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Workshop #2

Lease Remedies Post-Covid: May the Force (Majeure) Be with You

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Covid-19: The Symptoms for Commercial Landlords and Tenants

Since the beginning of the COVID-19 Pandemic (the "Pandemic") in early 2020, the commercial real estate and shopping center communities have, as we all know, experienced one of the greatest hardships in recent memory. In fact, economists have found that the Pandemic had a worse impact on the retail industry than the Great Recession of 2008, noting that "the COVID-19 collapse disproportionately affected the leisure and hospitality industries, where employment fell by nearly 50 percent."[1] On top of this economic downturn, there was an extraordinary level of uncertainty regarding the enforcement of commercial leases, spurred largely in part by direct government intervention.

As an example, near the beginning of the Pandemic most jurisdictions issued executive orders, rules, and other mandates as an attempt to slow the spread of the virus in hopes of not only saving lives, but also returning to normal as soon as practicable. Examples of such orders, attached hereto as Exhibits "A" and "B" respectively, are the State of Georgia Executive Order and the City of Atlanta "Stay in Place" Order. As shown in these particular

[1] Brian Wallheimer, *How the Covid-19 Recession Has Differed from the Great Recession*, CHICAGO BOOTH REVIEW (December 15, 2020) (finding that in the COVID-19 downturn's first two months, increases in joblessness and declines in employment "were roughly 50 percent larger than the cumulative changes over more than two years in the respective series in the Great Recession.").

orders, restrictions were placed not only on individuals, but also on landlords and tenants, especially those operating malls, shopping centers, and certain business that were deemed high risk. Orders such as these and the restrictions instituted therein have been the backbone of Tenant defenses throughout the Covid-19 pandemic, as Tenants have argued, with some success as discussed below, that these restrictions create valid impossibility defenses and trigger force majeure clauses.

Further, some jurisdictions such as New York City and Berkley California went as far as directly declaring Personal Guarantees of Commercial Leases unenforceable. See New York City Administrative Code § 22-1005 and Berkeley Municipal Code 13.113, which are attached hereto. These restrictions, while helping to curb the Pandemic, also had disastrous consequences for landlords, tenants, and the lending community serving both landlords and tenants. During the early stages of the pandemic, limited access to the Courts and a perception that Courts would not be sympathetic to any attempt to evict tenants based on Pandemic-related defaults caused Landlords to have a bleak outlook regarding their ability to enforce commercial lease agreements and obtain a recovery for any breaches thereunder. It is only now, more than two years after the beginning of the Pandemic and the initiation of the foregoing forms of government intervention that landlords and tenants alike are beginning to see trends in the courts' resolution of Covid disputes and the resulting remedies.

Litigation - Landlords' Remedy to the Covid-19 Economic Downturn.

Even though many tenants simply stopped paying rent and ceased operations or moved out overnight, Landlords were still obligated to pay ongoing expenses for mortgages, property upkeep and maintenance, taxes, and insurance. In turn, when tenants are not able to work out an amicable and financially acceptable resolution, Landlords next option is to take legal action to obtain the remedies provided for in the Lease at hand. Although specific leases will dictate what legal options are available to Landlords, as a general matter, Landlords may file suit for (1) damages, seeking payment of past due rent and potentially accelerated rent, (2) declaratory relief or potentially specific performance to require ongoing payment of rent, or (3) eviction.[2] Further, Landlords may consider recourse to the bankruptcy courts, including instituting involuntary bankruptcy proceedings. This remedy may, however, be subject to significant delay as shown in *the* Modell's Sporting Goods and Pier 1 Imports Bankruptcy proceedings.[3] All of the foregoing remedies have, however, been subject to significant interference by government mandates and attacks under both equitable and contractual defenses. In particular, two of the greatest threats to Landlords' remedies to Tenant non-payment during the Covid-19 Pandemic have been guaranty laws and Tenant friendly force majeure provisions.

The Emergence and Interpretation of "Guaranty Laws"

In response to the COVID-19 Pandemic, on March 7, 2020, New York Governor Andrew Cuomo enacted Executive Order 202, declaring a State disaster emergency for the entire state of New York. In an effort to limit the

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[2] *See* O.C.G.A §§44-7-70 *et seq*. *see also*, *Coast Fed. Say. and Loan Ass'n v. DeLoach*, 376 So. 2d 1190, 1191 (Fla. App. 1979) (allowing Landlord to accelerate unpaid rentals).

