



Professional Perspective

Commercial Leases and Force Majeure

*Perrie Weiner, Aaron Goodman, and
Alexandra Dunton-Stackhouse, Baker McKenzie*

Reproduced with permission. Published August 2020. Copyright © 2020 The Bureau of National Affairs, Inc.
800.372.1033. For further use, please visit: <http://bna.com/copyright-permission-request/>



Commercial Leases and Force Majeure

Contributed by *Perrie Weiner, Aaron Goodman, and Alexandra Dunton-Stackhouse, Baker McKenzie*

Amidst the struggles of the global pandemic, a battle rages between commercial landlords and their tenants over who will bear the economic burden. Will tenants be forced to pay rent while their doors remain closed in response to “stay at home” orders? Will landlords be left with empty buildings and no source of revenue? The answer to these questions could lie in the interpretation of an all-too-common, but rarely applicable, contract clause—the force majeure provision. There are a few key questions parties must consider when invoking a force majeure provision, whether as to payment or some other obligation under the lease.

Background

Force majeure clauses, common in most commercial lease agreements, generally excuse, or temporarily delay, certain landlord or tenant lease obligations due to unforeseen circumstances beyond the parties’ control. With businesses still fully or partially shut down, the federal Paycheck Protection Program (PPP) out of money, and the prospect of additional legislative relief uncertain, tenants have been increasingly leaning on force majeure provisions for relief from rent payments—from leases signed at the peak of the market—they can no longer afford.

Many commercial lease force majeure provisions contain an exception, which specifically excludes rental payments. That is to say, the occurrence of a force majeure event will not excuse payment of rent. In those circumstances, tenants will need to find other avenues of relief (e.g., frustration of purpose, impossibility, impracticability, failure of consideration, reformation, rescission). But for those tenants with force majeure clauses that do not exclude rent payments, they may be entitled to rent abatement and forgiveness.

Parties must determine first whether a force majeure provision applies due to a triggering event. Parties must then examine the standard of performance by asking what specifically does force majeure excuse or delay. Finally, to succeed on a claim or defense under force majeure, the party seeking relief must show applicability by proving that the event which triggered nonperformance falls within the scope of the force majeure provision and that the triggering event is the proximate cause of the nonperformance.

Triggering Events

Force majeure provisions typically enumerate a so-called parade of horrors—a list of specified force majeure events that excuse or delay performance under the contract. These triggering events often include acts of god, natural disasters, terrorist activities, governmental actions or restrictions, labor strikes, acts of war, and an inability to obtain services, labor, or materials. Some recent provisions also list “epidemics” or “pandemics” as triggering events, but these are uncommon, so parties seeking relief due to Covid-19-related issues must turn to other language.

In addition to the enumerated list, force majeure provisions often include “catch-all” language which, in some jurisdictions, expands the scope of the provision beyond only the specified events. It is generally well-settled that events specifically enumerated in the force majeure provision will trigger the provision, regardless of foreseeability. However, even when an enumerated event occurs, force majeure provisions are not without issues.

Disputes arise over the interpretation of the listed events, the applicability of catch-all language, and whether the provision covers the specific contractual obligation in question. In connection with Covid-19, interpretation of force majeure provisions is more important than ever. While these are novel disputes and clear case law is scarce, some recent decisions may offer guidance. Additionally, landlords and tenants can look to historical case law to determine how certain triggering events and force majeure language have been interpreted in the past.

There are two predominant triggering events that would invoke force majeure provisions in the context of Covid-19 and commercial landlord and tenant disputes. First, parties can argue that the mandated government shutdowns are the triggering event. Second, parties can argue that the pandemic itself is a triggering event, relying on language such as “acts of god,” or “war-like times.” Additionally, parties can rely on catch-all language to argue that the virus or governmental orders are unforeseen events that fall within the scope of the force majeure provision.

Government Action

Most force majeure provisions enumerate governmental action or inaction, orders of government, or government regulation as triggering events. The central question in this situation becomes: What is considered a governmental regulation, order, or action?

This question was addressed in *In re Hitz Rest. Grp.*, No. 20 B 05012, [2020 BL 206554](#) (Bankr. N.D. Ill. June 2, 2020), a recent Illinois decision where the court found that the restaurant tenant successfully invoked the “governmental action or inaction, orders of the government” phrase of the lease’s force majeure clause, in arguing that its obligation to pay rent was partially excused by the Illinois Governor’s Order prohibiting consumption of food or beverages on the premises of all restaurants.

Some courts require that the party listing government action as a force majeure event specify the degree to which the government action impacts the party’s performance. In *Hitz*, the tenant’s obligation to pay rent was only partially excused because the governor’s order did not prohibit the restaurant tenant “from performing carry-out, curbside pick-up, and delivery services.” Abatement of rent is then measured by the degree of interference and, in the case of *Hitz*, the force majeure served to excuse rent in proportion to the revenue lost from the lack of “dine-in” service.

