

# Force Majeure

Clauses in Leases

By Jessica S. Hoppe and William S. Wright

**I**n light of recent catastrophic events, lawyers, lessors, and lessees should take stock of the lessons learned. They should review the leases they draft or receive and analyze the positions in which each party would find itself if rights under the force majeure clause of the lease were exercised. Unique considerations and risks exist for lease parties in different parts of the country. These will affect the particular language of the force majeure clause of a lease, as well as the notice provisions that affect a party's success in asserting force majeure to excuse performance under a lease.

Force majeure is French for "greater force." The concept of relieving a party of its obligations because of some uncontrollable event goes back at least to the Code of Hammurabi, the early Babylonian law established circa 1780 BC, that relieved carriers whose goods were seized by enemy armies. This concept was introduced originally to American common law by the Napoleonic Code.

In England, force majeure, without more, means acts of God. California's Public Contract Code for state dealings defines "Acts of God" as earthquakes greater than 3.5 on the Richter Scale and tidal waves. Cal. Pub. Cont. Code § 1705(b)(2). The Restatement of Torts refers to extraordinary forces of nature with resulting harm that differs from mere negligence and occurs free from human involvement. Restatement (Second) of Torts § 451. Yet, in American jurisprudence, "force majeure" as a concept includes more than the natural force of acts of God alone—it also refers to events that originate in human agency.

The party claiming force majeure must use prudence, diligence, and care in anticipating and avoiding the event and, once the event occurs, in trying to overcome it. Force majeure should be distinguished from the doctrine of impossibility, another equitable principle that excuses performance because of circumstances that are absolutely not possible to overcome, and from the doctrine of frustration that excuses performance because of something not reasonably foreseeable or controllable, yielding extreme and substantial hardship or unreasonable expense or difficulty. Force majeure clauses now are common in many sorts of contracts and essentially excuse one or both parties from liability on the occurrence of an unforeseen and extraordinary event beyond the control of the asserting party, such as a flood, war, riot, or act of God, that prevents or delays performance under the contract.

Like other provisions of a lease, force majeure clauses typically are drafted by the lessor. Therefore, lessors must take care in drafting the clauses because courts

often will interpret them in favor of the nondrafting party. Conversely, lessees must ensure that the clause is negotiated and drafted fairly and reasonably, particularly for provisions affecting operations, services, and costs. The more sophisticated the parties, the higher the standard a court will apply in reviewing the language because the negotiation and drafting of the contract should reflect the parties' respective bargaining positions and ability to retain qualified counsel.

### Catastrophic Events

The tragedies of the September 11, 2001, terrorist attacks and more recently of Hurricane Katrina have emphasized the importance of well-drafted force majeure clauses.

Lessors and lessees have watched and learned a great deal from the litigation regarding force majeure provisions relied on to excuse nonperformance after September 11, 2001. Case law in New York now requires force majeure clauses to reference explicitly the event or act that would prevent a party's performance under the lease. *One World Trade Ctr., LLC v. Cantor Fitzgerald Sec.*, 789 N.Y.S.2d 652, 655 (N.Y. Sup. Ct. 2004) (stating the general rule in New York that a party is excused from performance "only if the force majeure clause specifically includes the event that actually prevents a party's performance"). In the case of terrorist attacks, the phrase "acts of war" may not be sufficient. Since 2001, parties have begun to use phrases such as "enemies of the State" or "public enemies" and to include language specific to biological warfare agents and "dirty" bombs. Although in most states an explicit listing of the particular events that will constitute a force majeure is not necessarily required, inclusion of specific examples clearly indicates the parties' intent regarding events that would excuse performance and would prevent litigation after a catastrophic event. A catchall phrase such as "other conditions similar or dissimilar to those enumerated in this section, which are beyond the reasonable control of the party obligated to perform" may also be used; however, such phrases have been held to be limited to events or occurrences of the same kind and nature as the particular events or acts listed under the doctrine of *ejusdem generis*. *Morgantown Crossing, L.P. v. Manufacturers and Traders Trust Co.*, No. 03-CV-4707, 2004 WL 2579613, at \*5 (E.D. Pa. Nov. 10, 2004). A better practice would be to define "force majeure" generally and then to list specific examples using a phrase that clearly manifests the intent that the list is not

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to be construed as limiting the general provision, such as “including without limitation.”

