Commercial Leasing: Reexamining Force Majeure in the Post-COVID Landscape

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The impact of the COVID-19 pandemic on commercial leasing was immediate and severe. Landlords and tenants were faced with challenges of a type and magnitude that neither they, nor their predecessors in the industry, had ever dealt with. The ensuing economic fallout and government shutdowns led landlords and tenants alike to examine the terms of their leases much more carefully and focus on provisions that were largely thought of as boilerplate (i.e., force majeure).

Now, as COVID-19 changes from pandemic to endemic, landlords and tenants are faced with a new normal in commercial leasing. What do landlords, tenants and their lawyers need to do in order to make sure the right protections are in place if this all happens again?

In March of 2020, force majeure provisions were put under a microscope while parties to leases addressed the new challenges of the emerging pandemic, from construction delays to operational restrictions on tenants and landlords. These clauses, previously meant to protect the parties from wars and the broadly defined "exceptional circumstances," suddenly became critical.

Often, the force majeure provisions in an agreement apply to the parties in the same manner — the circumstances that allow for a delay of a party's performance also allow for a delay on the part of the other party. While a tenant may want a very liberal force majeure provision to apply to its obligations under the lease, that same tenant might not want to be as forgiving when it comes to the landlord's obligations to complete tenant improvements and deliver possession to the tenant. As a result of the pandemic, force majeure provisions have become a subject of negotiation in leases in a way that we had not seen before the pandemic.

Courts often apply a test of "unforeseeability" when examining circumstances that might constitute a force majeure event;

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however, the courts will give effect to the parties' intent where the language in the contract is clear. Where that language is unclear, the concept of unforeseeability helps courts "fill in the blanks."

More than two years after the first shutdowns, stay-at-home orders and other restrictions on day-to-day life, the pandemic is no longer an unforeseeable event, but, as the last two years have shown us, we do not know what is around the corner. The unforeseen side effects of the pandemic will likely continue, from health and safety measures intended to curb the spread of new variants to future (or exacerbated) supply chain disruptions.

While it may be tempting to add "pandemic," "endemic" or other words that are now a part of our daily vocabulary to the list of force majeure events, dropping those words into a laundry list of bad things that would excuse or delay performance could have the unintended consequence of allowing a party to claim a force majeure delay where nothing unforeseen has occurred.

For example, where a landlord has a construction obligation under a lease, the existence of the pandemic should not give the landlord carte blanche to claim force majeure when the landlord does not meet the construction or delivery deadlines in the lease. The force majeure provision should also not absolve the landlord of an obligation to act as a prudent operator, accounting for known delays (e.g., permitting lead times and current supply chain delays) and planning accordingly.

The existence of the pandemic is a known cause rather than an unforeseen one. In this example, the landlord should anticipate certain delays caused by the pandemic and should incorporate those delays into its construction or delivery schedule in the same manner that contractors anticipate and incorporate a certain number of rain delay days into construction contracts.

As a result, the force majeure provision should be tailored to address the unforeseen aspects of the pandemic, such as future restrictions on work, government shutdowns, and further extension of delays in permitting. The ongoing nature of the pandemic should not, in and of itself, constitute grounds to delay performance.

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Tenants must also think carefully about the most effective ways to use force majeure provisions to protect from a pandemic-level event. Typically, force majeure clauses delay the performance of most obligations under commercial leases but not the obligation to pay rent. With that said, this historical norm should not preclude tenants from addressing interruptions in a tenant's income as a result of future developments in the pandemic.

While a landlord may not be willing to agree, as a part of the initial lease negotiations to waive or reduce rent because of a future pandemic or other force majeure events (outside of a casualty), a tenant might consider negotiating a short-term delay in the exercise of landlord remedies during the pendency of a force majeure event, including unforeseen developments in response to (or as a result of) a pandemic.

In the same way, the landlord should account for reasonably anticipated delays in the construction of tenant improvements. Prudent tenants must determine whether they can meet their obligations in the pandemic landscape before signing a lease. The continuation of the pandemic should not, by itself, excuse a delay in the tenant's performance.

The common law concept of unforeseeability, as a key component of force majeure delay, is not something best left to inference or interpretation. It should be a clear component of any force majeure clause in the post-COVID world.

For more information regarding the current state of force majeure provisions in commercial leasing contracts, please contact Christina Sprecher, Leah LaFramboise, or Clay Pulliam of Frost Brown Todd's Real Estate Practice Group.

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