



# IFA LEGAL SYMPOSIUM

# COVID-19 Impacts on Real Estate Leases

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Anthony J. Marks, Steve Dunn, Chris Mason & Chad Warpula

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Welcome to America's Diner

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# Panelists

## Moderator:



**Anthony J. Marks**  
Partner  
Bryan Cave  
[anthony.marks@bclplaw.com](mailto:anthony.marks@bclplaw.com)  
(310) 576-2162

## Speakers:



**Stephen C. Dunn**  
SVP, Chief Dev. Off.  
Denny's  
[sdunn@dennys.com](mailto:sdunn@dennys.com)



**Chris Mason**  
Exec. Managing Director  
Newmark  
[cmason@ngkf.com](mailto:cmason@ngkf.com)  
972-715-4370



**Chad Warpula**  
Partner  
Troutman Pepper  
[Chad.Warpula@troutman.com](mailto:Chad.Warpula@troutman.com)  
704-651-3412

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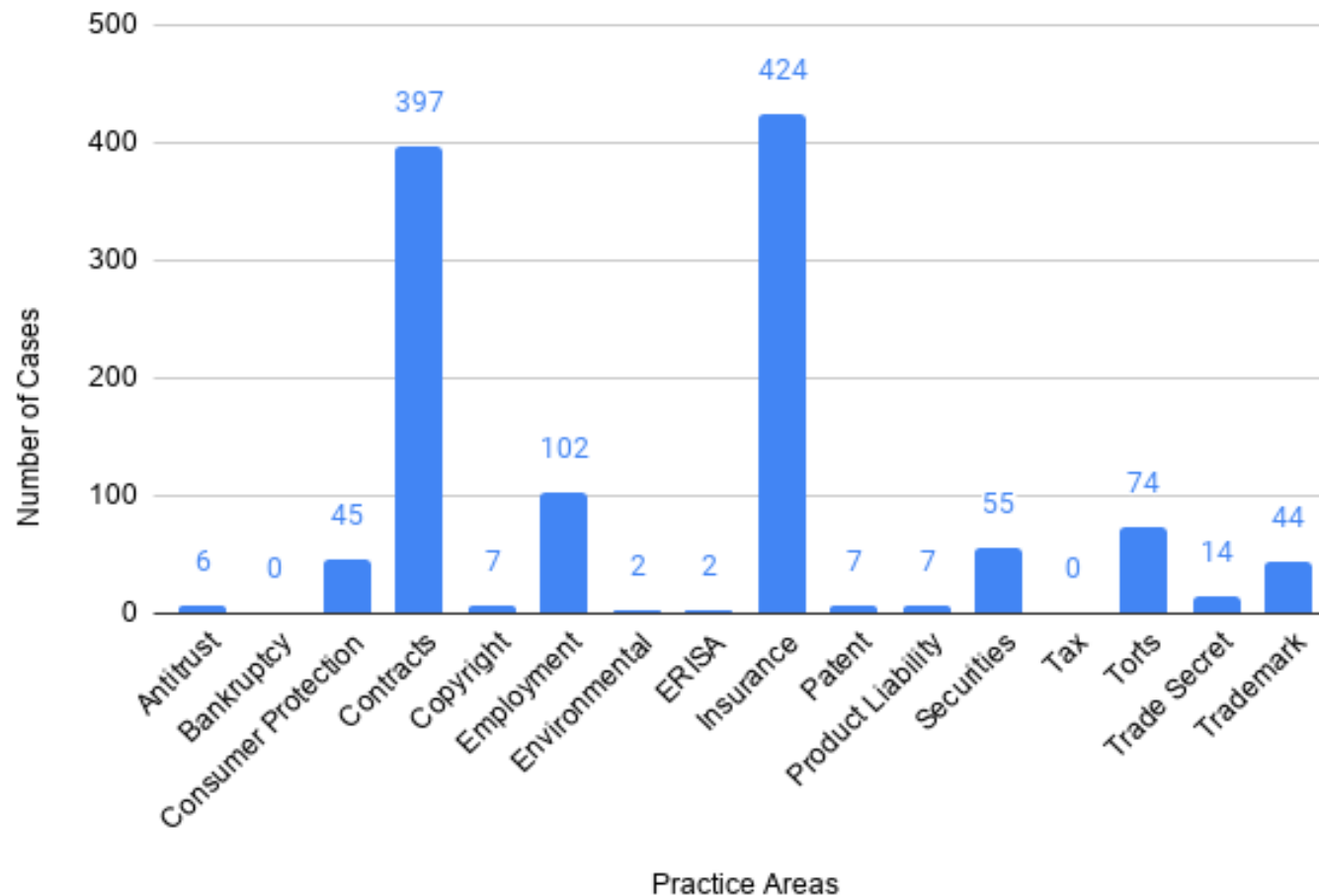
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# COVID-Related Litigation Activity