Given emerging case law, government shutdown and stay-at-home orders will likely be considered force majeure events, which fully or partially excuse performance if the force majeure provision enumerates governmental action. Whether the provision excuses payment of rent will depend on whether the clause includes an exclusion for rental payments.

Acts of God

What is an “act of god”? “Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses, have been held to be ‘acts of god.’” *Gleeson v. Virginia Midland Ry. Co.*, [140 U.S. 435](#), 439 (1891). Historically, courts have interpreted an act of god to include illnesses, reasoning that illness is beyond the power of man to control or prevent and, as such, it is an act of god. But are pandemics acts of god for the purposes of contemporary force majeure relief? Courts have not yet answered this question.

With no specific guidance on pandemics, parties can look to other interpretations of “act of god” in assessing the inquiry. Some courts have interpreted it to mean “intervention of such an extraordinary, violent and destructive agent, as by its very nature raises a presumption that no human means could resist its effect.” *Louisville & N.R.R. v. Finlay*, [237 Ala. 116](#), 118 (1939). Similarly, some courts will only consider an act of god as a force majeure event when it is so extraordinary and unprecedented that human foresight could not anticipate or guard against it. *Fla. Power Corp. v. City of Tallahassee*, 154 Fla. 638, 646, [18 So. 2d 671](#), 675 (1944). The general trend appears to require an unprecedented act that humans cannot guard against, and what has been more unprecedented than the current pandemic, which caught the world by surprise?

To date, there is no guiding case law on whether Covid-19 is considered an act of god, but parties have been making the argument. For example, in the recently filed case of *Gomel Capital Partners LLC v. 601 NE 29 Drive, LLC, et al.*, No. 1:20-cv-01922-FB-JO (E.D.N.Y. Apr. 27, 2020), a venture capital firm seeks to terminate its real property purchase and recover its deposit, citing the “outbreak of the Covid-19 global pandemic” as “a force majeure event” and “a quintessential ‘act of god.’” The plaintiff argues, and reasonably so, that the pandemic and corresponding stay-at-home orders made it impossible for them to perform certain contractual obligations. The case, and others like it, will pave the way for hundreds, if not thousands, of similar claims, making their way through courthouses across America.

War, Acts of War, and War-Like Times

In the absence of specific “government action” or “act of god” language, parties may also turn to the less common “war-like-times” trigger, to argue in favor of force majeure relief. While it is, perhaps, a stretch to argue that the pandemic has brought about war-like times, in this abnormal landscape where courts are frantically searching for an answer, legal decisions could be impacted by more equitable arguments. For example, one could credibly argue that Covid-19 has prompted mass shutdowns, unemployment, chaos, and fear, resulting in an ongoing fight against an invisible enemy.

Indeed, politicians and government leaders often analogize the efforts to overcome the Covid-19 pandemic as being at war, with President Donald Trump describing himself as a wartime president, New York’s Governor Andrew Cuomo stating that health-care workers are “soldiers in this fight,” and the U.N. Secretary-General adopting a similar wartime sentiment.

As such, parties could argue that the Covid-19 “war-like” environment is exactly the type of circumstance that is contemplated under the force majeure doctrine. If not, courts should ask, what else would be?

Catch-All Language

When force majeure provisions include catch-all language such as “including but not limited to the following” or “and all other unforeseen events,” disputes arise over whether there are limitations, or if that language can be interpreted to cover other non-enumerated unforeseen events. In some states, for events to fall within the “catch-all” category, they must be of the same kind as those specified. States adopting this approach will narrowly interpret the “catch-all” provision to events similar to those specifically enumerated. For example, the Southern District of Texas in *R & B Falcon Corp. v. Am. Expl. Co.*, 154 F. Supp. 2d 969, 974 (S.D. Tex. 2001), characterized “governmental instability and supply-chain-related events” as force majeure events when the clause listed “riots, strikes, wars, insurrection, rebellions, terrorist acts, civil disturbances, depositions” and governmental orders.

However, other courts take a more holistic approach to the inclusion of “catch all” language, requiring only that triggering events be unforeseeable and a proximate cause of the non-performance. In either case, where the force majeure provision in question contains “catch-all” language, parties may have a good basis to argue for inclusion of the pandemic as a triggering event, even if it is not otherwise classified as an act of god.

Proximate Cause

In many states, triggering events must be the proximate cause of the non-performance of the contract. For example, in *In re Hitz Rest. Grp.*, the court found that the Illinois governor’s “executive order shutting down all ‘on-premises’ consumption of food and beverages in Illinois restaurants was the proximate cause of restaurant tenant’s inability to generate revenue and pay rent.” However, courts generally do not require that the triggering event be the sole cause of the non-performance unless it is an act of god. See, e.g., *Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 67 (S.D.N.Y. 1991). As such, so long as the force majeure event is a proximate cause, most courts will find that the causation element has been satisfied.

