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The COVID Litigation Update: Emerging Issues, Themes, and Lessons

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Derek Domian represents landlords. Michael Geibelson represents tenants. Both continue to litigate matters arising from the COVID-19 pandemic. As such, their views about the adequacy and propriety of the decisions discussed below are the subject of substantial debate, between them and in the jurisprudence. Thus, the contents of these materials do not necessarily express the views of either of them in particular, or of any of their clients, but rather are the product of a spirited give and take to relate the array of perspectives and approaches taken by litigants and courts.

With more than a year and a half of COVID-19 now behind us, it has become increasingly difficult to remember a time when "social distancing" wasn't a thing. When masks were mostly for Halloween. And the evolution of shopping centers focused on transitioning to gathering places for entertainment and dining concepts. But courts have continued to grapple with the fallout from government mandates, center closures, store closures, and rapidly changing restrictions on various activities and uses.

It shouldn't seem like so long ago that retailers (and restaurants) and the shopping centers in which they do business would have to close. Some acted before the government orders required them to do so. Others waited until they were legally obligated to close. The vast majority of those who have not gone bankrupt have reopened with new policies and guidelines implemented for shopping and dining (or take-out) that were not expressly contemplated by their leases, nor foreseen by their lease negotiators. While no one credibly claims they had in mind the precise form of terribleness that the last year and a half brought, or envisioned the precise shopping environment that has been realized, the debate rages on about whether leases covered in some manner the situations the parties have faced, and whether they allocated the risks of the pandemic among them.

On the one hand, landlords have argued that their leases reflect an allocation of the particular risk that materialized for them and their tenants – government shutdown orders – such that retailers and restaurants must continue to pay rent. On the other hand, retailers say they never would have entered into the leases, or on the terms they did, had they known they would be unable to operate for extended periods of times for reasons not covered by insurance. With appeals across the country to be brought and decided, it remains difficult to define a consensus or trend that will be emerge from the cases, particularly given a growing number of trial court decisions on both sides of every issue. As appellate decisions are published, attorneys representing landlords and retailers may be able to provide a more authoritative assessment of their chances. But the differences to date suggest that local laws, particular lease language, and fresh takes an old legal doctrines will continue to guide how courts rule.

Landlords and tenants will continue to present their best arguments about specific lease language and state and local law and let them play out in the trial courts.

"Casualty" Cases Go Both Ways

Perhaps the best example of inconsistency in results is the two cases decided four days apart from one another in the same court, the New York Supreme Court (New York's trial court) on the issue of whether COVID-19 constitutes a casualty under New York law.

No, It's Not a Casualty: *A/R Retail LLC v. Hugo Boss Retail, Inc., 2021 WL 2020879* (Sup. Ct., NY County, May 19, 2021) rejected tenant's argument that the pandemic constituted a "casualty" under the lease's casualty provision. The court construed the provision to require physical damage to or destruction of the premises, an "interpretation [that] accords with a number of recent decisions, which have concluded that 'the pandemic is not a casualty as that term is generally used in commercial leases." Fair enough, tenant's "use of the Premises has suffered." But casualty, the court held, "is concerned with the Premises themselves."

As discussed further below, this conclusion is consistent with insurance cases that conclude there is no physical loss under those policies. But generally, neither "other casualty" nor "loss" is defined in the leases. Thus, it is a bit odd to engraft insurance jurisprudence that is heavily reliant on policy forms, endorsements, exclusions, and custom and practice in that industry into lease interpretation when their negotiators did not have those matters in mind and the leases don't incorporate them. At a minimum, there are triable facts about whether the negotiators had such definitions in mind.

The *Hugo Boss* Court also held there was no frustration of purpose where there was a mere "partial frustration" caused by diminution in business. Most courts have yet to determine the applicability of a separate frustration of purpose doctrine – the so-called temporary frustration of purpose – recognized by the Restatement of Contracts.

Yes, It's a Casualty: *188 Ave. A Take Out Food Corp. v. Lucky Jab Realty Corp.* (Sup. Ct., NY County, Nov. 6, 2020, Kelley, J., index no. 653967/2020), a Yellowstone injunction decision, analyzed a lease provision which read, "[i]f the demised premises are totally damaged or rendered wholly unusable by fire or other casualty, then the rent . . . shall be proportionately paid up to the time of the casualty and then shall cease until the date that the demised premises shall be . . . restored by Owner."

