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COVID and Consequences: How the Pandemic Changed Contract Interpretation and Litigation

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COVID AND CONSEQUENCES: HOW THE PANDEMIC CHANGED CONTRACT INTERPRETATION AND LITIGATION

ABSTRACT

In January 2020, the United States recorded its first COVID-19 infection. Soon after, courts across the country began interpreting language from commercial leases in disputes where tenants failed to pay rent due to the changed circumstances caused by the COVID-19 pandemic. Governors and mayors issued executive orders temporarily shuttering nonessential businesses and later replaced them with phased reopenings in an attempt to halt the spread of the virus. Many commercial tenants who could not operate their businesses during the onset of the pandemic and whose profits declined ultimately breached their leases by failing to pay rent. To recover their losses, many landlords sued their tenants for unpaid rent. Often, tenants offered affirmative common law defenses under impossibility, impracticability, and frustration of purpose. These defenses often required courts to apply leases' force majeure clauses to a new type of event—a pandemic. Courts have analyzed lease clauses thoroughly to rationalize different results—rent relief, denial of rent relief, and partial rent relief. Contract interpretation plays a vital role in disputes involving leases with force majeure clauses and specific limited use clauses, which limit businesses to a particular industry or business model in their demised premises. Scholars and practitioners alike can learn several lessons from recent decisions.

> On the day when the death-roll touched thirty, Dr. Rieux read an official telegram that the Prefect had just handed him, remarking: "So they've got alarmed at last." The telegram ran: *Proclaim a state of plague stop close the town.*[1]

INTRODUCTION

At the beginning of the COVID-19 pandemic, governors ordered many nonessential businesses to temporarily close or operate at a reduced capacity to mitigate the public health threat COVID-19 posed.[2] Consequently, those businesses suffered revenue shortfalls,[3] and some could not maintain contractual obligations, such as paying rent.[4] In the analysis of force majeure clauses in contracts at risk of being breached, initial advisory memos written by law firms did not encourage clients to breach their contracts by stopping rent based on the expectation that courts would not excuse their performance.[5] However, courts have taken various, sometimes contradictory, but not irreconcilable, approaches to excusing performance.[6] In general, courts only excuse performance if parties

1. ALBERT CAMUS, THE PLAGUE 63 (Stuart Gilbert trans., Vintage Books 1991) (1947).

2. *See, e.g.*, N.Y. Exec. Order No. 202.8 (Mar. 20, 2020), https://www.governor.ny.gov/sites/default/files/atoms/files/EO_202.8.pdf [https://perma.cc/QKQ7-BWSE]; Ill. Exec. Order No. 2020-10 (Mar. 20, 2020), https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf [https://perma.cc/CU82-4C6Z].

3. *See* Alexander W. Bartik et al., *How Are Small Businesses Adjusting to COVID-19? Early Evidence from a Survey* 9–10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26989, 2020), https://www.nber.org/system/files/working_papers/w26989/w26989.pdf [https://perma.cc/R4ZT-ZD7C] (noting that many small businesses did not have sufficient cash on hand to maintain operations during the early part of the pandemic); JIM KILPATRICK ET AL., DELOITTE, COVID-19: MANAGING CASH FLOW DURING A PERIOD OF CRISIS 2 (2020), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-COVID-19-managing-cash-flow-in-crisis.pdf [https://perma.cc/G3VG-6FW3] (highlighting low cash reserves and unstable cash flows in a wide variety of industries and business sizes at the onset of the pandemic).

4. *See* Konrad Putzier & Esther Fung, *Businesses Can't Pay Rent. That's a Threat to the $3 Trillion Commercial Mortgage Market*, WALL ST. J. (Mar. 24, 2020, 8:00 AM), https://www.wsj.com/articles/businesses-cant-pay-rent-thats-a-threat-to-the-3-trillion-commercial-mortgage-market-11585051201 [https://perma.cc/8KMH-B55Q]; *see also* Jonathan Lurie & Rob Palter, *The Effect of Government Stimulus on Commercial Real Estate Amid COVID-19*, MCKINSEY & CO. (Jan. 20, 2021), https://www.mckinsey.com/capabilities/operations/our-insights/the-effect-of-government-stimulus-on-commercial-real-estate-amid-covid-19 [https://perma.cc/A6RZ-KBKX] (discussing the effects of government stimulus packages on businesses and commercial properties).

5. Stanford Law School has compiled a searchable database of more than 4,000 memoranda prepared by law firms, audit firms, and other business advisors related to COVID-19 topics. Press Release, Stan. L. Sch., Stanford Law School Launches COVID-19 Memo Database in Collaboration with Cornerstone Research (Apr. 15, 2020), https://law.stanford.edu/press/stanford-law-school-launches-covid-19-memo-database-in-collaboration-with-cornerstone-research/ [https://perma.cc/D3NJ-G4B2].

6. *See* discussion *infra* Part II.

have contracted for that specific and unambiguous situation in advance.[7] Courts rarely accept post hoc theories and arguments that seek to redefine parties' intentions and obligations at the time of contracting.[8] In upholding contracts as written, courts rarely grant parties a windfall.[9]

In addition to the loss of human life and continuing illness and infection,[10] the pandemic caused devastating economic and social consequences. On June 8, 2020, the World Bank announced that it expected COVID-19 to cause the deepest global recession since World War II and forecasted that the U.S. economy would shrink by 6.1% that year.[11] About 400,000 businesses closed temporarily in the second quarter of 2020, and about 330,000 businesses closed permanently.[12] In addition, the unemployment rate reached 14.8% in April 2020—the highest since data collection began in 1948.[13] After the onset of the COVID-19 pandemic,[14] state and local governments eventually allowed phased business reopenings, often with capacity limitations and social distancing

7. *See* discussion *infra* Part II.

8. *See* discussion *infra* Part II. *See generally* RESTATEMENT (SECOND) OF CONTS. § 201 cmt. c ("The objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding: the courts do not make a contract for the parties.").

9. *See* discussion *infra* Part II.

10. Knvul Sheikh & Pam Belluck, *What We Know About Long Covid So Far*, N.Y. TIMES (Oct. 14, 2022), https://www.nytimes.com/2022/05/21/well/long-covid-symptoms-treatment.html [https://perma .cc/KG34-X4NK].

11. Press Release, World Bank, COVID-19 to Plunge Global Economy into Worst Recession Since World War II (June 8, 2020), https://www.worldbank.org/en/news/press-release/2020/06/08/covid-19-to-plunge-global-economy-into-worst-recession-since-world-war-ii [https://perma.cc/JX9D-JH8E].

12. Ryan A. Decker & John Haltiwanger, *Business Entry and Exit in the COVID-19 Pandemic: A Preliminary Look at Official Data*, BD. OF GOVERNORS OF THE FED. RSRV. SYS.: FEDS NOTES (May 6, 2022), https://www.federalreserve.gov/econres/notes/feds-notes/business-entry-and-exit-in-the-covid-19-pandemic-a-preliminary-look-at-official-data-20220506.htm [https://perma.cc/35UK-ZJMG].

13. GENE FALK ET AL., CONG. RSCH. SERV., R46554, UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC 2 (2021), https://sgp.fas.org/crs/misc/R46554.pdf [https://perma.cc/4ZPT-WHF5].

14. *CDC Museum COVID-19 Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/museum/timeline/covid19.html [https://perma.cc/C27N-VMJQ] (last visited May 24, 2022).

requirements.[15] Vaccinations allowed many Americans to return to a new normal even as the pandemic continued.[16]

This Note begins in Part I with an overview of the current doctrines affected by force majeure, impracticability and impossibility, and frustration of purpose. Part II then studies the types of language used in contracts that allocate risk (both foreseen and unforeseen) and how that language affects a court's decision when one party sues seeking relief due to another party's nonperformance. Specifically, it first examines how courts have interpreted force majeure clauses in commercial leases, especially in businesses where governmental restrictions required them to operate at reduced capacity. Second, it examines how courts have interpreted commercial leases where the purpose of the lease is specified, such as for a dine-in restaurant or a fitness center. This section analyzes various trends in interpretation, such as paying careful attention to business sense and reading contracts as a whole, and concludes that courts generally seek to determine the parties' intent at the time of contracting, balancing it with business principles. Third, it examines a case regarding a lease with a force majeure clause and a specific limited use provision where the court had reached its decision primarily by analyzing the doctrine of impossibility and frustration of purpose. In Part III, the Note examines how courts interpreted leases of businesses that sold alcohol in the early twentieth century when counties, states, and, later, the nation banned alcohol production and sale. Finally, in Part IV, the Note reviews the several strategies used in contract construction and concludes that courts are exceptionally hesitant to reallocate the risk between sophisticated parties and generally do not excuse performance resulting from financial difficulty.[17] Drawing on the cases discussed in Parts II and III, the Note ultimately provides guidance for drafting contracts intentionally based on courts' current semantic interpretations, such as explicitly defining the scope of

15. *See, e.g.*, Michael Gold & Matt Stevens, *What Restrictions on Reopening Remain in New York?*, N.Y. TIMES (May 1, 2021), https://www.nytimes.com/article/new-york-phase-reopening.html [https://perma.cc/H8BQ-L6B8]; *Reopening Massachusetts*, MASS. GOV, https://www.mass.gov/info-details/reopening-massachusetts [https://perma.cc/N555-L72W] (last visited May 24, 2022).

16. John Gramlich, *Two Years into the Pandemic, Americans Inch Closer to a New Normal*, PEW RSCH. CTR. (Mar. 3, 2022), https://www.pewresearch.org/2022/03/03/two-years-into-the-pandemic-americans-inch-closer-to-a-new-normal/ [https://perma.cc/Y2ZA-NXBU] (reporting survey results indicating increasing percentages of Americans comfortable visiting with friends, grocery shopping, going to hair a salon, eating out, attending an indoor sporting event or concert, and attending a crowded party); United Nations, *'COVID-19 Is Not Over', Tedros Warns World Health Assembly*, UN NEWS (May 22, 2022), https://news.un.org/en/story/2022/05/1118752 [https://perma.cc/K8JB-6JFQ] (reporting on the head of the WHO's May 22, 2022 address to the World Health Assembly that while COVID-19 cases and deaths have declined the pandemic is "most certainly not over.").

17. *See generally* Swata Gandhi, *Force Majeure and Contracting Strategies for the COVID-19 Era*, PRAC. LAW., Aug. 2021, at 55, 60.

relief in force majeure clauses, considering provisions for partial business operations, letting parties terminate contracts after a certain period of nonperformance, and drafting more permissive specific limited use provisions to let businesses modify or expand their operations or services if they cannot operate as originally planned due to a factor beyond their control.

I. FORCE MAJEURE CLAUSES AND THEIR EFFECT ON CONTRACT ENFORCEMENT

Contracts often contain force majeure clauses designed to excuse one or both parties from performance upon triggering events such as acts of God,[18] governmental regulations, floods, or labor strikes.[19] The force majeure clause must define the breach for which the promisor seeks to be excused, define the force majeure event, require and define a causal nexus between the breach and the event, and explain the remedy if performance is excused.[20]

Courts typically interpret force majeure clauses narrowly, especially when the parties are sophisticated commercial parties with equal bargaining power.[21] A court may interpret a force majeure clause in a commercial lease as excusing a tenant's rent obligation.[22] Few reported decisions involve disputes over force

18. Courts have interpreted act of God provisions and when they are triggered. *See, e.g.*, *In re* Flood Litigation, 607 S.E.2d 863, 877–78 (W. Va. 2004). ("'[A]n 'Act of God' is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected.' . . . In contrast, '[t]hat which reasonable human foresight, pains, and care should have prevented can not be called an act of God.'") (second alteration in original); *see also* Gleeson v. Va. Midland R.R. Co., 140 U.S. 435, 439 (1891); Cormack v. New York, 90 N.E. 56, 58 (N.Y. 1909). Black's Law Dictionary defines an act of God as, "[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado." *Act of God*, BLACK'S LAW DICTIONARY (11th ed. 2019). California's Public Contract Code defines an act of God as "earthquakes in excess of a magnitude of 3.5 on the Richter Scale and tidal waves." CAL. PUB. CONT. CODE § 7105(b)(2) (West 2022). *See generally* 22 RICHARD A. LORD, WILLISTON ON CONTRACTS § 59:29 (4th ed. 2021) (applying acts of God to the law of carriers).