Issues in the nature of delay and force majeure are encountered much more frequently in construction projects than in leases, so a look at the general construction contract forms available from the American Institute of Architects (AIA) is helpful. For weather-based delays, Form A201 “General Conditions” requires that the weather condition (1) be *abnormal* for the period of time, and (2) could not *have been reasonably anticipated*, plus (3) had an *adverse effect* on the construction schedule. AIA Form

A201, ¶ 4.3.7.2, available at [www.engin.umich.edu/class/cee431/AIA/05.04.05\\_A201\\_SAMPLE\\_encrypted.pdf](http://www.engin.umich.edu/class/cee431/AIA/05.04.05_A201_SAMPLE_encrypted.pdf). These are classic force majeure concepts. Note the requirement that the event be “abnormal.” A typical day of snow in winter in Minneapolis–St. Paul, Minnesota, should not be a basis for delay; the contractor should have assumed that in its schedule. A huge storm closing the downtown for a week may be treated differently, however, unless one occurs every month in winter.

A possible weather force majeure provision that attempts to define what is normal might state: “Daily snow [rain? cold? and so on] more than 30% [or other amount] in excess of the maximum daily average reported for that month by the National Oceanic and Atmospheric Administration, or successor agency reporting weather, during the preceding five years.”

Courts tend to interpret force majeure clauses narrowly, especially when both parties are sophisticated and have equal bargaining power. For example, in the *One World Trade Center* case mentioned above, the court noted that the defendants were “sophisticated commercial tenants and there is no reason to excuse them from the operation of the force majeure clause which they freely negotiated. Defendants bargained away their right to hold the lessor liable for nonperformance in the face of the tragic, unanticipated events which destroyed the Building.” 789 N.Y.S.2d at 654–55.

Similarly, in Hawaii, “when the contract has been negotiated between two parties of equal sophistication and equal bargaining power, the rule of interpreting ambiguities against the drafter has been held inapplicable.” *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 839 P.2d 10, 25 (Haw. 1992). In jurisdictions following this strict approach, the ambiguous provisions should be construed in favor of what reason and probability dictate was intended by the parties as opposed to favoring the nondrafting party. See *Eagle Leasing Corp. v. Hartford Fire*

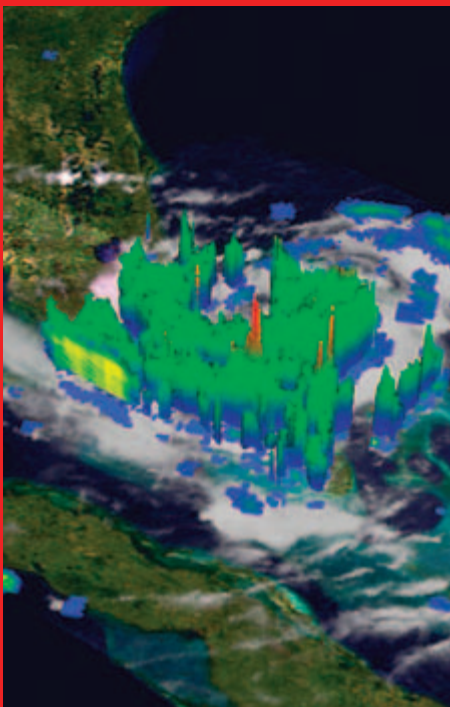
*Ins. Co.*, 540 F.2d 1257, 1261 (5th Cir. 1976).

These cases indicate not only that the courts generally uphold provisions drafted by sophisticated parties, but they also seem to indicate that if the parties had unequal bargaining power, the courts might have used a more lenient standard. For example, when the contract is “standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party.” *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1262 (Ohio 2003). This factor may be important for drafters of residential and small business leases in which lessees are generally less sophisticated.

