KRIEG DEVAULT

Insights

Force Majeure Considerations for Commercial Leases in Indiana

May 14, 2020

The concept of *force majeure* has garnered significant attention due to the social and economic impact of the novel Coronavirus ("COVID-19") resulting in a reduction of operations or closure of businesses, factories, stores and restaurants across the U.S. What does *force majeure* mean to landlords and tenants, and how can either party properly invoke such affirmative defense? This summary reviews the definition of *force majeure*, presents its possible interpretation by the Indiana courts, and discusses how landlord and tenants can protect themselves in future leases.

Force majeure has not been widely litigated in Indiana. Questions as to whether a party can invoke *force majeure* to temporarily stop paying rent, halt continuing operations, or pause build-out obligations will be fact-intensive and focus largely on the language within the *force majeure* provision of the lease. For instance, courts outside of Indiana have excused rent payments during the course of a *force majeure* event when: (i) the event was of the kind of events listed in the *force majeure* provision;**1** (ii) the obligation to forgo rent was explicitly included in the *force majeure* provision; **2** and (iii) the *force majeure* event was beyond a party's control.**3** It is common for *force majeure* provisions in commercial leases to explicitly preclude the tenant's obligation to pay rent, in which case it is highly unlikely a court will excuse a tenant from paying rent even if a *force majeure* event is triggered.

Lease interpretation and *force majeure*

Indiana courts have determined that a lease is first and foremost a contract,**4** and as such courts use the general principles of contract law to interpret leases.**5** Indiana courts will look at the plain language in the lease, only using outside evidence to interpret terms if they are ambiguous.**6**

Force majeure is defined as "an event or effect that can neither be anticipated nor controlled" and the term includes both acts of God and acts of people.**7** A typical *force majeure* clause within a lease will temporarily excuse a party's performance under the lease upon one of the specified *force majeure* events. Such events typically include floods, hurricanes and other acts of God, riots, war, strikes, and restrictive governmental laws.

Though there are few Indiana cases interpreting *force majeure* clauses, one case in particular, *Specialty Foods of Indiana, Inc. v. City of South Bend*, may be informative on how an Indiana court may interpret a *force majeure* provision within a lease.**8** In this case, Specialty Foods of Indiana ("Specialty Foods") entered into a contract with Century Center to be the exclusive food provider in the College Football Hall of Fame in South Bend, Indiana. **9** During the term of the contract, the College Football Hall of Fame moved to Atlanta, Georgia, terminating the contract with Specialty Foods.**10**

Specialty Foods moved for declaratory judgment to continue to conduct its food service business in the College Football Hall of Fame. In response, Century Center raised the affirmative defense that it was not required to

continue performance under the contract because the *force majeure* provision in the contract released Century Center from performing.**11** The *force majeure* provision excused performance by Century Center "by reason of strikes, lockouts, inability to procure labor or materials, failure of power, fire or other casualty, acts of God, restrictive governmental laws or regulations, riots, insurrection, war, or *any other reason not within the reasonable control of Century Center*."**12**

The Indiana Court of Appeals held that Century Center was excused from performance under the *force majeure* provision of the contract. Relying heavily on case law from other jurisdictions, the court looked at: (i) the specific language in the *force majeure* provision; (ii) the nature of the agreement; (iii) the circumstances surrounding the execution of the contract; and (iv) the apparent purpose of making the contract.**13** The court compared the language in the Specialty Foods contract to that in a New York case, *Kel Kim Corporation v. Central Markets, Inc.**14***, and reasoned that the phrase "any other reason" was broad and did not limit the *force majeure* event to be of the "kind and nature" of the other events listed in the *force majeure* provision.**15** The court also reasoned that the contract between Century Center and Specialty Foods was ancillary and contingent to the existence of the College Football Hall of Fame occupying the building.**16**

Applicability for current and future leases

Specialty Foods of Indiana, Inc. v. City of South Bend provides guidance on how an Indiana court may rule when determining whether a party is excused from its performance under a lease. It is unlikely that the term "pandemic" is listed as one of the specific *force majeure* events in the lease. If the term "pandemic" is not listed within the *force majeure* provision, a court will look to see if there is a "catch all" clause at the end of the provision, and, if so, determine if that clause is broad enough to include an event of the kind and nature such as a pandemic. A court may also look at the intent of the parties and the circumstances surrounding the lease at the time the lease was signed.