The court then went on to find that COVID-19 constituted a casualty under that language which excused the payment of rent, as follows:

> the term "casualty," as employed in a lease, is generally defined as an "accident" or an "unfortunate occurrence," that is, something other than a "common occurrence" constituting a "sudden or unexpected" event or series of events (Blue Water Realty, LLC v Salon Mgt. of Great Neck, Corp., _____AD3d_____, 2020 NY Slip Op 07450, *1 [1st Dept, Dec. 10, 2020]; see 45 Broadway Owner LLC v NYSA-ILA Pension Trust Fund, 107 AD3d 629, 631 [1st Dept 2013]; IQ Originals v Boston Old Colony Ins. Co., 85 AD2d 21, 22 [1st Dept 1982], affd 58 NY2d 651 [1982]). The plaintiffs have established that they are likely to succeed on their claim that the COVID-19 epidemic, and the consequent state-mandated suspension of indoor dining at restaurants, constituted a sudden, unexpected, unfortunate set of circumstances and, hence, a "casualty" within the meaning of the lease that rendered the premises unusable for a period of time, and thus relieved the tenant of its obligation to pay rent.

While the occurrence of a casualty has been inconsistently treated, courts consistently hold that a mere diminution of business resulting from the casualty – as opposed to an interference with the use of the premises itself – is not a casualty entitling a tenant to an abatement of rent. For example, in *1140 Broadway LLC v. Bold Food LLC* 2020 NY Slip Op 34017 (Sup. Ct., NY County, 2020), the court addressed the adequacy of a claim made by an insured that provided consulting services to restaurants who alleged it suffered a loss as a result of orders requiring restaurants to be closed and limit operations. However, the insured's lease was for office space, and the insured's claim was rejected. Regardless of whether its clients could or could not do business, there was no impairment of the use of the premises for the consulting business. The insured's business just dried up.

The inadequacy of a diminution of business to avoid contract performance is as unremarkable as it is varied in its application. For example, *Lantino v. Clay LLC*, No. 1:18-cv-12247, 2020 WL 2239957 (S.D.N.Y. May 8, 2020) echoes this noncontroversial conclusion that financial difficulties do not support a defense of impossibility in the context of an inability to make payments on a Fair Labor Standards Act settlement agreement as a result of the pandemic. Courts have leaned on this principle to minimize the effects of the pandemic on lease rights where the length of time a party was unable to use the premises was modest relative to the length of a lease. See, e.g. *BKNY1, Inc. v. 132 Capulet Holdings, LLC*, 2020 WL 5745631 (Sup. Ct., NY County, Sept. 23, 2020, Knipel, J.) (inability to use the premises for three months out of a nine year term does not frustrate the purpose of the lease). Tenants

might push back on this position by emphasizing: (1) the periodic (monthly) nature of leases and rent obligations; (2) the parties' negotiations and agreement to rent and other expenses (such as capital expenditures) are based upon the full lease term of operation, not the term minus some period of months, and (3) temporary frustration of purpose is a well-recognized principle, including in the Restatement (Second) of Contracts §269: "Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration." Regardless of whether the Restatement is applied, tenants have argued that it should be a factual issue for a trier of fact whether the frustration of even just a few months is sufficiently substantial to render the lease as a whole, frustrated and impracticable. Put differently, unless a court is prepared to hold that there would be no frustration of purpose even if the same events had occurred in the second month of a lease and continued through its term (perhaps another ten years), then a court is engaging in line-drawing, an exercise that juries might be more equipped to perform.

The need for facts to decide these issues figured prominently in *International Plaza v. Amorepacific*, 2020 WL 7416600, No. 155158/2020 (Sup. Ct., NY County, Dec. 14, 2020, Feinman, J.***).*** There, the tenant defeated a summary judgment motion brought before discovery was allowed. The trial court ruled that the tenant was entitled to build a case regarding frustration of purpose, based on factual questions related to foreseeability, among others. As Defendant states this must be determined by findings of fact, especially in this crisis that has never occurred in most of our lifetimes. Findings of summary judgment based on previously occurred events cannot be applied to the present case. There is a need to begin the fact finding discovery process in order to enable defendant to make its case. This is not saying that a finding of summary judgment can never be found. It is just premature at this point."