19. J. Hunter Robinson et al., *Use the Force? Understanding Force Majeure Clauses*, 44 AM. J. TRIAL ADVOC. 1, 8 (2020); Jessica S. Hoppe & William S. Wright, *Force Majeure Clauses in Leases*, PROB. & PROP., Mar.–Apr. 2007, at 8, 12.

20. Paula M. Bagger, *The Importance of Force Majeure Clauses in the COVID-19 Era*, AM. BAR. ASS'N (Mar. 25, 2021), https://www.americanbar.org/groups/litigation/committees/commercial-business/boilerplate-contracts/force-majeure-clauses-contracts-covid-19/ [https://perma.cc/WM3L-J7KN]; *see* Christian Twigg-Flesner, *A Comparative Perspective on Commercial Contracts and the Impact of COVID-19 - Change of Circumstances, Force Majeure, or What?*, *in* LAW IN THE TIME OF COVID-19 155 (Colum. L. Sch. ed., 2020) (ebook), https://scholarship.law.columbia.edu/books/240/ [https://perma.cc/2SGF-AVGC] (discussing the impact of force majeure clauses on commercial contracts during the onset of the COVID-19 pandemic in United States and foreign jurisdictions). *See generally* 14 JOSEPH M. PERILLO & JOHN E. MURRAY, JR., CORBIN ON CONTRACTS § 74.19 (2022) (discussing force majeure clauses).

21. Hoppe & Wright, *supra* note 19, at 9.

22. *See* discussion *infra* Section II.A.

majeure clauses that explicitly contain the word "pandemic" as a force majeure event.[23] Parties may use a force majeure clause in pleading an affirmative defense in a contract case.[24] While most states do not require force majeure clauses to include the specific event that triggers the clause, these affirmative events are ordinarily not successful in New York courts unless such events are specified in the clause.[25] Moreover, events that occur with regularity may cease to become force majeure events.[26]

23. A Westlaw search for cases conducted May 28, 2022 for "'force majeure' /p pandemic" in all state and federal jurisdictions retrieved 116 results. Four of those results were cases which listed pandemics or epidemics as a force majeure clause. *See* Huth v. Am. Inst. for Foreign Study, Inc., No. 20-CV-01786, 2022 WL 834419 (D. Conn. Mar. 21, 2022); Republican Party of Tex. v. Hous. First Corp., No. 14-20-00744-CV, 2022 WL 619708 (Tex. App. Mar. 3, 2022); Zhao v. CIEE Inc., 3 F.4th 1, 8 (1st Cir. 2021); Denbury Onshore, LLC v. APMTG Helium LLC, 476 P.3d 1098, 1101 (Wyo. 2020).

24. LORD, *supra* note 18, § 73:31.

25. Hoppe & Wright, *supra* note 19, at 9; One World Trade Ctr., LLC v. Cantor Fitzgerald Sec., 789 N.Y.S.2d 652, 655 (N.Y. Sup. Ct. 2004) (quoting Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296 (N.Y. 1987)) ("The general rule is that '[o]rdinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused.'") (alteration in original).

26. Hoppe & Wright, *supra* note 19, at 11–12 (discussing catastrophic weather events). On July 23, 2022, the WHO declared monkeypox a "public health emergency of international concern." Apoorva Mandavilli, *W.H.O. Declares Monkeypox Spread a Global Health Emergency*, N.Y. TIMES (July 23, 2022), https://www.nytimes.com/2022/07/23/health/monkeypox-pandemic-who.html. The WHO has only used this term for COVID-19, polio, and monkeypox. *Id.* Monkeypox is spread primarily through physical contact, as well as through respiratory droplets and birth, *id.*, unlike COVID-19, which spreads through airborne respiratory droplets. *How COVID-19 Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html [https://perma.cc/CMY7-T8F5] (July 14, 2021). Monkeypox is a viral zoonosis (a virus that can be transmitted to humans from animals), *Multi-country Monkeypox Outbreak in Non-endemic Countries*, WORLD HEALTH ORG. (May 21, 2022), https://www.who.int/emergencies/disease-outbreak-news/item/2022-DON385 [https://perma.cc/G4BX-B4DA], and research suggests COVID-19 is also a viral zoonosis, *Origins of Coronaviruses*, NAT'L INST. OF ALLERGY & INFECTIOUS DISEASES (Mar. 16, 2022), https://www.niaid.nih.gov/diseases-conditions/origins-coronaviruses [https://perma.cc/CZ2P-HEKQ]. On July 21, 2022, the New York State Department of Health announced a confirmed case of polio in the New York City metropolitan area. Press Release, N.Y. State Dep't of Health, New York State Department of Health and Rockland County Department of Health Alert the Public to a Case of Polio in the County (July 21, 2022), https://www.health.ny.gov/press/releases/2022/2022-07-21_polio_rockland_county.htm [https://perma.cc/VBV9-DW9R]. This case was the first confirmed case in New York State since 1990 and public health officials have warned that a larger outbreak is underway based on sewage water samples. Spencer Kimball, *New York Polio Case is the 'Tip of the Iceberg,' Hundreds of Others Could Be Infected, Health Official Says*, CNBC (Aug. 5, 2022), https://www.cnbc.com/2022/08/05/new-york-polio-case-tip-of-iceberg-hundreds-of-others-could-be-infected.html [https://perma.cc/QA4P-5MSJ]. China reported its first human infection of the H3N8 strain of bird flu, which is common in dogs and horses in April 2022. Dominque Patton, *China Reports First Human Case of H3N8 Bird Flu*, REUTERS (Apr. 27, 2022 12:30 PM), https://www.reuters.com/business/healthcare-pharmaceuticals/china-reports-first-hu

A. Impracticability and Impossibility

As contract liability is strict liability, generally, the obligor must perform even if performance is more difficult than expected or is not as economically feasible as anticipated at the time of contracting.[27] However, a court may excuse performance under "impracticability"[28] if the performance has become impracticable, or unreasonably difficult.[29] The impracticability must not have been created by the party's own fault, but instead must have been created by the occurrence of an event, the nonoccurrence of which was a basic assumption of the parties making the contract (unless the circumstances or contract's language specifically provides otherwise).[30] In other words, the event affecting performance must have been unforeseeable. A person will not be excused from performance under this defense if a person assumed the risk, by a force majeure or otherwise.[31]

Performance may be deemed impracticable because of an act of God or actions of a third party that make performance extremely or unreasonably difficult, expensive, or would cause injury or loss to at least one party.[32] In their analyses involving whether the COVID-19 pandemic is an act of God, few courts found that it is,[33] whereas others have concluded the opposite or reached

man-case-h3n8-bird-flu-2022-04-26/ [https://perma.cc/AM87-FYAT]. The Democratic Republic of Congo declared an outbreak of Ebola, a deadly viral zoonosis, on April 23, 2022, its fourteenth since 1976 and sixth since 2018. *Democratic Republic of Congo Declares New Ebola Outbreak in Mbankdaka*, WORLD HEALTH ORG. (Apr. 23, 2022), https://www.afro.who.int/countries/democratic-republic-of-congo/news/democratic-republic-congo-declares-new-ebola-outbreak-mbandaka [https://perma.cc/4X3D-NGQZ]. The WHO has announced an outbreak of severe hepatitis of unknown etiology among children. *Multi-Country – Acute, Severe Hepatitis of Unknown Origin in Children*, WORLD HEALTH ORG. (Apr. 23, 2022), https://www.who.int/emergencies/disease-outbreak-news/item/2022-DON376 [https://perma.cc/L2R6-PY3G]. As of April 21, 2022, there were at least 169 cases in 12 countries documented. *Id.*

27. RESTATEMENT (SECOND) OF CONTS. ch. 11, intro. note (AM. L. INST. 1981).

28. *Id.*

29. *Id.* § 261.

30. *Id.*; *see also* U.C.C. § 2-615 (AM. L. INST. & UNIF. L. COMM'N 2021).

31. *See* PERILLO & MURRAY, JR., *supra* note 20, § 74.15; *see also* Wis. Elec. Power Co. v. Union Pac. R.R. Co., 557 F.3d 504, 506 (7th Cir. 2009) ("Parties can, however, contract around the doctrine [of impossibility in the common law of contracts], because it is just a gap filler . . . ."); United States v. General Douglas MacArthur Senior Vill., Inc., 508 F.2d 377, 381 (2d Cir. 1974) ("The doctrine [of impossibility] comes into play where (1) the contract does not expressly allocate the risk of the event's occurrence to either party, and (2) to discharge contractual duties . . . of the party rendered incapable of performing would comport with the customary risk allocation.").

32. RESTATEMENT (SECOND) OF CONTS. § 261 cmt. d (AM. L. INST. 1981).

33. *E.g.*, 55 Oak St. LLC v. RDR Enters., Inc., 275 A.3d 316, 322 (Me. 2022) ("Because it has not been challenged on appeal, we accept the District Court's conclusion that the pandemic or the Governor's executive orders completely prohibiting indoor dining until June 1, 2020, fall within the language of the force majeure clause as an 'act[ ] of God' and 'governmental restrictions.'") (alteration in original).

decisions without independently analyzing that question.[34] A court may find that nonperformance falls under the doctrine of partial impracticability, which requires the obligee to perform the remaining part of the contract within a reasonable time.[35] Courts often use the term "impossibility" interchangeably with "impracticability"[36] even though strict impossibility of performance, which is unnecessary, requires a situation where performance is objectively impossible, such as destruction of the subject matter or means of performance.[37]

B. Frustration of Purpose

Frustration of purpose is closely related to impracticability and impossibility.[38] However, frustration of purpose is more commonly asserted as a defense when performance would be pointless rather than objectively impossible.[39] Courts may excuse contractual performance under frustration of purpose when performance has not changed or becomes more difficult, but a party's principal purpose of entering into a contract is substantially frustrated.[40] In these cases, the benefit the party expected to gain from the contract has been destroyed. Like with impracticability, the frustration of purpose must not have been created by the party's fault, and it must result from an occurrence of an event, the nonoccurrence of which was a basic assumption of the parties making the contract (unless the circumstances or contract's language specifically provides otherwise).[41] Before the pandemic, courts rarely excused performance under impossibility, impracticability, or frustration of purpose.[42]

34. *E.g.*, Dominion Energy Cove Point LNG, L.P. v. Mattawoman Energy, LLC, No. 20-cv-611, 2020 WL 9260246, at *8 (E.D. Va. Oct. 20, 2020) ("[J]udicial recognition of COVID-19 as an 'Act of God,' . . . [would] rend[er] most of this year's bargained-for exchanges voidable . . . . [E]ven if COVID-19 were considered an 'Act of God,' [Plaintiff] correctly observes that [Defendant] fails to allege that COVID-19 rendered it impossible for [Defendant] to obtain financing."); *In re* CEC Ent., Inc., 625 B.R. 344, 356 (Bankr. S.D. Tex. 2020) ("If the global pandemic is an act of God, [Debtor] cannot excuse performance of its rent obligations. . . . [E]ven if the pandemic . . . [is] not [an] 'act[] of God, . . .' the . . . lease contains no provision otherwise allowing [Debtor] to abate or reduce rent.").

35. RESTATEMENT (SECOND) OF CONTS. § 270 (AM. L. INST. 1981).

36. *See* PERILLO & MURRAY, JR., *supra* note 20, § 74.1 (discussing impossibility and frustration of purpose).

37. *See* Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296 (N.Y. 1987).

38. *See* PERILLO & MURRAY, JR., *supra* note 20.

39. *Id.*

40. RESTATEMENT (SECOND) OF CONTS. § 265 (AM. L. INST. 1981).

41. *Id.*

42. *See* Danielle K. Hart, *If Past Is Prologue, Then the Future Is Bleak: Contracts, Covid-19, and the Changed Circumstances Doctrines*, 9 TEX. A&M L. REV. 347, 369 (2022) (noting that from the beginning of 2010 to the end of 2019, performance was not excused in 86% of federal and state cases asserting these defenses in the Seventh Circuit and performance was not excused in 78% of federal and state cases in the Ninth Circuit); *see also* PERILLO & MURRAY, JR., *supra* note 20, at § 74.1 ("Discharge does not come easily, and parties have been held to bargains that turn out to be harsh in retrospect.").

