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# *Force Majeure* Lease Provisions and Covid-19 Related Relief: More Power to the Tenants?



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# *Force Majeure* Lease Provisions and Covid-19 Related Relief: More Power to the Tenants?


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# What is "*force majeure*"?

- An event beyond the control of the parties which prevents performance under a contract and may excuse a party's non-performance.
- Second Circuit: purpose of *force majeure* clause "is in general to relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated." *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985).

# Sources of *Force Majeure* Provisions: Contractual

- The most common type of *force majeure* provisions is contractual. Below is a sample of a typical *force majeure* provision.
- "The parties' performance under this Agreement is subject to acts of God, war, government regulation, terrorism, disaster, strikes (except those involving [a party's] employees or agents), civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement." 30 WILLISTON ON CONTRACTS §77:31 (4th ed.) (*citing OWBR LLC v. Clear Channel Commc'ns, Inc.*, 266 F.Supp.2d 1214 (D. Haw. 2003)).
- Recent cases interpreting contractual *force majeure* provisions may result in parties seeking to limit the ability of parties to enforce these provisions. In the lending context we have a provision similar to the following:
  - In order to induce Lender to grant and extend the Mortgage Loan to Borrower, Borrower agrees that it shall not request, and shall not be entitled to, any deferment or forbearance of any principal, interest or other payments due Lender on account of, due to, related to or arising from the COVID-19 pandemic or the effects thereof upon the economy and expressly disclaims any right now or hereafter arising to request any such deferment or forbearance, except to the extent otherwise expressly mandated or required by law.

# Sources of *Force Majeure* Provisions: Restatement (Second) of Contracts

- No express reference to "*force majeure*" but provides for discharge of contractual obligation by "supervening impracticability"
  - "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).
  - *Comment b* explains: "In order for a supervening event to discharge a duty under this Section, the non-occurrence of that event must have been a 'basic assumption' on which both parties made the contract," with "[t]he continuation of existing market conditions and of the financial situation of the parties are ordinarily not such assumption, so that mere market shifts or financial inability do not usually effect discharge under the rule stated in this Section." RESTATEMENT (SECOND) OF CONTRACTS § 261, *comment b* (1981).

# Sources of *Force Majeure* Provisions: Restatement (Second) of Contracts

- RESTATEMENT (SECOND) OF CONTRACTS § 264 (1981) - provides an excuse from party's contractual obligations where the party is prevented from fulfilling its obligation "by governmental regulation or order" as defined therein.
- RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981) - provides that a party's discharge from its obligations under a contract by "supervening frustration" as defined therein.
- BUT, temporary impediment will not provide permanent relief from contractual obligations
  - RESTATEMENT (SECOND) OF CONTRACTS § 269 (1981) - if the "[i]mpracticability of performance or frustration of purpose" is "only temporary," it "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."

# Sources of *Force Majeure* Provisions: State Laws

- California Code, Civil § 1511
  - "The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: 1. When such performance or offer is prevented or delayed . . . by the operation of law, even though there may have been a stipulation that this shall not be an excuse . . . . 2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary . . . ."
- North Dakota, Code § 9-11-04
  - "The want of performance of an obligation or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes to the extent to which they operate: 1. When such performance or offer is prevented or delayed . . . by the operation of law, even though there may have been a stipulation that this may not be an excuse; 2. When it is prevented or delayed by an irresistible superhuman cause or by the act of public enemies of this state or of the United States, unless the parties have agreed expressly to the contrary . . . ."

# Enforcing *Force Majeure* Provisions

- Courts have generally required that "a *force majeure* clause must include the specific event that is claimed to have prevented performance." *Phibro Energy Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989).

- BUT courts have also enforced fairly broad *force majeure* provisions which effectively left open the definition of *force majeure*
  - For example, a court permitted a party to invoke a *force majeure* provision which stated: "'Force Majeure' for purposes of this Consent Decree is defined as any event arising from causes beyond the control of HRSD … that delays or prevents the performance of any obligation under this Consent Decree despite HRSD's … best efforts to fulfill the obligation." *U.S. Hampton Roads Sanitation Dept.*, No. 09-cv-481, 2012 WL 1109030, *4-6 (E.D. Vir. Apr. 2, 2012) (ellipsis in the original).

# Bases of Covid 19 *Force Majeure* Arguments: Examples of State Moratoriums

- New York Executive Order 202.70
  - Extends moratorium on commercial evictions and foreclosures through January 1, 2021. Applies to owners or renters who are "eligible for unemployment insurance or benefits under state of federal law" or otherwise face "financial hardship due to the COVID-19 pandemic."

