Therefore, deadlines to file notices of appeal, or to make motions for leave to appeal, remain in effect and must be complied with to ensure that rights are not waived.

Magda Cruz is a partner in the Firm's Litigation Department, and heads its appellate practice.

If there are appellate matters that you wish to discuss, or you have questions concerning these new emergency procedures, please contact Ms. Cruz at mcruz@bbgllp.com.



Belkin · Burden · Goldman, LLP

270 Madison Avenue, New York, NY 10016



Belkin · Burden · Goldman, LLP

ATTORNEYS AT LAW

www.bbglp.com

New York Office 270 Madison Avenue, New York, NY 10016 | Tel: 212.867.4466 | Fax: 212.297.1859

Connecticut Office 495 Post Road East, 2nd Floor, Westport, CT 06880 | Tel: 203.227.1534 | Fax: 203.227.6044

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