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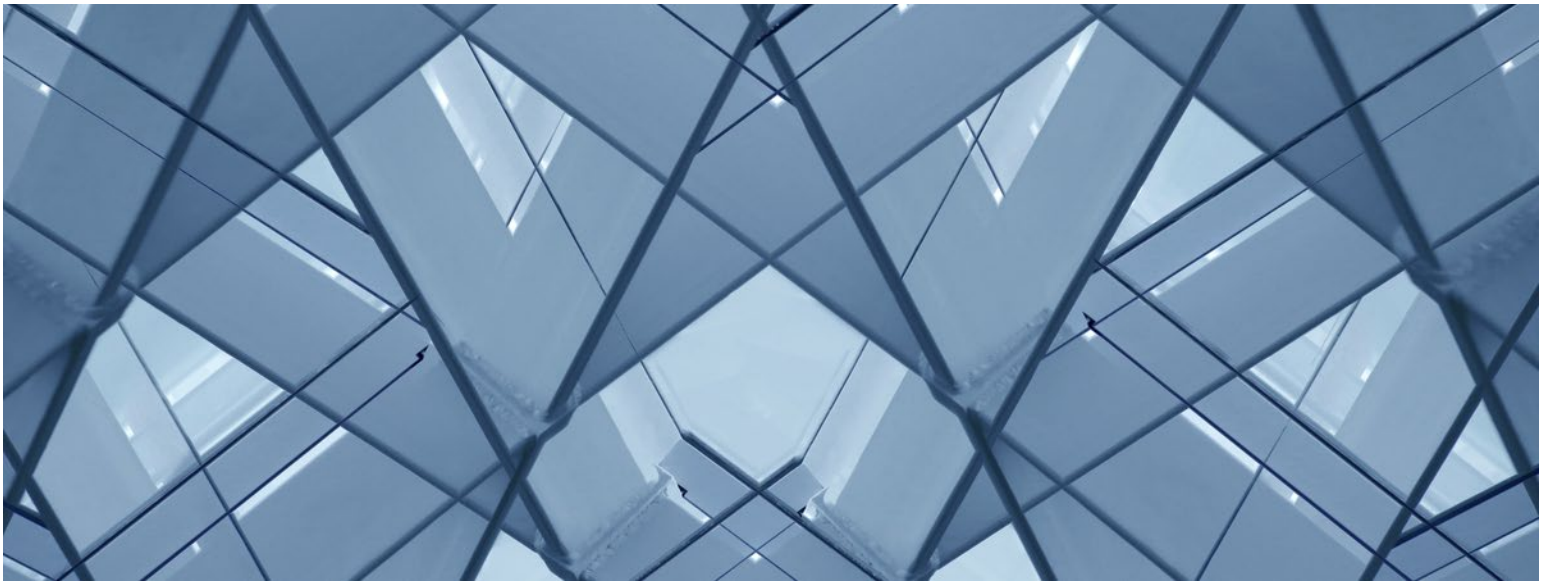

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It's The End Of The World As We Know It: But You Still Have To Pay Rent And Lessons Learned

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What does the post-COVID lease drafting and litigation landscape look like now when it comes to Force Majeure? Although it is not just about paying rent anymore (although it still has to be paid), what other considerations are there? This interactive Seminar with a transaction and litigation attorney will explore

what we've learned, and what language adjustments both landlords and tenants need to consider making and how courts have dealt with force majeure and might deal with it in post-COVID world.

I. Force Majeure – What is it?

The literal meaning from the French is "superior force."

1: superior or irresistible force
2: an event or effect that cannot be reasonably anticipated or controlled

Generally speaking, force majeure is a contract law concept. A force majeure clause is a contract provision that excuses a party's performance of its obligations under the contract when usually express circumstances arise beyond the party's control.

