

It's a Global Pandemic! Can We Stop Paying Rent?

Presented by Taft Law Chicago Partners:

John M. Riccione

William J. Serritella, Jr.

Brianna M. Skelly



Overview - Concepts

- Force Majeure
- Impossibility
- Uninhabitable or Untenantable



Overview - Guiding Principles

Contract Interpretation

- i. Plain Language
- ii. Foreseeability
- iii. Equity



What is Force Majeure?

Literal meaning: “superior force”

A force majeure clause is a provision in a contract that excuses a party's failure to perform under the contract to the extent caused by certain extreme circumstances outside that party's control, for example, due to a natural disaster or an act of terrorism or war.



What is Force Majeure?

- Use
- Allocation of Risk
- Restricted List
- Unrestricted List + Catch-All



What is Force Majeure?

“Uninhabitable”
and
“Untenantable”



Sample “Catch-all” Force Majeure Clause:

“Other than as otherwise expressly provided for in this Lease, whenever a period of time or deadline is prescribed for action to be taken by either party, such period will be extended, without liability, for any delays due to strikes, riots, **acts of God**, unusual adverse weather conditions, shortages of labor or materials, war, or the passage or application of any laws or moratorium of any governmental authority that is not now in effect, which has the effect of preventing or delaying the performance of such obligation, or any other causes of any kind whatsoever which are beyond the reasonable control of such party.”

Some Attributes of Force Majeure Clauses

- Impacted Party's Obligations
- Other Party's Remedies
- Exclusions



If no Force Majeure clause, is performance excused under another theory?

- Impossibility
- Frustration of Purpose



THE LAW

A Survey of cases which
have interpreted the 1918
Flu Pandemic and the
COVID-19 Pandemic...



Will Tenant's performance be excused because of COVID-19?

“Other than as otherwise expressly provided for in this Lease, whenever a period of time or deadline is prescribed for action to be taken by either party, such period will be extended, without liability, for any delays due to strikes, riots, **acts of God**, unusual adverse weather conditions, shortages of labor or materials, war, or the passage or application of any laws or moratorium of any governmental authority that is not now in effect, which has the effect of preventing or delaying the performance of such obligation, or any other causes of any kind whatsoever which are beyond the reasonable control of such party.”

Pandemic is not listed, so further analysis requires a determination of whether COVID-19 was foreseeable or unforeseeable?

- If Foreseeable, then the parties should have included “pandemic” in the clause, and there will *not* be legal excuse of performance.
- If Unforeseeable, then the catch-all clause may capture COVID-19, and there *will* be excuse from performance.

Foreseeability depends. When on this timeline was the contract executed?

- 11th Century: Leprosy
- 1350: The Black Death
- 1665: The Great Plague of London
- 1817: The Cholera Pandemic
- 1889: Russian Flu (H2N2 virus)
- 1918: Spanish Flu (H1N1 virus)
- 1957: Asian Flu (H2N2 virus)
- 2003: SARS (CoV-1)
- 2009: Swine Flu
- 2012: MERS (MERS-CoV)
- 2014: Ebola
- 2015: Zika
- 2020: COVID-19

If “pandemic” was listed within the force majeure clause, would the result be different?

- Look to contract language and applicable state law.
- Must still prove causation
- Test of Impossibility
- Notice requirements



Steps to Take If Force Majeure Event Affects a Contract/Lease:

- Determine whether force majeure clause exists
- If not, prepare for other legal arguments re: obligations to perform
- Identify the affected contracts/leases
- What events are included in contract?
- Does catch-all apply?

Steps to Take If Force Majeure Event Affects a Contract/Lease:

- Exclusions?
- Foreseeability
- Causation
- Review the risk management/allocation and insurance
- Keep detailed records of events and supporting evidence
 - Scope of interruption or not
 - Losses and expenses proximately caused

Questions?



John M. Riccione
jriccione@taftlaw.com
(312) 836-4173



William J. Serritella, Jr.
wserritella@taftlaw.com
(312) 840-4396



Brianna M. Skelly
bskelly@taftlaw.com
(312) 836-4195

Thank You!

Taft/

Acc Association of
Corporate Counsel
CHICAGO