- New York Executive Order 202.74
  - Executive Order 202.3, as extended, and Sections 105 and 106 of the Alcoholic Beverage Control Law, to the extent necessary to require that:
    - Liquor stores and wine stores shall cease all off premises sales and close at or before 10:00PM.
    - All businesses that are licensed by the State Liquor Authority for on premises service of alcoholic beverages, shall cease all on premises service and consumption of food and beverages inside or outside, at or before 10:00PM.
    - All restaurants, irrespective of whether such restaurant is licensed by the State Liquor Authority, shall cease in-person dining at 10:00PM, but may continue curbside takeout and delivery service after 10:00PM so long as otherwise permitted, and may reopen no earlier than 5:00AM.
    - Any gym or fitness center shall cease operation and close to the public at 10:00PM and cannot reopen until 5:00AM.

# Bases of Covid 19 *Force Majeure* Arguments: Examples of State Moratoriums

- New York Executive Order 202.61
  - Permits indoor food services and dining in New York City to resume beginning September 30, 2020, so long as Department of Health and any other applicable State-issued guidance is strictly adhered to. Bar service is not permitted.
    - All restaurants that reopen will be limited to 25% capacity indoors.
    - Capacity restrictions in locations outside of New York City are 50% capacity indoors.
- New York Executive Order 202.38
  - Allows restaurants and bars to reopen and serve in outdoor space, provided such restaurant or bar is in compliance with Department of Health guidance promulgated for such activity.
    - Safety protocols: temperature checks, contact information for tracing, face coverings when not seated and other safety protocols.

# Pre-Covid-19 Precedent: 2008 Financial Crisis

*In re Old Carco LLC*, 452 B.R. 100 (Bankr. S.D.N.Y. 2011).

- Bankruptcy court found that a *force majeure* provision excused a party's performance due to the financial crisis.
- *Force Majeure* provision:
  - "[Old Carco] shall not be considered … in default in the performance of its obligations under this agreement as a result of any cause beyond its reasonable control, including but not limited to severe and unusual weather, acts of God, or explosion, riot, acts of civil disobedience or sabotage, change to economic conditions and productivity and technological changes, power failures or shortages, restraint by court order or order of public authority, action or omission by any government agency, labor strikes or other labor disturbances." *In re Old Carco LLC*, 452 B.R. at 107.
- Court focused on the "change to economic conditions" clause in the provision and found that "it is clear that the [2008] Financial Crisis constitutes" a "change to economic conditions" within the meaning of the *force majeure* provision. *In re Old Carco LLC*, 452 B.R. at 120.
- In excusing the debtor's performance under the underlying agreement, the bankruptcy court found "that the ability of Old Carco to remain a viable automobile manufacturer once the [2008] Financial Crisis struck was not within its reasonable control." *In re Old Carco LLC*, 452 B.R. at 125-26.

# Pre-Covid-19 Precedent: September 11, 2001 Terrorist Attacks

*OWBR LLC v. Clear Channel Commc'ns, Inc.*, 266 F.Supp.2d 1214 (D. Haw. 2003).

- Court declined to excuse a party's performance due to the September 11, 2001 terrorist attacks.
- The parties entered an agreement under which the plaintiff would host a music industry event/conference produced by the defendants in February 2002. The event was cancelled by the defendants after the September 11, 2001 terrorist attacks. The *force majeure* provision provided, in pertinent part:
  - "The parties' performance under this Agreement is subject to acts of God, war, government regulation, terrorism, disaster, strikes (except those involving the Hotel's employees or agents), civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement." *OWBR LLC v. Clear Channel Commc'ns, Inc.*, 266 F.Supp.2d 1214, 1220 (D. Haw. 2003).
- Defendants argued that their performance was excused by the provision because the September 11, 2001 terrorist attacks "'severely disrupted travel, decimated the tourism industry, and created a pervasive sense of fear that gripped the country," such that holding the music event "was 'inadvisable' as referenced in the Force Majeure clause." *OWBR*, 266 F.Supp.2d at 1221.
- The court rejected this argument, finding that the defendants "have not presented sufficient evidence that terrorism presented travelers in February 2002 with circumstances so 'extreme and unreasonable' as to excuse performance under the Agreement." *OWBR*, 266 F.Supp.2d at 1225.

# Covid-19 Precedent

*In re Hitz Rest. Grp.*, 616 B.R. 374 (Bankr. N.D. Ill. 2020)

- Hitz, a restaurant operator, argued it should be excused from performance because, among other reasons, the language of a *force majeure* provision in the Lease excused its performance when such performance was prevented, hindered or delayed by the government-ordered shutdown related to Covid-19 pandemic.
- Bankruptcy court held that a *force majeure* provision of a lease partially excused Hitz's payment of rent under the lease where the leased premises was under a government ordered shutdown.
- Lease *force majeure* provision:
  - "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. . . . Lack of money shall not be grounds for Force Majeure." *Hitz Rest.*, 616 B.R. at 376-77.

# Covid-19 Precedent

*In re Hitz Rest. Grp.* (cont.)