II. PANDEMIC CASE REVIEW

A. Offering and Denying Relief

Many courts have refused to excuse performance during the pandemic based on precisely worded force majeure clauses. Some force majeure clauses in commercial leases include a sentence that provides that the tenant's lack of money is not a ground for force majeure.[43] During the pandemic, many governors' orders required businesses to stay closed or operate at partial capacity.[44] As a result, businesses faced revenue shortfalls and sought to invoke their leases' force majeure clauses, which courts then interpreted.[45] Courts' conclusions vary based on principles of contract interpretation, such as looking at the contract as a whole, reading in business sense, applying precedential case law, reviewing dictionary definitions, determining parties' intent at the time of drafting, construing terms against the drafter while recognizing the commercial sophistication of the parties, and parsing how modifiers affect clauses' meanings.

For example, in *In re CEC Entertainment, Inc.*, a bankruptcy court held that the pandemic did not excuse the operator of Chuck E. Cheese ("CEC") restaurant and entertainment venues from paying rent during the pandemic under the force majeure clause of its leases and under the doctrine of frustration of purpose.[46] CEC's business model relied heavily on a combination of entertainment and dining, as half of their revenue came from the former and 30% from the latter.[47] Many landlords initially objected to CEC's rent abatement motion but were able to resolve their objections, leaving the court to interpret six leases from restaurants across three states.[48] The Bankruptcy Code lets debtors suspend lease payments on nonresidential real property for a short time for cause.[49] However, debtors such as CEC and other businesses sought more extensive relief, such as complete or partial rent abatement.

43. *See* text accompanying notes *infra* 53, 65, 137.

44. *See, e.g.*, sources cited *supra* note 2; *infra* note 172; *infra* text accompanying notes 64, 84, 117, 133, 165.

45. *See, e.g.*, *supra* note 3 and accompanying text; *infra* text accompanying notes 46–58, 60–73, 77–115, 116–27, 129–41, 143–62, 164–85; *but see infra* text accompanying notes 191–219.

46. *In re* CEC Ent., Inc., 625 B.R. 344, 353, 364 (Bankr. S.D. Tex. 2020).

47. *Id.* at 349.

48. *Id.*

49. *Id.* at 353. A court may delay lease payments on nonresidential real property for 60 days when a corporation files for bankruptcy. 11 U.S.C. § 365(d)(3). A court may delay payments for an additional 60 days for subchapter V debtors who are experiencing a COVID-19 hardship. *Id.* at § 365(d)(3)(B)(i).

The court analyzed six force majeure clauses from CEC's leases and concluded that five were very similar.[50] They all list acts of God and governmental restrictions, along with several other events, as events that could trigger the force majeure clause.[51] Critically, the clauses end with a sentence that states the force majeure clause would not apply if either party lacked funds.[52] For example, the Greensboro, North Carolina lease states:

> [I]f either party shall be prevented or delayed from punctually performing any obligations or satisfying any condition under this Lease by any . . . act of God, unusual governmental restriction, regulation or control . . . 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. . . . 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 money or inability to raise capital or borrow for any purpose.[53]

CEC argued that the pandemic was both an act of God and that governors' orders restricting indoor dining and the operation of arcades triggered the government restriction event in the force majeure clause, and should therefore excuse the company's rent obligations.[54] However, the court declined to determine whether these events triggered the force majeure clause because it reasoned that the final sentence of the force majeure clause (the lack of funds provision) did not allow for rent abatement.[55] The court applied state contract law to each of the six clauses and came to the same conclusion.[56] Notably, the Lynnwood, Washington, lease differs from the other five leases because it contains an explicit anti-force majeure provision stating that force majeure events do not excuse the tenant's obligation to pay rent.[57] In assessing CEC's frustration of purpose defenses, the court reasoned that the force majeure clauses superseded CEC's frustration of purpose defenses.[58]

On the other hand, some courts have offered partial relief in cases involving almost identical force majeure clauses. At the beginning of the pandemic, few cases offered direct guidance,[59] so courts had to interpret leases in a new context.

50. *CEC Ent.*, 625 B.R. at 353–57. The Granada Hills, California lease contained an anti-force majeure clause that required performance even in the face of "acts of God, or any other cause beyond the reasonable control of either party." *Id.* at 356.

51. *Id.*

52. *Id.*

53. *Id.* at 353–54 (emphasis omitted).

54. *Id.* at 354.

55. *Id.*

56. *Id.* at 353–57.

57. *Id.* at 355.

58. *Id.* at 358–63.

59. *See* Andrew Satter, *Force Majeure Clauses Hard to Invoke, Even in the Pandemic (Video)*, BLOOMBERG LAW (May 4, 2020, 11:25 AM), https://news.bloomberglaw.com/us-law-week/force-majeure-clauses-hard-to-invoke-even-in-pandemic-video [https://perma.cc/3D5C-VZVY]

For example, while the court in *CEC Entertainment* offered no relief, another bankruptcy court in *In re Hitz Restaurant Group* offered partial rent relief to a restaurant that faced similar governmental orders.[60] Using case law, the *Hitz* court resolved a dispute according to the general/specific canon of interpretation.[61] Under this canon, specific provisions prevail when there is a conflict between a general provision and a specific provision in a contract or statute.[62]

Hitz's landlord sought an order for Hitz to pay post-petition rent.[63] The court found that Illinois Governor J. B. Pritzker's executive order issued March 26, 2020, that banned on-premises food or beverage consumption, triggered the force majeure clause in the restaurant's lease,[64] which contained standard force majeure triggering events and ended with a lack of funds provision, akin to the leases in *CEC Entertainment*:

> 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.[65]

The court looked to Illinois case law which states that force majeure clauses "excuse contractual performance if the triggering event cited by the nonperforming party was in fact the proximate cause of that party's nonperformance."[66] Governor Pritzker's executive order was, in the eyes of the court, "governmental action" that "'hindered' Debtor's ability to perform by prohibiting Debtor from offering 'on-premises' consumption of food and beverages" and was "unquestionably the proximate cause of Debtor's inability to pay rent . . . ."[67]

(forecasting that businesses will look to court opinions involving force majeure clauses decided early in the pandemic in determining how to operate as the pandemic continues).

60. *In re* Hitz Rest. Grp., 616 B.R. 374, 380 (Bankr. N.D. Ill. 2020). The company filed for Chapter 11 protection on February 24, 2020, so its March 2020 rent would have been its first month of post-petition rent due under 11 U.S.C. § 365(d)(3). *Id*.

61. The general/specific canon states that where there are conflicting provisions that cannot be reconciled, the specific provision prevails. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183–86 (2012). The reasoning behind this canon is that a specific provision "comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence." *Id* at 183.

62. *Hitz*, 616 B.R. at 378.

63. *Id.* at 376.

64. *Id.* at 377–78.

65. *Id.* at 376–77.

66. *Id.* at 377.

67. *Id.* at 377–78.

Unlike in *CEC Entertainment*, the *Hitz* court found the "governmental action" provision and the lack of money provision to be in conflict.[68] The court cited a Seventh Circuit case that reasoned that the most specific provision in a contract should control when terms are in dispute.[69] The *Hitz* court reasoned that Governor Pritzker's executive order was the direct and proximate cause of the restaurant's inability to pay post-petition rent (a specific event) and that a lessee can lack money for many reasons (a general circumstance).[70] In addition, the court rejected the landlord's argument that the restaurant could have sought a Small Business Administration loan to pay the rent because the force majeure clause did not require the affected party to borrow money to counteract its nonperformance.[71] However, the court did not entirely excuse the restaurant from its rent obligation. Because Governor Pritzker's executive order allowed off-premises consumption through means such as delivery or takeout, the court ordered the restaurant to pay 25% of its rent, common area maintenance fees, and real estate taxes from March 2020 through June 2020, the period the restaurant was closed except for takeout, because the restaurant's kitchen comprised 25% of the square footage of the restaurant.[72] Interestingly, and perhaps to the landlord's detriment, the landlord did not address partial rent abatement.[73] Attorneys have cited the decisions in *CEC Entertainment*[74] and *Hitz*,[75] both cases decided fairly early in the pandemic, in trial court motions, memoranda, and affidavits on their clients' behalf numerous times in attempts to analogize the facts of their cases to *CEC Entertainment* and *Hitz* hoping to persuade courts.[76]

Similarly, a Florida bankruptcy court in *In re Cinemex USA Real Estate Holdings, Inc.* had the opportunity to analyze the effects of several contract defenses that a luxury dine-in movie theater asserted in its case regarding different phases of the pandemic.[77] The *Cinemex* case provides important insight into how a court viewed a movie theater's business decision to not reopen once a governor's order permitted reduced in-person capacity at theaters.[78] Operators of forty-one theaters filed voluntary Chapter 11 bankruptcy petitions in late

68. *Id.* at 378 n.2.

69. *Id.*

70. *Id.* at 378, 378 n.2.

71. *Id.* at 378.

72. *Id.* at 379–80.

73. *Id.* at 379.

74. As of September 1, 2022, Westlaw listed 15 trial court documents citing, discussing, or mentioning the *CEC Entertainment* decision.

75. As of September 1, 2022, Westlaw listed 32 trial court documents citing, discussing, or mentioning the *Hitz* decision.

76. *See* text accompanying notes *infra* 111–113.

77. *In re* Cinemex USA Real Est. Holdings, Inc., 627 B.R. 693, 693, 698 (Bankr. S.D. Fla. 2021).

78. *See id.* at 701.

April 2020 and sought to reject several leases and delay or excuse payment due on several of their leases.[79] The decision examined how leases and contractual defenses are affected by different factual scenarios.[80] The lease, which the court noted was poorly drafted,[81] obligated the business to operate as a movie theater.[82]

The theater also argued that it did not have a post-petition rent obligation due to impossibility, impracticability, frustration of purpose, and the takings doctrine.[83] The bankruptcy court's opinion addressed one lease in Lakeland, Florida, where Governor Ron DeSantis's executive order closed movie theaters from March 20, 2020, until June 5, 2020, when they were allowed to reopen at 50% capacity.[84]

The theater argued that the pandemic made performance of the lease impossible and frustrated its purpose while the theater was closed.[85] Additionally, the theater argued that the doctrine of frustration of purpose applied because film studios stopped producing and releasing new movies.[86] It argued that the doctrine also applied because once the theater could have reopened at reduced capacity, the public was hesitant to resume attending film screenings.[87] The theater argued that even though the governor let them reopen at 50% capacity, they could only do so at an operating loss and thus chose not to reopen.[88] The theater projected it would have had to spend additional money on personal protective equipment and enforcement of social distancing rules were it to reopen.[89] Finally, the theater argued that operating the theater during a pandemic would expose the theater operators' bankruptcy estates to potential tort liability not covered by their insurance policies.[90] The theater requested that the court suspend its lease payments while the shutdown order was in place and excuse or reduce its rent once Governor DeSantis allowed theaters to operate at 50% capacity.[91]

The landlord argued that the purpose of the lease was not frustrated once the theater could reopen.[92] In addition, the landlord asserted that the lease did not specify the types of movies the theater was required to show, so the purpose of

79. *Id.* at 695.
80. *See id.* at 698–702.
81. *Id.* at 701 n.14.
82. *Id.* at 699.
83. *Id.* at 696.
84. *Id.* at 696 n.6.
85. *Id.* at 696.
86. *Id.*
87. *Id.*
88. *Id.* at 699.
89. *Id.*
90. *Id.* at 699–700.
91. *Id.* at 696.
92. *Id.* at 698.

the lease was not frustrated even though there were no new movies released when the Lakeland theater could have reopened.[93] It could have screened older movies, for example, without violating the lease terms.[94] Also, the landlord argued that the theater made a business decision not to reopen once they were permitted to do so at 50% capacity.[95] The landlord maintained that the theater could operate, so the defenses of impossibility and frustration of purpose should not be available to the theater.[96]

The lease has an article called "Effect of Unavoidable Delays," which the court viewed as an excuse of breach provision even though it contains language often found in force majeure clauses:[97]

> If either party to this Lease, as a result of any . . . (iv) acts of God, governmental action, . . . 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 formed under this Lease, then such failure shall be excused and not be a breach of this Lease by the party in question, but only to the extent occasioned by such event.[98]

The court interpreted the parties' intent at the time they drafted the lease and compared the article to similar articles within the lease.[99] Another article in the lease, which the court considered to be the force majeure clause despite its title, "Beginning Construction; Delivery by Landlord," provided that if the parties were prevented from performing an obligation of the lease for a reason of force majeure, then the lease would be extended for an amount of time equal to the delay.[100] The court found that Governor DeSantis's executive order excused the business from its obligation to operate a theater while the shutdown closed the business altogether.[101] The court found that the two clauses are consistent regarding the consequence of failing to pay rent.[102] The two clauses controlled in the dispute as the parties had explicitly included them, and as a result, the court did not address impossibility.[103]

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 699–700.
98. *Id.* at 699.
99. *Id.*
100. Lease Agreement by and Between Cobb Lakeside, LLC and Cobb Theatres III, LLC § 8.1, *In re* Cinemex USA Real Estate Holdings, Inc., 627 B.R. 693 (Bankr. S.D. Fla. 2021), ECF. No. 321-1.
101. *Cinemex*, 627 B.R. at 699.
102. *Id.* at 700.
103. *Id.* at 699.