Before the COVID pandemic in 2020, a standard force majeure provision in a typical retail lease would look something like this:

> "Landlord and Tenant shall be excused for the period of any delay in performing any obligations under this Lease by reason of the wrongful or negligent acts or omissions of the other party, their agents, employees, or contractors, or by reason of labor disputes, civil disturbance, war, war like operations, invasions, rebellion, hostilities, military or usurped power, sabotage, governmental regulations or controls, fires or other casualty, or acts of God (referred to collectively herein as "Force Majeure"). Notwithstanding the foregoing, nothing contained in this Article shall excuse either party from paying in a timely fashion any payments due under the terms of this Lease."

But why have language like this in a lease? *Black's Law Dictionary* says the clause is "meant to protect the parties in the event that a contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care." Because force majeure is contract-based, courts look to the contract language when interpreting and applying force majeure clauses. The Seventh Circuit has noted that "a force majeure clause must always be interpreted in accordance with its language and context, like any other provision in a written contract, rather than with reference to its name." *Wis. Elec. Power Co. v. Union Pac. R.R. Co., 557 F.3d 504, 507 (7th Cir. 2009)*.

Typical force majeure events include acts of God, war, terrorism, governmental laws, regulations or orders, weather-related causes, labor strike, riots, labor shortage, and other events or causes beyond the parties' control. While sometimes stated as one of the express circumstances covered by the clause, the concepts of epidemic or pandemic were not typically included in force majeure provisions before the COVID-19 pandemic.

II. Force Majeure Claims Pre-COVID

Prior to 2020, the inclusion of a force majeure clause was, in some cases, viewed as a checklist item in a lease template. Usually, the language would intentionally be broad so as to act as a "catch-all" for an impacting event, the likelihood of such an event happening being very small. But even in those agreements where the FM language included specifics, the burden was still on the impacted party to provide notice to the other, not only within the time frames laid out, but also detailing how the events matched what the agreement stated. Failure to do so usually spelled trouble for the claiming party.

While not specifically dealing with a leasing situation, *Sabine Corp. v. ONG Western, Inc.*, 725 F. Supp. 1157, 1168 (W.D.Okla.1989) did establish the base concept of having to not only provide the required information for a force majeure claim, but also the timeliness of providing notice. 'The failure to give proper notice is fatal to a defense based upon a force majeure clause requiring notice.' This case would later be quoted in a lawsuit that DID involve a retail lease with the question of Force Majeure being raised. (*Three RP Ltd. P'ship v. Dick's Sporting Goods, Inc.*, (E.D. OK 2019)) In this case the FM event was a tornado that hit Oklahoma in 2017. Weather events can and have been categorized as Force Majeure events, although

the severity typically needs to be fairly impactful. Hurricanes, floods, and forest fires? Usually yes. Cold temperatures, snow (in climates where snow is typical)? Usually not so much.

III. What Have We Learned From a Litigation Perspective

Most readers are familiar with the litany of cases relying on the force majeure clause during the pandemic to attempt to escape monetary liability under contracts and leases. Although the law has not been definitively determined and is still being litigated, overall these efforts have not been successful.

Since the pandemic occurred, tenants cited the force majeure clauses in leases to excuse their performance and the payment of rent. Most courts, however, have rejected this attempt on the basis that either the lease itself shifted the risk of loss in such situations to the tenant in that it agreed to not offset the rent irrespective of what occurs and/or the provision itself simply did not apply simply because tenant would not be making money in the space as it had anticipated.

For example, if the provision itself did not include the pandemic, which pre-COVID was unlikely, then the other listed provisions may not spare the tenant. For example, in *40 West Hubbard, LLC v. RCSH Operations, Inc.*, the tenant ("Ruth's Chris") closed its restaurant, stopped paying, and terminated the lease after the COVID-19 pandemic started and Illinois government authorities imposed certain restrictions on businesses. 2022 U.S. Dist. LEXIS 180523, *2-3 (N.D. Ill. Oct. 3, 2022). In finding that the lease was not impossible to perform due to COVID-19 and related government orders, the District Court relying on a much older Illinois case, *Phelps v. Sch. Dist. No. 109 Wayne City*, 134 N.E. 312 (Ill. 1922), found that a pandemic was not unforeseeable and should have been accounted for in a contract. *Id.* at *22 (quoting *Phelps*, 134 N.E. at 314 ("It works no hardship on any one to require school authorities to insert in the contract of employment a provision exempting them from liability in the event of the school being closed on account of a contagious epidemic.")

