

# Force Majeure Clauses: Contractual Performance Amidst a Pandemic

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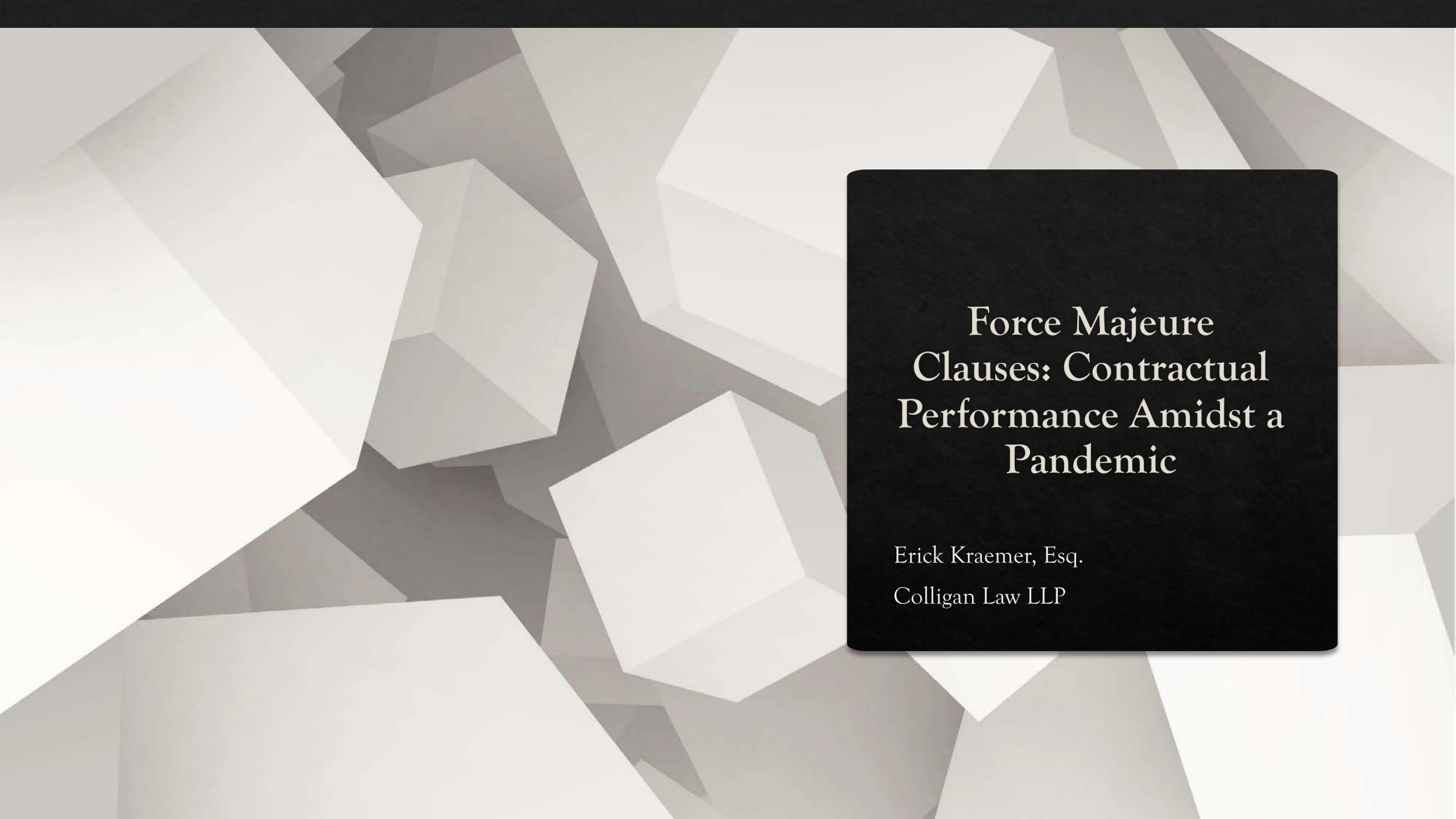
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# Force Majeure Clauses: Contractual Performance Amidst a Pandemic

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# Today's Objectives

- ◆ Force Majeure Basics
- ◆ Drafting a Force Majeure Clause
- ◆ Practical Applications of Force Majeure
- ◆ Force Majeure Invocation in the Current Pandemic



# Force Majeure

What is it?

Why have it?

What does it cover?

What does it not cover?

How can it help clients?