The landlord argued that the text in parenthesis in the "Effect of Unavoidable Delays" clause after romanette (v) referring to an event in which the theater does not pay rent in a timely manner indicates that the theater should not be excused from paying rent even if the delay is due to an act of God or governmental action.[104] Finally, the landlord argued that the phrase "excluding financial inability of the performing party" in the excuse of breach clause after the list of force majeure events (such as acts of God and governmental restrictions) prevented the theater from receiving any rent relief.[105] However, the court disagreed and noted that rent could be excused, explaining that the text in parenthesis is part of romanette (v), not the text following it.[106] The text in parenthesis following romanette (v) is known as a squinting modifier, which is a word or phrase that changes the meaning of or describes another word or phrase in a sentence that does not clearly indicate whether it modifies the word or phrase preceding it or the word or phrase following it.[107] Moreover, the court found that this interpretation is consistent with how the lease's force majeure clause is worded.[108] Other leases contain similar clauses;[109] however, best practices advise against using squinting modifiers in contracts, and recommend using caution when using other types of modifiers to avoid ambiguity.[110]

The court then found that the doctrine of frustration of purpose did not excuse the theater from any of its lease obligations once it was allowed to reopen at partial capacity on June 5, 2020, accepting the landlord's argument.[111] The court rejected the theater's argument that the *Hitz* decision applied because the court had already delayed the theater's rent under the force majeure and excuse of breach clauses.[112] Also, the *Hitz* case did not address frustration of purpose.[113] Additionally, the court noted that some of the forty-one theaters had reopened by the date the court issued its opinion, and other businesses had reopened

104. *Id.* at 699–700.

105. Objection to Debtors' Request to Abate Performance of Obligations Under Unexpired Real Property Leases ¶ 13, *In re* Cinemex USA Real Est. Holdings, Inc., 627 B.R. 693 (Bankr. S.D. Fla. 2021), ECF. No. 321.

106. *Cinemex*, 627 B.R. at 700.

107. *See* KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING 295 (2017); Elizabeth Ruiz Frost, *Modifier Fighters: Finding and Fixing Misplaced, Squinting and Dangling Modifiers*, OR. STATE BAR BULL., May 2017, at 13, 15–16.

108. *Cinemex*, 627 B.R. at 700.

109. *See* text accompanying *infra* notes 119, 137.

110. *See* sources cited *supra* note 107. *See generally* UNIV. OF MINN. LIBRS. PUBL'G, WRITING FOR SUCCESS 142–50 (2015), https://mlpp.pressbooks.pub/writingsuccess/ [https://perma.cc/BA4N-Q7SF] (discussing several problems with modifiers in writing).

111. *Cinemex*, 627 B.R. at 701 n.17.

112. *Id.*

113. *Id.*

safely, so the tort liability was no longer an issue.[114] In applying the language in the force majeure clause, the court extended the length of the lease.[115]

Unlike many other decisions, the court's decision in *Gateway Center v. Dunham's Athleisure Corp.* hinged upon the "Fire or Other Casualty" clause overriding the terms of the force majeure clause through its explicit language that excused the tenant from rent when the business was closed for more than two consecutive days for reasons beyond the tenant's control.[116] The court granted a Michigan gun shop's request to abate its rent from March 24, 2020, until May 8, 2020, when the shop was closed under Governor Gretchen Whitmer's order, temporarily shutting down nonessential businesses.[117] The "Fire or Other Casualty" clause has a provision about business interruption that proved key in the court's decision:

> Notwithstanding anything in this Lease to the contrary, in the event Tenant's normal business is interrupted, impaired or terminated for any cause beyond Tenant's control for more than two (2) consecutive business days, Base Rent and other charges shall abate until Tenant is able to operate its business as usual . . . .[118]

Next, the force majeure clause, which is standard, reads:

> Landlord or Tenant shall be excused for the period of any delay in performance of any obligations hereunder when prevented from doing so . . . by causes beyond Landlord's or Tenant's, as applicable, control, which shall include, but shall not be limited to all . . . governmental regulations or controls, fires or other casualty . . . or acts of God. The foregoing shall not apply to the payment of Base Rent or any other sum to be paid pursuant to this Lease.[119]

The court decided the tenant's defense under the doctrine of frustration of purpose was unavailable because the parties had allocated the risk of the pandemic in the contract by agreeing to abate rent if the business was closed for more than two days (frustration of purpose cannot be asserted when an event was reasonably foreseeable at the time the contract was made).[120] Furthermore, the change in circumstances requirement of the doctrine could not be satisfied because the change (the delay in performance due to governmental orders) was foreseeable under that clause.[121]

114. *Id.* at 700.

115. *Id*. at 700–01.

116. Gateway Ctr. v. Dunham's Athleisure Corp., No. 2020-181859-CB, 2021 Mich. Cir. LEXIS 858, at *3 (Mich. Cir. Ct. July 19, 2021).

117. *Id.* at *17.

118. *Id*. at *6.

119. *Id.* at *7.

120. *Id.* at *16–17.

121. *Id.* at *13.

The court found that the pandemic triggered the force majeure clause's governmental regulations or controls and the acts of God provisions.[122] The court also decided that the last sentence of the force majeure clause did not excuse Dunham Athleisure from its rent obligation, citing *CEC Entertainment* for guidance.[123] The court noted it "read the contract as a whole"[124] and paid careful attention to every word and phrase.[125] Using Michigan state case law and referencing dictionaries, the court extensively analyzed the word "anything" in the contract's "Fire or Other Casualty" clause to mean every part of the lease.[126] Thus, the court decided that the store did not have to pay rent while closed because it was closed for more than two consecutive days as per the governor's executive order.[127]

CEC Entertainment and *Hitz* are essentially at odds with each other. The different results in these two cases can best be explained as a matter of interpretation. Nevertheless, other case decisions have analyzed language in leases, focusing on precise grammar and language, reviewing how government orders affect lease terms, and examining the interaction between clauses within leases.

B. Relief Interpreting Specific Purposes

Some commercial leases explicitly identify a purpose for which tenants may use leased premises through a specific limited use clause, also called a permissible use provision.[128] For example, the lease in *UMNV 205–207*

122. *Id.* at *15.

123. *Id.* at *14–15.

124. *Id.* at *18–19. The whole text canon is best understood as construing a document as a whole by viewing "its structure and . . . the physical and logical relation of its many parts." SCALIA & GARNER, *supra* note 61, at 167. This is not a canon that lends well to limiting the meaning of a text (for that can be considered "abuse") and is used when interpreting words and phrases throughout a text. *Id.* at 168.

125. *Gateway Ctr.*, 2021 Mich. Cir. LEXIS 858, at *18–19. The surplusage canon states: "If possible, every word and every provision is to be given effect . . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." SCALIA & GARNER, *supra* note 61, at 174. When this canon is applied, courts can apply the ordinary meaning of a text and will avoid disregarding words. *Id.* at 175–76. However, in many contracts, drafters use doublets and triplets, *id.* at 177, like "demise and lease", and "cancel, annul, and set aside," LENNÉ EIDSON ESPENSCHIED, CONTRACT DRAFTING: POWERFUL PROSE IN TRANSACTIONAL PRACTICE 121–22 (2019).

126. *Gateway Ctr.*, 2021 Mich. Cir. LEXIS 858, at *19. *See generally* STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION 38 (2009) (noting that dictionaries often provide more than one dictionary meaning and grammatical function for each entry limiting their usefulness as purely objective interpretation tools); RESTATEMENT (SECOND) OF CONTS. § 219 cmt. b (AM. L. INST. 1981) ("Dictionaries record word usages which have achieved some generality, with varying degrees of completeness and accuracy.").

127. *Gateway Ctr.*, 2021 Mich. Cir. LEXIS 858, at *21.

128. *See generally* STUART M. SAFT, COMMERCIAL REAL ESTATE TRANSACTIONS § 10:38 (3d ed. Updated 2022) (discussing use of premises provisions in commercial leases).

Newbury, LLC v. Caffé Nero Americas, Inc. specifies that the tenant, Caffé Nero on 205–207 Newbury Street in Boston, Massachusetts, could only use the leased premises for "[t]he operation of a Caffé Nero themed café under Tenant's Trade Name and for no other purpose."[129] The lease requires the tenant to operate this location like the other Caffé Nero locations in the Greater Boston region.[130] Caffé Nero's business model, according to the court, was "to serve great coffee and food that customers could enjoy and linger over in a comfortable indoor space."[131] Importantly, the Newbury Street location lease states that takeout sales were only available from the café's regular sit-down menu.[132]

Massachusetts Governor Charlie Baker's executive order prevented Caffé Nero from offering indoor food and beverage services beginning on March 24, 2020.[133] The restaurant could not abide by its lease's specific limited use clause, and therefore could not run its business while the executive order prohibiting indoor dining was in force. Caffé Nero reopened at a limited capacity in June 2020 as allowed by Governor Baker's executive order for a phased reopening.[134] The restaurant did not pay rent from April 2020 to October 2020 despite offering to pay rent as a higher percentage of its sales rather than fixed rent.[135] Ultimately, it vacated its premises on October 29, 2020.[136]

Caffé Nero has a standard force majeure provision in its lease, which the court found addressed the doctrine of impossibility:

> Neither the Landlord nor the Tenant shall be liable for failure to perform any obligation under this Lease, except for the payment of money, in the event it is prevented from so performing by . . . order or regulation of or by any governmental authority . . . or for any other cause beyond its reasonable control, but financial inability shall never be deemed to be a cause beyond a party's reasonable control . . . and in no event shall either party be excused or delayed in the payment of any money due under this Lease by reason of any of the foregoing.[137]

However, the court found that the force majeure clause was unambiguous and did not address the "risk that the performance could still be possible even while main [sic] purpose of the Lease is frustrated by events not in the parties' control."[138] The inclusion of the two exceptions to the clause's applicability for

129. No. 2084CV01493-BLS2, 2021 Mass. Super. LEXIS 12, at *3 (Mass. Super. Ct. Feb. 8, 2021).
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at *4.
134. *Id.* at *3, *3 n.5.
135. *Id.* at *3, *7.
136. *Id.* at *7.
137. *Id.* at *14 (emphasis omitted).
138. *Id.* at *14–15.

"financial inability" or the failure to make a "payment of money" are indications that the parties could perform their obligations even if the purpose of the lease was frustrated.[139] Hence, the frustration of purpose defense was available to the tenant and was not precluded by the force majeure clause.[140] Therefore, in a rare decision, the court discharged Caffé Nero's rent obligation from March 24, 2020, through June 22, 2020.[141] The parties did not proceed to trial.[142]

The same court expanded upon and extended its line of reasoning in *Caffé Nero* three months later in a pending case, *Museum Properties, Inc. v. Goodcheer Enterprises*, which applied business common sense to contract interpretation.[143] The opinions in this case and *Caffé Nero* from the Massachusetts Superior Court Business Litigation Session show how a court can apply business principles to a contract to interpret the parties' intent.[144] Goodcheer operated a restaurant and lounge in a commercial property in Boston that it leased from Museum Properties.[145] The parties' lease states that Goodcheer could only use the leased premises to operate as a "restaurant and lounge business . . . including take-out and delivery services," and "for no other purpose" and that the restaurant must operate at least five days per week from 6:30 PM to 10:00 PM at a minimum.[146] The lease sets no minimum operating requirements for the nightclub, however.[147] Goodcheer stopped paying rent in

139. *Id.*

140. *Id.* at *15.

