

COVID-19 and Immunity from Liability

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Millions of people across the country are waiting to get the COVID-19 vaccine. For businesses, immunity is sought not against the virus but against liability, and, in some cases, businesses have been successful in invoking COVID-19 as a means to do so. Recently, the [Southern District of New York held](#) that the pandemic immunized a defendant, Phillips Auctioneers LLC, from liability under its contract with the plaintiff, JN Contemporary. Under the terms of the contract, Phillips agreed to present a painting at an auction scheduled for May 2020 and guaranteed JN that it would receive a minimum of \$5 million from the sale. Phillips' contractual obligations, however, were subject to the contract's *force majeure* provision which read as follows:

In the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination, we may terminate this Agreement with immediate effect. In such event, our obligation to make payment of the Guaranteed Minimum shall be null and void and we shall have no other liability to you.

Following the onset of the COVID-19 pandemic, Phillips announced that it was postponing the auction, and on June 1, 2020, Phillips sent JN a letter in which it invoked the *force majeure* provision. JN promptly sued Phillips alleging, among other things, breach of contract. Phillips moved to dismiss, arguing that Phillips expressly had the right to terminate the contract as a result of a "natural disaster," which included COVID-19. The court agreed with Phillips, and noted that the pandemic was squarely the type of event that fell within the common meaning of "natural disaster." On this point, the court relied heavily on Black's Law Dictionary definitions of "natural," defined as "[b]rought about by nature as opposed to artificial means," and "disaster," defined as "[a] calamity; a catastrophic emergency." The court buttressed its analysis by reference to several other sources, including Governor Cuomo's executive orders declaring the pandemic a "state disaster emergency."

Critically, the court rejected JN's contention that the doctrine of *ejusdem generis*—"an interpretive guide according to which 'the meaning of a word in a series of words is determined by the company it keeps'"—foreclosed inclusion of COVID-19 within the *force majeure* provision. JN argued that, based on this doctrine, the pandemic could not count as a triggering event because it was not similar enough to the other circumstances outside of the parties' control that were expressly listed in the *force majeure* provision. The court explained that the doctrine was inapplicable, however, because the list of circumstances in the contract was "without limitation."

The court's decision may open the door to reading COVID-19 into *force majeure* provisions that do not expressly list "pandemic" as a basis for contract termination. It also may support inclusion of COVID-19 within the meaning of other "trigger" words (such as "acts of God") or within the term "natural disaster" in other contexts. For example, a defendant in a Southern District of Florida employment case has cited to *JN Contemporary* in support of its position that COVID-19 falls under a "natural disaster" exemption immunizing the defendant from liability for alleged Worker Adjustment and Retraining Notification Act violations.

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