- Hitz argued that the Illinois Governor's Emergency Order closing restaurants in response to the Covid-19 pandemic implicated the *force majeure* provision of the Lease and excused its obligation to pay rent.

- Emergency Order provided:
  - "Beginning March 16, 2020 at 9 p.m. through March 30, 2020, all businesses in the State of Illinois that offer food or beverages for on-premises consumption —including restaurants, bars, grocery stores, and food halls— must suspend service for and may not permit on-premises consumption. Such businesses are permitted and encouraged to serve food and beverages so that they may be consumed off-premises, as currently permitted by law, through means such as in-house delivery, third-party delivery, drive-through, and curbside pick-up. In addition, customers may enter the premises to purchase food or beverages for carry-out. However, establishments offering food or beverages for carry-out, including food trucks, must ensure that they have an environment where patrons maintain adequate social distancing." *Hitz Rest.*, 616 B.R. at 377.

# Covid-19 Precedent

*In re Hitz Rest. Grp.* (cont.)

- The bankruptcy court held that the Emergency Order "unambiguously" triggered the *force majeure* provision of the Lease because it "unquestionably" constituted a governmental action and the issuance of an order as contemplated by the language of the *force majeure* clause. *Hitz Rest.*, 616 B.R. at 377.
- The bankruptcy court also held that Hitz's ability to perform was hindered by the Emergency Order because it prevented Hitz from operating normally and restricted its business to take-out, curbside pick-up and delivery and therefore was "unquestionably" the proximate cause of Hitz's inability to pay full rent. *Hitz Rest.*, 616 B.R. at 377-78.
- The bankruptcy court ruled that, accordingly, under Illinois law, the *force majeure* provision excused Hitz's performance, at least in part. *Hitz Rest.*, 616 B.R. at 378-79.

# Covid-19 Precedent

*In re Hitz Rest. Grp.* (cont.)

- The bankruptcy court rejected the Landlord's argument for a narrow reading of the *force majeure* provision that would apply only if the Emergency Order shut down the banking system or post offices and Hitz was physically unable to write and send rental checks to the Landlord. *Hitz Rest.*, 616 B.R. at 378.

- The bankruptcy court held that the more specific provisions relating to a "governmental action" or "orders of government" as triggers for the *force majeure* clause prevail over the more general provision excluding "lack of money" as a trigger for the *force majeure* clause. The bankruptcy court reasoned that in interpreting an Illinois contract, when there is a conflict between a clause of general application and a clause of specific application, the more specific clause prevails. Finally, the bankruptcy court rejected the Landlord's assertion that Hitz could have obtained a small business loan to pay the rent. The bankruptcy court held that nothing in the *force majeure* provision supported this argument and the Landlord did not provide any supporting caselaw. *Hitz Rest.*, 616 B.R. at 378.

- However, the bankruptcy court held that the Emergency Order did not wholly excuse Hitz's performance.
  - The bankruptcy court found that the Emergency Order did not order complete closure of restaurants but, rather, prohibited regular dine in service while encouraging take out and curbside delivery. Therefore, some performance by Hitz was possible. The bankruptcy court determined that 25% of the rent representing the portion of the restaurant operations which were permitted under the Emergency Order. Additionally, the bankruptcy court noted the Emergency Order was issued in the middle of the month of March and, therefore, had no impact on half of that month's rent obligations. *Hitz Rest.*, 616 B.R. at 379-80.

# Covid-19 Precedent

*Richards Clearview, LLC v. Bed Bath Beyond, Inc.*, No. 20-1709, 2020 WL 5229494 (E.D. La. Sept. 2, 2020)

- Commercial eviction for non-payment of rent (for April and May 2020). Shopping mall tenant argued that it was excused from timely payment of rent by governor's emergency proclamation which closed certain stores in malls and by the lease's *force majeure* clause. Due to the emergency proclamation, tenant argued, the subject store was closed from March 23, 2020 through June 5, 2020 with limited curb-side pickup starting May 1, 2020. Tenant requested rent reduction, paid partial April 2020 rent (which landlord accepted) and made no payment for May. The lease provided for "fixed rent" but also for "alternate rent" which was limited a percentage of tenant's gross sales and applied when there was an "excess vacancy" as the shopping mall. On June 1 (after receiving landlord's notice of default), tenant paid residual April 2020 rent, and full rent for May and June 2020.

- The *force majeure* provision in the lease provided that failure to perform an act required by the lease may be excused for the period of the delay in the event that performance is hindered by "strikes, failure of power, riots, insurrection, war, earthquake, hurricane or tornado … or other reason of a like nature which are beyond the reasonable control of the party." 2020 WL 522949 at *3.