[3] An involuntary bankruptcy petition, however, may not lead to a speedy resolution of the dispute in the Covid-19 and post-Covid-19 world. See *In re Modell's Sporting Goods, Inc.*, No. 20-14179 (VFP) (Bankr. D.N.J.) and *In re Pier 1 Imports, Inc.*, No. 20-30805 (KRH) (Bankr. E.D. Va.) wherein Bankruptcy Courts have "mothballed" or suspended the bankruptcy proceedings pursuant to their equitable powers under Bankruptcy Code: 11 U.S.C. § 305(a) and 105(a), code sections not often employed pre-pandemic.

spread of the disease, Governor Cuomo Order shortly followed this Order with several further Orders that had significant impacts on business activity in New York State.

First, on March 16, 2020, Governor Cuomo enacted Executive Order 202.3, which (1) cancelled or postponed any event with expected attendance of more than fifty persons; (2) required any restaurant or bar in the state of New York to cease serving patrons food or beverage on-premises; and (3) required gyms, fitness centers or classes, and movie theaters to cease operations. Two days later, on March 18, 2020, Governor Cuomo issued Executive Order 202.6, which required (1) all businesses and not-for-profit entities to utilize telecommuting or work from home procedures to the extent safely possible; and (2) employers were required reduce their in-person workforce at any work locations by 50%. "Essential Businesses"[4] were exempt from these in-person workforce restrictions. The next day, on March 19, 2020, Governor Cuomo enacted Executive Order 202.7, which (1) closed all barbershops, hair salons, tattoo or piercing parlors and related personal care services; and (2) further required employers to reduce their in-person workforce at any work locations by 75%. "Essential Businesses" remained exempt from these in-person restrictions.

This series of Executive Orders had a significant impact on tenants in New York City, forcing many businesses to suspend operations or close entirely. Subsequently, on May 26, 2020, New York City enacted Administrative Code § 22-1005[5], entitled "Personal Liability Provisions in Commercial Leases." This provision of the New York City Administrative Code is commonly known as the "Guaranty Law" and is currently subject to a significant constitutional challenge in the Southern District of New York.

The Guaranty Law provides "[a] provision in a commercial lease…that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement…shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied."

Paragraph 1 describes the types of Tenants that qualify for protection under the law:
"The tenant satisfies the conditions of subparagraph (a), (b) or (c):

(a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;

[4] Executive Order 202.6 provided numerous examples of "Essential Businesses", including "essential health care operations", "essential infrastructure including utilities", "essential manufacturing", and other "vendors of essential services."

[5] At least two other jurisdictions enacted similar laws. In Berkeley, California, Municipal Code 13.113 was enacted to prevent property owners from enforcing personal liability provisions in commercial leases for rent or other charges that a business was not able to pay between March 16, 2020 and July 30, 2021, due to being forced to close, limit capacity, or incur other costs because of COVID-19 emergency restrictions. In Seattle, Washington, Ordinance 126116 was enacted to limit the enforceability of "provisions in a commercial lease or other commercial rental agreement that makes the tenant or one or more persons who are not the tenant wholly or partially personally liable" for lease expenses.

(b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or

(c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020."

Paragraph 2 of the Guaranty Law sets forth the period for liability protection:

"The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and June 30, 2021, inclusive."

This Guaranty Law has been interpreted in New York to limit the ability of commercial landlords to enforce a "personal guaranty" in connection with a commercial lease — i.e., a contractual promise by a third-party, typically the principal of the business-tenant, to pay rent, utilities, or taxes in the event that the tenant of record defaults on those payments. The Guaranty Law only applies when the guarantor is a natural person other than the tenant, and only covers payments due between March 2020 through June 2021, but its effects are permanent: a commercial landlord may never collect from the personal guarantor for those outstanding payments, even after the pandemic ends.

In response to the Guaranty Law, a lawsuit was quickly filed in the Southern District of New York on July 20, 2020. This case was captioned *Marcia Melendez, et al. v. The City of New York, et al.*, Case No. 1:20-cv-05301-A. The plaintiffs in *Melendez* include owners of small commercial and residential buildings in Brooklyn, Queens, and Manhattan.