What Is Excused Under Force Majeure?

Once a party has established a force majeure event and proximate cause, the parties must then determine the impact on the parties’ obligations under the lease. Does the force majeure provision cover the contractual obligation in question? Is the performance fully excused, completely excused, delayed, canceled, etc.?

As noted earlier, it is not uncommon for force majeure provisions to expressly exclude coverage of rent payment. For example, in a [recent complaint](#) alleging failure to pay rent against the national discount clothing-chain tenant, Ross Dress for Less, the landlord argues that since the force majeure provision excludes from its scope “the making of payments,” tenant cannot invoke a force majeure defense. When parties are faced with a force majeure payment exclusion, they will need to turn to other defenses like impossibility, impracticability, frustration of purpose, or mutual mistake, for relief. But where there is no payment exclusion, parties to a lease dispute can raise force majeure defenses.

While it is somewhat uncommon, some leases actually include rent abatement as a force majeure remedy. For example, international law firm Simpson Thacher recently [filed](#) a complaint in New York state court, alleging its lease agreement specifically includes rent abatement for force majeure events. In that case, the law firm’s lease explicitly identifies “governmental preemption of priorities or other controls in connection with a national or other public emergency” as a force majeure event. The firm argues that they were ordered by government mandates to vacate their New York offices and were unable to continue the reasonable operation of their business for a period of over 60 days, which under the terms of the lease entitles them to rent abatement. As a result, the law firm’s suit seeks \$8 million in rent abatement from their New York landlord.

In another rent abatement case in Illinois, law-firm tenant Jenner & Block has invoked a force majeure defense against its Chicago landlord’s complaint alleging that the firm is more than \$3.7 million behind on their rent. The firm asserts in its answer that the lease contained “clear and explicit, hard negotiated rent abatement provisions,” which requires the landlord to reduce the firm’s rent in any event, including force majeure, where 20% of its office space cannot be used and occupied as intended. Here, the firm has incorporated into its lease the best of force majeure and frustration of purpose. But for most tenants, the provisions are significantly more ambiguous and the potential remedies subject to dispute.

When Are Obligations Excused?

Parties seeking relief from lease obligations under force majeure should consider the timing and effect of force majeure application. In *Hitz*, the court found that tenant's March lease payment, which became fully due before the governor's shutdown order, was not excused under the force majeure provision (even though the trigger shutdown order came mid-March), while later payments were subject to abatement. In that case, the provision specified that parties "shall be excused from performing ... obligations" in the case of a force majeure event. Some provisions render the obligations excused or terminated, but others only permit the obligations to be delayed. Landlords and tenants must pay close attention to the specific language of their commercial lease to evaluate successful invocation of a force majeure provision.

In the context of Covid-19, government orders shutting down or limiting businesses are likely to satisfy even the most stringent force majeure standards because, like in *Hitz*, operation of the business is, at least in part, impossible based on the governmental orders. However, relying specifically on the Covid-19 pandemic as the triggering event could make satisfying impossibility standards more difficult. If the business is still permitted to operate and generate revenue for rent, but chooses not to, performance is not impossible. In contrast, if the standard were lower, like "commercially impractical," parties may be able to argue that the dangers and extreme disruptions of Covid-19 excused performance.

What if Tenant Can Pay?

The most common argument by landlords in response to a tenant's claim that a force majeure provision excuses payment under the lease is that to be excused payment must be impossible. Landlords argue that, even with applicable force majeure clauses, tenants that are able to pay must still pay rent even when a tenant's business is shut down or the leased premises has been rendered largely unusable. This raises a critical question—what happens when tenants are financially capable of paying rent, but attempt to forgo or defer the obligation by invoking force majeure?

This precise issue was addressed by the court in *Hitz*, where the lease further specified "lack of money shall not be grounds for Force Majeure." The landlord tried to characterize the tenant's failure to pay rent as merely arising from a lack of money, which was not grounds for force majeure under the lease. The court rejected this argument, clarifying that the governor's shutdown order, rather than "lack of money," was "the proximate cause of [tenant's] inability to generate revenue and pay rent." Accordingly, the court reduced the tenant's rent obligation in proportion to its reduced ability to generate revenue due to the executive order. The court focused on the tenant's inability to generate revenue rather than its financial inability to pay rent.

Conclusion

Although the court's decision in *Hitz* was a step forward by the judiciary to sort through the myriad issues raised by the flood of Covid-19 related litigation, with many unanswered questions and hundreds of newly filed cases pending and many more waiting in the wings, only time will determine who will be the ultimate victor in this ongoing battle between landlords and tenants.

What is certain is that force majeure, once relegated to law school and the occasional bar exam essay, has become one of the pressing legal questions in contract interpretation. Landlords and tenants alike can expect the legal landscape to continue to evolve as more decisions are issued, and should consult counsel expert in the handling of the nuanced disputes arising from the pandemic.