# Force Majeure - A Provision Allocating Risk

- Typically, Force Majeure clauses identify what will occur when circumstances arise that are beyond the reasonable control of the parties.
- **Two key questions:**
  - Does the provision apply?
  - Does the provision allocate risk of an event (or non-event) to one of the parties?

# Force Majeure – An Example

- 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.
- *In re CEC Ent., Inc.*, No. 20-33162, 2020 WL 7356380, at \*14 (Bankr. S.D. Tex. Dec. 14, 2020)

# Force Majeure – Does it Apply?

- **Does it include any terms that may cover the COVID-19 Pandemic (e.g. “Governmental Orders,” “Acts of God,” “Natural Disasters,” or “Any Other Reason Beyond the Expectation of the Parties”)?**
  - *In re CEC Ent., Inc.*, No. 20-33162, 2020 WL 7356380, at \*10 (Bankr. S.D. Tex. Dec. 14, 2020), the Court rejected the argument that a force majeure clause did not include COVID-19 because the clause did not specifically refer to disease or pandemics. The Court reasoned that it was nonsensical for a force majeure clause to contemplate “unforeseen events” and then not apply that clause when an event wasn’t specifically contemplated.
  - Courts are split on whether COVID-19 qualifies as “natural disaster” or “force of nature.” *JN Contemp. Art LLC v. Phillips Auctioneers LLC*, No. 20CV4370 (DLC), 2020 WL 7405262, at \*7 (S.D.N.Y. Dec. 16, 2020); *Slusher v. Mid-Century Ins. Co.*, No. CV SA-20-CA-607-FB, 2020 WL 6440040, at \*6 (W.D. Tex. Sept. 14, 2020) (holding that COVID-19 is not a “force of nature” in insurance contract dispute).



# Force Majeure – An Example

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- *In re CEC Ent., Inc.*, No. 20-33162, 2020 WL 7356380, at \*14 (Bankr. S.D. Tex. Dec. 14, 2020)

# Force Majeure - Lease Language Is King

- **If a Force Majeure provision applies, how does it allocate risk?**
  - In *In re CEC Ent., Inc.*, No. 20-33162, 2020 WL 7356380, at \*14 (Bankr. S.D. Tex. Dec. 14, 2020), Leases included language in the Force Majeure clause carving out the payment of money. The Court held that the broad language demonstrated the parties' intent that "unforeseen circumstances will not excuse" the failure to pay rent.
  - Similarly, trial courts in New York have held that the doctrines do not excuse the nonpayment of rent where the allocation of risk clauses were "drafted broadly" and unequivocal. *Victoria's Secret Stores, LLC v Herald Sq. Owner LLC*, 70 Misc. 3d 1206[A], at \* 2 2021 NY Slip Op 50010[U] (Sup. Ct. N.Y. 2021); *Valentino U.S.A. v. 693 Fifth Owner LLC*, 2021 N.Y. Misc. LEXIS 607 at \*2; 2021 NY Slip Op 50119(U) (Sup. Ct. N.Y. 2021).
  - *1600 Walnut Corp. v. Cole Haan*, No. CV 20-4223, 2021 WL 1193100, at \*1 (E.D. Pa. Mar. 30, 2021) (nonpayment of rent not excused where force majeure clause excluded "obligation to pay rent" and nonperformance "due to lack of funds").

# Force Majeure

- *In re Hitz Rest. Grp.*, 616 B.R. 374, 378 (Bankr. N.D. Ill. 2020).
  - “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.”
- The Force Majeure clause was triggered by the Illinois Governor’s business shutdown order.
- Shutdown order was proximate cause of inability to generate revenue and pay rent. (Lack of money caused by Force Majeure event).
- Force Majeure clause partially excuses obligation to pay rent for April, May, and June 2020.