Government Orders requiring closures and "physical loss"

Inasmuch as many leases tie abatement to the physical loss or loss of use of the premises, many cases have focused on what constitutes such a loss. In this regard, insurance cases have progressed much further and in greater numbers than the lease cases. These cases frequently turn on the interpretation of what constitutes a loss under the insurance policies, which makes their application in the lease context more difficult. However, they are illustrative of ways that judges have found a physical loss. As above, most of the insurance decisions have found against coverage, including based upon the presence or absence of the physical loss claimed, and various exclusions and endorsements included (and not included) in the policies at issue. *See T & E Chicago LLC v. Cincinnati Ins. Co.*, --- F.Supp.3d ----, 2020 WL 6801845 (N.D. Ill. Nov. 19, 2020). With respect to government orders, however, some tenants have focused on the absence of access as a physical loss of the property and looked to *North State Deli, et al. v. The Cincinnati Ins. Co., No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020) (granting partial summary judgment)*. Like *JGB Vegas*, below, the decision will ultimately be decided on appeal and so the trial court's finding will have to be watched for precedential value. In *North State Deli*, the court applied dictionary definitions to find, on summary judgment, that government orders requiring businesses to close, and thus preventing access and use of the premises, to constitute a physical loss under an "all risks" insurance policy that did not provide definitions of the terms at issue. The Court granted partial summary judgment in favor of the restaurant tenants, holding that "in giving the ambiguous terms the reasonable definition which favors coverage, the phrase 'direct physical loss' includes the loss of use or access to covered property even where that property has not been structurally altered." Applying the plain meaning of the terms, the court reasoned as follows:

> Applying these definitions reveals that the ordinary meaning of the phrase "direct physical loss" includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions. In the context of the Policies, therefore, "direct physical loss" describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a "direct physical loss," and the Policies afford coverage.

The decision does include a presumption of coverage that may not exist in the leasing scenario. However, at a minimum, the case stands for the proposition that the interpretation is a reasonable one, precluding summary judgment in other contexts, and requiring a trial of the parties' intent.

In some leases, the parties foresaw and addressed the potential for a government order that shut down the business and allocated the risk of that loss between them. The fact that this has been done might be an indication that when it was not done, the lease did not address the matter, and the lease should be reformed or interpreted equitably, rather than trying to fit a square peg of an inapplicable provision into the round hole of COVID claims. Thus, some decisions will be more important for establishing what some people foresaw and addressed than their actual holdings. For example, in *Backal Hospitality Group LLC v. 627 West 42nd Retail LLC*, No. 154141/2020, 2020 WL 4464323 (Sup. Ct., NY County, Aug. 03, 2020), tenant sought a refund of the proceeds of a letter of credit when it was prohibited from catering large events and so could not pay its rent. The court rejected the argument based upon an express provision in the lease that "contemplated a scenario in which performance of the lease terms by [tenant] might become prohibited by a governmental order" – that "they would reach an agreement regarding the collection of rent at the conclusion of the governmental restriction." The clause and the court's reasoning did not distinguish between the collectability of rent and the ability to conduct business. Although such clauses are not standard, they may present a more flexible approach to addressing the issue in the future.

Taking an entirely different approach, one court has held that a government order which reduced capacity justified a reduction of rent. In *B & JCM Doral Development LLC vs. Tutto Foods Doral Corp et al*, (Miami-Dade Cnty., Fla., Cir. Ct., 11CA, Case No. 2020-014953-CA-01, 10/12/2020) the court found that government orders reduced the permitted use and thus, on a motion to determine rent to be paid into court, determined that the contract rent should be reduced by the reduction of square footage required by the orders. The court based its conclusion on the application of the Unavoidable Delay clause in the lease which provides, "if Landlord and Tenant shall be delayed in the performance of any act required under this Lease by reason of any Unavoidable Delay [including government regulations or controls] … performance of the act shall be excused for the period of the delay and the period for the performance of the act shall be extended…." Thus, the term provided both an excuse and a period of deferral to be tacked on to the end of the lease.