As was indicated above, whether a tenant can temporarily stop paying rent, temporarily cease continuous operations, or whether a landlord can temporarily pause build-out obligations will be fact-intensive and differ case by case. Most commercial leases explicitly preclude the obligation to pay rent within the *force majeure* provisions, and financial hardship alone will not allow a party to invoke the affirmative defense. Similarly, when determining whether a landlord must continue build-out obligations, the court will look at the plain language of the provision and whether such obligation is explicitly temporarily excused in the *force majeure* provision. The courts are also likely to try and determine the parties' intent when drafting the lease, and whether the obligation or performance should be excused by considering the following:

- The nature of the agreement;
- The facts and circumstances leading up to the execution of the contract;
- The relationship of the parties;
- The nature and situation of the subject matter; and
- The apparent purpose of making the contract.**17**

In the event of a lease dispute stemming from COVID-19 related issues, tenants will either want to argue: (i) the catch all phrase in its *force majeure* provision includes a pandemic; or (ii) the shelter-in-place order by the local government is considered a "restrictive governmental law" that would allow a party's performance under the lease to be excused temporarily. Landlords will make the opposite arguments.

In future leases, both parties will want to consider adding the following to their force majeure provisions:

- The terms “pandemic” or “COVID-19.”
- Notice requirements as to when and how a party can notify the other party of its intention to temporarily halt its obligations under the lease upon the triggering of a listed *force majeure* event.
- A receipt of notice requirement, to ensure both parties are on notice that a *force majeure* event has occurred.
- A relevant time period that the excusal of performance is allowed.

Tenants will also likely want to include a broad catch all clause that includes events outside of tenant’s control, while landlords will want to include limiting language, such as explicitly excluding monetary obligations or including build-out obligations.

It is likely that *force majeure* provisions will be a point of negotiation in future leases, and that *force majeure* interpretation by Indiana courts will continue to evolve in the wake and aftermath of COVID-19. For more questions regarding the *force majeure* provisions in your lease, or how to best protect yourself in future leases please contact the Krieg DeVault Real Estate and Environmental Practice Group.

For more information regarding information contained in this alert, please contact **Christopher Engel** or any member of **Krieg DeVault's Real Estate Team**.

[1] Trump on Ocean, LLC v. Ash, 899 N.Y.S. 2d 63 (N.Y. Sup. Ct. Nassau Cnty. 2009)

[2] Id. at 63 (N.Y. Sup. Ct. Nassau Cnty. 2009); Gillespie v. Simpson, 588 P.2d 890 (Co. Ct. App., Div. III 1978); LIDC I v. Sunrise Mall, LLC, 996 N.Y.Sd 875 (N.Y. Sup.Ct., Nassau Cnty, 2014);

[3] Crabtree Avenue Investment Group, LLC v. Steak & Ale of North Carolina, Inc., 611 S.E.2d 442, 444-45 (N.C. Ct. App. 2005)

[4] Schuman v. Kobets, 716 N.E. 2d 355, 356 (Ind. 1999).

[5] T-3 Martinsville, LLC v. U.S. Holding, LLC, 911 N.E. 2d 100 (Ind. Ct. App. 2009).

[6] T-3 Martinsville, LLC , 911 N.E. 2d at 111.

[7] Black’s Law Dictionary, 11th ed. 2019.

[8] Specialty Foods of Indiana, Inc. v. City of South Bend, 997 N.E. 2d 23 (Ind. Ct. App. 2013).

[9] Id. at 25.

[10] Id.

[11] Id. at 26.

[12] Id. at 27 (emphasis added).

[13] Id. at 29.

[14] Kel Kim Corporation v. Central Markets, Inc., 519 N.E. 2d 295 (N.Y. 1987).

[15] Id. at 28.

[16] Id. at 29.

[17] *Id.* at 26-27.