

# Occurrence Based Loss Of Use

**Drafting Considerations: *Force Majeure, impossibility of performance, casualty loss, civil unrest and related issues***



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# COVID-19 Related Litigation

- Litigation has spiked since the COVID-19 pandemic.
  - 6,196 Complaints have been filed nationwide. (As of November 9, 2020)
    - Of these complaints:
      - 442 related to contract disputes
      - 464 related to landlord/tenant and other property disputes
  - 451 Complaints have been filed in Texas.
    - Of these complaints:
      - 70 related to contract disputes
      - 71 related to landlord/tenant and other property disputes



## Generally: Force Majeure

- A party to a contract who is unable to perform may assert a Force majeure provision to a contract to excuse performance.
- A “force majeure” provision excuses the party’s non-performance when it is caused by circumstances beyond the reasonable control of the party.
- The term “force majeure” generally refers to an event, such as an “act of God,” beyond the reasonable control of the parties to the lease that intervenes to create a contractual impossibility and thereby excuses performance under the lease. See *Virginia Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 400 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).



# Force Majeure: a combustible history

- Created in English common law.
- *Taylor v. Caldwell*: An event organizer had contracted with a venue owner to rent a music hall and gardens for four days during the summer of 1861. Before the first event could take place, however, an accidental fire destroyed the music hall.
- The *Taylor* Court held that “[I]n contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.”



# Force Majeure: the fire crosses the Atlantic

- *The Tornado*: Twenty years after the English court's decision in *Taylor*, the SCOTUS came to the same conclusion.
  - The owner of *The Tornado* agreed to deliver goods.
  - The *Tornado* caught fire and sunk to the bottom of the harbor before the ship commenced the voyage and was rendered unseaworthy.
  - SCOTUS expressly adopted the rule in *Taylor* that, where the agreement of two contracting parties contemplate a specific set of circumstances that can no longer be performed, both parties are excused from performance.



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