Plaintiffs have argued in their suit that the Guaranty Law prevents them from recouping income pursuant to personal guaranties in connection with defaulting businesses. Plaintiffs have specifically sought to find, *inter alia*, that the Guaranty Law violates the Contract Clause of the U.S. Constitution[6] by rendering unenforceable certain personal guaranties of commercial lease obligations.

In the course of litigation, Plaintiffs appealed a November 30, 2020 judgment of Southern District of New York, which had dismissed constitutional challenges to the Law brought pursuant to 42 USC § 1983 (i.e. a civil action for deprivation of rights). Plaintiffs presented two primary arguments to the Second Circuit Court of Appeals: (1) amendments to New York City's Residential and Commercial Harassment violated the Free Speech and Due Process Clauses of the First and Fourteenth Amendments by restricting commercial speech in the ordinary collection of rents and failing to provide fair notice of what constituted proscribed threatening conduct; and (2) the Guaranty Law violated the Contract Clause of the U.S. Constitution by rendering unenforceable certain personal guaranties of commercial lease obligations.

On October 28, 2021, the United States Court of Appeals for the Second Circuit found that Plaintiffs failed to plausibly allege First, and Fourteenth Amendment claims regarding the amendments to the Harassment Laws. The Second Circuit concluded, however, that Plaintiffs "allege a plausible Contracts Clause challenge to the

[6] The Contracts Clause states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1.

Guaranty Law", and held that Plaintiffs' Contracts Clause claim should not have been dismissed. In its ruling, the Second Circuit further found that "because the Guaranty Law appears permanently and unexpectedly to repudiate commercial lease guaranties for arrears arising over a sixteen-month period, we conclude that plaintiffs have plausibly alleged a significant impairment of contract."

This ruling by the Second Circuit allowed Plaintiffs to pursue an ongoing constitutional challenge to the Guaranty Law, including injunctive and declaratory relief to prevent its enforcement. Recently, on March 28, 2022, Plaintiffs filed a Motion for Summary Judgment seeking to declare the Guaranty Law unconstitutional. Since then, a motion for an extension of time has been filed and granted, and a hearing is scheduled for the Motion for Summary Judgment on August 10, 2022.

Currently, the Guaranty Law remains in effect, preventing Landlords from recouping payment obligations from personal guarantors for liabilities incurred between March 7, 2020 and June 30, 2021. The upcoming decision by the Southern District of New York in *Melendez* on Plaintiffs' Motion for Summary Judgment could have widespread effects on Landlords and Tenants in the State of New York and beyond. A decision in favor of Plaintiffs' could render thousands of Tenants in New York liable for monies owed during the relevant time period of the pandemic.

May the Force (Majeure) Be with You

The past two years of litigation concerning Covid 19 have shown that tenants and landlords frequently rely on force majeure as a primary defense. "Force majeure is a phrase coined primarily for the convenience of contracting parties wishing to describe the facts that create a contractual impossibility due to an 'Act of God.' " *In re CEC Entm't, Inc.*, 625 B.R. 344, 353 (Bankr. S.D. Tex. 2020) (quoting *Perlman v. Pioneer Ltd. P'ship,* 918 F.2d 1244, 1248 n.5 (5th Cir. 1990)). It is important to note that in most jurisdictions force majeure is a contractual, not a common law, defense. This means that in order for either party to claim force majeure as a defense, there must be a force majeure provision contained in the applicable lease agreement. Under Georgia Law, for instance, force majeure is a contractual defense and "the construction of a contract is a question of law for the court . . . where the terms of the contract are clear and unambiguous, the court looks only to the contract to find the parties' intent." *Lodgenet Entertainment v. Heritage Inn*, 261 Ga. App. 557, 583 S.E.2d 225 (Ga. App. 2003). In turn, where a force majeure clause is invoked as a defense, the parties must have previously contemplated the existence of potential force majeure events and purposefully included a force majeure clause in the Lease Agreement. If a force majeure clause does not explicitly contemplate a particular event and allow for nonperformance when the subject event occurs, a court should not find the force majeure applicable. *See Holder Constr. Grp., LLC v. Ga. Tech Facilities, Inc.*, 282 Ga. App 796, 798, 640 S.E.2d 296, 298 (Ga. App. 2006).[7]

[7] The *Holder* Court held that the builder was liable for its nonperformance when the force majeure clause specifically provided that steel supply issues would not excuse untimely performance or failure to comply with the methods and materials designated in the subject contract. *See* also *Palm Springs Mile Assocs. v. Kirkland's Stores*, Case No. 20-21724-Civ-Scola, 2-3 (S.D. Fla. Sep. 8, 2020) (holding that "force majeure clauses are narrowly construed, and 'will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified.'") (quoting *ARHC NVWELFL01*, *LLC v. Chatsworth at Wellington Green*, *LLC*, No. 18-80712, 2019 WL 4694146, at *3 (Middlebrook, J.) (S.D. Fla. Feb. 5, 2019).