# Exclusionary Language is Examined on a Case-by-Case Basis

- In contrast, some Courts have held that the language of the lease did not completely preclude the application of the common law doctrines
  - In *In re Cinemex USA Real Est. Holdings, Inc.*, No. 20-14695-BKC-LMI, 2021 WL 564486, at \*1 (Bankr. S.D. Fla. Jan. 27, 2021), the Court examined the following allocation of risk language:
    - If either party to this Lease, as the result of any . . . (iv) acts of God, governmental action, condemnation, civil commotion, fire or other casualty, or (v) other conditions similar to those enumerated in this Section beyond the reasonable control of the party obligated to perform (other than failure to timely pay monies required to be paid under this Lease), fails punctually to perform any obligation on its part to be performed under this Lease, then such failure shall be excused and not be a breach of this Lease . . . .
    - The Court held that the “failure to timely pay monies” language only applied to roman numeral (v), the catch-all provision. Thus, because the shutdown orders were a “governmental action,” the exclusionary language did not apply.

# Recent State Decisions on Force Majeure Clauses

## New York

- *Sanders v. Edison Ballroom LLC*, 2021 NY Slip Op 30900(U), ¶ 1 (N.Y. Sup. Ct.) (Granting summary judgment in favor of Plaintiffs who brought breach of contract action where defendant canceled reservation at venue and refused to refund deposit that would ordinarily be nonrefundable pursuant to force majeure clause).
- *Tabor v. 148 Duane LLC*, No. 156655/2018, 2021 WL 1175112, at \*2 (N.Y. Sup. Ct.) (holding that an agreement to temporarily vacate property due to construction did not incorporate by reference force majeure clause in Lease, and that COVID-19 did not render performance impossible as to excuse breach).
- *98-48 Queens Blvd LLC v. Parkside Mem'l Chapels, Inc.*, 2021 NY Slip Op 50049(U), ¶ 5, 70 Misc. 3d 1211(A), 137 N.Y.S.3d 679 (Civ. Ct.) (force majeure clause in underlying lease did not excuse requirement to pay holdover rent rate, where the Lease expired and tenant remained on the premises).

# Recent State Decisions on Force Majeure Clauses, Cont'd

## Texas

- *Easom v. US Well Servs., Inc.*, No. CV H-20-2995, 2021 WL 1092344, at \*11 (S.D. Tex. Mar. 19, 2021) (Outside of FM context, holding that COVID-19 was a “natural disaster” under the WARN Act, applying Pennsylvania Supreme Court decisions, New York Federal Court decisions, and dictionary definitions).

## Massachusetts

- *Moran v. Stonehill Coll., Inc.*, No. 2077CV00431, 2021 Mass. Super. LEXIS 1, at \*22-23 (Feb. 16, 2021) (college could not invoke force majeure clause as a defense to suit from student seeking tuition refund for switch from in-person to online classes).

# Common Law Defenses – Impossibility and Impracticability

## Common Law Defenses to Nonperformance

- The modern origin of the doctrine of impossibility can be traced to the English case of *Taylor v. Caldwell*, written by Justice Blackburn. It involved the rental of the Surrey Gardens & Music Hall for an extravagant 4-day music festival featuring a 40-piece military marching band, minstrels, fireworks, a ballet of divertissement, a wizard, Grecian statues, tight rope performances, and “Parisian games”. When the music hall burned down, Justice Blackburn ruled that “[t]he principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.” There was no casualty clause. Just the words “God’s will permitting” at the end of the contract.
- For the defense of impossibility to be successfully raised: (1) there must be an occurrence of a condition, *the nonoccurrence of which was a basic assumption of the contract*, (2) the occurrence must make performance impossible, and (3) the condition must not have been anticipated by the parties to the contract.

# Common Law Defenses – Impossibility and Impracticability

## Common Law Defenses to Nonperformance

- With “strict” impossibility, performance must not merely be difficult or unexpectedly costly for one party, there must be no way for it to actually be accomplished.
- However, the doctrine of impracticability has evolved as a related but separate defense. It has all of the elements of impossibility, except that performance need not be impossible, it need only involve extreme and unreasonable difficulty, expense, or loss.
- Imagine if Surrey Garden and Music Hall did *not* burn down, but, instead, all of the major roads leading to the venue were closed, making performance of the music festival excessively burdensome and/or costly.... Impossibility is supposedly an objective analysis. Was performance possible? However, impracticability is a highly subjective and fact specific analysis.
- Over time, the doctrine of impossibility has been interpreted to include the doctrine impracticability. See Restatement Contracts (First) Section 454.