Hurricanes present a set of challenges that are similar to other large-scale catastrophes but different from more pinpoint location events. Because many people evacuate an area before a hurricane makes landfall or as a result of the mass destruction that may be wrought by a hurricane, many residents have some level of difficulty returning to their homes and businesses. After Katrina, power was out for weeks in the areas hardest hit, gasoline supply was limited, phone service was spotty, and cellular service for both incoming and outgoing calls was the luck of the draw. These consequences can affect the parties to a lease in a variety of ways. For example, services to be rendered to the property by the landlord may be impossible to accomplish because of the landlord’s inability to reach the property, use electrical service, or use the usual forms of communication.

Lessors and lessees have reacted to the consequences of a hurricane by specifically anticipating the massive effects on all facets of the local community. An example from the lease of a hotel condominium in Florida states: “The provisions of this Section shall be applicable if there shall occur, during the lease term, or before the commencement thereof, any . . . economic downturn affecting

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South Florida which continues for three or more months.” The quoted language undertakes to insulate the party claiming under the section during a normal recovery period after a major hurricane, while setting some measurable standard as well.

Of course, after Katrina there was and still remains a tremendous amount of goodwill, because many parties to leases were more or less in the same difficult and stressful situation; however, goodwill may last for only a limited period, particularly in the case when one party is located in an area not affected by the catastrophe.

As of the writing of this article, the states hardest hit by Hurricane Katrina (Mississippi, Louisiana, and Alabama) did not have any reported decisions specifically addressing force majeure clauses in relation to Katrina, although the issue is certain to have arisen for many landlords and tenants.

### **When a Force Majeure Event Ceases to Be a Force Majeure Event**

Another important consideration in drafting a lease is whether a catastrophic event that is typically defined as a force majeure may lose this classification if the event occurs with regularity and should therefore be within the reasonable contemplation of the parties at the time of contracting. For example, in *Logan v. Blaxton*, 71 So. 2d 675, 677 (La. Ct. App. 1954), the court found that seasonal rains were not a force majeure event because they were to be expected; the court therefore held that the lessee was obligated to perform under its oil lease. This consideration indicates that parties may want to consider the frequency at which events occur, and if catastrophic events, such as major hurricanes, continue to plague a certain area, the court may find that it was a reasonable expectation of the parties at the time of contract.

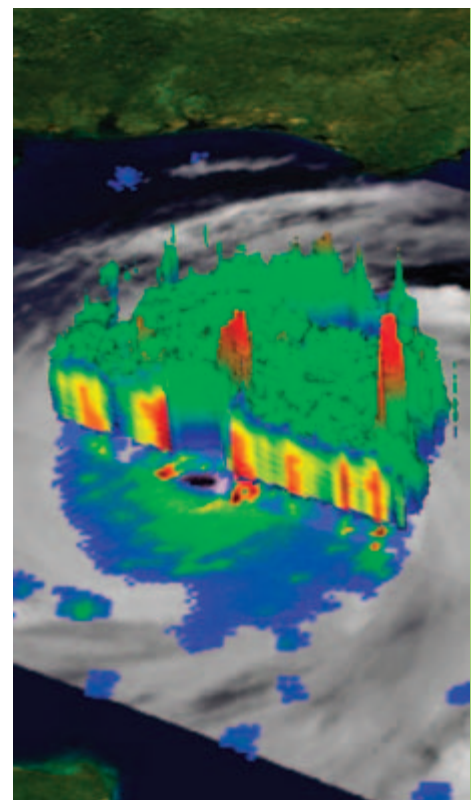
For another example, periodic flooding of the Mississippi River has been so frequent that it was not defined as a force majeure. The Supreme Court opined:

The overflow of the Mississippi River is of such frequent occurrence that it cannot be regarded as belonging to that class of extraordinary and unforeseen accidents which entitle the tenant of a predial estate to an abatement of rent. Indeed, the overflows of this river are so frequent, that a system of levees has been constructed, under the authority of the state, for the purpose of preventing, we may say, the annual inundation of its banks; and so frequently have the waters of this river made breaches in the levees that even a crevasse itself cannot be considered as an extraordinary accident in the sense of article 2714 of the Code, and as such entitle the tenant of a predial estate to a reduction of the stipulated rent, although such crevasse should be the means of overflowing the land leased by the tenant, and thereby destroying a part or the whole of his crop. The periodical overflow of the waters of a river is not an extraordinary accident; and if a party seeks to give to an inundation that character, he must show that it was unusual, unforeseen, and one to which the country was not ordinarily subjected.

*Viterbo v. Friedlander*, 120 U.S. 707, 731–32 (1887) (quoting from *Vinson v. Graves*, 16 La. Ann. 162 (1861)).

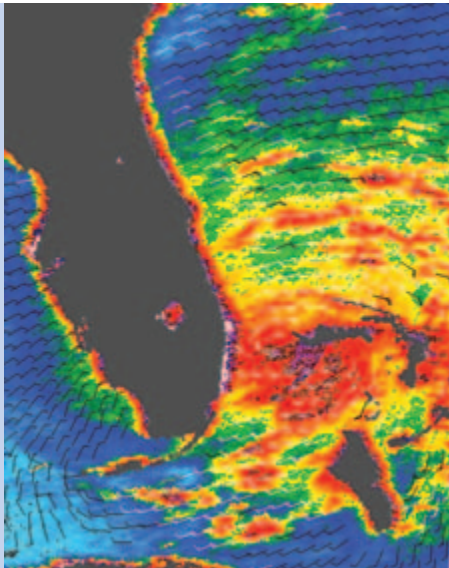
It is possible to describe accurately an event at its initial occurrence as unforeseeable but later, because of the regularity with which it occurs, to find that such a description is no longer applicable. In *Gulf Oil Corp. v. Fed. Energy Reg. Comm’n*, 706 F.2d 444 (3d Cir. 1983), the court found that if a certain type of event is spelled out in a contract as a force majeure event, performance may not be excused nonetheless when that event begins occurring with regularity.

Even presuming that Gulf’s routine mechanical repairs were within the ambit of the *force majeure* clause, their frequent, almost predictable, occurrence takes them



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outside of a *force majeure* excuse to nonperformance. The element of uncertainty that defines unforeseeability is negated by the regularity with which the events occurred. It is not enough for Gulf to allege that because the mechanical repairs were listed in the contract, they were *force majeure* events. Nor is it enough for Gulf to defend the inclusion of such repairs in the contract clause because it is unable



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to determine the volumes of gas which might be lost under such circumstances.

*Id.* at 454.

In the case of natural disasters, however, the court may find that, although a force majeure event occurs with frequency, in any given instance the event was “beyond the reasonable control of the parties.” In *Watson Labs, Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1114 (C.D. Cal. 2001), the court pointed out that although natural disasters may be foreseeable events, they are beyond the reasonable control of either party and performance is excused under the force majeure provision, stating: “True, some of the

enumerated events, such as natural disasters, are a foreseeable possibility, especially in Southern California (albeit no one can be sure when ‘the Big One’ will hit). But they also are ‘beyond the reasonable control of either party.’” *Id.* at 1113. The court advised the parties to expressly allocate the risk rather than rely on a boilerplate clause enumerating an extensive list of events that would be so unlikely to occur as to make them “qualitatively different” and further noted that in the absence of such allocation, “only governmental action not previously contemplated could qualify as *force majeure*.” *Id.* at 1113–14. Although no cases apply this frequency precedent to hurricanes, *Watson Laboratories* indicates that courts may still provide protection to parties when natural disasters occur.