COVID-19 droplets at or nearby the premises and "physical loss"

While face masks, hand washing and deep-cleaning have remained prophylactics to infection, substantial ink has been spilled in the debate about what surfaces can hold on to COVID-laden droplets, and for how long. Although that guidance has varied too, and the error of hindsight must be avoided in determining what was reasonable for landlords and tenants when stores originally closed. In making closure and reopening decisions, the extent and frequency of cleaning required, and the surfaces that can and can't be serially accessed by customers have been given attention resulting in different merchandise handling, purchase and return policies, as well as the adoption of new and different packaging for products. With this debate came claims that COVID-19 droplets caused a physical loss.

These claims commonly arose in the insurance context and there are scores of them in numerous jurisdictions holding that the presence (or likely presence) of COVID droplets is inadequate to support the physical loss necessary to invoke coverage. Some tenants, however, have relied on others' allegations where coverage was found as a way to plead lease-related claims. For example, in *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.* (Nev. Dist. Ct., Case No. A-20-816628-B, Nov. 30, 2020), the Court denied a motion to dismiss a claim for insurance coverage where it was alleged that COVID-19 droplets remain on surfaces and were present either at or nearby the premises, and that along with government orders, required closures resulting in business losses because the "Complaint alleges the physical presence and known facts about the coronavirus, including that it spreads through infected droplets that 'are physical objects that attach to and cause harm to other objects' based on its ability to 'survive on surfaces' and then infect other people."

The decision is notable both for applying the standard applicable when deciding pleading motions, and for indulging the presumption that COVID is now (or was then) all around us, even when it has only been identified nearby.

Frustration of Purpose, Impracticability, Impossibility, and Force Majeure Clauses

When the pandemic first struck, commentators quickly characterized it as an Act of God subject to force majeure clauses. And when those clauses were discussed, many pointed to reservations of the obligation to pay rent. Some courts have made quick work of those clauses to find that the force majeure clauses precluded an excuse from the rent obligation. However, others have reached different conclusions based on different language or a different approach to force majeure language and applicable law.

For example, one of the first COVID-19 decisions heralded in legal press was *In re Hitz Restaurant Group*, 616 B.R. 374 (Bankr. N.D. Ill. June 3, 2020). There, the Illinois bankruptcy court relied on the force majeure clause to grant the debtor-tenant's request to suspend rental payments and clarified that the issue was not the ability or inability to pay rent. Many commentators have suggested that the conclusion was informed by the intangibles of the bankruptcy process. However, those intangibles did nothing to slow a Texas Bankruptcy Court's conclusion in the

Chuck E. Cheese Bankruptcy, In re CEC Entertainment Inc., 2020 WL 7356380 (Bankr. S.D. Tex. Dec. 14, 2020). There, the court was faced with Debtor's Abatement Motion seeking "an order abating rent payments for stores closed or otherwise limited in operations as a result of any governmental order or restriction until such restriction or order has been lifted...." Although the facilities were not entirely closed, government orders limited them to offering "take out" food services -- obviously not the purpose of going to Chuck E. Cheese. Nevertheless, they made a business decision not to operate in the way they were permitted by law to do. The court ruled, "Frustration of purpose does not apply because the force majeure clauses supersede application of the doctrine under state law or because the purpose of each lease is not entirely frustrated." Against the grain of the language of these clauses, "CEC argue[d] that the force majeure clauses in its leases excuse performance in this case." However, all but one of the clauses said that there was no excuse under force majeure for not paying rent, and the remaining (California) lease said force majeure was not an excuse for anything, although the court did not refer to California's Civil Code section on the point. In finding that the force majeure clause reserved the obligation to pay rent, the court never analyzed whether the force majeure clause applied in the first instance.