# Force Majeure

- ◆ A “force majeure” clause (French for “superior force”) is a contract provision that relieves the parties from performing their contractual obligations in certain situations.
- ◆ A force majeure clause is frequently applied to “Acts of God” or events in nature, which are neither anticipated nor controllable.
- ◆ Also can apply to: war, acts of terrorism, epidemics, strikes, governmental action, accidents.
- ◆ “The burden of demonstrating force majeure is on the party seeking to have its performance excused, ... and the non-performing party must demonstrate its efforts to perform its contractual duties despite the occurrence of the event that it claims constituted force majeure.”

Rochester Gas & Elec. Corp. v. Delta Star, Inc., No. 06-CV-6155-CJS-MWP, 2009 WL 368508, at \*7 (W.D.N.Y. Feb. 13, 2009)

# Why have a Force Majeure clause?

- ◆ The uncertainties of life.
- ◆ To protect your client.
- ◆ To limit damages when something occurs that is beyond the control of the contracting parties.
- ◆ The parties in negotiating a contract determine the scope of a force majeure clause
  - ◆ To think about: what kinds of uncontrollable events would frustrate my client's ability to perform their obligations under this contract?

# What does it cover?

- ◇ It covers what the parties agree it will cover!
- ◇ Here – basic tenants of contract law apply.
  - ◇ We’re going to assume these are two sophisticated parties accurately agreeing on what their obligations will be.
  - ◇ Ambiguity free – no need to look beyond the four corners of the document.
- ◇ Same principle applies to the force majeure clause:
  - ◇ “Interpretation of force majeure clauses is to be narrowly construed and only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused.” *Kel Kim Corp. V. Central Mkts.*, 70 N.Y.2d 900, 902–903 [1987].

# What does it not cover?

- ◇ Narrowly construed.
- ◇ Events that are frustrating but not contemplated in the contract.
- ◇ Impracticality or unanticipated difficulty in performing the obligations contained in the contract does not excuse performance.
- ◇ Adverse economic conditions
  - ◇ We entered into a contract during a period of economic expansion and then a recession hits – insufficient to relieve you of your obligations.
- ◇ Contracts without force majeure clauses.
- ◇ Certain contracts explicitly exclude force majeure as a defense.



# How can it help clients?

- ◆ Adding a defense to the uncontrollable.
- ◆ Parties to a contract both have obligations – consideration – and a force majeure can protect both sides to a contract.
- ◆ Having relief from obligations in a large contract, when you cannot perform, can save your business from disaster: devastating loss of revenue, breach of contract law suit – with a high probability of losing, bankruptcy, etc.
- ◆ Peace of mind.



# Drafting the Force Majeure Clause

# Drafting the Force Majeure Clause

- ◆ Keeping in mind the following:
  - ◆ The purpose of a Force majeure clause is to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties.
- ◆ What kinds of frustrating things do we want covered in a Force Majeure Clause?
  - ◆ Legal definition of frustrating – not things that are merely irksome.



# Practical Applications

# Let's Look at a Sample Clause

- ◆ “If either party to this Lease shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance of such obligation shall be excused for the period of the delay.”
- ◆ From: Kel Kim Corp. v. Cent. Markets, Inc. NYS Court of Appeals 1987.

# Analysis & Interpretation

- ◇ Some of the terms of the Force Majeure Clause are general:
  - ◇ War
  - ◇ Government Regulations
  - ◇ Adverse Weather
  - ◇ Catch all: “or other similar causes beyond the control of such party”

# War: What is it good for?

- ◆ ~~Absolutely nothing.~~
- ◆ Relieving Contractual Obligations!
- ◆ There are, however, practical limitations.
- ◆ Was a war going on during the negotiation?
  - ◆ The fact that the War on Terror has been ongoing since 2001 does NOT necessarily excuse you from contractual performance on a commercial lease you signed earlier this week.
- ◆ War breaks out during performance of the contract – may well excuse performance.

# Government Regulations

- ◇ Effect of the Legislation
  - ◇ Does it make the contract more difficult?
    - ◇ Impossible?
- ◇ Timing of the legislation
  - ◇ Did we know this was coming?
  - ◇ Was the legislation in effect at the time of contracting?



# Hypothetical

- ◆ Hypothetical: Company A enters into a contract with Company B to construct small aircraft for Company A in exchange for money over a ten year period. Two years into this contract, it's going great. Unfortunately, war breaks out with Canada. The President uses the Defense Production Act to order a great company like Company B to shift all of its production to producing war planes to fight to the Canadians. Company B can no longer meet its obligations to Company A.
- ◆ What portions of a Force Majeure clause similar to the example could potentially apply here?
  - ◆ Additional fact: Company A is an Ottawa-based military contractor.