141. *Id.*

142. Stipulation of Dismissal*,* UMNV 205–207 Newbury, LLC v. Caffé Nero Ams. Inc., No. 2084CV01493-BLS2 (Mass. Super. Ct. Mar. 12, 2021), File Ref Nbr. 10.

143. Business common sense or "commercial common sense" is a principle of modern English contract law. The Rt Hon Lord Hodge, *Can Judges Use Business Common Sense in Interpreting Contracts?*, *in* COMPARATIVE CONTRACT LAW: BRITISH AND AMERICAN PERSPECTIVES 272, 272–75 (Larry DiMatteo & Martin Hogg eds., 2016). Lord Clarke interpreted an ambiguous term in a bond in the oft-cited *Rainy Sky* Case, in which a shipbuilder facing financial difficulties underwent debt restructuring, which led a vessel's buyers to demand an immediate refund of the first two installment payments it had made (worth approximately $13.2 million). Rainy Sky SA v. Kookmin Bank [2011] UKSC 50, [2]–[3] (appeal taken from Eng.). "[T]he court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other." *Id.* at [21]. In essence, the principle states that courts should look at the surrounding context and facts of business contracts—considering all knowledge available regardless of whether it was withheld from one party—to interpret them. The Rt Hon Lord Hodge, *supra* at 274; Museum Props., Inc. v. Goodcheer Enters., No. 2084CV01173-BLS2, 2021 Mass. Super. LEXIS 467, at *9–10 (Mass. Super. Ct. May 19, 2021).

144. The Business Litigation Session is a trial court whose judges specialize in complex commercial and business disputes. *About the Superior Court Business Litigation Session*, MASS.GOV, https://www.mass.gov/info-details/about-the-superior-court-business-litigation-session [https://perma.cc/4EWC-F8VK] (last visited Sept. 1, 2022).

145. *Museum Props.*, 2021 Mass. Super. LEXIS 467, at *1.

146. *Id.* at *1–2, *8.

147. *Id.* at *8.

April 2020.[148] While unable to resolve the case on its merits because Goodcheer asserted its argument as an affirmative defense in a motion for summary judgment, the court reasoned that the doctrine applied in *Caffé Nero* might apply in *Goodcheer* depending on the interpretation of the lease term while also looking at the contract as a whole.[149]

The decision as to whether Goodcheer must pay rent may hinge on the term "and" between "restaurant" and "lounge" in the specific limited use clause.[150] The order suggests that the court will consider whether "and" should have been disjunctive when it would make sense in a legal document for "and" to mean "or."[151] If Goodcheer could only have operated as a restaurant *and* a nightclub, the doctrine of frustration of purpose would apply for the time Governor Baker's executive orders required the business to stay closed. However, if the lease permitted Goodcheer to operate a restaurant *or* a nightclub, the defense would not apply because Goodcheer could have offered takeout and delivery and would thus be liable for rent.[152]

Furthermore, the lease's "without defense" provision states that the lessor must pay rent "without setoff, defense, counterclaim, reduction or abatement, except as otherwise specifically provided in this Lease in Sections 6 and 7 . . . ."[153] The judge in *Goodcheer* reasoned that contracts must be construed as

148. *Id.* at *3.

149. *Id.* at *3–4, *8, *12.

150. *Id.* at *9 n.6.

151. *Id.* The use of "and" in contracts when it makes rational business sense to use "or" has caused ambiguity that has led to litigation. ADAMS, *supra* note 107, at 281. *See* Maurice B. Kirk, *Legal Drafting: The Ambiguity of "And" and "Or"*, 2 TEX. TECH. L. REV. 235, 238 (1971) (explaining how "and" may be interpreted both "jointly" (conjunctively) and "severally" (disjunctively) through the illustrations "hospital and educational institutions," "funeral and burial expenses," and "every husband and father"); Matt Levine, *Caesars and the $450 Million 'And'*, BLOOMBERG (May 13, 2014, 1:45 PM), https://www.bloomberg.com/opinion/articles/2014-05-13/caesars-and-the-450-million-and [https://perma.cc/96WQ-MVPH] (reporting on a dispute over the word "and" when the word "or" made more business sense in a document); *see also* 3A WORDS AND PHRASES 166, 166–210 (2007) (reporting on cases involving disputes over the word "and"); 30 WORDS AND PHRASES 47, 47–111 (2008) (reporting on cases involving disputes over the world "or"). For a discussion of the conjunctive-disjunctive cannon, see generally SCALIA & GARNER, *supra* note 61, at 116–25.

152. The words "and" and "in" often create semantic ambiguity, which occurs when an expression has one structure but more than one meaning. Lawrence M. Solan, *Linguistic Knowledge and Legal Interpretation: What Goes Right, What Goes Wrong*, *in* THE NATURE OF LEGAL INTERPRETATION: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY 66, 81–83 (Brian G. Slocum ed., 2017). This type of ambiguity is prevalent under the principal of logic that states that "and" means "or" in instances of negation. *Id.* at 82–83.

153. *Museum Props.*, 2021 Mass. Super. LEXIS 467, at *9. Section 6 provides for rent abatement in the event the premises are physically destroyed by fire or another casualty and Section 7 provides both sides the right to terminate the lease if the premises are taken by eminent domain. *Id.* at *9–10.

"rational business instrument[s]" and that they should "carry out the intent of the parties."[154] The judge further reasoned that "it would have made no business sense for the parties to enter into a lease providing that Goodcheer may only use the leased premises for that narrow purpose, but must keep paying rent even if the only permissible purpose is no longer allowed or possible."[155] Thus, by applying basic business principles, the court held that the "without defense" provision did not bar the frustration of purpose defense.[156]

In a second order, nearly a year later, the court rejected Museum Properties' arguments that Goodcheer terminated its lease in one of three ways: either when Goodcheer sent a letter in May 2020 to Museum Properties that Governor Baker's COVID-19 orders effectively terminated their lease; or when Museum Properties sent a notice of termination in October 2020; or when Goodcheer filed a certificate dissolving its LLC in December 2020 (which was judicially voided later).[157] Goodcheer has neither reopened nor restarted paying its rent, nor has it given up possession of the leased premises.[158] However, because Museum Properties did not send Goodcheer a default notice concerning their unpaid rent, it cannot terminate the lease for nonpayment because the lease requires such notice.[159] Goodcheer may still be able to assert the doctrine of frustration of purpose for their closure due to Governor Baker's executive order.[160] The court has not yet issued a decision because issues of material facts remain.[161] Additionally, the case will proceed to trial as the meaning of the lease provisions described are ambiguous and ambiguity is a matter of law that cannot be resolved through summary judgment motions.[162] *Caffé Nero* and *Goodcheer* show one judge's trend toward an objective interpretation of leases.[163]

154. *Id.* at *10–11.

155. *Id.* at *11.

156. *Id.*

157. Museum Props., Inc. v. Goodcheer Enters., No. 2084CV01173-BLS2, slip op. at 2 (Mass. Super. Ct. Mar. 22, 2022).

158. *Id.* at 7.

159. *Id.*

160. *Id.* at 3.

161. *Id.* at 9.

162. Museum Props., Inc. v. Goodcheer Enters., No. 2084CV01173-BLS2, slip op. at 5–6 (Mass. Super. Ct. May 19, 2021); *accord* Sebastian Cotton & Grain, Ltd. v. Willacy Cnty. Appraisal Dist., 581 S.W.3d 804, 808 n.5 (Tex. Ct. App. 2019) ("'[A] contract is not ambiguous merely because the parties disagree.' Contract ambiguity is a question of law . . . .") (citations omitted). Black's Law Dictionary defines "ambiguity" as "[d]oubtfulnesss or uncertainty of meaning or intention, as in a contractual term or statutory provision; indistinctness of signification, [especially] by reason of doubleness of interpretation" and as "[a]n uncertainty of meaning based not on the scope of a word or phrase but on a semantic dichotomy that gives rise to any or two or more quite different but almost equally plausible interpretations." *Ambiguity*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See* SCALIA & GARNER, *supra* note 61, at 425 (same).

163. *See, e.g.*, BURTON, *supra* note 126, at 156 ("The interpreter, whether judge or jury, aims to use the objective context to give an apt meaning to the text in line with the parties' manifested

Other specific limited use clauses include language that makes it more difficult for courts to excuse performance entirely. For example, in *STORE SPE LA Fitness v. Fitness International Inc.*, a landlord sued the owners of three fitness centers for breach of contract to recover rent and for damages to one of the center's HVAC systems.[164] The centers did not pay rent while closed in compliance with Kentucky Governor Andy Beshear's executive orders.[165] The court addressed the defendants-fitness centers' arguments based on the force majeure provisions and the doctrines of impossibility, impracticability, frustration of purpose, failure of consideration, and condemnation.[166]

The lease for two of the fitness center locations included identical specific limited use clauses that differ significantly from those found in other leases, such as that of Caffé Nero. The clauses include a list of fitness center-related uses, but also state that "[t]enant shall use the Leased Premises . . . for any other lawful purposes with the prior written consent of Landlord."[167] Nevertheless, the defendants argued that the court should apply the frustration of purpose reasoning from *Caffé Nero* because they could not operate during the months in which the governor's executive order required them to stay closed.[168] The defendants also cited a case similar to *Caffé Nero*, in which a Michigan court excused a commercial tenant from its rent obligation.[169] The court rejected these analogies because the specific limited use clause allowed the fitness centers to request permission to use the premises for another purpose.[170] Hence, the purpose of the lease was not frustrated.[171] However, Governor Beshear's

intentions, understood as a reasonable person familiar with the objective circumstances would understand them.").

164. STORE SPE LA Fitness v. Fitness Int'l, LLC, No. SACV 20-953, 2021 WL 3285036, at *1–2 (C.D. Cal. filed June 30, 2021).

165. *Id.* at *2.

166. *Id.* at *7–11.

167. Lease Between Royce G. Pullman M & A, LLC, and Global Fitness Holdings, LLC § 1.1(d), STORE SPE LA Fitness v. Fitness Int'l, LLC, No. SACV 20-953, 2021 WL 3285036 (C.D. Cal. filed June 30, 2021), ECF No. 63-6 [hereinafter *Edge O Lake Lease*]; Lease Between Royce G. Pullman M & A, LLC, and Palumbo Drive Fitness, LLC § 1.1(d), STORE SPE LA Fitness v. Fitness Int'l, LLC, No. SACV 20-953, 2021 WL 3285036 (C.D. Cal. filed June 30, 2021), ECF No. 63-7 [hereinafter *Blake James Lease*].

168. Defendant Fitness International, LLC and Defendant Counter-Claimant Fitness & Sports Clubs, LLC's Opposition to Plaintiff and Counter-Defendant Store SPE LA Fitness 2013-7, LLC's and Plaintiff Store Master Funding V, LLC's Motion for Partial Summary Judgment at 13–15, STORE SPE LA Fitness v. Fitness Int'l, LLC, No. SACV 20-953, 2021 WL 3285036 (C.D. Cal. filed June 30, 2021), ECF No. 68.

169. *Id.* at 15; *see also* Bay City Realty, LLC v. Mattress Firm, Inc., No. 20-CV-11498, 2021 WL 1295261, at *9 (E.D. Mich. Apr. 7, 2021) (releasing a bedding store from its obligation to pay rent for two months while the store was closed due to Governor Whitmer's executive order under the doctrine of frustration of purpose).

170. *STORE SPE LA Fitness*, 2021 WL 3285036, at *10.

171. *Id.*

executive order only enabled "life-sustaining businesses" to remain open beginning on March 26, 2020.[172] Additionally, the executive order required businesses that could stay open to implement social distancing and enhanced hygiene measures.[173] Thus, it is not certain whether the two fitness centers could have repurposed themselves even if the tenants had requested and the landlord consented.