However, in many cases, the force majeure clause will not apply at all because there is no obligation to perform that is delayed, hindered, or prevented, or to be excused. Thus it could be argued that courts in those cases are applying an exception to a clause that does not apply in the first instance. This was the conclusion of the court in *Palm Springs Mile Associates, Ltd. v. Kirkland's Stores, Inc.*, 2020 WL 5411353 (Case No. 20-21724, S.D. Fla. 9/9/20). There, the tenant raised the force majeure clause in its lease as a basis for dismissing landlord's claim for unpaid rent. Kirkland's asserted that the restrictions on business operations and non-essential activities qualified as force majeure events under its lease and that therefore its obligation to pay rent is automatically suspended. The Court rejected Kirkland's position out of hand, finding that Kirkland's:

> fails to explain how the governmental regulations it describes as a force majeure event resulted in its inability to pay its rent. … The restrictions on non-essential activities and business operations must directly affect Kirkland's ability to pay rent. See Chatsworth WL 4694146, at *4 (holding that the defendant failed to show its inability to pay rent resulted from a force majeure event). Secondly, even if Kirkland had properly linked the force majeure event to an inability to pay its rent, the issue of the applicability of the force majeure clause to this case is a factual question that cannot be determined on a motion to dismiss."

While the decision is facially a loss of a motion to dismiss for this tenant, it provides the roadmap that has eluded other tenants and courts in two ways. First, it confirms that there must be a nexus (causation) between the force majeure event and the basis for the claim in order for the clause to apply. In other words, the clause might not apply at all because the event did not *cause* an inability to pay. More to the point, if the payment of rent is excused by other provisions of a lease or applicable law, the occurrence of a force majeure event is beside the point if it did not cause an inability to pay or any other delay or hindrance of performance of an obligation. Second, the court recognizes that facts must be discovered and tried to determine such things as causation, and implicitly the parties' intent in the application of the clause.

Some courts have recognized that (while a pandemic may have been foreseeable to epidemiologists studying the topic) the COVID-19 pandemic and government orders requiring the closure of retail were not foreseeable, and frustrated the purpose of leases for retail space. See e.g. *Bay City Realty, LLC v. Mattress Firm, Inc.*, 2021 WL 1295261, *8-9 (E.D. Mich, Apr. 7, 2021) (recognizing that COVID-19 and Michigan governor's pandemic orders were unforeseeable events frustrating purpose of lease of retail space for the sale of mattress products). See also *UMNV 205–207 Newbury, LLC v. Caffé Nero Americas Inc.*, 2021 WL 956069 at *5-7 (Sup. Ct. Mass., Feb. 8, 2021) (denying landlord's motion for summary judgment and granting, *sua sponte*, summary judgment for tenant in holding that restaurant lease had been frustrated and that the lease's force majeure clause did not apply to preclude frustration of purpose defense).

Where courts have engaged in fact finding, some of have found that the frustration of purpose, impossibility/impracticability, and illegality defenses require a trial to resolve factual issues. For example, in *Thomas BV Glendora, LLC v. Plesnik*, 2020 WL 7866020 at *6 (L.A. Sup. Ct., Nov. 5, 2020), the court found Plaintiff had shown a possibility of prevailing on the merits where the property it leased could not be used for a gym because of the pandemic and resulting government restrictions; see also *Playa Retail Investments, LLC vs. Gap Inc.*, Case No. 2020-013082-CA-01 (11th Jud. Cir. Miami-Dade County, Florida, April 15, 2021); *The Gap, Inc. v. Old Orchard Urban Ltd. P'ship*, Case No. 2019 L 13069 (Cir. Ct. of Cook County, Ill., Dec. 18, 2020). And in *1877 Webster Ave. Inc. v. Tremont Center, LLC*, --- N.Y.S.3d ----, 2021 WL 1621431 at *3 (2021), the Court found that reviewing the lease could not "resolve the parties' factual dispute regarding the foreseeability of the Covid pandemic at this early stage of the litigation to warrant dismissal [of] Plaintiff's frustration of purpose cause of action as a matter of law." The Court in *HWA 1290 III LLC v. Gkny1 Inc.*, 2021 WL 1943198 at *2 (Sup. Ct. N.Y., N.Y. Cnty., May 12, 2021), likewise found that "factual questions exist as to whether the Covid-19 pandemic, which resulted in the closure of

Global Kitchen's business for more than three months and is alleged to have substantially reduced the number of customers upon reopening, supports a frustration of purpose and/or impossibility defense." In these cases, the ultimate facts alleged adequately supported the defenses and required a trial to be decided.