- Court found in favor of the tenant, declining to direct eviction. Tenant "had a plausible basis for believing that Fixed Rent was not due, and that even if [the tenant] was mistaken, it attempted to remedy the default relatively shortly after receiving notice thereof. Although the cure did not comply with the applicable deadlines in the Lease, any deficiency in that regard is excusable by the global circumstances. Moreover, there is no evidence that Landlord was harmed by the delay in any way, let alone a substantial one. In sum, lease cancellation, a disfavored event under Louisiana law, is not appropriate here." *Id*. at *8.

# Covid-19 Precedent

*Palm Springs Mile Assocs. Ltd. v. Kirkland's Stores, Inc.*, No. 20-21724-Civ-Scola, 2020 WL 5411353 (S.D. Fla. Sept. 9, 2020)

- Landlord sued tenant for breach of commercial lease for failure to pay rent and related charges starting in April 2020. Tenant moved to dismiss, arguing (based on the *force majeure* clause in the lease) that government-mandated quarantine and restrictions on business operations due to Covid-19 suspended rent obligations.

- *Force majeure* provision in the lease: "Whenever a period of time is prescribed in this Lease for action to be take 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 law, regulations or restrictions or any other causes of any kind whatsoever which are beyond the reasonable control of such party." 2020 WL 5411353 at *2.

- Court denied motion to dismiss, finding that the defendant's motion failed to link its nonpayment of rent to the government regulations and that the *force majeure* affirmative defense was not properly raised on motion to dismiss.
  - "The restrictions on non-essential activities and business operations must directly affect [tenant's] ability to pay rent." 2020 WL 5411353 at *2.
  - "Second, even if [the tenant] 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." *Id*. "The existence of an affirmative defense generally will not support a motion to dismiss." *Id*.

# Covid-19 Precedent

*Belk v. Le Chaperon Rouge Co.*, No. 18CV1954, 2020 WL 3642880 (N.D. Ohio July 6, 2020)

- Plaintiff sought to enforce a settlement reached in a Fair Labor Standards Act dispute. Parties reached a settlement on the record on March 12, 2020. In late March 2020, defendant declined to execute written settlement agreement due to "financial constraints imposed by the pandemic and Executive Orders issued by the State of Ohio impacting [defendant's] child care centers and private elementary school." 2020 WL 3642880 at *3.

- Court granted plaintiff's motion to enforce the parties' settlement agreement and rejected defendants' defense based on the doctrine of impossibility due to Covid-19.
  - "The Court finds that the defense of impossibility is not available to Defendants because it was reasonably foreseeable on March 12, 2020 that COVID-19 could have a significant negative impact on Defendants' business operation and financial ability to fund the settlement payment." 2020 WL 3642880 at *11.
  - "[E]ven assuming the financial impact of COVID-19 was not reasonably foreseeable on March 12, 2020, the Court finds that Defendants have failed to carry their burden of demonstrating that it is impossible for [defendant/principal of the corporate defendant] to fund the settlement payment" because that the defendants failed to submit financial information that would show inability to perform under the parties' settlement agreement. 2020 WL 3642880 at *11.

# Covid-19 Precedent

*Su Jung Shin v. Yoon*, No. 17-CV-01371-AWI-SKO, 2020 WL 6044086 (E.D. Cal. Oct. 13, 2020)

- Judgment debtors seek order, under FRBP 60(b), delaying their payment obligations under a stipulated judgment for one without interest or penalties due to Covid-19, arguing that "performance of their payment obligations under the Stipulated Judgment is currently impossible because the COVID-19 pandemic thwarted" sales of assets at prices sufficient to cover the required payments, and that "the COVID-19 Pandemic of 2020 and subsequent lockdowns are each undeniably force majeure" and thus performance is excused under state law.

- Court denied Rule 60(b)(6) relief, finding that Covid-19 effect of reducing parties' assets (which they intended to liquidate to pay the judgment) "has nothing to do with improprieties in the proceedings that culminated in the Stipulation Judgment or defects in the Stipulated Judgment." 2020 WL 6044086 at *4.

- The court also rejected the judgment debtors' contractual impossibility defense, finding that "even if contract defenses were applicable to the Stipulated Judgment, Judgment Debtors have failed to show that they are excused from their obligations." 2020 WL 6044086 at *6.

# Similar Rent Relief – 11 U.S.C. §365(d)(3)

- Courts have granted debtor-tenants similar relief under Section 365(d)(3) of the Bankruptcy Code.
  - 11 U.S.C. § 365(d)(3): The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period.
  - Relief is explicitly limited to 60 days and only delays payments (debtor remains liability for the unpaid rent).