Typically, the outcome was the force majeure clause did not excuse tenant's performance to pay rent due to economic hardship or the clause itself excepted out payments of money. And many of the cases find against the tenants even if the ruling may seem harsh. As stated in *Simon Prp. Grp., L.P. v. Regal Entm't Grp*, 2022 Del. Super. LEXIS 263, *15 (June 27, 2022):

> The Court acknowledges that this ruling may seem harsh. However, all parties to the Leases are sophisticated. The parties freely contracted and allocated risks. The parties chose to allocate *force majeure* risk to Tenants. The events surrounding COVID-19, although unfortunate, are neither unprecedented nor unforeseeable. In the early 20th century, the world experienced one of the most severe pandemics—the Spanish Flu. In 1988, the film industry was significantly affected by the Writers Guild of America strike—halting the release of first-run movies.

Many cases have followed suit. *See, e.g., 55 Oak Street LLC v. RDR Enterprises, Inc.*, 2022 WL 1634229 (Me. June 9, 2022) (finding force majeure clause did not excuse tenant's obligation to pay rent after the governor partially lifted COVID-19 pandemic restrictions where the unambiguous language of the clause contained no indication that it could apply to partially excuse a party's nonperformance over its failure to make a profit due to reduced capacity restrictions and that even as a general matter, economic hardship such as market downturns do not constitute force majeure events unless stated in the contract); *Simon Property Group, LP. v. Brighton Collectibles*, LLC, 2021 WL 6058522 (Del. Dec. 21, 2021)(force majeure clause did not allow abatement of rent due to the clause stating that rent would be paid irrespective of any governmental order interfering with performance and that "time" instead would be given in such instances); *1600 Walnut Corp. v. Cole Haan Company Store*, 530 F. Supp. 3d 555 (E.D. Pa. 2021) (holding if a force majeure clause includes the unforeseeable event at issue (such as government restrictions) and the lease requires the payment of rent notwithstanding such restrictions, then the common law doctrines of frustration of purpose, impossibility, impracticability, and failure of consideration are inapplicable defenses and the lease governs the rights of the parties); *CW A&P Mamaroneck LLC v. PFM WC-1, LLC*, 162 N.Y.S.3d 924 (2022) (lease unambiguously required payment of rent in the event of a force majeure event); *Victoria's Secret Stores, LLC v. Herald Square Owner LLC*, 70 Misc. 3d 1206(A) (2021) ("it is of no moment that the

specific cause for the government law was not enumerated by the parties because the Lease as drafted is broad and encompasses what happened here- a state law that temporarily caused a closure of the tenant's business. The parties agreed that this would not relieve the tenant's obligation to pay rent."); *In re CEC Entm't, Inc.,* 625 B.R. 344 (Bankr. S.D. Tex. 2020) (CEC's rent obligation was not dismissed under the bankruptcy code under the force majeure clause which carved out its application to its monetary obligations); *55 Oak St. LLC v. RDR Enters*., 2022 WL 1634229 (Me. June 9, 2022) (while the government orders could qualify as a force majeure event, the orders themselves prohibited the tenant restaurant from being profitable but not from using the space*); Highlands Broadway Opco LLC v. Boss*, 2021 Colo. Dist. LEXIS 895 (Sept. 17, 2021) (tenant who entered into a lease after COVID occurred and then tried to use the force majeure clause to abate rent because of COVID was prohibited from doing so because the court found the parties foresaw that government regulations could impact business but the parties executed the lease anyway).