In other decisions, courts have looked to disparate portions of the lease to decide whether the parties could be said to have foreseen governmental shutdown orders. For example, in *The Gap Inc. v. Ponte Gadea New York LLC*, (S.D.N.Y. Case No. 20 CV 4541-LTS-KHP, Mar. 8, 2021), the Court found that a reference to "governmental preemption of priorities or other controls in connection with a national or other public emergency" in the force majeure clause meant that the government orders that were issued were foreseeable, even if the force majeure clause did not itself apply to the situation. The Court went on to find that the pandemic was not shown to completely frustrate the purpose of the lease based upon the operation of the store for some services for some period of time during the pandemic – i.e. even if not the express purpose of the lease.

Other courts have been less focused on the language of the leases and applicable law in service to the unprecedented nature of the pandemic and deference to a separation of powers. See *CAB Bedford v Equninox,* 2020 NY Slip Op 34296(U) (Sup. Ct., NY County, 2020) ("the Court declines to impose a rule that could indirectly impose a freeze on rent for commercial tenants; that is the province of the legislative and the executive branches."); see also *35 E. 75th St. Corp. v Christian Louboutin L.L.C.* 2020 NY Slip Op 34063(U) (Sup. Ct., NY County, 2020).

Still others have found that parties actually allocated the risk of the pandemic between them. Although described as a force majeure or "unavoidable delay" provision, the court in *Victoria's Secret Stores, LLC, etc. v. Herald Square Owner LLC*, (Sup Ct., NY County N.Y., Borrok, J., 1/7/21, index no. 651833/2020) was faced with what can more properly be characterized as a "no abatement" provision like those found in many New York leases. Unlike a force majeure provision which conditions the excuse on a delay or hindrance of performance, a no abatement provision turns that around and provides that rent shall not be abated except in the listed circumstances. With this understanding, the *Victoria's Secret* Court's one paragraph of analysis simplifies the issue: "The Complaint is premised on the mistaken theory that the parties did not allocate the risk of tenant not being able to operate its business and that tenant is therefore somehow forgiven from its performance by virtue of a state law. This is contrary to the express allocation of these risks set forth in Paragraph 26 of the Lease Agreement."[1]

Still, other courts have not been as quick to dismiss tenants' arguments. In *The Gap, Inc. v. 170 Broadway Retail Owner, LLC,* (Sup. Ct., NY County, Oct. 30, 2020, James, J., index no. 652732/2020)*,* another judge in New York ruled on a motion to dismiss that that the complaint "alleges in some factual detail, that such performance [use of the premises as a retail store] has been made objectively impossible, by an unanticipated event that could not have been foreseen or guarded against in the Lease, a credible description of the current worldwide pandemic,

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[1] That lease's Paragraph 26 states as follows:

> INABILITY TO PERFORM. (i) Except as expressly set forth in subparagraph (ii) below, this Lease and the obligation of Tenant to pay Rent and additional rent hereunder and perform all of the other covenants and agreements hereunder on the part of Tenant to be performed shall in nowise be affected, impaired or excused because Landlord is unable to fulfill any of its obligations under this Lease expressly or impliedly to be performed by Landlord or by any cause whatsoever reasonably beyond Landlord's control, including but not limited to, laws, governmental preemption in connection with a national emergency or by reason of any rule, order or regulation of any federal, state, county or municipal authority or any department or subdivision thereof or any government agency or by reason of the conditions of supply and demand which have been or are affected by war or other emergency (herein sometimes referred to as **"**unavoidable delay").
>
> (ii) If Landlord fails to provide any service or perform any obligation that Landlord is obligated to provide or perform under this Lease and solely as a result thereof, Tenant shall be not able to operate its store at the Premises, shall be closed for business and have discontinued its operation of the store for a period of six (6) consecutive days or more after written notice by Tenant to Landlord advising Landlord of such failure to provide any such service or perform any such obligation, that such failure has rendered the Premises unusable and that Tenant has closed for business and discontinued its operation of the store, then, Tenant shall be entitled to an abatement of Minimum Rent and additional rent for each day after said six (6) consecutive day period through the earlier to occur of the day preceding (i) the day on which the service is substantially restored and (ii) the day Tenant reopens for business and recommences its operation of the store at the Premises. Tenant shall not be entitled to an abatement of rent in the event that such failure results from (i) any installation, alteration or improvement which is not performed by Tenant in a good workmanlike manner; (ii) Tenant's failure to perform any obligation hereunder; (iii) the negligence or tortious conduct of Tenant; (iv) casualty; or (vi) unavoidable delay.

shutting down New York City "brick and mortar" retail stores. Plaintiff's action for a declaration that it is excused due to the impossibility of performance as a result of "the destruction of the means of performance by an act of God, vis major, or by law", ***states a viable claim."*** (Emphasis added.) Based upon the same allegations, the court also held that a claim for rescission on the grounds of impossibility or frustration was also sufficiently pled.

