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COVID-19, Commercial Leases, and Force Majeure

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By Ryan Lawrence & William Paterson

COVID-19 has dramatically impacted the commercial real estate industry. Even as states like Minnesota gradually reopen their economies, others restrictions.As businesses struggle to make ends meet, uncertain when conditions will improve, commercial landlords and tenants alike are facing increasing pressure. And as the pandemic wears on, even landlords and tenants who reached an early accommodation are forced to reconsider their situation in light of the evolving circumstances.

Some are turning to oft-forgotten force majeure clauses for relief. Force majeure clauses are contractual provisions that excuse performance upon the occurrence of an uncontrollable and unforeseeable event. Such clauses typically identify by category or kind the types of circumstances that excuse performance.

Does COVID-19 trigger my force majeure clause?

Like all contract terms, whether a force majeure clause in a commercial lease excuses performance depends upon what the parties intended. determine whether the parties contemplated excusing performance in circumstances such as these. The party relying on the force majeure clause will bear the burden of proving its applicability.

Two facets of the COVID-19 pandemic are particularly relevant to determining the applicability of a force majeure clause: the disease itself and the government orders issued in response.

Some force majeure clauses provide for pandemics or epidemics, creating a straightforward hook. Otherwise, the more general description, like "natural disaster." Cf. Friends of Danny DeVito v. Wolf, 227 A.3d 872, 889 (Pa. 2020) (deciding the COVID-19 pandemic is a natural disaster for the purposes of Pennsylvania's Emergency Code).

Many force majeure clauses also apply when laws, regulations, or governmental action would render performance impractical. Those categories seem to apply where many states are still substantially limiting the operations of businesses.

Perhaps reflecting the unique circumstances of the COVID-19 pandemic, a federal bankruptcy court recently held that a force majeure clause triggered by government action excused non-payment of rent, albeit only partially. In re Hitz Rest. Grp., 2020 WL 2924523 (Bankr. N.D. Ill. June 3, 2020). In Hitz, the force majeure clause excused performance prevented, delayed, retarded, or hindered by "laws," "governmental action or inaction," or "orders of government." The court reasoned that the Illinois Governor's executive order suspending on-premises consumption of food or beverages was unambiguously a government action and issuance of a government order, and the order was the proximate cause of the debtor's inability to pay rent. The court rejected the creditor's argument that the proximate cause of the inability to pay rent was "lack of money," which majeure clause. The court, however, held that because the debtor was delivery services, the force majeure clause provided the debtor only a partial excuse, and determined the debtor's rent obligation should be reduced in proportion to its reduced ability to generate revenue due to the executive order.

Aside from reviewing the circumstances to which a given force majeure clause applies, parties must clause. Some commercial leases have very landlord-friendly clauses. For example, some clauses list excuses for the landlord's performance but not the tenant's performance. Other force majeure clauses identify situations that relieve the tenant of all its obligations **except** the obligation to pay rent.

Of course, each lease is different. Parties will need to look at the COVID-19 will have on their contractual obligations. Because of the various sector of the economy—and each business—it is best to seek a legal opinion about your or your client's own situation before concluding that a force majeure clause does or does not apply.

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