# Common Law Defenses – Impossibility and Impracticability

## Common Law Defenses to Nonperformance

- ***Albert M. Greenfield & Co. v. Kolea*, 380 A.2d 758, 759 (Pa. 1977)**. In this case, a used car dealership burned down. The Pennsylvania State Supreme Court ruled that the tenant was relieved from any lease obligations due to the doctrine of impossibility, which they noted, quoting Section 454 of the Restatement (First) of Contracts, “means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved.”
- Commercially impracticable is more than just unprofitable; performance must result in “extreme and unreasonable difficulty, expense, or loss involved.” ***Ellwood City Forge Corp. v. Fort Worth Heat Treating Co.*, 636 A.2d 219, 223 (Pa. Super. 1994)**. In this case, the parties entered into a contract whereby the defendant tried to lease a commercial ionitride furnace, which both parties thought operated at 450 K.W., but which turned out to operate at only 350 K.W. This resulted in a jury instruction that the “production of the incorrect furnace entitled [defendant] to discharge due to commercial impracticability.”

# Common Law Defenses – Impossibility and Impracticability

## Common Law Defenses to Nonperformance

- A “supervening event” must be an “event the non-occurrence of which was a basic assumption on which the contract was made.” *Step Plan Servs., Inc. v. Koresko*, 12 A.3d 401, 411 (Pa. Super. Ct. 2010) (quoting Restatement (Second) of Contracts § 261 (1981)).
- The plaintiff brought a claim against the defendant for an “unlawful” scheme to gain a competitive advantage. The parties signed a settlement agreement, whereby Koresko was supposed to make direct cash payments to Step. However, after the settlement was signed, a group of unrelated creditors obtained an injunction barring payment of the settlement proceeds to Step. The court decided that performance under the contract was excused because of impracticability, citing § 261 of the Restatement: “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.”

# Common Law Defenses – Impossibility and Impracticability

## Common Law Defenses to Nonperformance

- The court also cited § 264 of the Restatement: “If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.”

# Common Law Defenses – Exclusionary Clauses

- **Lease language may limit applicability of doctrines to exclude breaches for nonpayment of rent.** *Victoria's Secret Stores, LLC v Herald Sq. Owner LLC*, 70 Misc. 3d 1206[A], at \* 2 2021 NY Slip Op 50010[U] (Sup. Ct. N.Y. 2021) (“It is of no moment that the specific cause for the government law was not enumerated by the parties because the Lease as drafted is broad and encompasses what happened here — a state law that temporarily caused a closure of the tenant's business.”); *Valentino U.S.A. v. 693 Fifth Owner LLC*, 2021 N.Y. Misc. LEXIS 607 at \*2; 2021 NY Slip Op 50119(U) (Sup. Ct. N.Y. 2021).
- But Courts will view the specific language of any exclusionary clause to determine if the common law doctrines apply to nonpayment of rent. *In re Cinemex USA Real Est. Holdings, Inc.*, No. 20-14695-BKC-LMI, 2021 WL 564486, at \*1 (Bankr. S.D. Fla. Jan. 27, 2021).

# Recent State Decisions on Impracticability and Impossibility

**New York -- CAI Rail, Inc. v. Badger Mining Corp., No. 20 CIV. 4644 (JPC), 2021 WL 705880, at \*7 (S.D.N.Y. Feb. 22, 2021).**

*Badger* leased railcars for transporting sand used for hydraulic fracking. As a result of the pandemic, 1/3 of *Badger's* business “disappeared overnight.” Travel restrictions and reduced economic activity resulted in oil consumption falling to its lowest level in 30 years. However, that was not enough for the court to find impossibility or impracticability. “In New York, a party is not excused from a contract simply because it becomes more economically difficult to perform....” The court noted that there was no governmental regulation limiting the use of train cars, and the defendant did in fact continue using train cars during the pandemic. Court noted that it didn’t matter that there was no force majeure clause. Impossibility is difficult in New York....

# Frustration of Purpose

## What is it?

- Performance may be excused where the “principal purpose” of the agreement “is substantially frustrated . . . by an event the non-occurrence of which was a basic assumption on which the contract was made” if the event was no fault of the nonperforming party. Restatement (Second) of Contracts § 265 (1981).
- How does it relate to impracticability?
- What defines the purpose?

