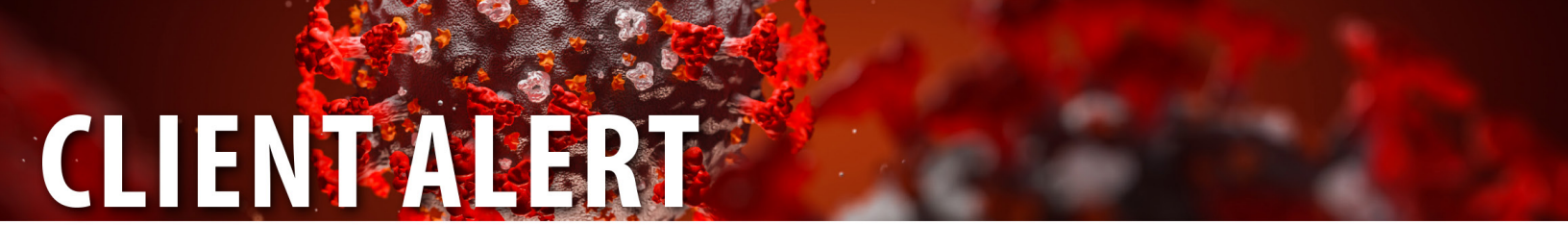

LITIGATION

COVID-19 AND THE WORLD OF COMMERCIAL LEASES: FORCE MAJEURE AND RELATED COMMON LAW DOCTRINES

by Jared Christensen and Matthew Keane

Given the ongoing COVID-19 crisis and the many stay-at-home orders, it is likely that many businesses have temporarily closed their physical doors because they do not operate an "essential business." These businesses – whether they are a landlord or tenant – will face legal issues surrounding the enforcement of their leases. For example, do today's circumstances implicate the implied covenant of quiet enjoyment? And how will a *force majeure* clause impact parties' rights, if at all? Though each case is factually-driven and jurisdictionally dependent, below is a first step in examining how courts may actually view today's circumstances if called upon to decide them.

Quiet Enjoyment

Many states have adopted the implied covenant of quiet enjoyment, a common law doctrine that is often deemed to supplement the terms of any commercial lease.[1] At first blush, it may appear that the covenant of quiet enjoyment has been breached where, for example, a tenant is unable to operate their business and "enjoy" the premises due to an applicable stay-at-home order. This is not the case, however, where the shutdown is the result of government action and not actions of the property owner.[2]

As a result, stay-at-home orders are not likely to trigger a breach of "quiet enjoyment" covenants, however, an argument could be made if a landlord in some way contributed to a business's closure. Parties to a contract should carefully consider how any actions (whether theirs or another party's) go beyond what may be required by their state government, in which case the covenant of quiet enjoyment could be implicated.

Force Majeure Provisions

A "*force majeure*" clause is a rarely invoked lease provision that relieves parties from performing their obligations if certain specified circumstances beyond the parties' control occur, rendering performance substantially difficult or impossible. Depending on the nature of the lease and the terms of the *force majeure* provision itself, the COVID-19 crisis may qualify as a *force majeure* event and provide relief from contractual obligations.

The interpretation of *force majeure* provisions is a question of state law and a party must look to the proper state to analyze the veracity a *force majeure* defense. While many states do not have substantial case law on the issue, there are general principles recognized near-universally. For instance, *force majeure* clauses are "narrowly construed." [3] In other words, they will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically (expressly) identified.[4]

To illustrate, a government's classification of COVID-19 as a "pandemic" could trigger a force majeure clause that expressly contemplates pandemics. Less clear, however, is how courts will apply a force majeure clause that is silent on "pandemics" but covers mandatory governmental shutdowns and forced closures. The outcome is likely to hinge on the governmental order and its precise wording, contrasted with the force majeure clause. No matter the case, parties must review their lease's terms to determine whether their force majeure clause expressly contemplates the circumstances.

Common Law Alternatives

Because of their rare use, many leases do not actually contain *force majeure* provisions. And courts throughout the country have routinely held that a *force majeure* defense cannot be asserted when the lease does not contain such a provision.[5] However, parties may still turn to the traditional common law defenses of impossibility, impracticability, and frustration of purpose. In fact, even if the lease does contain a force majeure clause, these defenses remain viable. A *force majeure* provision does not supplant these common law defenses, and they can be pled in the alternative.[6]

However, these common law defenses come with a high burden of proof that should be considered when weighing your options. The defenses of impossibility or impracticability have become synonymous in modern law.[7] Invoking these doctrines requires a showing that (1) a supervening event made performance impossible or commercially impracticable; (2) the non-occurrence of the event was a basic assumption upon which the contract was based; (3) the occurrence of the event was not the fault of the party seeking to invoke the defense; and (4) neither party assumed the risk of occurrence.[8]

The frustration of purpose doctrine is similar to the doctrines of impossibility and impracticability, but has slightly different elements. It requires a party to demonstrate that (1) a supervening event occurred that should excuse performance, (2) the party did not bear the risk of the event, and (3) the event rendered the value of the party's performance worthless.[9] In contrast, a party with a *force majeure* provision in its lease need only show that an enumerated *force majeure* event in fact occurred and impacted contractual performance.

[1] Under Michigan law, for example, every lease (residential or commercial) incorporates a covenant that: (1) the tenant will not be dispossessed by the landlord or any party claiming through the landlord; and (2) the landlord will not interfere with the tenant's declared use for the premises. Royal Oak Wholesale Co v Ford, 1 Mich App 463; 136 NW2d 765 (1965).
[2] Tucker v Gvoic, 344 Mich 319, 323-324; 74 NW2d 29 (1955); Milton R. Friedman, Friedman on Leases §29.202 (4th ed 1997) ("Interference with the tenant's use by the police power is not breach of covenant of quiet enjoyment").
[3] See, e.g., Kel Kim Corp. v. Cent. Markets, Inc., 70 N.Y.2d 900, 902-903, 519 N.E.2d 295, 296 (1987); Rohm & Haas Co. v. Crompton Corp., 2002 WL 1023435, at *3 (Pa. Com. Pl. 2002).
[4] Kyocera Corp. v. Hemlock Semiconductor, LLC, 313 Mich. App. 437, 446, 886 N.W.2d 445, 451 (2015).
[5] Flathead-Michigan I, LLC v. Penninsula Dev., LLC, 2011 WL 940048, at *5 n. 1 (E.D. Mich. 2011); Vill. of Monticello v. 56-60 Broadway, Inc., 61 Misc. 3d 1217(A), 110 N.Y.S.3d 899 (N.Y. Co. Ct. 2018); Ner Tamid Congregation of N. Town v. Krivoruchko, 638 F. Supp. 2d 913, 931 (N.D. Ill. 2009); Hubbard v. Talbott Tavern, Inc., 2006 WL 2089308, at *4 (Ky. Ct. App. 2006).
[6] See, e.g., Seaboard Lumber Co. v. United States, 308 F.3d 1283 (Fed. Cir. 2002).
[7] Opera Co. of Boston, Inc. v. Wolf Trap Found. for Performing Arts, 817 F.2d 1094, 1099

(4th Cir. 1987); Island Dev. Corp v. District of Columbia, 933 A.2d 340, 349 (D.C. App. 2007).
[8] United States v. Winstar Corp., 518 U.S. 839, 904, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996).
[9] Everett Plywood Corp. v. United States, 227 Ct.Cl. 415, 651 F.2d 723, 729 (1981).

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