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Seminar 19

Frustration, Impossibility and Force Majeure: A Litigator's View of Whether COVID-19 Can Be Invoked to Avoid Lease Obligations

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I. Introduction

COVID-19 has affected virtually all economic areas, including commercial leasing. Especially hard hit by both the virus and the aggressive public health response are sectors like retail, hospitality, sports, entertainment, travel and tourism, which are dependent on customers coming in person to the leased premises. Notwithstanding catastrophic loss of business, lease obligations do not miraculously vanish. As a consequence, landlords and tenants are searching for ways to limit their exposure, suspend or eliminate obligations, or resist or get recompense for failures to perform.

Possible legal defenses include doctrines like "force majeure," "frustration of purpose," "operation of law," "acts of God," and "impossibility." While these defenses can be effective and should be carefully considered, they are by no means magic bullets. In addition, courts across the country or even within the same jurisdictions, have applied these defenses inconsistently even under similar circumstances, and appellate review of these issues has been minimal so far. Ultimately, just because the situation has been dire does not mean that defenses of force majeure or frustration of purpose or the like will prevail. Rather, until there are more appellate decisions on the application of these defenses, cases will often turn on the particular preferences of the judge hearing the case.

II. Lease Obligations Typically At Issue

The following lease obligations have been affected by the pandemic:

A. Landlord's timely completion of "Landlord's Work."
B. Tenant's timely completion of "Tenant's Work."
C. Tenant's obligation to pay rent, including the commencement of that obligation.
D. Tenant's obligation, if any, to open or operate.
E. Tenant's right (if not in default) to exercise an option to extend the lease term.
F. Tenant's right to reduce its rent obligation or terminate the lease if there is a failure to meet a co-tenancy requirement as a result of other stores not operating.

III. Potential Defenses To Lease Obligations Flowing From The Pandemic

A. A Force Majeure Provision In The Lease

1. The Words Of The Provision Matter

"Force Majeure," which means "superior force", and is sometimes referred to as a "supervening event", originated in French law but is widespread in many legal systems. Basically, the contracting parties expressly agree that the occurrence of certain extraordinary or catastrophic events detailed in the contract will excuse or extend time for performance if they are not within the control of the non-performing party, and have an overwhelming negative impact on performance.

The starting point for an analysis of a force majeure clause is the express wording of the clause, based on the principle in American law to honor the express agreement of the contracting parties as written; express language will be given great weight. Whether COVID-19 constitutes a force majeure event will depend on the exact wording and scope of the force majeure provision.

a. Does the provision expressly cover a pandemic or a government order that requires the public to stay at home, prohibits construction activities, or requires retail businesses to close?
b. Does the provision eliminate the performance obligation or just delay it until the force majeure event passes?
c. Does the provision address how the existence of a force majeure event impacts the obligation to pay rent?
    i. Many leases provide that a force majeure event does not excuse the timely payment of rent.
    ii. If the lease is silent on whether a force majeure event excuses or delays the rent obligation, does the lease elsewhere reflect the parties' bargain that the tenant is, or is not, required to operate in the premises?
d. To the extent the provision covers an "Act of God," is a pandemic an "Act of God?"

e. Many force majeure provisions contain a catchall provision like “and any other event which is beyond the control of the parties.”
    i. Some courts limit such a provision to only those events that are similar in character to the specifically enumerated events.
    ii. Some courts interpret such a provision more broadly.
f. Does the provision require the party invoking force majeure to promptly notify the other party?

2. Key observations

Exact language important. Courts will carefully address the specific language of a force majeure or unavoidable delay clause, starting with the list of force majeure events. For a party seeking to excuse performance by force majeure, it is clearly easier if the specific event in question is overtly listed. And judicial decisions tend to be very strict. While some force majeure clauses do expressly refer to “epidemics,” “pandemics,” or “quarantines,” this is uncommon, although quarantines or shelter in place orders may be adjudged to be reasonably included in force majeure verbiage like “governmental restrictions” or “regulations”.

Catch-all phrases. Catch-all phrases such as “or any other causes of any kind whatsoever which are beyond the reasonable control of such party” are often used and helpful to claimants of a force majeure defense, but they are open to legal disputation based on various doctrines of contract interpretation. On the other hand, some force majeure clauses do not contain any catch-all language, and therefore to benefit from them a party claiming a force majeure defense will be limited to the exact terms listed.

