Litigation Alert
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Second Circuit Signals Broader Interpretation of "Catchall" Provisions in Force Majeure Clauses Under New York Law

Force majeure clauses have been the subject of much discussion and litigation over the past two years, as many businesses adversely impacted by COVID-19 have sought to excuse nonperformance in light of the global health crisis. In many instances, however, force majeure clauses have offered limited utility. Relatively few clauses drafted prior to COVID-19 list "pandemics" or "epidemics," and so contracting parties have had to rely on "catchall" provisions such as "other similar causes beyond the parties' control"—ultimately with little success. New York courts, in particular, typically construe force majeure clauses narrowly to apply only to those force majeure events that are specifically enumerated.

A recent Second Circuit decision, however, may have opened the door to New York courts interpreting catchall provisions more broadly to excuse nonperformance as a result of the pandemic. The decision in *JN Contemporary Art LLC v. Phillips Auctioneers LLC* suggests that force majeure provisions that omit "pandemics" and "epidemics" may nonetheless apply to COVID-19 where they list other large-scale socially disruptive events such as natural disasters or terrorist attacks alongside sufficiently encompassing catchall language.

JN Contemporary Art LLC v. Phillips Auctioneers LLC

JN Contemporary Art owned a painting by the Italian artist Rudolf Stingel and contracted with Phillips Auctioneers to sell the work at its annual spring auction of 20th-century and contemporary art, scheduled to be held in May 2020. The parties' agreement contained a force majeure clause stating that "[i]n the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination, we [i.e., Phillips] may terminate this Agreement with immediate effect."

In March 2020, as the pandemic swept through New York, then-Governor Andrew Cuomo declared a state of emergency and issued a series of executive orders restricting and eventually barring nonessential business activities until June 2020. Phillips postponed its spring auction and invoked its right to terminate the parties' agreement under the force majeure clause, prompting JN to file suit for breach of contract.

The U.S. District Court for the Southern District of New York granted Phillips' motion to dismiss JN's complaint, principally on the basis that the pandemic constituted a "natural disaster" beyond the parties' reasonable control. "It cannot be seriously disputed that the COVID-19 pandemic is a natural disaster," the district court stated,

pointing to dictionary definitions of "natural" as "brought about by nature as opposed to artificial means" and "disaster" as "a calamity" or "a catastrophic emergency." Government proclamations declaring a "state disaster emergency" and issuing a "major disaster declaration" buttressed this conclusion, the court opined.

On appeal to the Second Circuit, JN argued that whether COVID-19 is naturally occurring is an unsettled question, referring to theories that the virus originated in a Wuhan lab and that the district court had erred in deeming the pandemic a "natural disaster" as a matter of law. That term, JN argued, should properly be regarded as referring to localized events resulting from natural processes of the earth, such as hurricanes, earthquakes and tornadoes. The Second Circuit sidestepped this question entirely, however, holding that the COVID-19 pandemic and resulting executive orders constituted "circumstances beyond our or your reasonable control" sufficient to trigger the parties' force majeure clause.

The court recognized that New York law requires these clauses to be construed narrowly so that "only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused." In particular, the court noted, a narrow construction applies "when the force majeure clause contains a 'catchall,' such as 'or other similar causes beyond the control of such party,' cabining the meaning to things of the same kind or nature as the particular matters mentioned." Phillips' termination, it held, was consistent with these principles. According to the court, the pandemic and government shutdown orders are the same types of events as those listed in the clause at issue, which include, "without limitation," natural disaster, terrorist attacks and nuclear or chemical contaminations. Each of those enumerated events, the court reasoned, is of a type that causes large-scale societal disruptions, is beyond the parties' control, and is not due to the parties' fault or negligence. To hold otherwise, the court said, would render meaningless both the catchall phrase and the clause's explicit statement that the non-exhaustive list of events following the catchall phrase did not limit it.

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