As a brief aside, it necessarily follows that any events included in a force majeure provision will limit a parties ability to successfully argue an impossibility of frustration of purpose defense because if the parties considered that the event could occur, it cannot also be argued that the event was "wholly unforeseeable." *See, e.g., THE GAP INC. v. PONTE GADEA NEW YORK LLC,* No. 20 CV 4541-LTS-KHP, 2021 WL 861121, at *8 (S.D.N.Y. Mar. 8, 2021) (finding that Gap has not framed a genuine issue of material fact in connection with its frustration defense. First, to the extent Gap contends that New York State's blanket prohibition on non-essential business between March 22 and June 8, 2020, frustrated the purpose of the Lease, the possibility of just such a prohibition was referenced in the Lease itself, defeating any claim that the possibility was 'wholly unforeseeable.'").

When a party employs force majeure as a defense, the court will be tasked with interpreting the minutiae of the particular force majeure clause at issue and applying it to the facts at hand. This is not always as simple as it may sound, however, because most force majeure clauses contain a laundry list of events that may or may not be covered. It is common for force majeure clauses to include triggering events such as strikes, riots, acts of God, shortages of labor or materials, war, laws, regulations, or government restrictions. Some force majeure clauses even include extremely broad language that covers any event which is "beyond the reasonable control" of the party or parties. *See JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 2020 WL 7405262, *see also Camacho Enters., Inc. v. Better Constr., Inc.*, 343 So.2d 1296, 1297 (Fla. Dist. Ct. App. 1977) (finding that the delay caused as a result of the company's president suffering a heart attack was covered by the applicable force majeure provision because it was a circumstance "beyond the control" of the company).[8]

A. Historic Precedent Used to Predict Court Rulings on Covid-19 and Force Majeure

At the genesis of the Covid-19 pandemic, Attorney's had to get creative with their arguments concerning whether or not a particular force majeure provision applied to Covid-19. At the time, very few force majeure provisions explicitly included pandemics as a triggering event and the law concerning the application of generic force majeure provisions to pandemics was sparse. In Georgia, some practitioner relied on *Elavon, Inc. v. Wachovia Bank, National Association*, 841 F. Supp. 2d 1298, 1306–08 (N.D. Ga. 2011). In the *Elavon, Inc.* case, the Northern District of Georgia found that Great Recession of 2008 was not an "act of God," and did not render payment or performance under the applicable contract impossible. As a result, the recession did not trigger the applicable force majeure clause or excuse the Defendants' performance. Although this case was easily applied to instances in which the Defendants claimed economic damages triggered force majeure provisions, it did not address whether viruses could be considered an act of God. Further, this case also did not directly whether government intervention, such as the Covid-19 stay in place orders, would trigger force majeure provisions.

Prior to the appellate holdings concerning the same that began to be issued at the end of 2020, some of the only case law on point concerned the Spanish Influenza pandemic of 1918. *See Citrus Soap Co. v. Peet Bros. Manufacturing Co.* (Cal. App. 2d Dist. 1920). In the *Citrus Soap Co.* Case, Citrus Soap entered into a contract with Peet Brothers Manufacturing in which Peet Brothers was to provide eleven to twelve barrels of "Sellers usual good quality Soap lye Crude glycerine," with all of the barrels to be provided before December 31, 1918. *Id.* Nine drums of the glycerin, however, were not delivered on time due to the fact that "there was prevalent in the city of San Diego

[8] Florida Law allows a force majeure clause to be enforced even when it is particularly broad, as long as the force majeure provision is not so broad that it causes the contract to become illusory. *See Home Devco/Tivoli Isles Ltd. Liab. Co. v. Silver*, 26 So. 3d 718 (Fla. Dist. Ct. App. 2010) (citing *St. Joe Paper Co. v. State Dep't of Envtl. Regulation*, 371 So.2d 178, 180 (Fla. Dist. Ct. App. 1979).