# Frustration of Purpose – Broad Purpose

- Where the lease provides that the property can be used for “any lawful purpose” government orders shutting down a specific category of businesses would not “frustrate” the lease purpose. *In re CEC Entm’t., Inc.*, No. 20-33162, 2020 WL 7356380, at \*15 (Bankr. S.D. Tex. Dec. 14, 2020).
- In ***Gap Inc. v. Ponte Gadea N.Y. LLC*, No. 20 CV 4541-LTS-KHP, 2021 U.S. Dist. LEXIS 42964, at \*21 (S.D.N.Y. Mar. 8, 2021)**, the Court held that the purpose of a lease permitting Gap to operate a “first class retail business” was not frustrated.
  - Gap argued that the lease language guaranteed it a high rate of foot traffic because the property was located prominently on Fifth Avenue in New York City.
  - The Court found that nothing in the term “first class retail business” guaranteed a certain amount of foot traffic, and that the pandemic did not prevent it from operating its retail business.
  - Gap was able to open at a limited capacity at the time of the decision and, even when government orders required it to close its doors, it provided curbside pickup of retail orders.
  - The Court also noted that to invoke the doctrine: “It is not enough, however, that the transaction will be less profitable for an affected party or even that the party will sustain a loss.”

# Frustration of Purpose – Narrow Purpose

- Where the Lease language provides for a specific purpose, however, an order closing that type of business may trigger frustration of purpose doctrine. **UMNV 205-207 Newbury, LLC v. Caffé Nero Americas, Inc. 2084CV01493-BLS2, 2021 WL 956069 (Mass. Super. Ct. Feb. 8, 2021).**
- In *Caffe Nero*, the Lease specifically provided that the premises could only be used “only to operate a café with a sit-down restaurant menu ‘and for no other purpose.’” (*Id* at \*5).
- The Court held that because the purpose was limited under the terms of the Lease, and that specific purpose was unlawful under the governmental orders then in place, the frustration of purpose doctrine was satisfied.



# Temporary v. Permanent Frustration

## Some Courts will look at the contract or lease as a whole:

- In ***Bedford LLC v. Equinox Bedford Ave, Inc.***, 2020 NY Slip Op 34296(U), ¶ 4, 2020 WL 7629593 (Sup. Ct. N.Y. 2020), the court looked at the entire term of the lease to determine if the frustration was frustrated, and it ultimately held that “A gym being forced to shut down for a few months does not invalidate obligations in a fifteen-year lease.”

## Other Courts look to the specific time period where a party failed to perform:

- The Bankruptcy Court in ***In re Cinemex USA Real Estate Holdings, Inc.***, No. 20-14695-BKC-LMI, 2021 Bankr. LEXIS 200, at \*13 (Bankr. S.D. Fla. Jan. 26, 2021) found that, either under the force majeure clause or the doctrine of frustration of purpose, the payment of rent would be excused only for the time where governmental orders prohibited opening, but not when the business could open, but chose not because it would have been unprofitable.

# Remedies Where Purpose is Frustrated

## Rescission

- The often cited remedy for frustration of purpose is rescission of the contract. Generally, rescission is appropriate because the doctrine relates to the fundamental purpose of the agreement rather than a breach or termination. *In re CEC Entm't, Inc.*, 2020 Bankr. LEXIS 3493, at \*28.

## Temporary Suspension

- Under the Restatement, a temporary frustration “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.” Restat 2d of Contracts, § 269; see e.g. *Martin v. Banco Popular de P.R.*, No. 2008-109, 2009 U.S. Dist. LEXIS 73672, at \*9 (D.V.I. Aug. 19, 2009).
- In *Bay City Realty, LLC v. Mattress Firm, Inc.*, No. 20-CV-11498, 2021 U.S. Dist. LEXIS 67054, at \*30 (E.D. Mich. Apr. 7, 2021), the Court found that governmental orders caused a temporary shutdown that frustrated the fundamental purpose of the Lease, and thus, the nonpayment of rent was excused for the time the orders prohibited the business.

# Recent Decisions on Frustration of Purpose

- **New York - Crystal Run Galleria LLC v. Town of Walkill**, No. EF004035-2020, 2021 WL 219888, at \*11 (N.Y. Sup. Ct. Jan. 20, 2021) (Frustration of purpose did not apply where taxation consent agreement provided that it would remain in force unless the “actual value” of the property remained within certain parameters. The court held that the purpose was not frustrated unless the pandemic caused the actual value of the property to fall below the parameters set by the agreement).
- **Vendome Commercial LLC v. S2AB, Inc.**, 2021 NY Slip Op 30957(U), ¶ 3 (Sup. Ct. Mar. 25, 2021) (holding that frustration must be complete; “diminution in value” or limitation on use does not frustrate purpose of lease).
- **Massachusetts - Holmes v. University of Massachusetts**, No. 2084CV01025-B, 2021 WL 1099323, at \*3 (Mass. Super. Mar. 08, 2021) (under Massachusetts law, application of doctrine of frustration of purpose cannot be determined at motion to dismiss stage).