The inability to use the premises for the purpose contemplated by the lease also figured prominently in an Illinois decision which held that the circumstances of the pandemic and the resulting government orders would sufficiently state the defenses of frustration of purpose and impossibility. *The Gap, Inc. v. Old Orchard Urban Ltd. Ptrnshp,* (Circuit Ct., Cook County, Brennan, J., Dec. 18, 2020, Case No. 2019 L 13069). The court further explained that the government shutdown orders add support to the frustration of purpose defense.

Among the most comprehensive analyses of these interrelated grounds for claiming abatement of rent is found in the bankruptcy court's opinion in *In Re: Cinemex USA Real Estate Holdings, Inc, et al.*, (S.D. Fla. Bankr., Jan. 27, 2021). While the decision arises in the context of a unique type of bankruptcy proceeding, it discusses different periods of time and the application of the defenses during those periods – specifically, when the pandemic prevented movie production and new releases, when government orders prevented operation of movie theaters altogether, and when government orders limited capacity. The opinion first defines and distinguishes among impossibility, frustration of purpose, and impracticability under Florida law. Then, on impossibility, the court notes that "with respect to rent accruing during the government ordered shutdown, the only issue is whether it was foreseeable at the time the Lakeside Lease was made that this shutdown would occur." The answer was dependent upon specific language in the lease. On frustration of purpose during the period after the impossibility (for government regulation) ceased, the court ruled that the purpose of the lease was not frustrated because it appears that the tenant elected not to operate for business reasons. Finally, the court turned to the effect of the pandemic on the rent obligation and held that, based upon the language of the lease, the period of impossibility effectively excused the obligation to pay rent during that period. However, the court concluded that that period simply extended the term of the lease by the length of time the theater was required to be closed.

Injunctive Relief Requiring Operation of Retail Stores

Since 2017, substantial discussion has centered on the decision in *Simon Prop. Grp., L.P. v. Starbucks Corp.*, 2017 WL 6452028 (Ind. Superior Ct. Nov. 27, 2017), where the Indiana Superior Court enforced an operating covenant in scores of leases in Simon shopping centers after Starbucks made a very public announcement to close all of its Teavana stores for business reasons. The Court focused on the fact that the parties had expressly agreed that "Landlord shall have the right to obtain specific performance by Tenant upon Tenant's failure to comply with [the continuous operations provision]." *Id*. at *15.

However, the decision was and remains an outlier in the jurisprudence. Indeed, "Many courts, in many jurisdictions, have refused to specifically enforce obligations of continuous operation in commercial leases, even where those obligations are unambiguously expressed." *Hamilton W. Dev., Ltd. v. Hills Stores*, Co., 959 F.Supp. 434, 439 (N.D. Oh. 1997). And "cases denying injunctive relief reflect the modern trend and the majority rule." *Massachusetts Mut. Life Ins. Co. v. Associated Dry Goods Corp.*, 786 F.Supp. 1403, 1424 (N.D. Ind. 1992). As a result, decisions are found across the country refusing to enforce such provisions.