Difficulty of invoking force majeure to excuse payment obligations. Inability to pay rent or other financial obligations is often expressly excluded from force majeure provisions. Different judges throughout the country have arrived at different conclusions as to whether this language precludes a tenant’s ability to claim force majeure or whether this language suggests an allocation of risk among the parties that would preclude the assertion of other common law defenses. Some courts construing business contracts have historically viewed such claims with skepticism, presuming that business risk, even though in extreme circumstances it may seem unfair, is naturally part of a business deal and not the type of extraordinary supervening “Act of God” on which force majeure doctrine focuses.

Need to demonstrate causation. There must be a link between the supervening event and the failure to perform. For example, take a force majeure event like governmental restrictions. Clearly, a very strong case can be made that a governmental order to close most retail operations would directly excuse an operating covenant. However, what about an order to “shelter in place”? This may virtually eliminate customer traffic, but the order is directed at individuals, and the effect on shopping decisions is indirect. Even less direct in terms of linkage is government “advice” to stay home, avoid crowds, etc. And such government actions may not prevent a tenant from actually paying rent.

“Not within the control” is key. The parties must consider their duty of mitigation. Note that force majeure doctrine is focused solely on events that are not within the control of the non-performing party (or, sometimes, “reasonable” control), and foreseeability is not part of force majeure requirements. After all, acts of God (i.e., natural disasters), war, riots, strikes, government restrictions, etc., are certainly foreseeable. The key is whether the event is outside the control of the performing party and cannot reasonably be mitigated. For example, might a retail outlet closed to the public by government order be reasonably expected, as some have done, to switch to takeout, home, or curbside delivery and thus not be entitled to excused performance as a result of the government order?

Adherence to notice requirements. To benefit from force majeure clauses, the non-performing party often must provide notice of the force majeure event and its consequences to the other party within a specified time period or lose the defense (while even that requirement can be subject to legal challenge, both parties should pay careful attention to time and notice requirements). Among other things, this will require readiness to act quickly—the content of a notice invoking force majeure relief is important and should track the wording of the clause granting the relief.

3. A Sample Of Relevant Cases

In *Kel Kim Corp. v. Central Markets, Inc.*, 524 N.Y.S.2d 384 (Ct. of App. 1987), the tenant sought to invoke a force majeure provision to excuse its inability to maintain insurance requirements in a lease for a roller

rink. The Court interpreted the force majeure provision narrowly, found no express reference to insurance interruptions and denied relief under the catch-all provision for events beyond the parties' control.

In *Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs.*, 731 F Supp 850 (N.D. Ill. 1990) (Applying New York law) (Circuit Judge Posner sitting by designation), the Court held that the government's suspension of the licensing of nuclear facilities constituted a force majeure event. But the Court also held that the inclusion of a force majeure provision supplants common law defenses of frustration of purpose or impossibility and that a party claiming a force majeure event has an implied obligation to attempt to resolve the event (related to the duty of good faith) before invoking a force majeure provision.

In *Kyocera Corporation v. Hemlock Semiconductor, LLC,* 313 Mich. App. 437 (2015), the Court narrowly construed the force majeure provision to the specifically identified events and held that financial hardship or unprofitability of performance is not a force majeure event with respect to a fixed price take or pay contract. The Court denied relief because the contract allocated to the buyer the risk of the alleged force majeure event, a trade war which lowered the market price for solar panels greatly below the fixed price.

In *Bay City Realty, LLC v. Mattress Firm, Inc.,* Case No. 20-CV-11498 (E.D. Mich. Apr. 7, 2021), the Court held that the tenant was allowed to abate rent due to COVID restrictions on commercial operation. In doing so, the Court rejected the landlord's effort to expansively interpret force majeure language contained in a lease provision on "hazardous materials," that the landlord argued allocated the risk of closures due to government regulation to the tenant. The Court held that the language must be read in context and was intended to apply only to those regulations relating to "hazardous materials", which would not include COVID-19.

In *Palm Springs Mile Associates, Ltd. v. Kirkland's Stores, Inc.*, Case No. 20-21724, 2020 WL 5411353 (S.D. Fl., Sept. 8, 2020), the Court held that, notwithstanding broad lease force majeure language triggered by "governmental laws" or "acts of God," the tenant's obligation to pay rent was not excused by COVID restrictions. According to the Court, the tenant was still obligated to establish causation: that "a force majeure event *resulted* in its inability to pay its rent" and that the "restriction on non-essential activities and business operations must directly affect [the tenant's] ability to pay rent."