The court also rejected the defendants' arguments that they did not receive the benefit of their bargain while they were closed.[174] The defendants had exclusive possession of the premises even though it was temporarily illegal to use them as fitness centers.[175] They also argued that the executive order constituted a temporary taking as provided by two of the leases, whose condemnation clauses discuss appropriation and takings by public authorities.[176] According to these arguments, the temporary taking should have excused the centers of their rent obligations.[177]

The defendants further argued that the force majeure clauses in their leases should have excused their rent obligations.[178] However, the landlord noted to the court that the fitness centers asserted that they could pay their rent, so the clauses, which required an inability to perform, could not excuse their obligations.[179] Moreover, even if they were excused, all three leases included force majeure clauses that extended the time for performance if a force majeure clause caused a delay.[180] For example, the leases for the Edge O Lake and Blake James locations state:

> If either party is delayed or prevented from any of its obligations under this Lease by any reason of strike, labor troubles or any other cause whatsoever beyond such party's control, then the period of such delay or such prevention shall be deemed added to the time provided herein for the performance of any such obligation.[181]

172. Ky. Exec. Order No. 2020-257 (Mar. 25, 2020), https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf [https://perma.cc/6HAL-AXGM]. The Executive Order listed 19 categories of life-sustaining business that could remain open in addition to federally designated critical infrastructure sector businesses. *Id.*

173. *Id.*

174. *STORE SPE LA Fitness*, 2021 WL 3285036, at *10.

175. *Id.*

176. *Id.*; *Edge O Lake Lease*, *supra* note 167, § 4.2; *Blake James Lease*, *supra* note 167, § 4.2. *Cf.* JWC Fitness, LLC v. Murphy, 265 A.3d 164, 167, 177 (N.J. Super. Ct. App. Div. 2021) (recognizing that Governor Phil Murphy's executive orders temporarily closing and placing restrictions on a kickboxing gym did not effectuate a compensable physical or regulatory taking of property).

177. *STORE SPE LA Fitness,* 2012 WL 3285036, at *10.

178. *Id.* at *7.

179. *Id.* at *8.

180. *Id.* at *7–8.

181. *Id.* at *8.

Unlike some other force majeure clauses in commercial leases, this clause states that performance is only delayed for the time performance is prevented.[182] Thus, it would be very difficult to read this clause as completely abating rent.[183]

The court further rejected the defendants' impossibility and impracticability arguments for the same reason it rejected the force majeure argument—the defendants demonstrated that they had the ability to pay rent, so the pandemic did not make performance impossible or impracticable despite their loss of revenue.[184]

STORE SPE LA Fitness is a notable case because the parties seeking rent abatement conceded their ability to pay, which precluded using the force majeure clause to excuse performance.[185] Gyms generally operate on an automatically recurring membership model that provides a relatively stable revenue stream.[186] On the other hand, restaurants, which operate on small profit margins,[187] are less likely to maintain ample revenue streams when closed or operating at partial capacity.

Specific limited use clauses have proved problematic for commercial tenants and landlords alike. When tenants could not abide by their leases or pay rent because of unforeseen governmental orders, some landlords were forced to take them to court. Courts interpreted the clauses in a literal fashion while also using their knowledge of business to resolve ambiguous terms.

C. Relief Through the Doctrines of Impossibility and Frustration of Purpose

Most commercial leases contain a force majeure clause, which is a contracted term that parties include to govern their contract rather than common law doctrines. However, some courts have evaluated claims primarily under those doctrines even though the parties included a force majeure clause.

182. Compare *supra* text accompanying notes 53, 181 (providing additional time to perform obligation), with *supra* text accompanying notes 65, 119, 137 and *infra* text accompanying note 202 (no additional to time perform obligation).

183. *STORE SPE LA Fitness*, 2021 WL 3285036, at *8.

184. *Id.* at *9.

185. *Id.* at *8.

186. *See* Cheryl Wischhover, *Gyms Aren't Making It Easy for People to Cancel Memberships*, VOX (Oct. 9, 2020, 7:00 AM), https://www.vox.com/the-goods/21497534/cancel-gym-membership-crunch-equinox-planet-fitness [https://perma.cc/866A-96LW] (reporting difficulties consumers faced when attempting to cancel gym memberships during the onset of pandemic).

187. Stefon Walters, *The Average Profit Margin for a Restaurant*, USA TODAY, https://yourbusiness.azcentral.com/average-profit-margin-restaurant-13113.html [https://perma.cc/B7R6-XBBE] (Aug. 22, 2019) (noting that full-service restaurants generally have profit margins between 3% and 5%).

In addition to the restaurant industry,[188] the retail sector also suffered from the pandemic.[189] Sales at many brick and mortar stores fell during the early days of the pandemic because few people were willing or able to shop in person and many governors' executive orders temporarily shuttered nonessential businesses.[190] Courts interpreting large retailers' lease provisions often consider the retailer and landlord to be sophisticated parties. DUSA, a clothing and accessories brand doing business as Desigual, was the tenant of a new lease for a ground floor retail space at 605 Fifth Avenue in Manhattan.[191] The lease was dated January 17, 2020, and the premises were supposed to be delivered on or about May 1, 2020.[192] DUSA argued that the purpose of this lease "was to provide DUSA with a highly visible luxury retail location at the heart of the world-renowned Fifth Avenue shopping corridor."[193] DUSA further argued that part of the purpose of the physical store was to have a virtual billboard and tourist foot traffic.[194] In addition, the lease requires that the ground floor of the premises be used "exclusively for the retail sale and display of men's, women's and children's apparel, footwear, accessories, handbags and other related goods."[195] DUSA refused to pay its rent because it lacked the tourist foot traffic and other shoppers it had expected from a prominent Fifth Avenue store location.[196] As a result, the landlord threatened to draw down on a letter of credit provided by DUSA.[197] In July 2020, DUSA's landlord issued a notice of default and, later, a notice of event of default to terminate lease.[198] On July 22, 2020, DUSA filed

188. *See* OFF. OF THE N.Y. STATE COMPTROLLER, THE RESTAURANT INDUSTRY IN NEW YORK CITY: TRACKING THE RECOVERY 4 (2020), https://www.osc.state.ny.us/files/reports/osdc/pdf/nyc-restaurant-industry-final.pdf [https://perma.cc/EER8-7K2P] (noting that there were more than 315,000 people employed in New York City's restaurant industry in February 2020 whereas by April 2020 there were 91,000 people employed).

189. *See* OFF. OF THE N.Y. STATE COMPTROLLER, THE RETAIL SECTOR IN NEW YORK CITY: RECENT TRENDS AND THE IMPACT OF COVID-19 (2021), https://www.osc.state.ny.us/files/reports/osdc/pdf/report-8-2021.pdf [https://perma.cc/5K5U-KJ9U] [hereinafter THE RETAIL SECTOR IN NEW YORK CITY] (noting that there were nearly 338,000 people employed in New York City's retail industry in February 2020 whereas by April 2020 there were 245,000 people employed).

190. *See, e.g.*, *Id.* at 7 ("[T]axable sales in retail trade declined by nearly one-third from March to May 2020 compared to one year earlier."); *see also* text accompanying *supra* note 12.

191. *In re* NTS W. USA Corp., No. 20-CV-6692, 2021 WL 4120676, at *1 (S.D.N.Y. Sept. 9, 2021), *aff'd*, 2022 WL 10224963 (2d Cir. Oct. 18, 2022).

192. *Id.*

193. *Id.*

194. Notice of Supplemental Authority in *NTS W. USA Corp. v. 605 Fifth Property Owner, LLC*, Appeal Case No.: 20-CV-6692 (CS) at 1, *In re* NTS W. USA Corp., No. 20-CV-6692, 2021 WL 4120676 (S.D.N.Y. Sept. 9, 2021), *aff'd*, 2022 WL 10224963 (2d Cir. Oct. 18, 2022), ECF No. 23 [hereinafter *DUSA Supplemental Authority*].

195. *NTS W. USA*, 2021 WL 4120676, at *1.

196. *Id.* at *2.

197. *Id.*

198. *Id.*

for subchapter V Chapter 11 bankruptcy, and on July 23, 2020, it filed an adversary complaint against the landlord for its 605 Fifth Avenue location.[199] DUSA argued that the bankruptcy court should cancel its lease or abate or defer its rent due to frustration of purpose or impossibility of performance.[200] The bankruptcy court denied relief, and DUSA appealed to the district court, which also denied relief.[201] The "Interruption of Access, Use or Services" clause of the 605 Fifth Avenue lease provides:

> Landlord shall not be liable for any failure . . . to provide access to the Premises, to assure beneficial use of the Premises . . . when such failure is caused by natural occurrences . . . or by any other condition beyond Landlord's reasonable control . . . nor shall such failure relieve Tenant of the obligation to pay all sums due hereunder. . . . If any government entity . . . imposes mandatory or voluntary controls or guidelines on Landlord or the Property, . . . Landlord may comply with such controls or guidelines . . . . [S]uch compliance . . . shall [not] . . . relieve Tenant of the obligation to pay any of the sums due hereunder . . . .[202]

The lease also included a force majeure clause, but the court did not substantially rely on it in resolving the frustration of purpose and impossibility of performance issues.[203]

Like many other New York courts, the court held that "temporary and evolving restrictions on a commercial tenant's business do not warrant recission or other relief based on the frustration-of-purpose doctrine."[204] In addition, the court found that the pandemic was a "natural occurrence" for which the parties had already allocated the risk in the lease, so DUSA was not relieved of its obligation to pay rent.[205]

In discussing impossibility, the court noted that DUSA and its landlord were sophisticated commercial parties who entered into an agreement that anticipated future occurrences, including "natural occurrences" and "governmental . . . controls or guidelines."[206] The court also cited other recent New York cases and discussed that performance should be excused only when performance is entirely impossible.[207] Throughout much of the decision, the judge relied heavily on a similar case, *Gap Inc. v. Ponte Gadea N.Y. LLC*,[208] but counsel for DUSA

199. *Id.*
200. *Id.* at *3.
201. *Id.* at *3, *7.
202. *Id.* at *1 n.2.
203. *See id.* at *1.
204. *Id.* at *4.
205. *Id.* at *5 n.6.
206. *Id.* at *7.
207. *Id.* at *6.
208. *Id.* at *5–7; Gap Inc. v. Ponte Gadea N.Y. LLC, 524 F. Supp. 3d 224, 234–235, 237 (S.D.N.Y. 2021) (holding that the pandemic and New York Governor Andrew Cuomo's executive orders temporarily closing nonessential businesses did not frustrate the purpose of two of The Gap's Manhattan retail leases and that impossibility of performance did not terminate those leases either).

argued that *Caffé Nero* should apply instead.[209] While the leases in *Gap* involved force majeure clauses listing governmental restrictions or orders, DUSA's force majeure clause did not.[210] However, the district judge reasoned that the pandemic fell within the "Interruption of Access, Use or Services" clause as a "natural occurrence," so it did not matter that the force majeure clause did not specifically mention a pandemic or government order.[211] DUSA argued that the district court should have reached the same conclusion as the *Caffé Nero* court—that the force majeure clause did not prevent the frustration of purpose defense.[212]

In addition, DUSA's counsel cited, to no avail, the part of *Caffé Nero* that highlighted that the restaurant and its landlord had entered into a lease that "made no business sense."[213] The judge noted that, had DUSA wanted to condition payment of rent on heavy tourist foot traffic in a luxury shopping area, the company should have negotiated that condition into a lease provision.[214] In so noting, the judge declined to look outside the four corners of the contract and only read the parties' objective intent as expressed in the plain terms of the lease.[215]

DUSA appealed the decision and asserted that because COVID-19 arrived in the United States after the lease was signed, but before their landlord delivered the premises, their case was unique.[216] The Second Circuit rejected DUSA's argument.[217] While the court agreed that this might be a unique case, it found no reason to go beyond the lease's "plain meaning" and affirmed the district court's decision.[218]

Although DUSA had a force majeure clause in its lease, the courts relied on common law doctrines in their decisions. The *Caffé Nero* case also had a force majeure clause, but the courts found that the wording of the clause did not block the frustration of purpose defense, which ultimately allowed for rent relief whereas in DUSA's case, another clause did prevent DUSA from successfully

209. *NTS W. USA*, 2021 WL 4120676, at *6 n.9; DUSA Supplemental Authority, *supra* note 194, at 3.

210. *NTS W. USA*, 2021 WL 4120676, at *1.

