

# Could Specific Contracts Help Save Retail Industry?

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The retail industry is in the midst of perhaps its most challenging time in its history. To make sure the industry and its stores survive, here are some items store and property owners should be considering that could affect their future:

## **Force Majeure Provisions** - *Does your Lease or Agreement of Sale Have One?*

The presence of a *force majeure* provision in any lease or agreement of sale will be the guiding principle when it comes to obligations of a contract. An express *force majeure* clause in a contract will prevent a party from being able to bring other common law defenses, such as frustration, impossibility and impracticability.

*Force majeure* is an event outside the reasonable control of a party and prevents them from performing a contract obligation. A claim for relief under *force majeure* will typically only be for the duration and effect of the event. A claim requires three distinct criteria:

- The event must be beyond the reasonable control of the affected party.
- The affected party's ability to perform its obligations under the contract must be prevented, impeded or hindered by the event.
- The affected party must have taken all reasonable steps to seek to avoid or mitigate the event and its consequences. Often, notice is also required when asserting a *force majeure* claim.

*Force majeure* clauses still will require rent payment unless the provision expressly states otherwise.

Store and property owners should review all contracts to determine whether COVID-19 qualifies as a *force majeure* event, consider the aspects of the contract that will not be able to be performed because of the effects of COVID-19 and consider what steps could be taken to mitigate the damages that could result from the effects of COVID-19.

Parties attempting to assert a *force majeure* claim should do so with caution as a wrongful claim could result in breach or repudiation of the contract and entitle the other party to termination and damages.

## **Common Law Defenses** - *What if Your Lease or Agreement Does Not Have Express Language?*

The following doctrines are only available if there is no express *force majeure* language in the contract.

**Frustration:** This applies if the underlying event is not the fault of any party to the contract, the event or circumstance occurs after the formation of the contract and was not foreseen and it becomes physically or commercially impossible to fulfill the contract, or transforms the obligation to perform into a radically different obligation from that undertaken initially. Fulfillment of the frustration clause would cause contract termination.

The bar for a frustration claim is higher than that of *force majeure* because it must be shown that the obligations impacted by the event or circumstance are fundamental to the contract.

**Impracticability/Impossibility:** A contract's obligations can be forgiven if they become impracticable or impossible by the occurrence of an event, which is outside of the party's control and the non-occurrence of which was a basic assumption on which the contract was made. Impossibility is a high burden to meet, and courts have not typically required proof of impossibility unless expressly agreed to in the contract.

**Prevention by Governmental Regulation or Order:** This applies when a governmental action - such as, perhaps, Pennsylvania's order to shut down all non-life-essential businesses - happens and businesses can't continue. Parties may be discharged from their obligations if the performance of a duty is made impracticable by having to comply with governmental regulation or order, the non-occurrence of which was a basic assumption on which the contract was made.

During this unprecedented time, the best thing is to be proactive in reviewing contracts and working together during this trying time.

Please reach out to our [Real Estate Practice Group](#) if you have any specific questions regarding your contractual obligations during COVID-19.

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