# Bankruptcy Consideration

- Although the following information does not directly relate to force majeure, impossibility, impracticability or frustration of purpose, it is another area of practice that often comes up when dealing with non-performing tenants under commercial leases.
- Under 11 U.S.C. § 365(d)(3), a debtor in possession is required to timely perform all obligations under any nonresidential lease until such lease is assumed or rejected in bankruptcy.
- Although § 365(d)(3) allows for payment of post-petition lease obligations to be deferred until the 60<sup>th</sup> day of the bankruptcy case, any further deferment would seem contrary to § 365(d)(3).

# Bankruptcy Consideration

- However, under 11 U.S.C. § 105(a), the bankruptcy court has broad equitable powers to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].”
- Also, under 11 U.S.C. § 305, “[t]he court, after notice and hearing...may suspend all proceedings in a case under [the Bankruptcy Code].”
- Virginia - In re Pier 1 Imports Inc., 615 B.R. 196, 202 (Bankr. E.D. Va. 2020), the court relied on its “broad equitable powers” to grant extraordinary relief. The court temporarily suspended the Chapter 11 debtor’s obligation to pay rent under their commercial leases during a “limited operations period” when their stores were closed due to the pandemic. The debtor had to pay non-rent related expenses and assure the lessors or cure payments in the future.

# Bankruptcy Consideration

- Citing *In re Circuit City Stores, Inc.*, 447 B.R. 475 (Bankr. E.D. Va. 2009), the court in *In re Pier 1 Imports Inc.* noted that “[11 U.S.C.] Section 365(d)(3) does not provide a separate remedy to effect payment. If a debtor fails to perform its obligations under Section 365(d)(3), all a Lessor has is an administrative expense claim under § 365(d)(3), not a claim entitled to superpriority.” Thus, Section 365(d)(3) does not give the Lessors a right to compel payment from the debtors. Rather, to the extent the debtors do not pay post-petition rent that they are obligated to pay, the Lessors are entitled to an administrative expense claim under Sections 507(a) and 503(b), which means that post-petition rent must be paid on the date that any plan is confirmed by the court. However, the Lessors may be entitled to adequate protection pursuant to Sections 361 and 363 of the Code.

# Bankruptcy Consideration

- The Consolidated Appropriations Act of 2021 (the “CAA”) also made changes to the Bankruptcy Code that landlord and tenants should be aware of.
- A “small business debtor” (a commercial debtor with non-contingent liquidated debts under \$7.5mm) will have rent forbearance until the earlier of: (1) 60 days after the order for relief under the Code, *plus* another 60 days if the court determines that a commercial tenant is experiencing “financial hardship,” or (2) The date the lease is assumed or rejected.
- A commercial tenant will have 210 days (plus a possible 90-day extension) to accept or reject a lease.
- “Covered rental arrearages” payments will be excluded from preferential treatment in certain situation (even if made 90 days prior to a bankruptcy filing). This means that deferred or postponed rental payments under a commercial lease based on an amendment dated after March 13, 2020 won’t be treated as preferential payments.

# Best Practices and Takeaways

## Drafting – Control your own destiny

- Consider the “purpose” language, e.g. “any lawful retail purpose” vs. a specific purpose
- Does the Force Majeure provision allocate risk of nonpayment?
- Be specific about what constitutes a force majeure, use “fire, earthquake, tornado, etc.” instead of “natural disaster”



# Best Practices and Takeaways

## Litigation – Lease language is king

- Review and rely upon lease language in framing arguments
- Verify if the lease includes a specific purpose or designated uses
- Does the force majeure clause clearly carve out the payment of rent or otherwise allocate risk?
- Consider the available remedies
- Does the lease identify what remedy is available?
- Courts may be more receptive to a request to excuse the nonpayment of rent during the months the purpose was frustrated rather than the entirety of the lease or may reduce the rent proportionately for months where the business operated at a reduced capacity.