### Other Causes

Should the lease include all non-weather problems as force majeure events? In the construction context, the Associated General Contractors (AGC) “Standard Form of Agreement and General Conditions Between Owner and Contractor (Where the Contract Price Is a Lump Sum)” excludes from force majeure strikes involving only the contractor on the theory that the contractor for its own benefit cannot impose the detriment on the owner. AGC Doc. 200 ¶ 6.3 (2000 ed.). But some contracts go further and include enumerations such as “delay attributable to strikes, labor troubles, or any cause whatsoever including, but not limited to . . . .” This clause goes far beyond the quite broad standard definition of “beyond landlord’s reasonable control.” The AGC’s form also expressly includes as force majeure events delay caused by governmental agencies, unusual transportation events, and unavoidable accidents or circumstances. A drafter crafting a broad standard might also include epidemics. In fact, the Office of Thrift Supervision of the Comptroller of the Currency issued an interagency advisory on March 15, 2006, recommend-

ing that banks under its jurisdiction consider the possible effects of epidemics and what safeguards they should take. Board of Governors of the Federal Reserve System, *Interagency Advisory on Influenza Pandemic Preparedness*, 2006 WL 851834 (F.R.B.).

### Notice of the Force Majeure Event

To evaluate the actions of the party seeking relief, it is helpful for the other party to have a specific lease requirement that one party notify the other party promptly after it becomes aware of the force majeure event, stating the facts on which relief is being claimed, the details of the actions being taken by the first party, and the anticipated date on which the performance is expected to be accomplished. This notice requirement also permits the affected party to consider its alternatives for self-help or added payment, relocation, or simply for claiming that the efforts being undertaken are insufficient in the circumstances.

Requiring notice to the other lease party of the inability to perform because of a force majeure event may be just as important as careful drafting of the rest of the force majeure clause. The anxiety created by a storm and a related mass evacuation may cause the parties to forget the whereabouts of the lease or be unable to fulfill their notice obligations under the lease.

Courts generally have upheld the procedural requirements that accompany the force majeure clause in contracts so that the force majeure clause should explicitly state what the non-performing party must do to properly invoke the clause. For example, the clause may require that the non-performing party give notice of its inability to perform to the other party. When notice is required, the drafter should state whether notice becomes effective on dispatch or on receipt. In addition, the drafter should address other notice issues, including (1) time limits, (2) whether notice must be written, (3) the conse-

quences of failure to give notice, and (4) when the excusing event is deemed to have occurred and, thus, when the duty to give notice arises. Parties may include a constructive notice requirement, particularly in

the case of natural disasters when it would be deemed appropriate.

It is more difficult to define notice requirements when a natural disaster is involved because these events are obvious and may place the other

party on constructive notice of a force majeure event. To date, however, there is no precedent regarding constructive notice in the context of force majeure provisions or natural disasters. After Katrina, businesses

## Sample Force Majeure Clauses

### **An Interesting Baseball Stadium Lease Clause, But with No Notice and Diligence Concepts**

“Force Majeure” means the occurrence of any of the following for the period of time, if any, that the performance of a Party’s material obligations under this Lease is actually, materially, and reasonably delayed or prevented thereby: acts of God, lock-outs, acts of the public enemy, the confiscation or seizure by any government or public authority (excluding the stadium owner authority), insurrections, wars or war-like action (whether actual and pending or expected), arrests or other restraints of government (civil or military), blockades, embargoes, strikes, labor unrest or disputes, unavailability of labor or materials, epidemics, landslides, lightning, earthquakes, fires, hurricanes, storms, floods, wash-outs, explosions, any delays occasioned by arbitration actions and proceedings under the Arbitration Procedures specified in this Lease, civil disturbance or disobedience, riot, sabotage, terrorism, threats of sabotage or terrorism or any other cause, whether of the kind herein enumerated or otherwise, that is not within the reasonable anticipation or control of the Party claiming the right to delay performance on account of such occurrence and which, in any event, is not a result of the intentional act, negligence or willful misconduct of the Party claiming the right to delay performance on account of such occurrence. As to Landlord, actions of the Landlord shall not be considered actions of a Governmental Authority for purposes of Force Majeure. Notwithstanding the foregoing, “Force Majeure” shall not include (i) any strikes or lock-outs or other labor disputes related to Tenant’s trade organizations, or (ii) economic hardship.