an epidemic of Spanish influenza." *Id.* As a result, "on December 5, 1918, the common council of the city of San Diego adopted a quarantine ordinance." The Court found that this quarantine ordinance provided that "all factories and places of business, including the factory and place of business of plaintiff, should be closed for four days." The applicable force majeure clause stated that:

> This contract is made ***subject to suspension*** in case of fire, flood, explosion, strike or unavoidable accident to the machinery or the works of the producers or receivers of this material, or from ***any interference in plant by reason of which either buyers or sellers are prevented from producing, delivering or receiving the goods*** and in such event the delivery thus suspended is to be made after such disabilities have been removed; otherwise to be fulfilled in good faith. ***Notice, with full particulars and the probable term of the continuance of such disability, shall be given to the other party hereto, within ten days of the date of the occurrence of such disability***.

Id. (***emphasis added***). Based on the foregoing provision and the fact that the requisite notice was given. The court found that strict performance of the contract, through delivery of all 12 glycerin barrels before December 31 was not required and that the delay in delivery was allowable. *Id.* Therefore, Citrus Soap Co. was not entitled to cancel the contract or seek damages for the late glycerin delivery. This ruling foreshadowed the Covid-19 Pandemic rulings to come in that broad or ambiguous force majeure provisions will be interpreted to apply to pandemic events, especially when government restrictions are put in place.

B. Post Covid-19 Pandemic Court Rulings – side effects may vary based on jurisdiction.

One of the first cases decided by a court in the wake of the Covid-19 Pandemic stoked many Landlords' fears that courts would be overly sympathetic to the plight of tenants during the pandemic. *See In re Hitz Rest. Grp.*, 616 B.R. 374 (Bankr. N.D. Ill. 2020). In the *Hitz* case, the applicable force majeure provision plainly stated that "Lack of money shall not be grounds for Force Majeure." *Id.* at 377. The force majeure clause at issue, however, also stated that "Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by . . . ***laws, governmental action or inaction orders of government*** . . .." *Id. (**emphasis added**).* In turn, the Bankruptcy Court of the Northern District of Illinois took the tenant sympathetic view that the Governor's Executive Order "unambiguously triggered" the force majeure clause at issue and partially excused the restaurant from paying rent during the months in which the Governor's Executive Order Limited the restaurant's sales. *Id.*[9] Notably, they found that the force majeure provision excused performance even though the subject order allowed the restaurant to continue its operations through carry-out, curbside pick-up, and delivery services." *Id.* at 378.

Similarly, The *Caffe Nero* case followed in the steps of the *Hitz* court. *See Umnv 205-207 Newbury, LLC v. Caffé Nero Ams., Inc.*, Nos. 145768, 2084CV01493-BLS2, 2021 Mass. Super. LEXIS 12, at *1 (Feb. 8, 2021). Although this case focused on the Tenant's frustration of purpose defense, the court also discussed the applicable force majeure clause. *Id.* at 2. The force majeure clause at issue was as follows:

> Neither the Landlord nor the Tenant shall be liable for failure to perform any obligation under this Lease, except for the payment of money, *in the event it is prevented from so performing by* . . . order or regulation of or by any governmental authority . . . or for *any* other *cause beyond its reasonable control*, but financial inability shall never be deemed to be a cause beyond a party's

[9] The *Hitz* court found that the Tenant's rent should be reduced by 75% thereby agreeing with the Tenant's argument that approximately 75% of the restaurant's square footage, was "rendered unusable" by the Governor's order. *Hitz* at 378

> reasonable control . . ., and in no event shall either party be excused or delayed in the payment of any money due under this Lease by reason of any of the foregoing.

Id. at 14. (*emphasis in original*). The Superior Court of Massachusetts found that this force majeure clause did in fact excuse the Tenant's payment of rent and denied the Landlord's motion for summary judgment, despite the fact that the clause plainly states that "in no event shall either party be excused or delayed in their payment of any money due under this Lease . . .." *Id.* Caffe Nero Americas Inc. was therefore awarded summary judgment on its behalf, even though it had not actually moved for summary judgment. *Id.* at 2-10. The Court's ruling was based on its reasoning that the force majeure provision only considered impossibility defenses and not any defenses based on frustration of purpose. *Id.*