# Model Force Majeure Clauses

- Notwithstanding anything to the contrary contained in this Lease, any prevention, delay or stoppage due to strikes, lockouts, labor disputes, acts of God, acts of war, terrorist acts, inability to obtain services, labor, or materials or reasonable substitutes therefor, governmental actions, governmental laws, regulations or restrictions, civil commotions, casualty, actual or threatened public health emergency (including, without limitation, epidemic, pandemic, famine, disease, plague, quarantine, and other significant public health risk), governmental edicts, actions, declarations or quarantines by a governmental entity or health organization (including, without limitation, any shelter-in-place orders, stay at home orders or any restrictions on travel related thereto that preclude Tenant, its agents, contractors or its employees from accessing the Premises, national or regional emergency), breaches in cybersecurity, and other causes beyond the reasonable control of the party obligated to perform, regardless of whether such other causes are (i) foreseeable or unforeseeable or (ii) related to the specifically enumerated events in this paragraph (collectively, a “Force Majeure”), shall excuse the performance of such party for a period equal to any such prevention, delay or stoppage. If this Lease specifies a time period for performance of an obligation of either party, that time period shall be extended by the period of any delay in such party’s performance caused by a Force Majeure. Notwithstanding anything to the contrary in this Lease, no event of Force Majeure shall (i) excuse Tenant’s obligations to pay Rent and other charges due pursuant to this Lease, (ii) be grounds for Tenant to abate any portion of Rent due pursuant to this Lease, or entitle either party to terminate this Lease, except as allowed pursuant to Articles \_\_ [INSERT REFERENCE TO CASUALTY CLAUSE – ASSUMING LEASE CAN BE TERMINATED IN THE EVENT OF A MATERIAL CASUALTY] and \_\_\_\_ [INSERT REFERENCE TO CONDEMNATION CLAUSE – ASSUMING LEASE CAN BE TERMINATED IN THE EVENT OF A MATERIAL CONDEMNATION] of this Lease, (iii) excuse Tenant’s obligations under Articles \_\_ [INSERT REFERENCE TO USE CLAUSE] and Articles \_\_ [INSERT REFERENCE TO LEGAL COMPLIANCE OBLIGATION] of this Lease, or (iv) extend the occurrence of the [INSERT ANY DATES ARE NOT AFFECTED BY FORCE MAJEURE, SUCH AS THE “Lease Commencement Date”].

# Buy v. Sell Side Force Majeure Clauses

| Buyer Friendly   | Seller Friendly  |
|--|--|
| <p>Neither party shall be liable <u>to the other party</u> for its failure in its performance of its obligations hereunder (<u>including</u> payment obligations)</p>  | <p>Neither party shall be liable for its failure or delay in its performance of its obligations hereunder (<u>excluding</u> payment obligations)</p>   |
| <p>to the extent due to <u>the following</u> events (each a “Force Majeure Event”):</p>  | <p>if due to <u>any event</u> beyond its control of the party affected (each a “Force Majeure Event”), including without limitation,</p>   |
| <p>act of God, war, fire, natural disaster, pandemic, applicable governmental regulation or order,</p>   | <p>any act of God, war, terrorist act, riot, civil disturbance, fire, explosion, earthquake, flood, hurricane, tornado, severe weather, accident, casualty, intentional acts of others, epidemic, pandemic, the spread of infectious diseases, quarantines and the COVID-19 pandemic, including related government orders (notwithstanding that the COVID-19 pandemic is ongoing as of the effective date and its effects may be reasonably foreseeable even if not known for certain), labor problems, strikes, insurrections, embargos, tariffs, acts of civil or military authority, applicable governmental regulation or order, plant shutdown, any software, computer or equipment failure, data breaches, failure of any third party to perform any commitment to such party or the shortage or inability to obtain (on terms deemed practicable by the party affected) any supplies, services, equipment, personnel or transportation, or any other cause, whether similar or dissimilar to the foregoing causes, beyond the reasonable control of such party.</p> |
| <p>which (i) could not have been reasonably foreseen, (ii) the affected party has used and continues to use all diligent and commercially reasonable efforts to avoid or overcome such event as quickly as possible, (iii) was not caused or allowed by the affected party, (iv) directly and materially impairs such party's ability to so perform such obligation, and (v) which the affected party has given written notice to the other party promptly following such party becoming aware of facts or circumstances reasonably likely to result in such event, but in no case later than three (3) days following the initial impact of such event on the affected party;</p> | <p>[Not notice obligation or conditionality]</p>   |
| <p>provided, that the following shall not constitute Force Majeure Events: economic hardship, changes in market conditions, insufficiency of funds, labor disputes or disruptions, failure of any third party or the shortage or inability to obtain any supplies, services, equipment, personnel or transportation.</p>   |  |