### **A Modest Clause**

This Lease and the obligation of Tenant to pay rent hereunder, and the obligation of each party to perform and comply with all of the other covenants and agreements hereunder on its part to be performed or complied with, shall not be affected or excused because of the other party’s delay or failure to perform any of the covenants and agreements hereunder on the part of the other to be performed for reasons beyond the reasonable control of such other party which reasons are generally being encountered at the time in Comparable Buildings [defined somewhere in the Lease, may or may not be appropriate here], including, without limiting the generality of the foregoing, strikes, lockouts or labor problems, governmental preemption, laws, conditions of supply and demand which

have been or shall be affected by war or other emergency or general market conditions or otherwise; provided, however, that this Section shall not apply to, and nothing contained in this Section shall affect or impair either party’s rights and remedies pursuant to, Articles [fire, condemnation, cure, abatement] hereof, or any offset rights or rights to credit expressly given to Tenant in this Lease, and further, in no event shall any delay or failure of payment of rent or other money, whatever the cause, be either considered as a reason beyond a party’s reasonable control or to any extent excused by operation of this Section.

### **A Clause with Diligence and Notice**

Except as otherwise expressly set forth herein, in the event either party hereto shall be delayed or hindered in, or prevented from, the performance of any act or rendering any service required under this Lease, by reason of strikes, inability to procure materials, failure of power, restrictive governmental laws or regulations, riot, insurrection, war or other reasons of a similar or dissimilar nature which are beyond the reasonable control of the party (collectively referred to herein as “Event”), then the performance of any such act or rendering of any such service shall be excused for the period of the resulting delay and the period of the performance or rendering shall be extended for a period equivalent to the period of such delay. Notwithstanding the foregoing, this paragraph shall not be applied so as to excuse or delay payment of any monies by one party to the other, including rent.

Except in the instance described in a provision of this Lease expressly referring to this Section, nothing contained in this Section shall be applied so as to: (i) permit any delay or time extension due to shortage of funds; or (ii) excuse any nonpayment or delay in payment of rent; or (iii) limit either party’s rights under right-to-cure-other’s-default as if this Section were not contained in this Lease. It shall be a condition to either party’s claim of the benefit of this Section that such party (“Claiming Party”) notify the other in writing within 48 hours after the occurrence of the Event, and within 24 hours after request shall advise the other party in writing of its good faith estimate of the time which will be required until the delay is ended. Claiming Party shall have no liability to the other if the good faith estimated time of cure of the delay is not met but Claiming Party shall advise the other in writing whenever Claiming Party learns that any material additional time shall be required (and promptly upon request shall advise the other party of any latest estimated time of cure of the delay and the actions being taken to cure the delay). ■

and individuals were scattered all over the country either because they evacuated before the storm hit or were forced to leave in its aftermath. Normal mail service, private mailing services, phone lines, and Internet access were down for weeks and even months in some areas. In some cases, the address designated for receiving notice of the force majeure event was destroyed in the hurricane as well.

The effects of a hurricane are not unique; an earthquake, flood, or similar catastrophic event widespread over a certain geographical area could have the same effects. Therefore, in negotiating the force

majeure clause, both parties should consider providing alternative places or means of giving and receiving notice to cover that possibility and may want to consider constructive notice for a catastrophic event. For example, the lease might provide: "In case of interruption of all methods of giving notice set forth in this Section, notice shall be deemed given on the second day of reasonably prominent news coverage of the force majeure event reasonably able to be recognized as affecting the premises." This might equally benefit a tenant seeking to claim abatement, which requires notice before it becomes effective.

AIA Form A201 requires notice of a delay claim within 21 days after the event occurs or the contractor becomes aware of its effect on the job. AIA Form 201 ¶ 4.3.2. The form provides that most notices are to include estimated *cost* and the probable *effect of delay* on scheduled dates. Id. ¶ 4.3.7.1. The 21-day provision is intended to give the contractor time to determine the effects of the delay, but that is a long time in a leasing situation. The Associated General Contractors has a comparable form contract that calls for a 14-day notice of the consequences but prompt notice of the fact of delay. AGC Doc. 200 ¶ 6.3.

