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Property Writes

[Newsletters and Alerts](#)

[Articles and White Papers](#)

[Books](#)

[Maritime Spotlight](#)

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[Printer Friendly Version](#) 

Property Writes

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In this Issue...

- [Kelo v. City of New London, Connecticut: Putting Things Into Better Perspective](#)
- [In the Wake of the Hurricane: *The Lessons of a Force Majeure Clause – Oh When the Saints ...*](#)
- [Inside Wiring and Abandoned Cabling: An Update](#)

[In the Wake of the Hurricane: *The Lessons of a Force Majeure Clause – Oh When the Saints ...*](#)

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Orlando

After assessing the overwhelming devastation caused by Hurricanes Katrina, Rita and Wilma in 2005, and lest we not forget Hurricanes Charlie, Frances, Ivan and Jeanne in 2004, we now must focus on assessing the effects of these storms on the commercial real estate market. Last year's hurricanes have had a significant impact on commercial real estate, both long-term and short-term. In the short-term, we have seen significant disruptions to oil and natural-gas production, massive destruction and serious damage to millions of square feet of commercial property and severe spikes in unemployment rates. In the longer term, we should anticipate dramatic increases in construction costs and operating costs of commercial properties.

Just as early preparation for each hurricane season is the key to successful rebuilding, drafting for such events in real estate documents is also key to ensuring protection of legal rights and property. In the wake of the hurricanes, while we continue our relief efforts and rebuilding our communities, it is also important for us to assess the legal exposure and take steps to minimize future risks.

As a helpful illustration of how language in real estate documents can produce unintended financial consequences in the face of natural disaster, we can look at the fate of the Superdome in New Orleans. While this is an extreme example, it certainly illustrates the point.

The Fate of the Superdome

The \$81 million question that reportedly faced Tom Benson, owner of the NFL's New Orleans Saints, after Hurricane Katrina was whether the Saints would invoke a "*force majeure* clause" in his contract with the state of Louisiana relating to the Superdome and terminate the contract. In the last few years, there had been reports that the Saints were threatening to move to San Antonio, Texas or Los Angeles, California. Last year, the perfect opportunity, in the form of Hurricane Katrina, appeared to have come along if in fact the Saints wished to move. In essence, the *force majeure* clause apparently allowed the Saints to terminate the contract without penalty (namely the \$81 million exit penalty that the Saints would otherwise be obligated to pay to terminate the contract) if an "act of God" had prevented the team from using the Superdome, even though reports had said that the stadium was able to be restored for use by the end of the 2006

football season.

How much could your *force majeure* clause cost you?

The Concept of *Force Majeure*

The traditional boilerplate language of *force majeure* clauses are often overlooked in contract drafting. Often times these clause are too general and vague for modern circumstances and could produce unintended consequences. It is no longer sufficient for parties to insert a *force majeure* clause in the miscellaneous section of a contract and hope that such an event will not occur. In today's climate, parties should use specific, detailed language in carefully defining the scope and effect of these clauses.

Force majeure is a legal concept meaning that the contract cannot be performed because of a superior intervening force outside of the control of either party. No uniform set of events constitutes *force majeure*. However, common events of *force majeure* include "acts of God," which cover floods, fire, earthquakes, tornadoes, hurricanes, severe winds and other acts not attributable to man in general, and acts of government, which include war, both civil and overseas, insurrection, and acts preventing one side or both sides from performing under their contract, such as embargoes. The *force majeure* event must directly impact the parties, preventing their performance of the contract, not merely making their performance more difficult or expensive.

The doctrine of *force majeure* has developed from the legal principles of "physical impossibility," "frustration of purpose" and "commercial impracticability." Without a *force majeure* clause, parties will have to rely on these legal principles and the courts' application to their contract. Thus, we see the importance in today's climate for parties to shape and mold a *force majeure* clause to allocate risk between the parties, to provide predictability to the fate of the contract upon the happening of a *force majeure* event, and to provide notice to the parties of events that may suspend or excuse performance of the contract. The parties are free to define the contours of *force majeure* in their contract and those contours dictate the application, effect and scope of *force majeure*. More importantly, courts are not at liberty to rewrite the contract or interrupt it in a manner which the parties never intended.

A Typical *Force Majeure* Clause

A typical *force majeure* clause may read something to this effect:

In the event the performance of the contract by either party is made inadvisable, impractical, illegal or impossible by reason of an act of God, war, terrorism, government regulations, disaster, fire, strikes, civil disorder, curtailment of transportation facilities, or other similar cause beyond the control of the parties, this contract may be terminated without penalty for any one or more of such reasons by written notice from one party to the other.