211. *Id.* at *1, *5 n.6.

212. DUSA Supplemental Authority, *supra* note 194, at 3; UMNV 205–207 Newbury, LLC v. Caffé Nero Ams. Inc., No. 2084CV01493-BLS2, 2021 Mass. Super. LEXIS 12, at *8 (Mass. Super. Ct. Feb. 8, 2021).

213. DUSA Supplemental Authority, *supra* note 194, at 3; *NTS W. USA*, 2021 WL 4120676, at *6.

214. *NTS W. USA*, 2021 WL 4120676, at *5 n.7. By the author's May 6, 2022 trip to the 605 Fifth Avenue location, the storefront appeared empty, and no billboard was present.

215. *Id.*

216. *In re* NTS W. USA Corp., No. 21-2240, 2022 WL 10224963, at *1–2 (2d Cir. Oct. 18, 2022).

217. *Id.* at *2.

218. *Id.*

asserting frustration of purpose.[219] Furthermore, courts have proven hesitant to reallocate contracting risk between sophisticated parties. While courts typically interpret contracts against the drafter,[220] courts are less likely to follow that principle when the parties are sophisticated businesses with equal bargaining power.[221] Tenants cannot escape their rent obligations under the doctrines of impracticability and impossibility or frustration of purpose due to the occurrence a specific event when their lease includes a clause that allocates the risks of that event to them, making it foreseeable.

III. PROHIBITION-ERA COMMERCIAL LEASE CASES INVOLVING SPECIFIC LIMITED USE CLAUSES

Although it may be useful for practitioners, courts, and scholars to look to past public health emergencies for guidance in interpreting and drafting leases and contracts, cases involving commercial real estate leases decided shortly after the ratification of the Eighteenth Amendment and the beginning of Prohibition are also informative. The national temperance movement, which began in the 1830s, had already successfully enacted dry laws in some counties and states before the ratification of the Eighteenth Amendment in 1919.[222]

There was one year between the Eighteenth Amendment's ratification and its enforcement,[223] which conveniently provided some businesses that sold or served alcohol time to transition their operations to other businesses, such as grocery stores or cigar shops, that would comply with the new law.[224] Many establishments closed altogether,[225] some continued to serve alcohol,[226] and about 30,000 speakeasies sprang up in New York City alone during Prohibition.[227] However, commercial leases generally have long terms-of-

219. *NTS W. USA*, 2021 WL 4120676, at *6 n.9.

220. BURTON, *supra* note 126, at 187–88.

221. *See, e.g.*, Hoppe & Wright *supra* note 19, at 9.

222. *Prohibition: A Case Study of Progressive Reform*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/prohibition-case-study-of-progressive-reform/ [https://perma.cc/5KGV-2GPU] (last visited Sept. 3, 2022).

223. U.S. CONST. amend. XVIII, § 1 (repealed 1933).

224. *See* MICHAEL A. LERNER, DRY MANHATTAN: PROHIBITION IN NEW YORK CITY 53–54 (2007); *see also* DEETS PICKETT, HOW PROHIBITION WORKS IN AMERICAN CITIES 7, 16, 50, 56 (1921).

225. LERNER, *supra* note 224, at 54 ("Whereas approximately 15,000 saloons had been licensed in the five boroughs before Prohibition, only a fraction remained in business after 1920. According to the World League against Alcoholism, the city saw a 52 percent reduction in saloons between 1918 and 1922, and an 80 percent reduction between 1916 and 1924.").

226. *See* ELLEN NICKENZIE LAWSON, SMUGGLERS, BOOTLEGGERS, AND SCOFFLAWS: PROHIBITION AND NEW YORK CITY 81 (2013).

227. LERNER, *supra* note 224, at 3.

years.[228] Thus, a bar with a ten-year lease beginning in 1915 would have about five years after Prohibition went into effect until the end of its lease. In contrast, the immediacy of the pandemic provided much less time for businesses to transition their operations; many could not, and were forced to close.[229]

Like some modern commercial leases, some leases from the early twentieth century contain specific limited use clauses. Businesses in the liquor industry with these specific limited use clauses in their leases suddenly became businesses with illegal leases when Prohibition laws went into effect. While COVID-19 cases have not discussed illegality in the same way as Prohibition-era cases, there are many similarities between court opinions. For example, the Boston liquor store in the case *Imbeschied v. Lerner* had a ten-year lease beginning on February 1, 1914.[230] The lease describes the premises and states they were "to be used for the purpose of carrying on liquor business."[231] In addition to this specific limited use clause, the lease also stipulates that "the lessee . . . will not, without the consent in writing of the lessors, . . . make any unlawful, improper, or offensive use of said premises . . . that no use be made of said premises other than that above specified."[232] Once Prohibition went into effect, the liquor store could no longer sell liquor, so the owner argued that he should be relieved of his rent obligation.[233] However, the court disagreed, noting that the liquor sales industry is heavily regulated.[234] It stated that had he wanted to protect himself from rent liability, he should have negotiated a clause into the lease that would have addressed that situation.[235] In addition, the court noted

228. *See* 1 STUART M. SAFT, COMMERCIAL REAL ESTATE LEASING § 22:2 (2d ed. updated 2022) (discussing current standard practices regarding lease terms in ground leases).

229. *See* Jonathan Randles, *Fitness Studios Pushed to the Brink by Covid Are Forced to Get Creative*, WALL ST. J. (Dec. 20, 2020, 9:00 AM), https://www.wsj.com/articles/fitness-studios-pushed-to-the-brink-by-covid-are-forced-to-get-creative-11608472800 [https://perma.cc/MY7Y-D484] (describing some gym and fitness club's efforts to hold socially distant classes outdoors and develop digital offerings for clients); Pete Wells, *Restaurant Dining Is Back, if You Can Find a Table*, N.Y. TIMES (Aug. 30, 2022), https://www.nytimes.com/2020/06/23/dining/outdoor-restaurants-nyc-coronavirus.html [https://perma.cc/84TH-3EFD] (discussing the pivot to outdoor dining in New York City in June 2020); Anson Wong, *How Shifting to Online Has Helped Escape Rooms Survive During the Pandemic*, TORONTO OBSERVER (June 16, 2021), https://torontoobserver.ca/2021/06/16/shifting-to-online-has-helped-escape-rooms-survive-during-pandemic/ [https://per ma.cc/3BDE-9ACP] (discussing how escape room entertainment venues transitioned to online platforms to offer their services during the pandemic); *see also* THE RETAIL SECTOR IN NEW YORK CITY, *supra* note 189, at 8–9 (noting that many New York City retailers adjusted their businesses practices and others closed or closed temporarily).

230. Imbeschied v. Lerner, 135 N.E. 219, 219 (Mass. 1922).

231. *Id.*

232. *Id.*

233. *Id.* at 220.

234. *Id.*

235. *Id.*; *accord* Standard Brewing Co. v. Weil, 99 A. 661, 663 (Md. 1916) ("[T]he sale of intoxicating liquors [is] subject to regulation or prohibition . . . , and if the tenant desires to protect

that a party is liable for rent even if the building containing the leased premises is destroyed by fire, demonstrating the high bar that courts have historically placed on lessees seeking lease recissions or rent abatements.[236]

Some commercial leases contain provisions designed to protect the lessee if their jurisdiction enacts dry laws. For example, a five-year lease for a liquor store in Los Angeles, California, which began on February 7, 1916, contains a specific use clause that allowed the tenant to use the premises for a "general retail liquor establishment."[237] However, unlike the lease in *Imbeschied*,[238] the Los Angeles liquor store's lease has a provision that gave the landlord the discretion to reduce the store's rent if the city went dry:

> That should the city of Los Angeles be voted dry and all retail liquor establishments be abolished, and should the within premises thereby become worth less rent per month than the amount above stated ($150 per month), that [the landlord] will grant such reduction on said rent as she may deem proper at that time.[239]

Los Angeles passed an ordinance that went into effect on April 1, 1918, prohibiting the operation of saloons.[240] As a result, the store did not pay rent from April to October 1918.[241] The landlord sued the tenant, and the trial court modified the rent to $40 per month.[242] The appellate court reversed the trial court's judgment and upheld the rent, finding the specific limited use clause to be permissive rather than restrictive.[243] That clause provided that the leased promises were to be "used for the purpose of conducting and carrying on the business pertaining to a general retail liquor establishment."[244] The court reasoned that the tenant could use the premises for another type of business, so the court declined to reduce the rent even though there was a specific limited use clause and a potential rent reduction covenant.[245]

In other instances, courts excused performance for businesses without such a provision in their leases. One saloon in New York City had a ten-year lease

himself against a change in the liquor laws, he should so stipulate in the agreement, and if he omits to provide for a contingency, he is bound by the contract . . . .").

236. *Imbeschied*, 135 N.E. at 220.

237. Sec. Tr. & Savs. Bank v. Claussen, 187 P. 140 (Cal. Dist. Ct. App. 1919).

238. *Imbeschied*, 135 N.E. at 220.

239. *Sec. Tr. & Savs. Bank*, 187 P. at 140.

240. *Id.* at 141.

241. *Id.* at 140–41.

242. *Id.* at 141.

243. *Id.*; *accord* Christopher v. Charles Blum Co., 82 So. 765, 766, 768 (Fla. 1919) (finding a lease for a barroom stating that leased could not be used for "illegal or improper purposes" as permissive rather than restrictive after a state statute took effect that forbade the consumption of certain liquors on the premises where they were sold).

244. *Sec. Tr. & Savs. Bank*, 187 P. at 141.

245. *Id.*

beginning on February 1, 1914.[246] The lease provides that "the only business to be carried on in said premises is the saloon business . . . ."[247] Once the states enacted Prohibition, the saloon owner notified the landlord of its intent to vacate the premises.[248] The owner vacated the saloon on January 2, 1920, but the landlord refused to accept the surrender.[249] The saloon had paid its rent through January 1920 and the landlord later sued the saloon owner for back rent.[250] The trial court entered a judgment for the landlord, which the Appellate Term later modified, holding the saloon responsible for rent in January 1920 but not the subsequent months.[251] The landlord appealed, and the Appellate Division upheld most of the Appellate Term's decision based on the theory that a lease of premises for an illegal purpose is void.[252] The court considered that a saloon could sell items such as soft drinks and cigars, but found those to be too incidental to the purpose of a saloon to justify reversing the Appellate Term's decision.[253]

The Appellate Term notably rejected the argument that the saloon could have bargained for a provision in its lease that defined a "saloon" as a place for the sale of intoxicating rather than nonintoxicating beverages.[254] That court noted that the parties signed the lease before they had to contemplate Prohibition legislation that have would prevented performance.[255] The temperance movement was much more successful in rural areas and in southern and western states than in urban areas like New York City,[256] which may have led the court to assume the enaction of such legislation was less foreseeable.

Foreseeability is a crucial factor in force majeure, impracticability and impossibility, and frustration of purpose case analyses.[257] To some, Prohibition and dry laws may have been foreseeable, so some parties negotiated for contract terms addressing the potential issue.[258] To others, the onset of Prohibition

246. Doherty v. Monroe Eckstein Brewing Co., 191 N.Y.S. 59, 60 (App. Div. 1921).

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 62.

253. *Id.* at 61. *But see* O'Byrne v. Henley, 50 So. 83, 85–86 (Ala. 1909) (affirming judgment for landlord reasoning a tenant-saloon could continue selling nonintoxicating beverages and cigars once stated enacted dry laws despite likely profit decline).

254. Doherty v. Monroe Eckstein Brewing Co., 187 N.Y.S. 633, 637–38 (App. Term.), *aff'd*, 191 N.Y.S. 59 (App. Div. 1921).

255. *Id.* at 637.

256. LIBR. OF CONG., *supra* note 222.

257. *See* RESTATEMENT (SECOND) OF CONTS. § 261 cmt. b, cmt. c, § 265 cmt. a. (AM. L. INST. 1981).