In turn, all Landlords, particularly those that owned property in northern jurisdictions such as Massachusetts or Illinois, had a bleak outlook on the enforceability of force majeure clauses at the beginning of the Covid-19 pandemic, despite historical and modern precedents that suggested force majeure clauses would be strictly construed. The *In re CEC Entertainment, Inc*., and *Kirkland's Stores* cases, however, showed that not all jurisdictions would act so leniently. *See In re CEC Entm't, Inc.*, 625 B.R. 344 (Bankr. S.D. Tex. 2020); *see also, Palm Springs Mile Assocs. v. Kirkland's Stores*, Case No. 20-21724-Civ-Scola, 3 (S.D. Fla. Sep. 8, 2020). In the *Kirkland's Stores* case, the court held that the applicable government shutdown order would did not trigger the following particularly vague force majeure clause:

> Whenever a period of time is prescribed in this Lease for action to be taken by either party, such party will not be liable or responsible for, and there will be excluded from the computation of any such period of time, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, governmental laws, regulations or restrictions or any other causes of any kind whatsoever which are beyond the reasonable control of such party.

Kirkland's Stores at 3. Florida's Southern District Court found that Kirkland's "fail[ed] to explain how the governmental regulations it describes as a force majeure event *resulted in* its inability to pay its rent." *Id.* (*emphasis in original*). Due to Kirkland's failure to "properly link[] the force majeure event to an inability to pay its rent" the Court found that Kirkland's Motion to Dismiss had no basis. *Id.*

The *CEC Entertainment Inc*., case involved a much more specific force majeure clause. CEC Entertainment Inc. runs a nationwide chain of family style restaurants and arcades otherwise known as Chuck E. Cheese, which, as the court noted, "aims to be 'a place where a kid can be a kid.'" *Id.* at 348. This case delt with the following force majeure clause:

> Subject to the casualty and condemnation provisions of this Lease, if either party shall be prevented or delayed from punctually performing any obligations or satisfying any condition under this Lease by any strike, lockout, labor dispute, inability to obtain labor or materials or reasonable substitutes therefor, act of God, unusual governmental restriction, regulation or control, enemy or hostile governmental action, civil commotion, insurrection, sabotage, fire or other casualty, or any other condition beyond the reasonable control of such party, or caused by the other party, then the time to perform such obligation or to satisfy such condition shall be extended on a day-for-day basis for the period of the delay caused by such event. The party claiming the benefit of this Section shall give notice to the other party in writing within ten (10) days of the incident specifying with particularity the nature thereof, the reason therefor, the date and time incurred and the reasonable length said incident will delay the fulfillment of obligation contained herein. ***This Section shall not apply to the inability to pay any sum of money due hereunder or the failure to perform any other obligation due to the lack of money or inability to raise capital or borrow for any purpose*.**

Id. at 353-354 (**emphasis added by Court**). This provision excepting the tenant's inability to pay rent from being covered by the force majeure clause is common in commercial leases. In turn, the Southern District of Texas's held that the subject North Carolina, Washington, and California Covid-19 Orders did not provide relief under the subject force majeure. In turn, Landlords in Florida and Texas could breathe a sigh of relief once these decisions were entered. *Id.*

Based on the recent decision entered by the Supreme Judicial Court of Maine on May 24, 2022, in *55 Oak Street. LLC v. RDR Enterprises* the tide may, however, be turning for Landlords located in the Northern United States. *See* 55 *Oak St. LLC v. RDR Enters.*, 2022 ME 28. In this case, the court was tasked with determining "whether the lease's force majeure clause excused RDR Enterprises' obligation to pay rent" following the Maine Governor's Executive Order providing that "[a]ll restaurants and bars shall close their dine-in facilities . . . eating and drinking inside restaurants and bars is temporarily prohibited." *Id.* at 5. The force majeure clause at issue read as follows:

> Neither party hereto will be liable for any failure to comply or delay in complying with its obligations hereunder if such failure or delay is, including but not limited to, due to acts of God, inability to obtain labor, strikes, lockouts, lack of materials, governmental restrictions, enemy actions, civil commotion, fire, unavoidable casualty or other similar causes beyond such party's reasonable control (all of which events are herein referred to as "Force Majeure Events"). It is expressly agreed that neither party will be obliged to settle any strike to avoid a Force Majeure Event from continuing.