# Example: Oil & Gas Leases

- ◇ “[A]nalysis should take into account that oil and gas leases “stand on an entirely different basis from any other leasehold agreements” Beardslee v. Inflection Energy, LLC, 25 N.Y.3d 150, 157 (2015) (internal citations omitted).
- ◇ Highly technical industry.
- ◇ Distinct terminology.
- ◇ Look to parties’ intent and known practices of the industry.

# Example: Labor Dispute as Force Majeure

- ◇ Example: NHL Lockout
- ◇ Bouchard Transp. Co. v. New York Islanders Hockey Club, LP, 40 A.D.3d 897, 898, 836 N.Y.S.2d 654, 655 (2007)
- ◇ “[T]he agreement between the plaintiff lessee and the defendant lessor contains a *force majeure* clause which excuses the defendant's nonperformance “by cause or causes beyond Lessor's control which shall include, without limitation, all labor disputes.”
- ◇ A specific provision defining a labor dispute as a force majeure was built into the lease.
- ◇ Not Ambiguous.

# Example: Government Regulations

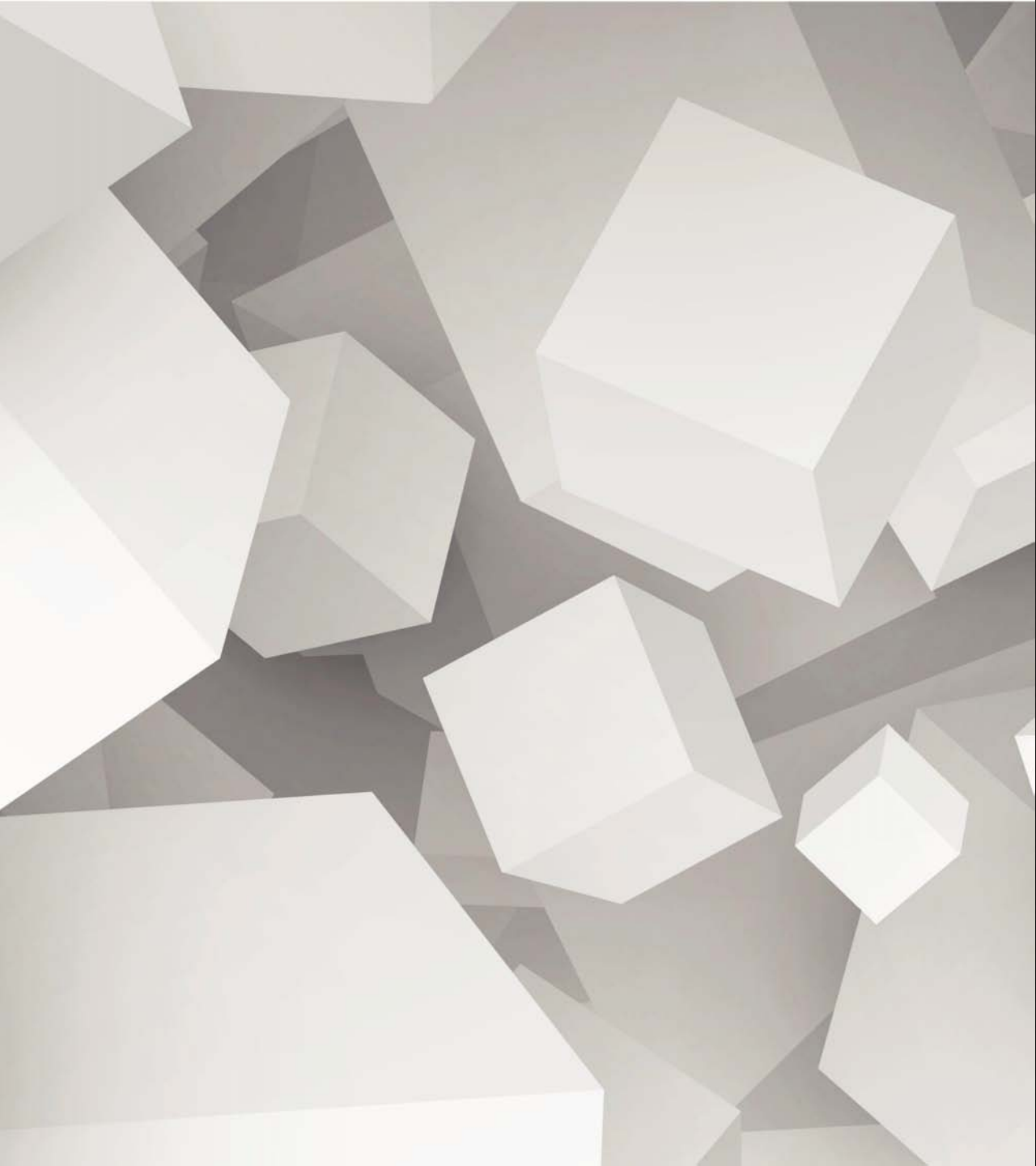
- ◆ Macalloy Corp. v. Metallurg, Inc., 284 A.D.2d 227, 227–28, 728 N.Y.S.2d 14, 14–15 (1<sup>st</sup> Dept. 2001)
- ◆ Force Majeure Clause including “Plant Shutdown”
- ◆ Plaintiff shut down its plant voluntarily due to financial considerations brought about by environmental regulations.
- ◆ Court determined: “Those are not circumstances constituting a *force majeure* event, and financial hardship is not grounds for avoiding performance under a contract”.
- ◆ “Plaintiff was fully aware of the environmental regulations, and the Environmental Protection Agency's intention to enforce them fully, prior to entering into the contract with defendant.”

