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Force Majeure Clauses in Commercial Leases

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A “force majeure clause” is a provision found in many different types of contracts, especially in commercial leases, which relieves both parties of their respective liabilities and obligations under the contract upon the occurrence of a certain type of event (a “Force Majeure Event”). A Force Majeure Event is a supervening event that is out of the control of both parties. Force Majeure clauses usually specify certain Force Majeure Events that will trigger the effect of the clause. The Force Majeure Events in a contract may vary, but are generally similar, and will typically include: acts of God, war, strikes, natural disasters, acts of terrorism, governmental actions and any other unforeseeable, supervening event outside of the parties’ control.

In light of the recent outbreak of the coronavirus, commonly known as COVID-19, and the resulting worldwide pandemic crisis, many commercial tenants are turning to the force majeure clauses in their leases for relief. Some force majeure clauses may specifically refer to “epidemics” and/or “pandemics” as a Force Majeure Event, which would accurately describe the COVID-19 circumstances at hand. For those clauses that do not, the COVID-19 pandemic may be considered an “act of God,” which is usually a defined Force Majeure Event in force majeure clauses. If a tenant’s business and/or industry has been limited or wholly restricted in its operations by a governmental action in response to the COVID-19 pandemic, a tenant may look to pursue force majeure relief under the “governmental action” Force Majeure Event, if available. For example, New York implemented some of the country’s strictest limitations and restrictions on non-essential businesses and industries, especially those that draw large crowds (like restaurants and movie theaters), and many tenants of these types of businesses/industries are hoping their leases will provide relief from these unprecedented events.

The relief sought will vary from tenant to tenant and the relief that is actually available will differ depending on the language in the lease. Tenants who find themselves in particularly devastating hardship from the COVID-19 pandemic may try to terminate their leases, while others may seek a rent abatement for a temporary amount of time (usually for so long as the Force Majeure Event is current). However, while force majeure clauses will excuse a tenant’s performance and other lease obligations, it is very common that the clause will include a caveat providing that a tenant is *not* excused from its rental obligations as a result of any Force Majeure Event. If this is the case,

the tenant will not be able to use force majeure for rental payment relief.

It is critical to examine force majeure clauses on a case by case basis because, although the clauses are typically similar, the particular language of the clause may specify certain relief that is, or is not, available to the contracting parties as a result of a Force Majeure Event. If it is determined that a force majeure clause will not provide the tenant the relief sought, the tenant may turn to common law doctrines of impossibility, impracticability, and/or commercial frustration of purpose. Tenants are faced with a high burden of proof when asserting these doctrines, but the unprecedented circumstances of COVID-19 may suffice as the supervening event(s) needed in order to invoke such doctrines.