### Performance Standards

Although many clauses have standards that carve out exceptions to the excuse for nonperformance because of an event or act of force majeure, such as a "party's negligence, willful actions, or breach of contract," additional language could be used to establish a higher standard by requiring each party to make good faith efforts to perform notwithstanding the existence of a force majeure. In addition, holding the party to accepted or codified industry standards for the particular type of lease (such as banking, health care, and so on) also may be effective when such a standard is either acknowledged by both parties or universally accepted.

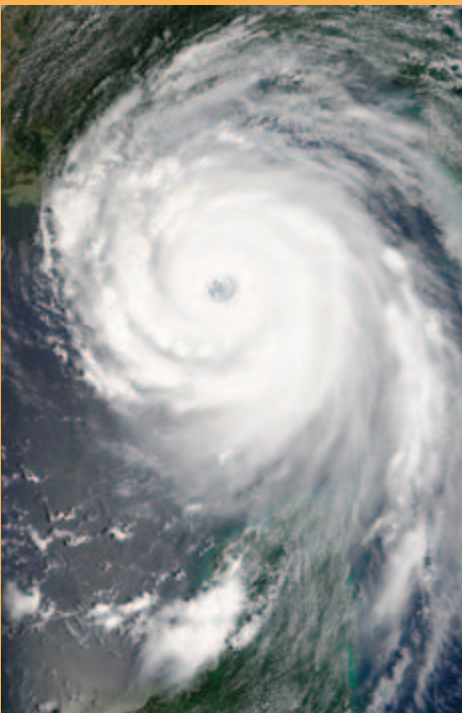
Offering an economic incentive for the parties to perform their obligations may be the most effective way to ensure good faith efforts to perform. For example, a lease might provide: "The affected party shall be entitled to an abatement of rent during the period the leased premises are unable to be used and first party is excused from performing its obligations under this section."

Statutory codes also may provide some guidance for a standard, but such guidance may be limited. Twenty-three states mention force majeure at some point in their codes, although most only make a passing mention of the concept without defining the term. Only a few states have codified their standard of performance for force majeure clauses. Even when codified, the provisions usually refer to a very specific type of lease or a particular type of party. Furthermore, no notice requirements are established by statute for force majeure.

Under Kentucky law, a party is required to use good faith in invoking force majeure. Good faith is honesty in fact and the observance of reasonable commercial standards of fair dealing. Ky. Rev. Stat. Ann. § 355.1-201(2)(t). A party is also under the obligation to eliminate the disabling effects of such force majeure as soon as, and to the extent, possible. *Ky. Util. Co. v. South East Coal Co.*, 836 S.W.2d 392, 401 (Ky. 1992).

Texas law permits parties to determine the standard by which the performance of contractual obligations related to the sale of goods is to be measured if such standards are not manifestly unreasonable. Tex. Bus. & Com. Code § 2.615. This limitation is deferentially applied to the contracts of sophisticated parties. For example, this section did not preclude parties to an ethylene delivery contract from agreeing to a broader force majeure clause, which excused an oil company's nonperformance as a result of explosion, irrespective of whether the explosion was beyond the oil company's reasonable control. *PPG Indus. Inc. v. Shell Oil Co.*, 919 F.2d 17 (5th Cir. 1990). Texas, however, has codified a standard for utility companies that, in

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the event the parties do not elect a standard, limits the application of a force majeure clause to situations in which regulatory acts, natural disasters, war, and even terrorism, create a predetermined cost increase or revenue decrease for the affected party of more than 10% in any calendar year. Tex. Util. Code. Ann. § 39.055.