As is exemplified by the New Orleans Saints illustration above, this typical *force majeure* clause is the type of clause that could wind up producing a potentially costly consequence.

Drafting a *Force Majeure* Clause

As mentioned above, a *force majeure* clause has three purposes: (1) to allocate risk; (2) to provide predictability to the fate of the contract upon the happening of a *force majeure* event; and (3) to provide notice to the parties of events that may suspend or excuse performance of the contract.

The analysis and drafting of a *force majeure* clause requires consideration of three main elements: (1) the *force majeure* event; (2) the effect of a *force majeure* event on the performance that is sought to be excused; and (3) the procedural requirements that must be fulfilled by the invoking party.

The *Force Majeure* Event

When drafting a definition of a *force majeure* event, the event must have the following characteristics in order to qualify: (1) the event must be external; (2) it must render the performance radically different from that originally contemplated; and (3) its occurrence must be beyond the control of the party seeking to enforce the clause.

The element of control, discussed immediately above, is often addressed by the inclusion of language stating that the *force majeure* event is "an event that is beyond the control of either party." The concept of control involves two related points: (i) a party may not affirmatively cause a *force majeure* event; and (ii) a party may not rely on a *force majeure* event if the party could have taken reasonable measures to prevent the

event. By the inclusion of this language, a party wishing to invoke the *force majeure* clause must prove that, despite their due diligence and good faith, performance under the contract remains impossible or impracticable.

A suggestion for drafting a definition of a *force majeure* event is to start with the element of control (*i.e.*, "an event that is beyond the control of either party"), followed by a list of events specifically contemplated. For example:

"*Force Majeure* Event" shall mean an event that is beyond the control of either party, including, without limitation, lightning, floods, hurricanes, earthquakes, wind storms, tornadoes, act of terrorism, war, restrictive governmental laws or regulations, fire, strikes, lockouts, labor troubles, civil disorder or other events of a similar or different kind.

The Effect of the *Force Majeure* Event

The effect of the *force majeure* event deals with whether the invoking party can be excused from performing the contract. Depending on the language of the *force majeure* clause, the obligation to perform may be suspended throughout the duration of the *force majeure* event or may lead to the termination of the contract altogether.

Determining the effect of the *force majeure* event is the most important component of the *force majeure* clause in terms of allocation of risk. Just as the parties may define a *force majeure* event, the parties are free to choose the effect of the *force majeure* event. A typical *force majeure* clause allows either party to terminate the contract. If you wish to avoid such a harsh consequence, a drafting suggestion is to consider drafting the clause so that the party's performance is suspended during the period of *force majeure*. After the period is over, the contracting party is required to resume performance of its obligations under the contract. An example of such language is as follows:

In the event that either party shall be delayed or hindered in or prevented from the performance of any act required under the contract by reason of a *Force Majeure* Event (defined above), 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.

The Procedural Requirements

A *force majeure* clause should contain a notification component. Such component should require a party that wishes to be excused from performing the contract, under the *force majeure* clause, to give prompt notice to the other party. The clause could also specify that failure to comply with the procedural requirement may invalidate the *force majeure* claim. It is important to consider how and when such notice can feasibly be given, taking into consideration the impact of the *force majeure* event. An example of such a notification component is as follows:

The party whose performance is delayed, hindered or prevented by a *Force Majeure* Event (defined above) shall immediately (or as soon as practical after the *Force Majeure* Event) notify the other party of the occurrence of the *Force Majeure* Event and describe in reasonable detail the nature of the *Force Majeure* Event.

The parties may want to consider including telephonic or e-mail communication as an acceptable means of notice for purpose of this clause. Depending on the scale of the *force majeure* event, overnight courier service, U.S. mail and/or facsimile notice may not be available. However, in today's world, most people carry a cellular phone or perhaps a hand-held device or even a laptop computer, which may provide a faster and more reliable method of communication following a *force majeure* event. As an example of this, following Hurricane Katrina, several businesses posted *force majeure* notices on the Internet to provide notice to their customers, suppliers, contractors, etc. that due to the *force majeure* event performance of the contract would be delayed, or their offices would be closed, etc.

Additional Considerations

As always in any drafting context, you cannot look at a single provision in a vacuum. The *force majeure* clause in a contract should be reviewed and drafted, taking into consideration such other concepts as insurance provisions and casualty clauses.

Conclusion

Proper planning for *force majeure* events in contracts, leases and other real estate documents will allow parties to maximize the protection of their legal rights and property and minimize the likelihood of unintended consequences. Don't let your Saints go

marching out without a consequence.

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