

## 4 Force Majeure Tips For Real Estate Lawyers Amid Pandemic

By Andrew McIntyre

Law360 (April 14, 2020, 7:24 PM EDT) -- Force majeure has become a hot topic in the real estate community amid the COVID-19 pandemic as parties look to see if such contract clauses may help or harm them. Lawyers say keeping a few key strategies in mind can go a long way.

The clause, which appears frequently in contracts, excuses parties from certain responsibilities and obligations due to events that are deemed to be out of the realm of control, although most do not mention pandemics.

Landlords and tenants are closely scrutinizing their contracts as tenants are having trouble making rent payments and landlords need to make mortgage payments, and property owners and construction contractors are also reviewing their documents to see how force majeure might play out.

Lawyers say that exact wording is key, as are the facts and circumstances, to determining whether the clause is a viable argument. And it will likely be difficult to use the argument as a way to get out of paying rent, according to experts.

Here, Law360 looks at four force majeure tips for real estate lawyers amid the COVID-19 pandemic.

### Look Beyond Force Majeure for Rent Problems

Tenants who are having difficulty coming up with the rent have been trying to use force majeure as an argument for nonpayment, but lawyers say most leases work in the landlord's favor on that point.

"Tenants are saying, 'I'm not paying rent because of force majeure.' For the most part, landlords have drafted the force majeure clauses fairly narrowly," said Latham & Watkins LLP partner Gary Axelrod, suggesting that such leases often explicitly state that force majeure does not apply to rent payment.

Philip Morgan, a partner at Brinkley Morgan, said the leases he has looked at recently have had rent carved out, such that force majeure can't be used to get a tenant off the hook for rent responsibility.

"Force majeure typically relates to delivery of goods and services rather than the obligation to pay money," Morgan said.

Still, tenants are trying the tactic.

"One of my clients, a commercial landlord, received a generic force majeure letter from a national tenant," said Steven Appelbaum, a partner at Saul Ewing Arnstein & Lehr LLP. "Fortunately for our client, we had force majeure language in the lease that was landlord friendly ... [and] the tenant made the payment."

Appelbaum said he suspects that tenant sent the same generic letter to its landlords across the country.

Lawyers say tenants instead are likely to have more luck looking at what protection states and cities may be offering as opposed to pursuing the force majeure avenue. It may also be possible for tenants to get assistance from the Coronavirus Aid, Relief, and Economic Security Act.

"In general, the inability to pay rent is not generally considered a force majeure event," said Bonnie Hochman Rothell, a partner and chair of the litigation practice at Morris Manning & Martin LLP. "It's hard to talk about force majeure alone. There are a lot of other things that are impacting the real estate arena now."

### Read Construction Contracts Closely

Just as tenants are sending force majeure letters on the question of rent payment, so too are contractors sending such letters on the point of project delays, and lawyers say many of those claims thus far have not had sufficient substance to be viable.

"A lot of parties are basically triaging the COVID-19 issue, meaning that a lot of contractors right now are sending very generic claim notices to owners so they don't miss notice deadlines within their contracts," said Deborah Cazan, a partner at Alston & Bird LLP. "Owners are pretty uniformly rejecting these claims."

Cazan said those notices frequently come with little or no demonstration that COVID-19 has actually been the cause of delays.

But contractors are still seeking to use force majeure.

"We're seeing contractors who are now trying to claim [supply chain problems] are excusable on some of their construction projects," Hochman Rothell said. "They can't get certain supplies from vendors ... overseas. Supply chains are being slowed down."

Still though, contractors could in the future find viable paths with force majeure claims.

"In the coming months, contractors' claims will have more substance to them. At that point, the analysis is going to change," Cazan

said. "At this point right now, owners especially should be careful not to accept claims just because of the existence of COVID-19." Courts, though, will likely find government bans on construction to fall under force majeure, experts said.

"Where it's more likely to come into play ... is in the construction world, when the supply chain is being altered," Hochman Rothell said. "I think that's where force majeure is more likely to be triggered."

### **Try Working Out Disputes, But Also Prepare for Court**

While both parties in a force majeure dispute may believe they can prevail in court, litigation may not be a great idea for either, given that it will likely be some time before such disputes can proceed.

"There is a lot of conversation about how this should play out. The problem is the courts are closed," said Kenneth Fields, a partner at Greenberg Glusker Fields Claman & Machtinger LLP. "When the courts do reopen, odds are the criminal and more serious cases are the ones that will be heard first."

Fields said the conversation requires commercial tenants, for one, to take a serious look at what their business may look like following the COVID-19 pandemic.

"For landlords and tenants, you need to try to work through a solution that both parties can live with," Fields said. "As a tenant, one of my first questions is: Do you see a runway to success when this is all over? If you do, then it makes sense to sit down, dig deep and find a way to make this work."

But if not, then it may make more sense to seek an "orderly close" to a business while minimizing risk and giving the landlord something in the process, Fields said.

Still, many disputes will go to court.

"Just like in the housing collapse of 2008, you're going to see a good amount of litigation using the force majeure as a defense. Lawyers are going to try to represent their clients and come up with some very novel new arguments as to how and to what extent the force majeure applies," Morgan said.

"Lawyers ... [will] come up with good and logical and really creative defenses, and it's going to center around the greater implementation of the force majeure concept," Morgan added.

And different states may interpret the same matter differently. For example, New Jersey defines Acts of God more broadly than New York, said Marc Gurell, a partner at Seyfarth Shaw LLP.

"It is conceivable that events qualifying as force majeure may well excuse performance in New Jersey, while application of the same contract clause in a New York court may result in more narrow application," Gurell said.

### **Don't Jump to Conclusions**

While it's understandable to think that a pandemic such as COVID-19 could trigger force majeure and allow for delays or missed payments, lawyers say it's important to analyze the circumstance as well as the contract before jumping to that conclusion.

"In general, force majeure is a unique doctrine that is very, very specific to the contract at hand. ... I'm telling clients to look at both force majeure clauses as well as state doctrines that may apply," Hochman Rothell said.

"To determine whether this pandemic is a triggering force majeure event in any particular context, you have to scrutinize not only the contract but also the underlying facts relating to why one party is seeking to trigger that clause. Is there really a causal relationship?" she said.

Hochman Rothell said she has looked at past events such as major hurricanes, the Sept. 11, 2001, terror attacks and the 2009 swine flu outbreak to try to draw some context to the current COVID-19 pandemic. During those events, sometimes the force majeure argument prevailed and other times it didn't.

Wording also matters. Hochman Rothell said she has yet to see two force majeure provisions with identical wording.

"What I'm advising my owner clients is to think about it," Cazan said. "Just because COVID-19 exists doesn't automatically mean that these contractors have been delayed."

--Editing by Jill Coffey.