

How Will Courts Interpret Force Majeure Clauses in the COVID-19 Crisis Response? Look to 2008 Recession Fallout for Clues

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As the COVID-19 crisis continues to unfold, businesses nationwide are struggling to meet their existing contractual obligations. While companies may attempt to rely on force majeure clauses to exempt performance, they are well advised to look to how courts interpreted these clauses following the 2008 financial recession. In general, courts will excuse contractual performance where an unforeseeable event beyond the parties' control prevents performance if the force majeure clause specifies applicability to the particular event.¹ Typical examples of contractually identified events include wars, famines, fires, and earthquakes. But how will courts interpret force majeure clauses now, when a pandemic has plunged us into financial crisis?

While courts are unlikely to excuse performance solely because of financial hardship, the COVID-19 pandemic has already impacted more sectors of society than the 2008 economic recession. In addition to the ensuing financial destruction, the widespread impact of the health crisis itself has already been felt through the staggering statistics of illness and fatalities, shelter-in-place orders, travel restrictions, emergency government regulations, and the shutdown of schools and nonessential businesses nationwide. Force majeure arguments are more likely to be successful if performance was truly prevented by

the pandemic itself, and not merely made more economically burdensome due to the ensuing financial destruction.

It is instructive to consider how courts interpreted force majeure provisions in the wake of the 2008 financial crisis. The resulting case law is clear: Courts seldom excused performance due solely to the economic downturn.² For example, a New York court considered a force majeure clause in a case involving a breach of a commercial lease agreement amid the 2008 financial recession.³ In that case, the plaintiff filed suit to recover damages from the restaurant chain Ruby Tuesday for allegedly breaching its lease to open a restaurant. The court found the force majeure clause was not applicable, explaining:

Courts generally are reluctant to excuse contractual non-performance based on claims of economic hardship and changing economic conditions ... But even assuming for purposes of this motion that a severe economic downturn is a triggering event that falls within the broad "catchall" language of the force majeure clause, the Court concludes that Ruby Tuesday has failed to demonstrate that it was prevented from complying with its obligations under the lease due to events entirely outside of its control.⁴

¹ See "Two Weeks Into a Pandemic: A Fresh Look at Force Majeure," Jamie Gottlieb Furia and Alexandra S. Droz, Lowenstein Sandler LLP Client Alert, March 25, 2020, <https://www.lowenstein.com/news-insights/publications/client-alerts/two-weeks-into-a-pandemic-a-fresh-look-at-force-majeure-litigation>.

² See, e.g., *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minnesota, LLC*, 871 F. Supp. 2d 843 (D. Minn. 2012) (refusing to excuse performance due to the global financial crisis preventing the parties from obtaining financing to construct a pipeline, when it was foreseeable upon entering into the contract that financing might be difficult or impossible to obtain); see also *Elavon, Inc. v. Wachovia Bank, Nat. Ass'n*, 841 F. Supp. 2d 1298 (N.D. Ga. 2011) (holding that force majeure did not excuse performance where economic downturn did not objectively prevent defendant bank from referring customers under a credit card merchant processing service agreement).

³ *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, No. 2413-09, 2010 WL 1945738, at *4 (N.Y. Sup. Ct. 2010), *aff'd*, 88 A.D.3d 1224 (1st Dep't 2011).

⁴ *Id.* at *4 (internal citations omitted).

Ruby Tuesday's own affidavits were given significant weight in the court's analysis. These submissions demonstrated the measures Ruby Tuesday took to protect its own financial condition, including deferring the construction of new restaurants like the one subject to the at-issue lease. The court found that these measures were business decisions rather than unforeseeable events beyond Ruby Tuesday's control.⁵ Also of relevance to the court was the lack of proof submitted by Ruby Tuesday as to any reasonable steps it took, despite the economic downturn, to attempt to perform its obligations under the lease. The court concluded that "all defendant has shown is that changing economic conditions have made it burdensome or more difficult to perform its contractual obligations,"⁶ which is insufficient to excuse performance under a force majeure clause.

What would have happened in the Ruby Tuesday case if the backdrop was the COVID-19 pandemic instead of the 2008 recession? Presumably, in order to operate at the leased premises, Ruby Tuesday would have needed to undertake some degree of construction to transform the space to its needs. It is highly unlikely that work to construct a restaurant would be considered "essential" in the COVID-19 era. Thus, the pandemic may have rendered it impossible for Ruby Tuesday to build out and operate its

business at the site of the lease. Ruby Tuesday could have raised a stronger argument that its failure to open the restaurant was caused by the pandemic as opposed to a business decision. This set of facts may have caused the court to reach a different decision.

We can expect a surge in force majeure litigation in the aftermath of the COVID-19 pandemic and resulting financial crisis. Parties attempting to rely on force majeure to excuse performance now would be wise to document all reasonable attempts to perform their contractual obligations. Businesses should also review their contracts to be sure any force majeure clauses specify an event such as a "pandemic," an "epidemic," "widespread illness," "travel restrictions," "government shutdown," or a "quarantine." It is unlikely that courts will enforce force majeure clauses due to the COVID-19 outbreak unless performance was truly impossible, not simply burdensome or costly. Companies will be more successful if they can demonstrate that performance was prevented due to the pandemic itself, rather than the accompanying financial crisis.

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⁵ *Id.* at *5 (noting that Ruby Tuesday's own submissions revealed it "had ultimate control over the decision whether or not to open a restaurant on the Property and that its failure to do so was the product of a decision to apply its limited financial resources towards other obligations.").

⁶ *Id.*

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