Georgia codified a force majeure relief standard for taxpayers in the event they fail to meet their number of employee maintenance requirements for any taxable year within a recapture period. It defines force majeure as (1) explosions, implosions, fires, conflagrations, accidents, or contamination; (2) unusual and unforeseeable weather conditions; (3) acts of war (whether or not declared), carnage, blockade, or embargo; (4) acts of public enemy, acts or threats of terrorism, or threats from terrorists, riot, or public disorder; (5) strikes or other labor disturbances; or (6) expropriation, requisition, confiscation, impoundment, seizure, nationalization, or compulsory acquisition of the site of a qualified project or any part thereof. Ga. Code Ann. § 48-7-40.24(a)(3). More interesting, however, is Georgia's exception that provides that force majeure shall not include any event or circumstance that could have been prevented, overcome, or remedied in whole or in part through the exercise of reasonable diligence and due care, nor shall such term include the unavailability of funds. *Id.*

As with all other force majeure provisions, the standard of performance may be negotiated in the contract, but the parties may take guidance from an applicable state code or from industry standards.

### **Drafting the Clause in General**

The basic principles to consider in drafting force majeure clauses are:

- The clause should list as many likely events (other than very remote causes) as possible.
- The clause should include some version of "all other causes."
- The affected party should seek to limit or tighten the definition.

- The affected party should seek the other's agreement to incur effort and cost.
- The affected party should seek the right to be fully informed and updated.
- The affected party should seek the right to cure with payment by the other party of all or part of the cost.

Sample force majeure clauses are suggested in the sidebar on page 13.

### **Further Solutions**

Because both parties may be resistant to changes in an existing lease that would shift the risk, a better solution than relying on the force majeure clause itself may be business interruption insurance. The main concern under a policy is that the claimed event be a "covered risk." Many businesses in areas affected by Hurricane Katrina are dealing with whether their business was interrupted by wind or flood. Flood is often excluded from property insurance policies (even special form policies (formerly called "all risk")), although a storm surge is argued by both sides as being or not being part of a hurricane. Lessors, lessees, and their lawyers should keep current with insurance litigation in Mississippi and Louisiana involving coverage for damage resulting from the wind/flood storm surge in business interruption insurance policies and language referencing such policies within their leases.

### **Post-disaster Relationship**

The post-disaster relationship between landlord and tenant deserves special attention after a mass catastrophe. In connection with and in addition to the force majeure clause, the lease should address what happens if a building is damaged but not totally destroyed. Post-Katrina office space and housing continue to be in high demand, and as a result, rental rates have increased to varying degrees. Unlike a contained event affecting leased premises where the landlord could

rebuild at a reasonably foreseeable cost, unknown or escalating rebuilding costs after Katrina continue to prevent some lessors from fulfilling their obligations.

Even buildings that were damaged but not destroyed are expensive to repair because of increases in the cost of building materials, transportation of such materials, and labor shortages. If a lessor is obligated to repair a damaged building but is locked in at the same rental rates, the lease becomes less economically desirable. Therefore, the lessor may seek to terminate a pre-storm lease by claiming an excuse for performance under a force majeure clause to attempt to sign a new tenant at the new rental rates.

Lessors and lessees should negotiate protective language in the lease for both of their interests. Obviously, a lessee with little or no negotiating power, such as a residential tenant, may have to rely on his or her landlord's fair dealing, but a sophisticated lessee should negotiate a clause obligating the landlord to rebuild at post-storm costs with perhaps a percentage increase in rent to cover all or some of the increase.

### **Conclusion**

Lawyers, lessors, and lessees should use the lessons from recent catastrophic events, particularly the hurricanes of 2005, to review their leases and analyze their positions should the force majeure clause be exercised. Drafting an effective force majeure clause in a lease is dependent on the unique considerations and risks that exist for the parties in different parts of the country. Inclusion of specific events in the force majeure clause demonstrates the intent of the parties, which should be to the drafter's benefit if a dispute becomes litigious. The drafter and other parties, however, should be mindful of the likelihood of such events occurring. Review and careful drafting of the notice provisions related to the force majeure clause is also necessary to fully effectuate a successful exercise of the clause. ■