Because most tenants have not fared well using force majeure, tenants have looked to equitable doctrines as well, such as impossibility, impracticability or frustration of purpose. First, when there is a force majeure clause, courts often find that the equitable doctrines of impossibility, impracticability or frustration of purpose do not apply. *See 40 West Hubbard*, 2022 U.S. Dist. LEXIS 180532, at *22 (Ruth Chris's reliance on an impossibility defense In finding that the pandemic and government stoppage was foreseeable, the District Court noted that the force majeure provision in the lease belies Ruth's Chris argument because it provided for restrictive governmental law or regulations); *Morgan St. Partners, LLC. v. Chi Climbing Gym Co., LLC*, 2022 U.S. Dist. LEXIS 35633, *15 (N.D. Ill. Mar. 1, 2022) ("But this Court need not consider applicability of those common law defenses because express force majeure clauses in contracts supersede those defenses); *In re CEC Entm't, Inc.*, 625 B.R. at 351 ("Frustration of purpose does not apply because the force majeure clauses supersede application of the doctrine under state law or because the purpose of each lease is not entirely frustrated."); *In re Hitz Rest. Grp*., 616 B.R. 374, 377 (Bankr. N.D. Ill 2020) (noting that force majeure clauses "supersede" common law contract defense of impossibility).

Even when there is not a force majeure clause that bars such a claim, other courts have found the equitable doctrines still did not apply. *See L.D.S., LLC v. Fitness Blueprint, LLC*, 2023 IL App (1st) 200275-U ¶ 71 (no abatement o rent during COVID-19 pandemic stating that "[t]he Governor's executive orders which temporarily required [the tenant] to shut down its fitness club for four months, out of five-year lease, did not frustrate the overall purpose of the lease."); *40 West Hubbard*, 2022 U.S. Dist. LEXIS 180523, *19-25 (the Court rejected the equitable defenses to try and excuse itself from paying rent because of COVID-19 and the related government orders, including (1) impossibility because the pandemic was foreseeable and the premises was not destroyed or physically impossible to operate; (2) commercial frustration because the pandemic is a reasonably foreseeable occurrence and the value of the leased premises was not totally or nearly totally lost); *See AGW Sono Partners, LLC v. Downtown Soho*, LLC, 343 Conn. 309 (2022) (although lease had no force majeure clause addressing the situation, the doctrine of impossibility would not excuse a restaurant's payment of rent where it was factually possible for tenant to utilize the premises for curbside and take out business irrespective of the large dining room its contracted for and its inability to be used).

Even though the legal landscape is more favorable for landlords, there are instances where tenant's have been relieved under force majeure or the equitable doctrines and offer hints for future "unforeseen" events. *See In re Hitz Rest. Grp*., 616 B.R. at 377 (case was the first to find that the pandemic altered the contract terms and allowed for Tenant to abate a portion of the rent given it could not use its dining space and the force majeure provision unambiguously covered governmental action and issuance of an order). A year later, a similar restaurant case led to the same result in Massachusetts. *Unnv 205-207 Newberry, LLC v. Caffe Nero Ams., Inc*., 2021 Mass Super. LEXIS 12, *1-*15 (Feb. 8, 2021) (finding that lease was frustrated because the leases premises could only be used to operate a café with a sit-down restaurant menu "and for no other purpose" and finding that the force majeure provision allocate the risk of impossibility but does not address or preclude frustration of purpose). So, in each of those cases, the court found that the pandemic relieved the tenant from paying some portion of its rent given it could not operate what the parties intended at the outset of the Lease.

