

*The*  
HOSPITALITY LAW  
CONFERENCE

Force Majeure Clauses in the  
Post-Covid Reality

*David T. Denney*

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Denney Law Group

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GDRP President, July '19 – Dec. '20;  
Board Member

TRA Board Member, 2018 - present

Represents independent restaurants,  
bars, caterers, ghost kitchens, food halls,  
chefs, bev alc manufacturers, etc.

Speaks at inappropriate times.



# What is Force Majeure?

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- Force Majeure refers to certain acts, events, or circumstances beyond the control of a party that inhibit or prevent the performance of that party's obligations under a contract.
- It's Frenchy.
- That means it comes from civil (as opposed to common) law, so the terms need to be spelled out in the contract...

# What you *might* see in a force majeure clause in a lease...

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- Application of FM to landlords only
- Inapplicability of the FM clause to any payment of money by Tenant
- Undefined terms (e.g. “governmental restriction”)
- Limitations on the time period a tenant can be in FM (possibly hidden in the use/operations section)
- Requirement of notice to LL for FM to be effective
- Inapplicability of FM to Tenant’s “financial inability” or shortage of funds

# Post-Covid LL standard Force Majeure clause

Unless otherwise specifically provided in this Lease, in the event that either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, lock-outs, labor troubles, inability to procure materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, **epidemic, pandemic**, or other reason of a like nature not the fault of the party delayed in performing work or doing acts required under the terms of this Lease, then performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. **It is understood, however, that the provisions of this Section shall not operate to excuse Tenant from the prompt payment of Minimum Rent, or any other payments required by the terms of this Lease. It is also understood that a party's financial inability to perform shall not be deemed to excuse nonperformance or delayed performance.**

# Post-Covid Tenant addition

Notwithstanding anything in this Section to the contrary, **in the event Tenant is prohibited from operating in all or any portion of the Premises** due to a government shutdown order, Tenant shall be entitled to a proportionate abatement of gross rent (as said term is defined above) until such time as the shutdown order shall have been lifted and Tenant may permissibly resume operations in the full Premises (for example, in the event of a shutdown order prohibiting Tenant from operating in 50% of the Premises, Tenant shall be entitled to a 50% abatement of gross rent).

# Why Landlords are the Bad Guys

Notwithstanding the preceding sentence [about FM not applying to the payment of money], if the applicable force majeure event is (a) a governmentally required, **complete** closure of all similar business establishments in the applicable jurisdiction and (b) is not covered in whole or part by government relief or Tenant's business interruption insurance (a "Government Mandated Shutdown"), then:

(i) Rent shall not abate for the first thirty (30) days of the Government Mandated Shutdown; and

(ii) If (a) the Government Mandated Shutdown persists for more than thirty (30) consecutive days and (b) Tenant demonstrates to Landlord's reasonable satisfaction that Gross Receipts have reduced twenty-five percent (25%) or more as a result of the Government Mandated Shutdown, then fifty percent (50%) of Fixed Minimum Rent will be abated until the earlier of (A) the date on which Tenant re-opens for business in the Premises, or (B) the date which is one hundred twenty (120) days following the commencement of the Government Mandated Shutdown. In no event, however, shall Tenant be entitled to such abatement if an Event of Default then exists beyond applicable notice and cure periods provided herein. The Lease Term shall be extended for one (1) day for each day that Fixed Minimum Rent is partially abated as set forth above.



# Why Tenants Wear White Hats

- **Government Restrictions.** In the event Tenant is prohibited from fully-operating in the **entire Premises** for the Permitted Use as a result of any governmental order (defined as an order restricting occupancy limits to less than 50% of full occupancy limits, referred herein as an "Order") hereafter adopted by any applicable governmental authority in connection with the pandemic known as COVID-19 (**or similar pandemic event**), then **Tenant shall pay the lesser of** (i) **Minimum Rent** as set forth in this Lease, **or** (ii) **Alternate Rent** (defined below), commencing on the effective date of the Order and ending on the date of full expiration or earlier suspension of the Order.
- As used herein, "**Alternate Rent**" means, in lieu of Minimum Rent payable hereunder (it being understood that Tenant shall at all times continue paying Additional Rent), Tenant shall pay to Landlord Alternate Rent determined by **multiplying the total Gross Sales made in or from the Premises** during the particular calendar month **by ten percent (10%)**. The Alternative Rent shall be paid in monthly installments within twenty (20) days after the preceding month and shall be prorated for any partial calendar month. Upon the full expiration or earlier suspension of the Order, Tenant shall recommence paying Minimum Rent as provided in this Lease in the calendar month following such expiration or suspension.

# Drafting Force Majeure clauses post-Covid (for the Tenant, of course)

- Ensure the definition of “Casualty” does not include epidemic/pandemic, and if so, contract around it
- Carve-out specific exceptions for governmental restriction as to any portion of the premises (e.g. dining rooms)
- Shore up any LL carve-outs related to government assistance
- If FM contains a notice requirement, specify that governmental orders will act as notice
- Try to get estimated CAM payments curtailed during FM, since it will be likely that the entire property will be affected, and therefore unlikely LL will spend CAM \$\$

# Final Thoughts

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- FM Clauses are only one of the myriad contractual provisions that need to be reconsidered in light of the pandemic.
  - Casualty, lease/rent commencement, work letters,
- Leases, construction contracts, purchase/sale agreements, vendor contracts – all need to be reviewed with an eye to future force majeure events.
- Contracts that have not historically included FM clauses might be candidates for revision, at least with regard to pandemic provisions.



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TIME AND ATTENTION!

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Thank you!