- *In re Pier 1 Imports, Inc.*, 615 B.R. 196 (Bankr. E.D. Vir. 2020)
  - Chapter 11 debtors granted relief from rent obligations for a "limited operations period" (through May 31, 2020) when their stores were closed due to Covid-19 stay-at-home order
  - Court acknowledged that "COVID-19 presents a temporary, unforeseen and unforeseeable glitch in the administration of the" debtors' bankruptcy cases and permitted the debtors to effectively defer payment of rent payments to the effective date of the plan of reorganization by treating such obligations as administrative expenses. *In re Pier 1 Imports, Inc.*, 615 B.R. at 203.
  - "Without more, it would seem that" the relief sought by the debtors "would be in express contradiction of section 365(d)(3) of the Bankruptcy Code." Moreover, it seems contrary to the Congressional intent in enacting section 365(d)(3) of the Bankruptcy Code. Nevertheless, the bankruptcy court allowed the debtors to suspend their rent payments, with their rent obligations deemed an administrative expense which would have to be "paid by the Debtors on the effective date of any plan confirmed in these Bankruptcy Case," because "[t]o compel payment by the Debtors now would be to elevate payment of rent to the Lessors to superpriority status." *In re Pier 1 Imports, Inc.*, 615 B.R. at 202.

# Similar Rent Relief – 11 U.S.C. §365(d)(3)

- *In re Modell's Sporting Goods, Inc. et al.*, No. 20-14179 (Bankr. D.N.J.)
- Bankruptcy filed March 11, 2020 and, on March 23, 2020, debtors sought to suspend temporarily their chapter 11 cases pursuant to sections 105 and 305 of the Bankruptcy Code.
  - 11 U.S.C. § 305(a): "The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceeding in a case under this title, at any time if-- (1) the interests of creditors and the debtor would be better served by such dismissal or suspension . . . ."
- "The unprecedented, exponential spread of Coronavirus disease COVID-19 ("COVID-19") through the United States over the course of the last week, along with the resulting, state-imposed limitations and prohibitions on non-essential retail operations, has forced the Debtor to re-evaluate the short-term trajectory of this chapter 11 cases. The cornerstone of these cases is the liquidation of the Debtors' 134 stores and e-commerce site through store closing sale. Notwithstanding the Debtors' best-laid plans, COVID-19 has prevented the Debtors from conducting the robust liquidation sales that seemed possible just one week ago; it has left the Debtors with no choice but to temporarily 'mothball' their operations to preserve value, with the hope that they can recommence operations in the near future and successfully liquidate their inventory for the benefit of all parties-in-interest. In order to mothball their operations and abide by their social and ethical duties to promote social distancing, the Debtors seek a temporary suspension of all deadlines and activities in their chapter 11 cases, for a period of up to sixty days, pursuant to section 305 of the Bankruptcy Code . . . without prejudice to their right to seek additional time." ECF No. 115 (*Debtors' Verified Application in Support of Emergency Motion for Entry of an Order Temporarily Suspending Their Chapter 11 Cases Pursuant to 11 U.S.C. §§ 105 and 305*), pp. 2-3.
- Bankruptcy court granted the debtors' request, suspending the debtors' chapter 11 case until April 30, 2020. ECF No. 166 (*Order Temporarily Suspending the Debtors' Chapter 11 Cases Pursuant to 11 U.S.C. §§ 105 and 305*). Subsequent Court orders extended the suspension to May 31, 2020 (ECF 294) and June 15, 2020 (ECF 371).

# Similar Rent Relief – 11 U.S.C. §365(d)(3)

- Relief under section 365(d)(3) to delay the payment of rent based on Covid 19 related hardship has become a commonplace fixture in retail, restaurant and other similar bankruptcy cases. Some of the courts that have granted extensions of time have based on finding that COVID 19 related hardship constitutes cause include:
  - In re Brooks Brothers Group, Inc., No. 20-11785 (Bankr. D. Del. July 30, 2020)
  - In re 24 Hour Fitness Worldwide, Inc., No. 20-11558 (Bankr. D. Del. July 2, 2020
  - In re CEC Entertainment Inc., No. 20-33163 (Bankr. S.D. Tex. June 30, 2020)
  - In re J.C. Penney Company, Inc., No. 20-201782 (Bankr. S.D. Tex. June 11, 2020)
  - In re Stage Stores, Inc., No. 20-32564 (Bankr. S.D. Tex. May 27, 2020)
  - In re Chinos Holdings, Inc., No. 20-32181 (Bankr. E.D. Va. May 26, 2020)
  - In re Art Van Furniture, LLC, No. 20-10553 (CSS) (Bankr. D. Del. Apr. 27, 2020)

# Similar Rent Relief – 11 U.S.C. §365(d)(3)

- At least one recent filing suggests that there may be limits to availability of relief under section 365(d)(3).
  - In *In re Ascena Retail Group, Inc., et al.,* case no. 20-3313 (Bankr. E.D. Va.) [Dkt. No. 274], the Official Committee of Unsecured Creditors (the "Committee") objected to the Debtors' motion seeking relief from its obligation to pay rent during the first 60 days of the cases pursuant to section 3659(d)(3) of the Bankruptcy Code based on Covid related restrictions on operations.
  - The Committee argued that Covid 19 shutdown orders did not constitute "cause" within the meaning of section 365(d)(3) because the pandemic as not a new exigent circumstance, but rather it had been ongoing for several months when the Debtors filed for bankruptcy in July 2020. The Debtors had factored Covid 19 related restrictions and the payment of rent into the budget. The Committee alleged that the Debtors' motive for seeking relief was to put pressure on landlords in ongoing negotiations regarding potential assumption of leases.
  - The Debtors withdrew the motion in the face of numerous objections and the Court did not consider the Committee's arguments, but they suggest that there are limits to the use of Covid 19 as a basis for section 365(d)(3) relief.