# Buy Side v. Sell Side Force Majeure Clauses (cont.)

| Buyer Friendly  | Seller Friendly   |
|---|---|
|   | <p>Any quantities not delivered or accepted because of any such Force Majeure Event shall be eliminated from the Agreement. The affected party shall not be obligated to deliver any products from other than the production or shipping points designated herein and shall not be obligated to rebuild or repair any damage or destruction to such production or shipping points in order to fulfill this Agreement.</p> |
| <p>Notwithstanding any such Force Majeure Event, Seller as the affected party shall fully allocate to Buyer all quantities of products available to Seller in order to fulfill its obligations hereunder.</p> | <p>The Seller as the affected party may allocate any available product among its customers, including its own subsidiaries, divisions and departments on such basis as it deems fair and reasonable, and its failure, partial or otherwise, to make deliveries to Buyer shall not be a breach of this Agreement.</p>  |
| <p>In the event such Force Majeure Event continues or is likely to continue for more than [30] days, the non-affected party may terminate this Agreement upon notice to the affected party.</p>               | <p>In the event of any such Force Majeure Event, the time for performance shall be extended for a period equal to the time lost by reason of the Force Majeure Event and a reasonable period thereafter to allow for completion of performance without prejudice to any of the other rights of such party under this Agreement.</p>   |



Gensler

# U.S. Work From Home Survey 2020

Do you prefer to go back to the office or continue to work at home?



They want more space (less density) for social distancing and an assigned workspace. These measures can also improve the performance of the workplace, addressing issues of noise and distraction that were already diminishing effectiveness.

Their spaces could be used for other functions when not in use as workspaces, given their intermittent need. Ample social distancing space, and recommended cleaning protocols, will still be crucial.

# What is the future role of the office?

# 1. Reconstruct how work is done

- What are the company's most important processes and how can they be re-envisioned?
  - The same practices that were put in place for the physical world are not always achievable in the digital world.
  - How do you replicate the spontaneity that an office environment provides?
  - How do you train and develop talent remotely?



## 2. Decide ‘people to work’ and ‘work to people’

- Organizations need to understand what roles can be carried out remotely, what must be carried out in-person, and to what degree.
  - Fully remote
  - Hybrid
  - On-site
- Organizations will have access to a wider array of talent with remote workers, but there will be challenges with training and development.
  - Monthly trips to HQ and in-person meetings with colleagues, when necessary, could suffice.

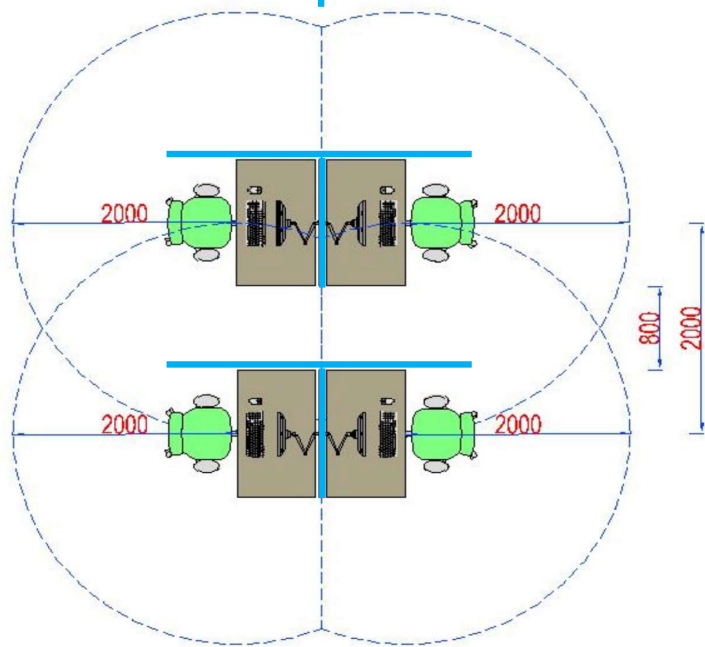
# 3. Redesign the workplace to support organizational priorities

- If the role of the office shifts to a place that primarily serves as a collaboration hub, then the layout needs to reflect that.
- How would an organization's culture be affected by a shift to Work-From-Home (WFH)?

# Option B: Social Distancing Plan

49 Desk Positions

- 2 Maximum Capacity for Common or Shared Zone
- H High Risk Areas
- Perspex Screen



Typical Office Space