Another recent case, *In re Hitz Restaurant Group*, 616 B.R.374, 376-378 (Bankr. N.D. Ill., (2020), held that a stay-at-home order issued during the pandemic, which prevented a tenant from providing on-premises dining at its restaurant and limited it to takeout and curbside service, was excused in part from its rent obligations based on the force majeure clause in its lease. The clause excused tenant from performing its lease obligations "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" except due to "[l]ack of money." The court found that the stay-at-home order "hindered" the tenant's ability to perform and proximately caused the tenant's "inability to pay rent, at least in part, because it preventing [the tenant] from operating normally…"

B. Common Law Defenses

Regardless of whether the lease contains a force majeure provision that applies to pandemics such as COVID-19, landlords and tenants in many jurisdictions may have grounds for excusing lease obligations under common law doctrines including frustration of purpose, impossibility/impracticability, operation of law, and "Acts of God." These doctrines overlap and exist in one form or another in most U.S. jurisdictions. In general, these doctrines may excuse various lease obligations if performance is frustrated by unforeseeable circumstances, beyond the reasonable control of the landlord and tenant, where the risk of those events were not allocated in the lease to a party. There are a growing number of legal decisions applying these historic doctrines to pandemics, like COVID, but these decisions have not been tested in the appellate courts and so, while potentially persuasive, are not precedential.

1. The Frustration of Purpose Defense

Depending on the lease language for force majeure, landlords and tenants may seek relief from lease obligations based on the common law doctrine of frustration of purpose. As explained in Restatement (Second) of Contracts, §265, a frustration of purpose arises:

> Where, after a contract is made, a party's principal purpose is substantially frustrated 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 remaining duties to render performance

> are discharged, unless the language or circumstances [of the contract] indicate the contrary.

The purpose of a retail lease may arguably be frustrated, at least temporarily, if the pandemic results in a governmental shutdown of the tenant's business operations at the premises. The doctrine of frustration applies when performance remains possible (e.g. the payment of rent) but the fundamental reason of both parties for entering into the contract has been frustrated by an unanticipated supervening circumstance, destroying substantially the value of performance by the party seeking to enforce the contract. *Cutter Laboratories, Inc. v. Twining,* 221 Cal.App.2d 302, 314-315 (1963). Under this doctrine, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing its promise unless a contrary intention appears. *Brown v. Oshiro,* 68 Cal.App.2d 303 (1945) (tenant was still required to perform hotel lease serving Japanese community notwithstanding civilian exclusion order of persons of Japanese ancestry). The doctrine may excuse a tenant's obligation to pay rent if it can prove there has been a failure of consideration.

However, courts in many jurisdictions will not allow tenants to invoke the doctrine of frustration to escape their obligations if the lease contemplates or allocates the risks arising from the event in question, such as a pandemic. In these jurisdictions, the doctrine of commercial frustration is not applicable when the lease contemplates the event. *See, e.g., Glenn R. Sewell Sheet Metal, Inc. v. Loverde,* 70 Cal.2d 666, 676-678 (1969). If the force majeure provision in a tenant's lease requires it to pay rent notwithstanding a pandemic or government closure of the premises, the tenant may have difficulty relying on the doctrine of frustration to abate rent.

A leading case on the historical doctrine of frustration of purpose is *Lloyd v. Murphy,* 25 Cal.2d 48 (1944). The plaintiff car dealer in that case closed his dealership and repudiated his lease after the federal government ordered that the sale of new cars be discontinued during World War II. The California Supreme Court noted that "principles of frustration have been repeatedly applied to leases by the courts of this state." *Id.*, at 52-53. The Court also emphasized the equitable nature of the doctrine:

> The question in cases involving frustration is whether the equities of the case, considered in the light of sound public policy, require placing the risk of a disruption or complete destruction of the contract equilibrium on defendant or plaintiff under the circumstances of a given case …, and the answer depends on whether an unanticipated circumstance, the risk of which should not be fairly thrown on the promisor, has made performance vitally different from what was reasonably to be expected. *Id.*, at 54 (citations omitted).

The doctrine of frustration places the burden on the party seeking to avoid commercial lease obligations. The plaintiff car dealer in *Lloyd v. Murphy* did not meet that burden, and ultimately lost his case. The court limited the doctrine of frustration "to cases of extreme hardship so that businessmen, who must make their arrangements in advance, can rely with certainty on their contracts," and further stated that "laws or other governmental acts that make performance unprofitable or more difficult or expensive do not excuse the duty to perform a contractual obligation." *Id.*, at 54-55. The court required the plaintiff lessee to show something more than "substantial" frustration, but rather the complete or nearly complete impossibility of using the premises for the purpose for which they were leased.