# Take Aways

- Enforcement of a *force majeure* provision is a fact specific analysis that will require consideration of:
  - specific language of the *force majeure* provision
  - impact of Covid 19 - whether and to what extent business operations are impacted
  - extent of economic impact of affected business operations, i.e., whether hardship is a result of Covid 19

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Matthew G. Roseman heads the firm's Bankruptcy and Creditors' Rights department. He represents debtors, secured creditors, landlords and acquirers of assets in bankruptcy proceedings throughout the United States. Over his years of practice, Matthew has advised debtors and creditors in corporate reorganizations involving both public corporations and privately held businesses, and he has successfully argued a case of the first impression before the United States Court of Appeals for the 2nd Circuit involving an issue of the bankruptcy procedure. Matthew also has particular experience representing construction companies and contractors in bankruptcy proceedings and workouts, and he regularly provides True Sale, Safe Harbor and Non-Consolidation opinion letters in complex commercial transactions.

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Michael represents businesses in matters ranging from litigation to insolvency, creditors' committees in Chapter 11 reorganizations and out-of-court workouts, and other clients with interests throughout the world. In his international law practice, Michael maintains a special focus on Israel, Poland and Eastern Europe, and he has appeared before courts throughout the United States, Poland and Israel.

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Michelle works with her clients to create strategies tailored to meet their business needs and objectives. Her experience includes preparing and prosecuting pleadings and motions, negotiating out-of-court settlements and appearing at adversarial hearings related to first-day motions, DIP financings, automatic stays, asset sales, disclosure statements, reorganization plans, assumptions and assignments of leases and contracts, and objections to claims. She has also defended numerous clients in avoidance actions, and she advises buyers in acquisitions of distressed assets and other transactions involving troubled companies.

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Michael began his legal career before starting law school. After graduation from McGill University in Montreal, he worked as a legal assistant for a bankruptcy and commercial litigation law firm. While a law student at Brooklyn Law School, Michael served as an intern to the Honorable Jerome Feller of the United States Bankruptcy Court for the Eastern District of New York and Judge Bernard J. Fried of the Commercial Division of the New York State Supreme Court, and he interned with the United States Attorney's Office for the Eastern District of New York. Michael also served as an Executive Board member of the Brooklyn Journal of International Law and as a Barry L. Zaretsky Bankruptcy and Commercial Law Center fellow while in law school.

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Feature

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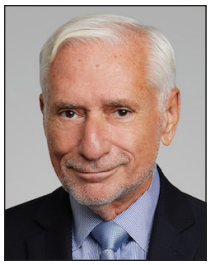
# *Force Majeure* Provisions Likely to Give Tenants Leverage with Landlords in COVID-19 Defaults



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**Editor's Note:** *For another perspective on this topic, please read the cover feature of the August 2020 issue (abi.org/abi-journal).*

As a result of government-ordered shutdowns related to the COVID-19 pandemic, commercial tenants have been increasingly engaging landlords in negotiations — in and out of bankruptcy — to seek rent concessions and other relief to address accruing lease obligations on shuttered locations. In a recent decision, a bankruptcy court has determined that the *force majeure* provision of a lease partially excused the tenant's payment of rent where the leased premises were subject to a pandemic-related shutdown order. If other courts follow suit, the argument could provide tenants with additional arguments supporting their requests for rent relief.

## What Are *Force Majeure* Provisions?

The phrase "*force majeure*" describes an event beyond the control of the parties that prevents performance under a contract and may excuse a party's non-performance. As explained by the Second Circuit, the purpose of a *force majeure* clause "is in general to relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated."[1] Courts have generally required that "a *force majeure* clause must include the specific event that is claimed to have prevented performance."[2] For example, a *force majeure* clause might provide the following: "The parties' performance under this Agreement is subject to acts of God, war, government regulation, terrorism, disaster, strikes (except those involving [a party's] employees or agents), civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement."[3]

Although the *Restatement (Second) of Contracts* does not expressly refer to "*force majeure*," it provides for the discharge of contractual obligations by "supervening impracticability," which is largely the same. Specifically, it provides that

> [w]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.[4]

1 *Phillips Puerto Rico Core Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985).

2 *Phibro Energy Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989).