Among the prominent reasons for denying specific performance is the courts' reluctance to supervise the operation of an ongoing business – a factor which has informed numerous decisions, including in states where contracts have traditionally been very strictly construed and applied. See *Lorch, Inc. v. Bessemer Mall Shopping Ctr., Inc.,* 310 So.2d 872, 876 (**Ala.** 1975) ("Special knowledge, skill and judgment is necessarily involved in … day-to-day business decisions. No case has been cited where this court has ever required continuous, affirmative acts of the type requested here."); *Mayor's Jewelers, Inc. v. State of Cal. Pub. Emp's Ret. Sys.,* 685 So.2d 904, 904-06 (**Fla.** Ct. App. 1996) (adopting "majority view" against "injunctive relief requiring a tenant to specifically perform a lease"); *CBL & Assocs., Inc. v. McCrory Corp.,* 761 F. Supp. 807, 809 (M.D. **Ga.** 1991) (declining to "spend the next nine years making certain that the store remains open"); *W. & S. Life Ins. Co. v. Crown Am. Corp.,* 877 F. Supp. 1041, 1044 (E.D. **Ky.** 1993) ("[T]he operating covenant is unenforceable primarily because the relief would involve the court in continuous supervision of the operations of the store to make sure that it was being operated in good faith as a going concern."); *8600 Assocs., Ltd. v. Wearguard Corp.,* 737 F. Supp. 44, 46 (E.D. **Mich.** 1990) ("The court determines that the decisions denying injunctive relief reflect the modern trend and the majority rule. The court … declines to extend its supervision over a commercial tenant by means of an injunction."); *New Park Forest Assocs. II v. Rogers Enters.,* 552 N.E.2d 1215, 1220 (**Ill.** App. Ct. 1990) ("Illinois courts will not specifically enforce a long term lease of this nature."); *Grossman v. Wegman's Food Markets, Inc.,* 43 A.D.2d 813, 813 (**N.Y.** App. Div.

1973) ("courts of equity are reluctant to grant specific performance in situations where such performance would require judicial supervision over a long period of time"); *Summit Town Centre, Inc. v. Shoe Show of Rocky Mount, Inc.,* 828 A.2d 995, 1004 n.12 (**Pa.** 2003) (noting "persuasive authority from other jurisdictions concerning injunctions sought by shopping center lessors to compel store proprietors to continue their operations").

In COVID times, Brookfield sought injunctive relief in Texas against Gap Inc. that would have required the company to reopen 17 stores that had been closed. After a short trial (conducted by Zoom in August 2020), the court found Brookfield's evidence so lacking that it granted Gap's motion for nonsuit. The decision is notable because of the result, but also because it addresses the evolved status quo. Whether to address the standard for injunctive relief, or to set the parameters for operation in COVID-times, some courts have been reluctant to find as a matter of law what constitutes the new normal for retail. Indeed, the new normal continues to evolve with the amendment of guidelines, expiration of emergency orders, the distribution of vaccines, and the growing body of knowledge about transmissibility and variants.

Landlords have also sought to lock tenants out of premises, frequently under Texas law because of its simple procedures; although those procedures are commonly superseded by lease language which requires dispossession only by process of law. *See* Texas Property Code Section 93.002. Such lockouts were the subject of another notable action in COVID times – *Simon Property Group, L.P. v. Pacific Sunwear Stores LLC*, 2020 WL 5984297 (2020). Buoyed by its Starbucks success in Indiana state court, Simon sued Pacific Sunwear there for unpaid rent. PacSun sought a Temporary Restraining Order to prevent Simon from locking it out of its Texas premises. The court granted PacSun the requested relief. It ruled that because of the government orders and Simon's closure of its malls, albeit for less than the entire time that PacSun had not paid rent, the Court found PacSun had shown "a likelihood of success on the merits of their impossibility defense of the delinquent rent claim." *Id*. *6. The case was dismissed (and presumably settled) shortly after the order, but the reasoning lives on as an exemplar of a tenant-friendly decision in a historically landlord-friendly jurisdiction under historically landlord-friendly state law.

Conclusion

Distinctions in the leases and the legal defenses to the payment of rent – and particularly the necessity of causation which has been the law of force majeure and frustration of purpose since their inception – are exceedingly important. Just as important is the precise interplay between the language found in leases and the common law doctrines that exist outside of leases. We should expect these considerations to be further articulated, developed, and refined as cases make their way through the trial courts and up through the appellate courts. We should at least hope for analytical rigor in applying lease terms to the unprecedented circumstances and more cases – likely at the appellate level – demonstrating this rigor. Accordingly, it is anticipated the trial court decisions are but the first wave of litigation, and a second, smaller but perhaps more compelling wave will come from the courts of appeal, as well as a second wave of suits related to co-tenancy failures. Whether those decisions will matter by then to the broader retail market will depend on how quickly and how retailers and shopping centers get back to business in a post-COVID world.