

## TOP STORY

## COVID-19 Is Natural Disaster Triggering Force Majeure Clause

By Grant H. Hackley – June 10, 2021

When the COVID-19 pandemic postponed a marquee auction event, the auction house relied upon a force majeure clause to terminate an agreement to sell a high-priced painting and refused to pay the seller the guaranteed minimum price. A federal district court found the language of the agreement's termination provision controlled, and the COVID-19 pandemic was a natural disaster within the meaning of the contract. Accordingly, [ABA Litigation Section](#) leaders suggest that litigators take care in interpreting force majeure clauses to determine whether particular events trigger these provisions.

### COVID-19 Pandemic Is a Natural Disaster

In [JN Contemporary Art LLC v. Phillips Auctioneers LLC](#), the [U.S. District Court for the Southern District of New York](#) rejected an art dealer's attempt to enforce its agreement with an auction house to auction a painting by contemporary artist Rudolf Stingel. The agreement, executed in the summer of 2019, obligated the auction house to sell the painting at its May 2020 contemporary art auction and to pay the dealer a minimum price of \$5,000,000 in connection with the sale.

The COVID-19 pandemic swept through New York in the spring of 2020, along with a state-wide disaster emergency declaration and restrictions on all non-essential activities, causing postponement of the auction. The auction house negotiated with the dealer and others on potential alternative dates for the sale, going so far as to say it would honor its agreements with its dealers.

Nevertheless, the contract at issue allowed the auction house to terminate the agreement and avoid payment of the guaranteed minimum price if the auction was "postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster . . . ." On June 1, 2020, the auction house terminated the agreement to sell the Stingel painting. With the Stingel piece no longer a part of the auction, on July 2, 2020, the auction house still held a delayed virtual event at which it successfully sold many other works.

The dealer sued to compel the sale of the Stengel painting and for payment of the \$5,000,000 minimum. The auction house moved to dismiss. The district court granted the motion, finding the pandemic was a “natural disaster,” triggering the termination provision. The court explained that the pandemic was a “worldwide public health crisis that has taken untold lives and upended the world economy.” The court also found that the pandemic was a “circumstance beyond [the parties’] reasonable control,” further permitting termination.

### **A Necessary Ruling?**

Contrary to the familiar idea of a natural disaster consisting of an earthquake, volcano, or some other event causing physical destruction, whether a viral pandemic is a natural disaster sufficient to terminate a contract had little precedent before 2020. “The court found it persuasive that New York State itself described the pandemic as a disaster and that it was natural in origin,” notes [Marc J. Zucker](#), Philadelphia, PA, cochair of the Litigation Section’s [Commercial & Business Litigation Committee](#). “The issue of whether it qualified as a natural disaster was resolved as a matter of public record,” he adds.

“The court made a big deal of saying that a pandemic is a natural disaster,” agrees [Paula M. Bagger](#), Boston, MA, cochair of the Section’s Commercial & Business Litigation Committee. “As a matter of contract interpretation, the court did probably have to go through that exercise,” she opines, noting that “termination here required only that the postponement of the auction be outside the parties’ reasonable control.” The court had to determine whether the pandemic was “outside of the parties’ control in deciding if the force majeure clause applies,” she continues.

### **What Is a Lawyer to Do?**

“It’s not rocket science to recognize that if you want your force majeure clause to be given broad effect, it should be drafted broadly, and vice versa,” comments Zucker. “Care in drafting is particularly important now, when the impact of the pandemic going forward is arguably within the contemplation of the parties and is not unexpected,” he cautions.

Bagger expresses a similar sentiment. “Usually, a termination provision is included in the back of a contract with all that other stuff that tends to cause people’s eyes to glaze over,” she says. “Now, people are more mindful of force majeure language. The only place you used to find the word ‘insurrection’ is in a termination provision,” she quips, highlighting how recent events have changed our perspective on once-obscure contract terminology. She advises attorneys to consider including a notice provision in a force majeure clause. “In this case, it would have helped the owner of the painting if the auction house had been required to decide whether it

was invoking force majeure at the time it cancelled the auction—not a month or two later as it did,” she concludes.

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## Related Resources

- Bryan E. Rogers, “[COVID-19 as a Force Majeure. But What Is Force Majeure? My Contract Doesn’t Even Use that Term!](#),” *Under Construction*, Vol. 22, No. 1 (Summer 2020).
- Julie Negovan, “[What to Do When COVID-19 Disrupts Contractual Performance](#),” *Commercial & Business Litig.* (Jul. 17, 2020).