Id. at 4. Unlike the *Caffe Nero* case, the *55 Oak Street* Court found that the above referenced force majeure clause did not partially excuse Tenant's duty to pay rent. *Id.* The *55 Oak Street* Court held that "in the absence of express contractual language, we do not read into a force majeure clause the concept of a "partial" excuse for nonperformance based on events such as the issuance of executive orders that reduce seating capacity." *Id.* at 23. In overturning the trial court and granting possession to the Landlord, the Supreme Judicial Court of Maine commented that "The District Court may well have acted with the laudable goal of reaching a Solomonic resolution in light of the difficult realities of the COVID-19 pandemic . . . But the District Court's interpretation of the force majeure clause goes against its plain language, and the lease clearly provides that failure to perform results in a default justifying termination."

Trial Courts' Interpretation and Application of Developing Appellate Covid Case Law.

Currently, Georgia Trial Courts are strictly enforcing force majeure clauses as they are written. Recently, there was a case concerning one of the largest retail properties in Georgia which was impacted by the State of Georgia Executive Order concerning Covid-19 and the City of Atlanta's "Stay in Place" Order (which are attached hereto as exhibits "A" and "B" respectively) as well as other local, state, and federal rules and regulations concerning Covid-19. Based on the issuance of these orders, the Landlord limited access to the premises by allowing the public to access the premises by appointment only, effective as of May 7, 2020. As restrictions began to loosen, on June 8, 2020, the landlord allowed the public to resume normal daily access to the premises. Predictably, when a lawsuit had to be brought against a tenant who owed over half a million dollars in back rent, one of the tenant's main defenses was that the force majeure provision barred Landlord's recovery because the tenant's access to the premises was limited.

The Fulton County State Court, a trial level court in Georgia, found the following force majeure clause did not provide any protection to the Defendant-Tenant:

> Notwithstanding any other provision of this Lease, when a period of time is herein prescribed of ***any action to be taken by Lessor, Lessor shall not be liable or responsible for***, and there shall be excluded from the computation for any such period of time, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, laws, regulations or restrictions or any other causes of any other kind whatsoever ***which are beyond the reasonable control of Lessor***.

Clearly, this provision was extremely Landlord friendly as it only applied to and excused Landlord's performance. It also contained the overly broad language, which was discussed in multiple cases above, but again, in this instance, the provision only applied to Landlord. As a result, the Fulton County State Court found in favor of Landlord and granted its Motion for Summary Judgment in excess of $850,000.00, despite the allegation that in person sales were likely limited by the applicable State and Local Executive Orders.

Using Hindsight to Draft Better Force Majeure Clauses Moving Forward.

The most important takeaway from the foregoing historic and modern precedents is to take steps to ensure that any force majeure provisions that we as practitioners use in Leases moving forward are specifically tailored to the needs of our clients. Force majeure clause can no longer be considered boilerplate; landlords and tenants alike should review the relevant decisions in your jurisdiction along with the foregoing referenced force majeure provisions to carefully and meaningfully draft the force majeure provisions in any Lease Agreements moving forward.

First, be acutely aware of the "who, what, and when" terms that will trigger a particular force majeure provision. In addition, make sure that you consider any modifiers that may be included in a triggering event. For example, does the economic impact of a potential product shortage trigger the force majeure, or will the force majeure only be triggered if there is an actual shortage of the product. Do all types of war trigger a particular force majeure provision or should the provision state that only wars which occur within a certain geographic range can be considered triggering events?[10] Once the parties have agreed on the triggering events covered by a force majeure provision, they are only halfway done drafting the provision.

Second, be very mindful of what types of performance are excused or forms of mitigation are allowed by the provision. As we have seen in the post-Covid-19 litigation, partial performance is a hotly contested issue and courts have taken varied approaches to interpreting arguments concerning partial performance.

Third, be sure to take into account how the provisions of the applicable force majeure clause will impact the other lease terms as well as both parties' ability to employ impossibility of frustration of purpose defenses in the future.

Lastly, in the event that a force majeure provision contains overly broad language, such as "circumstances beyond our or your reasonable control," be mindful that courts may interpret that to include Pandemic scenarios even when none of the listed triggering events include pandemics or government restrictions. As a result, a Tenant may want to push for such a provision to be included in the force majeure clause. Landlords, however, should argue for force majeure clauses to be as narrowly tailored as possible.

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[10] This may become particularly important if the economic impacts of the War in Ukraine continue to cause economic disruptions.