3 30 *Williston on Contracts* §77:31 (4th ed.) (citing *OWBR LLC v. Clear Channel Commc'ns Inc.*, 266 F. Supp. 2d 1214 (D. Haw. 2003)). Courts have also enforced fairly broad *force majeure* provisions that effectively left open the definition of "*force majeure*." *See, e.g., U.S. Hampton Roads Sanitation Dept.*, No. 09-cv-481, 2012 WL 1109030, *4-6 (E.D. Va. April 2, 2012) (permitting party to invoke *force majeure* provision, which stated that "'*Force Majeure*,' for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of HRSD ... that delays or prevents the performance of any obligation under this Consent Decree despite HRSD's ... best efforts to fulfill the obligation.") (ellipsis in the original).

4 *Restatement (Second) of Contracts* § 261 (1981). Comment b to the provision explains that "[i]n order for a supervening event to discharge a duty under this Section, the non-occurrence of that event must have been a 'basic assumption' on which both parties made the contract," with "[t]he continuation of existing market conditions and of the financial situation of the parties are ordinarily not such assumption, so that mere market shifts or financial inability do not usually effect discharge under the rule stated in this Section." In addition, *Restatement (Second) of Contracts* § 264 (1981) provides an excuse from a party's contractual obligations where the party is prevented from fulfilling its obligation "by governmental regulation or order" as defined therein. Lastly, *Restatement (Second) of Contracts* § 265 (1981) provides that a party's discharge from its obligations under a contract by "supervening frustration" as defined therein.

Notably, if the "[i]mpracticability of performance or frustration of purpose" is "only temporary," it "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."[5] Accordingly, a temporary impediment will not provide permanent relief from contractual obligations.

## Prior Applications Based on National Events

Before the 2020 pandemic, courts addressed *force majeure* provisions with inconsistent results. For example, after the 2008 financial crisis, a bankruptcy court found that a *force majeure* provision excused a party's performance due to the financial crisis. In *In re Old Carco LLC*,[6] the bankruptcy court interpreted the following *force majeure* provision:

> [Old Carco] shall not be considered ... in default in the performance of its obligations under this agreement as a result of any cause beyond its reasonable control, including but not limited to severe and unusual weather, acts of God, or explosion, riot, acts of civil disobedience or sabotage, change to economic conditions and productivity and technological changes, power failures or shortages, restraint by court order or order of public authority, action or omission by any government agency, labor strikes or other labor disturbances.[7]

Focusing on the "change to economic conditions" clause in the provision, the bankruptcy court found that the 2008 Financial Crisis clearly "constitutes [a] change to economic conditions" within the meaning of the *force majeure* provision.[8] In excusing the debtor's performance under the underlying agreement, the bankruptcy court found "that the ability of Old Carco to remain a viable automobile manufacturer once the [2008] Financial Crisis struck was not within its reasonable control."[9]

By contrast, the court in *OWBR LLC v. Clear Channel Commc'ns Inc.*[10] declined to excuse a party's performance due to the Sept. 11, 2001, terrorist attacks. The parties had executed an agreement under which the plaintiff would host a music industry event/conference produced by the defendants in February 2002.[11] The event was cancelled by the defendants after the Sept. 11, 2001, terrorist attacks.[12] The *force majeure* provision provided, in pertinent part:

> The parties' performance under this Agreement is subject to acts of God, war, government regulation, terrorism, disaster, strikes (except those involving the Hotel's employees or agents), civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement.[13]

Arguing that their performance was excused by the provision, the defendants claimed that the Sept. 11, 2001, terrorist attacks "severely disrupted travel, decimated the tourism industry, and created a pervasive sense of fear that gripped the country," such that holding the music event "was 'inadvisable' as referenced in the *Force Majeure* clause."[14] The court rejected this argument, finding that the defendants had "not presented sufficient evidence that terrorism presented travelers in February 2002 with circumstances so 'extreme and unreasonable' as to excuse performance under the Agreement."[15]

## Pandemic-Related Shutdown Orders Can Constitute *Force Majeure*

As was reported by ABI Editor-at-Large **Bill Rochelle**,[16] a recent decision by the U.S. Bankruptcy Court for the Northern District of Illinois interpreting the *force majeure* provision of a restaurant lease could have significant implications for landlords. The court held that a *force majeure* provision of a lease partially excused the debtor tenant's payment of rent under the lease where the leased premises was under a government-ordered shutdown.[17] The bankruptcy court addressed a motion by a landlord seeking to compel Hitz, its debtor/tenant, to pay rent owed under a lease of nonresidential real property pursuant to § 365(d)(3) of the Bankruptcy Code. Hitz, a restaurant operator, argued that it should be excused from performance because, among other reasons, the language of a *force majeure* provision in the lease excused its performance when such performance was prevented, hindered or delayed by the government-ordered shutdown related to the pandemic. The lease provided, in pertinent part, that the