Some other cases have followed suit. *See also Hamilton Mill Theatre Dev. v. Regal Cinemas, Inc.,* 366 Ga. App. 124, 132 (Ga. Ct. App. Aug. 26, 2022) *(*holding that Regal's failure to show first run movies

was the result of force majeure excusing Regal of its obligation to continuously operate its theater for first run movies, starting that "[o]ne of the parties to this lease must absorb the burden of the financial impact of the unexpected global pandemic. The terms of this lease put that burden on Landlord…"); *55 Jackson Acquisition, LLC v. Roti Restaurants, LLC,* 2022 IL App (1st) 210138 ¶¶ 58, 61 (the Illinois Appellate Court found that in a dispute for unpaid rent by Roti that for the defenses of impossibility, impracticability and frustration that "the parties did not and could not anticipate the circumstances allegedly causing impossibility—the COVID-19 pandemic and the public health orders—when they entered into the Lease" and "the allegedly frustrating event—again, COVID-19 and the orders—were not reasonably foreseeable when the Lease was formed," but did find that there were factual issues of the circumstances where Roti found it impossible to operate under the government orders while other restaurant in the same building or neighborhood operated); *Morgan St. Partners, LLC. v. Chi Climbing Gym Co., LLC*, 2022 U.S. Dist. LEXIS 35633, *11-*15 (N.D. Ill. Mar. 1, 2022) (denying summary judgment because Covid qualified as a force majeure event and thus suspended tenant's obligation to pay rent at least for some portion of time to be determined by the court as that force majeure provision applied "to any payments of Rent or other monies due from Tenant under this Lease."); *In re Cinemex USA Real Estate Holdings, Inc.,* 627 B.R. 693, 698-701 (Bankr. S.D. Fla. 2021) (theater was not required to pay rent only for the time the theater had to close per government orders.)

Thus, if another variant of some sort results in more government shutdowns or orders restricting use, it is very likely the force majeure provision will not excuse performance unless it specifically covers this event and allows for rent to be abated in such situations. Moreover, arguably, force majeure clauses are meant to cover events where the event is typically unforeseeable. Government shutdowns and restrictions on use which may occur in the future may likely now be considered foreseeable should they occur again thereby limiting a party's reliance on this provision. Moreover, tenants may be better off in not including a force majeure provision at all knowing that many courts will not consider the common law excuse defenses (frustration of purpose, illegality, impossibility) if such a clause exists in the lease.

IV. Force Majeure language in the post-COVID world

So what does the landscape look like after three-plus years of everyone in our industry now being overly familiar with the phrases "COVID" and "Force Majeure"? Have the cases above taught lawyers anything in drafting force majeure clauses. Some questions have emerged:

1. Should parties even have a force majeure provision?

2. If you are going to include a force majeure provision, how general or specific should it be?

3. How can you draft the provision to include all possible catastrophes?

4. Is it more relevant what the use of the premises is for and how the use provision is drafted>

5. What do we make of these catch all provisions – do they do more harm than good?

6. And how do they impact equitable protections you might obtain in court (i.e., impossibility, impracticability and frustration of purpose)

Indeed, the devil is in the details. Or more specifically, the specific language that is included as a triggering event. Words like "pandemic", "endemic", "outbreak", "quarantine", along with "supply chain" are now showing up as frequently as "acts of God". Is that detail enough to stand up in court, or preferably, avoid litigation altogether?

And, if you are going to include force majeure language in your lease, how far is too far when it comes to language?

Take a look at the following actual example:

> END OF THE WORLD. The occurrence of the end of the world, defined as occurring as the result of a pandemic, fireball, earthquake, flood or similar event resulting in total destruction, prior to the complete performance by Tenant of the terms, covenants and conditions of the Lease, including full payment of minimum rent, percentage rent, additional rent, and any other amounts which remain outstanding at the time of said occurrence, shall permit Landlord to accelerate and demand payment of all charges which remain as an obligation of Tenant under this Lease, and Landlord's collection of monies due from Tenant may be pursued by any immediately available procedure. For all purposes hereunder or until Landlord provides notice to the contrary, such notice to be given to Tenant by the then prevailing medium of communication, Landlord shall be deemed aligned with the Forces of Light and Tenant shall be deemed allied with the Powers of Darkness, notwithstanding either party's final ordered placement.

To paraphrase R.E.M. – "It's The End Of The World As We Know It – But You Still Have To Pay Your Rent!"