# Example: Government Regulation

- ◇ Burnside 711, LLC v. Nassau Reg'l Off-Track Betting Corp., 67 A.D.3d 718, 719, 888 N.Y.S.2d 212, 213 (2d Dept. 2009)
- ◇ Plaintiff: Owner/Landlord; Defendant: Regional Off-track Betting Corp./Tenant
- ◇ The lease provided that the defendant was to use and occupy the premises for “any legalized betting and ancillary uses.
- ◇ The lease included a force majeure clause which included language regarding “governmental action or inaction”.
- ◇ Building Zone Ordinance of the Town of Hempstead was amended to restrict the location of off-track betting parlors.
- ◇ Force Majeure defense was successful.

# Example: Illness

- ◆ Belgium v. Mateo Prods., Inc., 138 A.D.3d 479, 479, 29 N.Y.S.3d 312, 313 (1<sup>st</sup> Dept. 2016)
- ◆ Plaintiff Lofraco Belgium contracted with KLT for an artist known as Akon to perform at a concert in Brussels, Belgium on December 9, 2009.
- ◆ Force Majeure Clause: “NON-PERFORMANCE,” which stated that Akon's inability to perform due to “sickness or accident” would be considered force majeure, for which Akon would not be subject to liability (though the money paid was to be returned).
- ◆ Couldn't be decided on summary judgment absent proof of Akon's illness – but it indicates that had he been able to support the defense – if the parties contracted for illness as force majeure it would have been a successful defense.



# Force Majeure Clauses in the Current Pandemic

# Force Majeure during a Pandemic

- ◇ Pandemic or Epidemic contained in the Force Majeure Clause
- ◇ In Touche Ross & Co. v. Manufacturers Hanover Tr. Co., 107 Misc. 2d 438, 441, 434 N.Y.S.2d 575, 577 (Sup. Ct. 1980), here was the force majeure clause:
  - ◇ Force majeure is defined in the contract to include, but is not limited to:  
“Flood, epidemics, earthquake, War, cases which are generally accepted by international practice as Force Majeure.”



# Epidemic vs. Pandemic

- ◆ Epidemic

- ◆ A widespread occurrence of an infectious disease in a community at a particular time.

- ◆ Pandemic

- ◆ A pandemic is an epidemic of disease that has spread across a large region, for instance multiple continents, or worldwide.

- ◆ The terms matter – but here even if your clause only says epidemic, a credible argument could be made that a pandemic is an epidemic.

# COVID-19

- ◇ COVID-19 is having a huge effect on businesses all over the world and certainly here in New York.
- ◇ Leases, Contracts need to be examined for the language contained in their Force Majeure Clauses.
- ◇ Even if the Contract does not contemplate a pandemic (or epidemic), what is the language contained in the in “catch all” provision, if any.

# COVID-19 Cont...

- ◇ Considerations of the Coronavirus:
  - ◇ Unforeseen
    - ◇ If the contract entered into prior to the outbreak
  - ◇ Attempts to perform under the contract despite the outbreak
    - ◇ It depends on what the contract asks you to do:
      - ◇ Example: operate a concert hall vs. writing short stories
  - ◇ Essential v. Non-Essential
    - ◇ Government Regulation issue

# COVID-19: Other Options

- ◇ If the contract or lease does not have a force majeure or one that does not contemplate a pandemic, there are still other potential options for defense:
  - ◇ Impracticability
  - ◇ Impossibility
  - ◇ Illegality
  - ◇ Frustration of Purpose

# Questions?

- ◆ Any further discussion, please feel free to contact me:  
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