While this historical doctrine and its elements are generally recognized across the country, courts have been very inconsistent in the doctrine's application to commercial tenants impacted by COVID governmental restrictions. For example, in *UMNV 205-207 Newbury LLC v. Caffé Nero Americas Inc.,* 2084CV01493-BLS2 (Mass. Superior Ct., Feb. 8, 2021), the Court granted rent abatement to a restaurant tenant based on a frustration of purpose defense. In *UMNV*, the lease provided that the tenant could use the leasehold solely for "the operation of a Caffé Nero themed Café under Tenant's Trade Name and for no other purpose" and that services at this location must be consistent with other Caffé Nero locations in the Greater Boston area. The tenant also was permitted only to offer takeout from its regular sit-down menu. The Court held that, because the lease limited the permitted use of the premises to a single permitted use that was prohibited by COVID regulation, the purpose of the lease was frustrated. The Court also rejected the landlord's argument that the lease's force majeure provision (applying where a party was "prevented" from performing due to government regulation) allocated the risk of government restriction to tenant, holding that this provision did not preclude common law defenses, such as frustration of purpose.

On the other hand, in *The Gap Inc. v. Ponte Gadea New York LLC,* 2021 WL 861121 (S.D.N.Y., March 8, 2021), the Court rejected the tenant's frustration of purpose defense in support of lease rescission/reformation, holding that the lease was not frustrated because the relevant COVID executive orders allowed for some in-store shopping, curbside pickup, and online order fulfillment, noting that there was "no covenant in the lease in which

[the landlord] made any guarantee regarding foot traffic, or the nature or demographic characteristics of the area of the Lexington Avenue store premises." In addition, the Court held that, while the COVID pandemic might not have been foreseeable, government regulations closing commercial operations were expressly contemplated under the lease's force majeure provision, which included "governmental preemption of priorities or controls in connection with a national or other public emergency. . . ."

And other courts, such as in *East 75th Street Corp. v. Christian Louboutin L.L.C.,* No. 154883/2020, 2020 WL 7315470 (N.Y. Sup. Ct. Dec. 09, 2020), have suggested that, because the leasehold still exists, there can be no frustration of purpose.

2. The Impossibility, a/k/a Impracticability, Defense

Under the Restatement (Second) Of Contracts, §261:

> When, 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.

Impossibility can establish a defense to nonperformance where performance is basically made physically or legally impossible by an unforeseen event outside the parties' control (unlike frustration of purpose, where performance may be possible but the fundamental purpose for doing so is completely frustrated). For example, a governmental order closing retail stores would arguably render an operating covenant impossible to perform, and, likewise, closure of borders to import a non-replaceable but vital building material might render building obligations impossible to perform. However, in the same circumstances, paying rent may not be impossible, as the tenant theoretically could find other sources of payment, just like the case where revenues are severely diminished due to changed customer preferences. Note that the law traditionally favors "objective impossibility" (where anyone would find it impossible to perform) as opposed to "subjective impossibility" based on the characteristics of the particular individual (where, for example, the actual obligated party loses a critical source of financing).

A relatively recent case arising from the terrorist attacks in New York City illustrates how the impossibility doctrine is applied and has been referenced by other courts examining impossibility during the COVID pandemic. In that case, the issue was whether a New Yorker was entitled to a refund of her vacation deposit after the terrorist attack on September 11, 2001. The contract allowed the travel agency to keep the deposit unless the traveler canceled 60 days before the departure date. The would-be vacationer tried to cancel immediately following 9/11, which was more than 60 days before departure. But she could not reach the travel agency for several weeks because of the emergency, near-lockdown conditions in New York City. The Court found the equitable circumstances outweighed the contract language. It held that even though the vacationer's cancellation was untimely under the contract terms, she was entitled to a deposit refund if she could prove that the events of 9/11 made it temporarily impossible for her to contact the travel agency. See *Bush v. ProTravel Int'l, Inc.*, 746 N.Y.S.2d 790 (Civ. Ct. 2002).

Relying upon *Bush*, the Court in *267 Dev., LLC v Brooklyn Babies & Toddlers, LLC,* No. 510160/2020, 2021 BL 97086 (N.Y. Sup. Ct. Mar. 15, 2021) held that the scope of the COVID pandemic, like the events of 9-11, were unprecedented and could not have been foreseen or built into the parties' contract. The Court therefore agreed with the tenant that, since its business was closed by government regulation, tenant's performance under the lease, including its obligation to pay rent, was made objectively impossible.