> 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 gov-

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5 *Restatement (Second) of Contracts* § 269 (1981).
6 452 B.R. 100 (Bankr. S.D.N.Y. 2011).
7 *Id.* at 107.
8 *Id.* at 120.
9 *Id.* at 125-26.
10 266 F. Supp. 2d 1214 (D. Haw. 2003).
11 *Id.* at 1215.
12 *Id.* at 1216.
13 *Id.* at 1220.
14 *Id.* at 1221.
15 *Id.* at 1225.
16 "*Force Majeure* Clause Cut an Illinois Debtor's Rent by 75%," *Rochelle's Daily Wire* (June 11, 2020), *available at* abi.org/newsroom/daily-wire/force-majeure-clause-cut-an-illinois-debtor%E2%80%99s-rent-by-75 (last visited on July 23, 2020).
17 *In re Hitz Rest. Grp.*, No. 20-05012 (Bankr. N.D. Ill. June 2, 2020), ECF No. 48 (Memorandum Opinion).

ernment.... Lack of money shall not be grounds for *Force Majeure*.[18]

Hitz asserted that the Illinois governor's emergency order closing restaurants in response to the pandemic implicated the lease's *force majeure* provision and excused Hitz's obligation to pay rent under the lease. The emergency order stated:

> Beginning March 16, 2020, at 9 p.m. through March 30, 2020, all businesses in the State of Illinois that offer food or beverages for on-premises consumption — including restaurants, bars, grocery stores, and food halls — must suspend service for and may not permit on-premises consumption. Such businesses are permitted and encouraged to serve food and beverages so that they may be consumed off-premises, as currently permitted by law, through means such as in-house delivery, third-party delivery, drive-through, and curbside pick-up. In addition, customers may enter the premises to purchase food or beverages for carry-out. However, establishments offering food or beverages for carry-out, including food trucks, must ensure that they have an environment where patrons maintain adequate social distancing.[19]

The bankruptcy court held that the emergency order "unambiguously" triggered the lease's *force majeure* provision because it "unquestionably" constituted a governmental action and the issuance of an order as contemplated by the language of the *force majeure* clause. The bankruptcy court also held that Hitz's ability to perform was hindered by the emergency order because it prevented the debtor from operating normally and restricted its business to take-out, curbside pick-up and delivery, and therefore was "unquestionably" the proximate cause of the debtor's inability to pay full rent. The bankruptcy court ruled that, accordingly under Illinois law, the *force majeure* provision excused Hitz's performance, at least in part.[20]

The bankruptcy court disagreed with the landlord's argument for a narrow reading of the *force majeure* provision that would apply only if the emergency order shut down the banking system or post offices and Hitz was physically unable to write and send rental checks to the landlord. The court also rejected the landlord's argument that the emergency order was not the proximate cause of Hitz's inability to pay rent, but rather Hitz's lack of money was the proximate cause, and the *force majeure* provision specifically excluded lack of money as a basis for invoking the provision.

The bankruptcy court held that the more specific provisions relating to a "governmental action" or "orders of government" as triggers for the *force majeure* clause prevailed over the more general provision excluding "lack of money" as a trigger for the *force majeure* clause. The court reasoned that in interpreting an Illinois contract, when there is a conflict between a clause of general application and a clause of specific application, the more specific clause prevails. Finally, the court rejected the landlord's assertion that Hitz could have obtained a small business loan to pay the rent, and it found that nothing in the *force majeure* provision supported this argument and that the landlord did not provide any supporting case law.[21]

However, the bankruptcy court held that the governor's emergency order did not wholly excuse Hitz's performance. It found that the emergency order did not order complete closure of restaurants but, rather, prohibited regular dine-in service while encouraging take-out and curbside delivery. Therefore, some performance by Hitz was possible. The bankruptcy court determined that 25 percent of the rent representing the portion of the restaurant operations was permitted under the emergency order. In addition, the court noted that the emergency order was issued in the middle of March and therefore had no impact on half of that month's rent obligations.[22]

## Conclusion

If more broadly adopted, the bankruptcy court's decision could have significant implications for all landlords with leases containing similar *force majeure* provisions, both in and out of bankruptcy. For example, Jenner & Block LLP is reported to have been in negotiations with its landlord asserting similar claims for rent-abatement based on a *force majeure* provision of the lease for its Chicago offices.[23] We will probably see more of these lease-related disputes resolved out of court, but the *force majeure* issue will also come to the courts increasingly over the coming months. abi

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18 *Id.* at p. 2.
19 *Id.* at p. 3.
20 *Id.* at pp. 3-4.
21 *Id.* at pp. 4-6.
22 *Id.* at pp. 5-6.
23 Debra Cassens Weiss, "Fighting Landlord's Suit, Jenner & Block Says COVID-19 Pandemic Entitles It to Rent Abatement," *ABA Journal* (June 24, 2020).