Is the Coronavirus a *Force Majeure* that Excuses Performance of A Lease?

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The coronavirus is causing a true Friday the 13th nightmare for many in the retail industry today. Yesterday the country began ardently practicing social distancing and self-quarantining to a degree never seen before, and many shopping center landlords and retail tenants are immediately facing an uncertain future.

The coronavirus-related question the AGG retail industry team is getting most often today is whether *force majeure* ("superior force") or "Act of God" clauses justify tenants' suspension of performance of their duties under their leases (primarily operating and paying rent). The answer depends on the specific contract language, local law, and the causal connection between the pandemic and the particular tenant's inability to meet its lease obligations. Commercial landlords and tenants alike need to understand the application of these rarely invoked clauses.

Black's Law Dictionary explains that a *force majeure* 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." *Force majeure* clauses allocate risk between the parties when an unanticipated event makes performance impossible or impracticable.

While state laws vary, every jurisdiction respects parties right to contract. So, disputes over application of *force majeure* clauses start with the specific language used in the lease. A *force majeure* lease clause may contain a list of specific events which constitute a *force majeure*, it may be more vague to include anything out of the parties' control, or, the clause may define specific events and then include broad "catch-all" language such as, "for other reason whether of a like nature or not that is beyond the control of the party affected."[1] Generally speaking, the more specific the clause, the more limited application it has – if the actual occurrence is not on a long list of specific events, it is not likely a *force majeure*. Most clauses specify that they are only invoked when performance becomes impossible; some have more liberal language requiring only the hindrance or delay of performance.

As it pertains to the coronavirus, any broad *force majeure* clause language should apply since March 11, when the World Health Organization declared it a pandemic. It is unlikely any court would decide that any tenant caused the coronavirus.[2] And, many *force majeure* clauses

1 For example: If either party is delayed or hindered in or prevented from performing any term, covenant or act required hereunder by reasons of strikes, labor troubles, inability to procure materials or services, power failure, restrictive governmental laws or regulations, riots, insurrection, sabotage, terrorism, act of the public enemy, rebellion, war, act of God, or other reason whether of a like nature or not that is beyond the control of the party affected, financial inability excepted, then the performance of that term, covenant or act is excused for the period of the delay and the party delayed shall be entitled to perform such term, covenant or act within the appropriate time period after the expiration of the period of such delay. Nothing in this Section, however, shall excuse Tenant from the prompt payment of any Rent or the obligation to open for business on the Commencement Date.

2 An Idaho Court did find questions of fact whether an egg-produce for a grocery chain contributed to an outbreak of Avian Flu that allegedly prevented it from fulfilling its contractually obligated output of eggs. *Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc.*, 2017 WL 3929308 (N.D. IO 2017)

specifically include “epidemic” or “pandemic” in its laundry list of qualifying events.[3] Even without that specific reference, the coronavirus should qualify under most *force majeure* clauses due to the government imposed travel bans and quarantines.

Tenants could have trouble proving its damages if business was already down. Most courts require the party claiming *force majeure* to show that the event was not foreseeable and directly caused the failure to meet its contractual obligations. While this is often a close call in weather-related natural disasters - the geographic scope and actual impact on the stream of commerce of a storm is often debatable – a pandemic resulting in mass closures of all public events and schools should not be a close call. This is not a normal risk of doing business.

As in any lease matter, strict compliance with the technical requirements of the lease may be necessary for a tenant to invoke a *force majeure* clause. Typically a lease requires prompt notice of a claim of *force majeure*. Several courts have refused tenants’ *force majeure* claims when they failed to provide adequate notice under the lease.[4]

One common, and particularly controversial clause in a situation such as the one we are in today, is found in the last line in the above example at footnote one: “Nothing in this Section, however, shall excuse Tenant from the prompt payment of any Rent or the obligation to open for business on the Commencement Date.” The intention of the parties appears to be that a tenant may be excused by a *force majeure* of complying with a continuous operation clause in the event of a pandemic, but it still must pay rent. Under the current circumstances, one could make an argument that these clauses are unenforceable because they are unconscionable and against public policy.

Finally, landlords could also seize this opportunity to use *force majeure* clauses proactively. Landlords may claim *force majeure* clauses excuse co-tenancy requirements and other obligations to its tenants. Landlords could argue that *force majeure* requires it to breach an exclusive so it can lease to a competitor of an existing tenant so as to ensure revenue stream.

Questions regarding *force majeure* clauses are one of many issues that arise during challenging times for the retail industry, but with vigilant adherence to their contracts and applicable law, landlords and tenants can navigate these troubled waters successfully.

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3 “The term ‘*force majeure*” as used herein shall be Acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, riots, **epidemics**, lightning, earthquakes, explosions, accidents or repairs to machinery or pipes, delays of carriers, inability to obtain materials or rights of way on reasonable terms, acts of public authorities, or any other causes, whether or not of the same kind as enumerated herein, not within the control of the lessee and which by the exercise of due diligence lessee is unable to overcome.” [emphasis added] *Aukema v. Chesapeake Appalachia, LLC,* 904 F.Supp.2d 199 (N.D. NY 2012)

4 “Section 17.3(b) requires prompt written notice no later than five business days after the occurrence, including an estimation of its expected duration and probable impact on the performance of obligations. The record reflects that plaintiff did not provide such notice until September 21, 2017. This is more than four months after the occurrence. The notice also did not provide the required information. ‘The failure to give proper notice is fatal to a defense based upon a *force majeure* clause requiring notice.’” *Three RP Limited Partnership v. Dick’s Sporting Goods, Inc.*, (E.D. OK 2019), quoting *Sabine Corp. v. ONG Western, Inc*., 725 F. Supp. 1157, 1168 (W.D.Okla.1989).

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