Likewise, in *In re: Cinemex USA Real Estate Holdings, Inc, et al.,* Case No. 20-14695, 2021 WL 564486 (U.S. Bankruptcy Court, S.D. Florida, Miami Div., Jan. 27, 2021), the operator of a dine-in movie theatre claimed in a Chapter 11 bankruptcy that its ability to operate was made impossible due to COVID regulations and that this excused its obligation to pay rent. The Bankruptcy Court agreed, holding that the operator was not required to pay rent during periods of forced closure and that the term of the lease was extended for this period. However, the Bankruptcy Court also held that this abatement only applied during periods in which closure was required, not periods of decreased profitability due to consumers' reluctance to attend movies.

On the other hand, in several cases including *CAB Bedford LLC v. Equinox Bedford Ave Inc.,* 2020 WL 7629593 (N.Y. Supreme, Dec. 22, 2020), Courts have decisively rejected the application of the impossibility

defense absent evidence that the premises have been destroyed. The CAB Court held that the gym tenant had operated for years prior to COVID and was able to operate after closure regulations ended. According to the Court, "[t]he subject matter of the lease was not destroyed. At best, it was temporarily hindered. That there are more hurdles to running the business is not a basis to invoke the impossibility doctrine."

3. The Operation of Law Defense

In addition to asserting an "impossibility" defense, landlords and tenants may also seek relief from lease obligations when performance is prevented by "operation of law," although this defense is invoked less frequently than others in the COVID jurisprudence. For example, a California court allowed a tenant to terminate its liquor store lease, which permitted no other use for the premises, after prohibition went into effect and made liquor stores illegal. *Industrial Land & Development Co. v. Goldschmidt,* 56 Cal.App. 507 (1922). Courts are less likely to grant relief under this doctrine if laws or regulations merely increase the expense of performance. For example, a New York court rejected the defense of operation by law by a residential landlord who was forced to obtain a permit with onerous financial conditions in order to perform an obligation to renovate the premises. *Stasyszyn v. Sutton East Associates,* 555 N.Y.S.2d 297 (App. Div. 1st Dept. 1990).

If the lease requires payment of rent when force majeure events occur, many courts will enforce the lease notwithstanding arguments for abatement based on common law doctrines. However, tenants in California have special protection under California Civil Code Section 1511(1), which codifies the operation of law doctrine as follows:

> The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:
>
> 1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse; however, the parties may expressly require in a contract that the party relying on the provisions of this paragraph give written notice to the other party or parties, within a reasonable time after the occurrence of the event excusing performance, of an intention to claim an extension of time or of an intention to bring suit or of any other similar or related intent, provided the requirement of such notice is reasonable and just; ….

To the extent that "shelter in place" and other governmental orders require tenants to close their premises, or landlords to close shopping centers, Civil Code subsection 1511(1) arguably supports a tenant's abatement of rent on grounds that payment is prevented or delayed "by the operation of law." Even if the lease provides that payment will not be excused by a force majeure event, subsection 1511(1) may excuse the tenant's performance if the force majeure event prevents or delays performance.

Thus, regardless of whether the lease states otherwise, if the tenant is required to cease operations by government order, then the tenant's obligations under the lease in California, including the payment of rent, may be relieved during the required closure period even if the lease contains a force majeure clause that expressly states that a force majeure event will not exempt the obligation to pay rent. This theory does not appear to have been tested in California, so some caution must be observed when relying on the statute.

Outside of California, many other states recognize the operation of law doctrine. *See generally YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC,* Ill.App.3d 1, 933 N.E.2d 860 (2010); *Innovative Modula Solution v. Hazel Crest School Dist.,* 358 Ill. Dec. 343, 965 N.E.2d 414 (2012). However, we are aware of no other state that has applied the doctrine to a lease containing a force majeure provision that expressly requires a tenant to pay rent when lease performance is prevented by operation of law.