258. *See* text accompanying *supra* notes 237–45.

seemed much more unexpected.[259] These attitudes were also reflected in case decisions. During the pandemic, courts analyzed lease contracts using force majeure clauses and the doctrines of force majeure, impracticability and impossibility, all of which factor in what is foreseeable at the time of contracting.[260] Like during Prohibition, some courts excused performance during the pandemic based on foreseeability, but, many have not.[261]

IV. RECOMMENDATIONS: IT'S ALL IN THE DRAFTING

Two main issues in commercial leasing emerge from the pandemic: how courts will interpret leases where one party fails to perform, and how transactional lawyers can draft leases and other contracts to avoid litigation in similar future occurrences. Not only have many of these cases gone to trial courts, but some decisions have even been appealed.[262] Patterns in judges' reasoning have emerged: courts are reading lease provisions closely, construing contracts as a whole, and responding to parties' good faith arguments.[263] Courts have been hesitant to reallocate the risk between commercially sophisticated parties where they have already contracted for it in a provision such as a force majeure clause.[264]

Considering how judges have construed their terms so far, lawyers who draft leases should consider writing new force majeure clauses that address the likelihood of additional global outbreaks in the future.[265] Clauses that define

259. *See* text accompanying *supra* notes 246–56. According to a cocktail historian, "[p]rohibition was a small-town rural movement, and people in the cities resented it. They really thought until the very end that there was going to be a way out of it, and then, suddenly, it became clear there wasn't." Jennifer Harlan, *100 Years Ago, the Booziest January Suddenly Dried Up*, N.Y. TIMES (Jan. 1, 2020), https://www.nytimes.com/2020/01/01/us/100-years-ago-the-booziest-january-suddenly-dried-up.html [https://perma.cc/87R6-2VVE].

260. *See* discussion *supra* Parts I–II.

261. *See* S.H. Spencer Compton & Robert J. Sein, *The First Quarter of 2021 Is Over: Where Are We in New York?*, 37 PRAC. REAL EST. LAW., at 59, 61 n.24 (2021) (listing pandemic-related cases where courts have excused performance and where courts have not excused performance).

262. *E.g.*, AGW Sono Partners, LLC v. Downtown Soho, LLC, 273 A.3d 186, 210–11 (Conn. 2022) (affirming lower court's holdings that restaurant tenant that breached lease agreement by failing to pay rent during the pandemic was not entitled to relief under impossibility and frustration of purpose); JN Contemporary Art LLC v. Phillips Auctioneers LLC, 29 F.4th 118, 123–24, 128 (2d Cir. 2022) (affirming lower court's holdings that COVID-19 pandemic and resulting governor's orders restricting nonessential businesses triggered a force majeure contract in an auction house's consignment and sales agreement and that the parties' agreement did not require the auction house to conduct another auction or an auction in the future).

263. *JN Contemporary Art LLC*, 29 F.4th at 124.

264. *Id.*

265. Jon Hilsenrath, *Global Viral Outbreaks like Coronavirus, Once Rare, Will Become More Common*, WALL ST. J. (Mar. 6, 2020, 5:30 AM), https://www.wsj.com/articles/viral-outbreaks-once-rare-become-part-of-the-global-landscape-11583455309 [https://perma.cc/MSV4-MW7P] (noting urbanization, globalization, and increased human consumption of animal proteins are causing an increase in the number of epidemics); *Zoonotic Diseases*, CTRS. FOR DISEASE CONTROL

force majeure events in detail avoid confusion. Equally important, the scope of relief should be well thought out.

Lawyers and parties should consider whether courts will accept that government orders are force majeure events based on the nature of a business or industry. If the business would be impacted by a government shutdown, parties should consider various scenarios, such as a complete shutdown versus a partial shutdown, as well as its length. Parties may wish to include relief dependent on the exact event they anticipate. For example, a restaurant may consider offering to pay rent based on revenue rather than a base rent during a partial shutdown (necessitating landlords' immediate access to reliable financial records). While landlords might not receive full rent, this compromise could prevent or discourage a tenant from withholding rent, filing for bankruptcy protection, or closing entirely. Had the parties in *Hitz* and *CEC Entertainment* included such a clause in their leases, the two decisions could be reconciled more easily. The parties could determine how to handle certain situations in advance and avoid the need for costly litigation that might produce an unexpected outcome dependent on jurisdiction and judicial assignment.[266] Drafters can use the provision in *Imbeschied* as a starting point, which gave the landlord sole discretion over the new rent if the city went dry.[267] The clause in *Imbeschied* ultimately led to litigation, so parties should be more forward-thinking and specify any precise rent adjustment if business operations are suspended or limited.[268]

Parties must also negotiate how to determine when operations are suspended or limited. Parties should consider whether a governor's executive order shutting down the business or allowing it to operate at partial capacity is a sufficient definition. Parties could consider inserting clauses that look at governmental health agency advisories that inform consumer decisions affecting the tenant's industry. For example, the theater in *Cinemex* chose not to reopen because it

& PREVENTION (July 1, 2021), https://www.cdc.gov/onehealth/basics/zoonotic-diseases.html [https://perma.cc/SLB6-V66Q] (explaining that three-quarters of new or emerging infectious diseases in people come from animals); *see also* sources cited *supra* note 26.

266. President Theodore Roosevelt stated in his 1908 Annual Message (what is now called the State of the Union Address, *State of the Union Address*, LIBR. OF CONG., https://history.house.gov/Institution/SOTU/State-of-the-Union/ [https://perma.cc/T4C7-726R] (last visited Dec. 3, 2022)), "[e]very time [judges] interpret contract . . . rights, . . . they necessarily enact into law parts of a system of social philosophy . . . . The decisions of the courts on economic and social questions depend upon their economic and social philosophy . . . ." 43 CONG. REC. 21 (1908). Then-judge Cardozo quoted this statement when discussing judicial temperament and the subconscious forces involved in the judicial process. BENJAMIN N. CARDOZO, NATURE OF THE JUDICIAL PROCESS 171 (1921). He described the task of a judge as a "translator." *Id.* at 174. He also wrote that, "[w]e may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own." *Id.* at 13.

267. Imbeschied v. Lerner, 135 N.E. 119, 220 (Mass. 1922).

268. *Id.*

could only do so at a financial loss even though it was objectively possible for the theater to be open. If parties allow for rent reductions or delays in rent payments when specific threshold events occur, then they may be more likely to stay in business and remain tenants in the long run.

In commercial leases, a force majeure clause comprised of only a few terse sentences of legalese will likely no longer suffice. As an illustration, a recent law review article examining force majeure clauses in the energy industry included a model seven-page force majeure clause for a liquefied natural gas sales contract[269] that included provisions for buyer's and seller's rights upon the other party triggering the clause.[270] It also included two provisions that specified relief based on the length of the party's nonperformance and specified the number of days of nonperformance after which a party could choose to terminate the contract.[271] Parties to new or renewed commercial leases could consider adding a provision to their force majeure clauses that would allow them to terminate the lease if a force majeure event occurred and nonperformance continued for a set number of days. The model clause cited above is easy to read, defines key terms, and makes clear which terms apply to which section or subsection.[272] Modifications such as these would avoid the syntactical dispute over romanette (v) and the text in parenthesis in the "Effect of Unavoidable Delays" article in *Cinemex*.[273]

Landlords and tenants can also consider omitting lack of funds clauses from leases or specifying when and how they apply. If a force majeure event is prolonged, a business (especially a small retail business) would likely suffer so much financially that the clause would be of little use. Parties can specify that a lack of funds provision applies only certain events. Had CEC and Hitz specified exactly when the lack of fund provision applies, they could have requested relief under their force majeure clauses more easily. Parties can also decide based on their needs whether COVID-19 should be included as a force majeure event or whether only future unforeseen events related to the pandemic should be listed as force majeure events. Most importantly, all clauses must be as precise as possible. Drafters can avoid ambiguity and strategically choose language so that the lease is effective in new circumstances.

Furthermore, as judges tend to read contracts as a whole and give meaning to each word, parties should seek to identify how clauses interact with each other. Finding conflicting clauses before signing a lease may prevent litigation that could yield unwanted results. Additionally, drafters should make sure that

269. Jay D. Kelly, *So What's Your Excuse? An Analysis of Force Majeure Claims*, 2 TEX. J. OIL GAS & ENERGY L., 91 118–24 (2007).

270. *Id.* at 122–23.

271. *Id.*

272. *Id.* at 118–24.

273. *In re* Cinemex USA Real Est. Holdings, Inc., 627 B.R. 693, 699 (Bankr. S.D. Fla. 2021).

the word "and" will be construed conjunctively when intended, and that the word "or" will be construed disjunctively when intended. In *A Manual of Style for Contract Drafting*, Kenneth A. Adams offers an apt suggestion for lists of alternatives:

> Using just *or* works when occurrence of only one of the specified alternatives is feasible or desirable. But if you want to avoid having someone argue that occurrence of more than one of the specified alternatives precludes operation of the provision in question, then put the phrase *one or more of the following* before the specified alternatives and put *and* after the next-to-last alternative.[274]

Additionally, attorneys should carefully review a document to ensure that occurrences triggered by various articles or clauses interact with each other in a logical way.

Likewise, the phrasing of specific limited use clauses should be reexamined considering how courts are interpreting them in pandemic-related cases so far. For some businesses, a very narrow specific limited use clause may make sense. Some businesses and properties simply cannot be repurposed or operated under a new business model. On the other hand, businesses that can adapt to a pandemic or disruption to their regular business activities should negotiate for an exception in their specific limited use clause. In this way, they will be able to operate a business that generates sufficient revenue without violating the terms of their lease. Perhaps Caffé Nero could have switched to a takeout or delivery model, but the terms of its very restrictive lease did not allow for such modifications.[275] Parties should consider a clause like that found in the Edge O Lake Lease and the Blake James Lease in *STORE SPE LA Fitness*.[276] Those leases contained a clause that would have permitted the fitness centers to request permission from their landlord to operate a different type of business in the demised premises.[277] Businesses that can be flexible in changing situations will thrive, so they need leases that will allow them to adapt when necessary. Lawyers can help their clients adapt to unforeseen circumstances by carefully drafting more permissive clauses. On the other hand, landlords with several commercial tenants in one building or shopping center may face challenges if the clauses are too permissive and the tenants pivot to the same line of business, compete with each other, and earn less revenue as a result; however on the other hand, landlords whose tenants withhold rent would be in a much worse situation.

274. ADAMS, *supra* note 107, at 281.

275. UMNV 205-207 Newbury, LLC v. Caffé Nero Ams. Inc., No. 2084CV01493-BLS2, 2021 Mass. Super. LEXIS 12, at *2 (Mass. Super. Ct. Feb. 8, 2021).

276. *Edge O Lake Lease*, *supra* note 167, § 1.1(d); *Blake James Lease*, *supra* at note 167, § 1.1(d).

277. *Edge O Lake Lease*, *supra* note 167, § 1.1(d); *Blake James Lease*, *supra* at note 167, § 1.1(d).

For now, courts may read common commercial sense into leases to an extent. They attempt to construe contracts as meaningful instruments. However, as exemplified by DUSA, they will not consider what parties did not include in their writing.[278] Thus, if a tenant has a specific business reason for choosing a particular property, such as the ability to put up a billboard, a location in a safe neighborhood, or heavy foot traffic outside the premises, it should attempt to negotiate those reasons into its lease. Erring on the side of clarity and inclusion can protect businesses down the line.

CONCLUSION

The COVID-19 pandemic exposed many ambiguities in contracts and leases that appeared clear and workable before. Moving forward, parties should attempt to be as specific as they can in leases, given the high stakes businesses face when relying on these documents. Lawyers must continue to consider the consequences of specific limited use clauses, force majeure clauses, and any interaction between the two when they write contracts.

The pandemic has highlighted a number of novel issues in the interpretation of contracts in the aftermath of government-mandated shutdowns. Parties will likely remain in dispute over pandemic-related contract terms for a long time. It is unlikely that COVID-19 will be the last global pandemic; local and regional health emergencies will continue to arise as well. By learning from issues that surfaced in pandemic contract disputes, drafters can work to write leases that will withstand other types of new disasters, government regulations, and unpredictable business outcomes. The pandemic has caused significant loss, changed people's habits forever, and may bring more surprises. The tensions exposed in leases have signaled the need for precise drafting that is durable yet adaptable to new and evolving situations.

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278. *In re* NTS W. USA Corp., No. 20-CV-6692, 2021 WL 4120676, at *5 n.7 (S.D.N.Y. Sept. 9, 2021), *aff'd*, 2022 WL 10224963 (2d Cir. Oct. 18, 2022).

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