4. The Act of God Defense

Landlords and tenants may also seek relief from lease obligations on grounds that the pandemic represents an "Act of God." The Act of God doctrine is a well-established legal doctrine that courts have traditionally applied to severe natural disasters including earthquakes, floods and lightning. *Ryan v. Rogers,* 96 Cal. 349, 353 (1892). It is usually limited to events caused by natural forces without "human agency" and which could not have been prevented by due care or reasonable foresight. Whether the Act of God doctrine could apply

to pandemics does not appear to have been tested yet, but the doctrine is plainly not limited to natural disasters. *See, e.g. Whole Foods Market v. Wical Ltd.,* 2019 WL 5395739 (D.D.C. Oct. 22, 2019) (ruling that it was a question of fact whether rodent infestation that resulted in closure of tenant's premises constituted an "act of God" for which landlord was not responsible).

Force majeure and Acts of God are similar but not identical doctrines. In some jurisdictions, force majeure includes events that involve human agency or intervention, such as acts of war or labor strikes, whereas Acts of God do not. *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.,* 29 Cal.2d 228, 238 (1946). Act of God is defined in one federal statute as an "unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." 42 U.S.C. section 9601 (CERCLA).

The Act of God doctrine is codified by statute in California as follows:

> The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: . . .
> 2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; ….

California Civil Code § 1511(2). COVID-19 is arguably "an irresistible, superhuman cause" but there is an issue whether human action increased its spread. Nevertheless, retail tenants in California and elsewhere may seek to invoke the Act of God doctrine to abate rent if their leases do not expressly provide to the contrary.

Courts in Florida, New York, Texas, and Illinois have all recognized the common law Act of God doctrine. Florida courts define an act of god as an "occurrence so extraordinary and unprecedented that human foresight could not foresee or guard against it . . ." Fla. *Power Corp. v. City of Tallahassee,* 154 Fla. 638, 18 So.2d 671, 675 (1944); *see also Mailloux v. Briella Townhomes, LLC,* 3 So.3d 394, 34 Fla. L. Weekly D269 (2009). However, Florida courts do not appear to have addressed the question of whether the Act of God doctrine can support a tenant's abatement of rent. Texas courts recognize Acts of God as an unavoidable occurrence. *See generally Hutchings v. Anderson,* 452 S.W.2d 10 (1970) (finding flooding in the basement of a tenant's apartment was an Act of God due to unprecedented rainfall and not as a result of negligence by the landlord); *TEC Olmos, LLC v. ConocoPhillips Company,* 555 S.W.3d 176 (2018) (finding force majeure clause accounting for Acts of God was enforceable but could not be extended to include nonperformance due to economic downturn in oil and gas). Similarly, Illinois has recognized act of God as a defense related to injury caused by acts of God beyond the power of human agency to foresee or prevent an event. *See Evans v. Brown,* 399 Ill.App.3d 238, 925 N.E.2d 1265 (2010). But, Illinois does not appear to have addressed the doctrine in the context of a commercial lease dispute.

Several courts addressed whether the act of God doctrine excused contractual obligations following the 1918 Spanish Flu epidemic. The government response to the Spanish flu, like the response to COVID, included a broad economic shutdown resulting in widespread job losses and economic difficulties for American workers. In that crisis, Courts required employers to meet their obligations to unionized workers and others with employment contracts, even when government closures and the epidemic prevented workers from performing their jobs. For example, the Illinois Supreme Court held that a school district could not rely on force majeure or the act of God doctrine to avoid paying a teacher who was idled when the epidemic forced schools to close. *Phelps v. School District No. 109, Wayne County,* 134 N.E. 312 (Ill. 1922). However, Courts were split on whether force majeure doctrines excused school districts from paying school bus drivers under employment contracts during the 1918 epidemic. Compare *Crane v. School District No. 14 of Tillamook County*, 188 P. 712 (Or. 1920); and *Sandry v. Brooklyn School District No. 78 of Williams County,* 182 N.W. 689, 690-91 (N.D. 1921).

IV. Final Observations

Given the inconsistency in judicial decisions applying these defenses and the lack of appellate decisions resolving that inconsistency, all of these defenses should be considered closely by both commercial tenants and landlords and require detailed attention to the facts and causation in each case. In all matters, careful legal review of specific language and application of the general doctrines to the specific facts of the case is required in evaluating a party's legal position and strategy.

Regardless, it is prudent in this time of continuing, general upheaval for parties to a lease, as with all contracting parties, to look to their legal rights and defenses, plan for appropriate timely, preemptive measures, and work closely with their counsel. At the same time, relying alone on an adversary legal posture is not necessarily sufficient or wise from a practical point of view, especially when so many of the parties, and their counterparties in other chains of contracts, have been harmed economically by the COVID-19 pandemic. Thus, it will also be advisable to keep lines of communication open and look for compromise.