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SAME OLD STORY, *NEW SOLUTION*: FORCE MAJEURE DEFICIENCIES IN THE WAKE OF COVID-19 *AND* AN UNORTHODOX APPROACH TO DRAFTING IT

ABSTRACT

On January 20, 2020, the Centers for Disease Control and Prevention reported the first laboratory-confirmed case of the 2019 Novel Coronavirus (COVID-19) on American soil.[1] *On March 8, 2021—more than a year later—the United States District Court for the Southern District of New York decided Gap v. Ponte Gadea New York.*[2] *It ruled, inter alia, that the COVID-19 pandemic, in keeping with the relevant provision's narrow tailoring, did not amount to a force majeure event and a defense to breach.*[3] *While seemingly one of the first decisions of its kind in the Southern District, this Note argues that the holding and the general principles it was based upon (i.e., that narrow contract construction invites narrow interpretation) was expected and historically quite familiar. Nevertheless, this Note advocates, in response, for a divergent, albeit unconventional, new approach to the drafting of the force majeure provision. One that not only embraces and accepts the historical shortcomings of the force majeure provision, but uses an ever-present contractual interpretation to its advantage.*

INTRODUCTION

As the 2019 Novel Coronavirus pandemic (COVID-19) continued down its lethal path in the spring months of 2020, thousands of commercial retail tenants, in the largest cities across the globe, suffered from dwindling sales because of a combination of factors, including a frightened consumer public and state-sanctioned shutdowns.[4] Similarly, commercial office spaces throughout the globe emptied as the global workforce transitioned to remote work practices.[5]

1. *Museum COVID-19 Timeline*, CDC, https://www.cdc.gov/museum/timeline/covid19.html (last visited Feb. 5, 2023).
2. Gap v. Ponte Gadea, 524 F. Supp. 3d 224 (S.D.N.Y. 2021).
3. *Id.* at 234.
4. *Coronavirus delivers record blow to US retail sales in March*, CNBC (Apr. 15, 2020), https://www.cnbc.com/2020/04/15/us-retail-sales-march-2020.html; Gaëtan Mertens et al., *Fear of the coronavirus (COVID-19): Predictors in an online study conducted in March 2020*, 74 J. OF ANXIETY DISORDERS 102258 (Aug. 2020); Michael Safi, *Coronavirus: the week the world shut down*, THE GUARDIAN (Mar. 20, 2020), https://www.theguardian.com/world/2020/mar/20/coronavirus-the-week-the-world-shut-down.
5. Emily Cadman, *The March Back to Office Heads in Sharply Different Directions*, BLOOMBERG CITYLAB (Oct. 3, 2021), https://www.bloomberg.com/news/articles/2021-10-06/sydney-readying-to-emerge-from-107-day-covid-lockdown.

This Note was particularly inspired by the events of one of the, if not *the*, hardest hit cities as a result of the COVID-19 pandemic: New York City.[6] Home to thousands of the aforementioned commercial tenants, New York City boasts a one-of-a-kind commercial real estate landscape.[7] A tourist destination with exceptionally high numbers of foot traffic, New York City unsurprisingly features a plethora of mega-stores from several of the biggest retailers in the world.[8] However, when COVID-19 effectively halted global travel and shut down in-person retail shopping in the United States, many of these same retailers (with massively inflated rents) ceased paying rent in an apparent effort to conserve dwindling financial resources.[9]

The Gap Inc. (Gap) was one retail tenant who made the calculation, amidst the COVID-19 pandemic, to cease rent payments on its corner storefront location in Midtown Manhattan.[10] Specifically, for a period of approximately three months, Gap paused all rent payments under its leases (for all stores in North America). Gap was subsequently served with a Notice of Termination by its landlord, Ponte Gadea, on June 12, 2020.[11] That same day, Gap filed an action in district court for the Southern District of New York against Ponte Gadea, alleging that the closure of its two Manhattan stores (a Gap and Banana Republic store) in March of 2020, in response to the COVID-19-motivated government shutdowns and reduced foot traffic, released it from its lease and rent obligations.[12] In response to Gap's five main arguments, the court ultimately disagreed that Gap was released from its rent obligations under the lease and granted summary judgment in favor of the landlord.[13] The court in *Gap* refused to interpret several standard "boilerplate" provisions loosely in a manner that would have likely afforded *Gap* relief as a result of the events of the COVID-19 pandemic.

Prior to the *Gap* ruling, the legal landscape, much like the parallel political and social environments, appeared more favorable to commercial

6. Lisa Fickenscher, *Famous brands close their NYC shops in record numbers*, N. Y. POST (Dec. 23, 2020), https://nypost.com/2020/12/23/famous-brands-close-their-big-apple-shops-in-record-numbers/.

7. Mathew Haag, *One-Third of New York's Small Businesses May Be Gone Forever*, N. Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/08/03/nyregion/nyc-small-businesses-closing-coronavirus.html.

8. *See* Christian González-Rivera, *Destination New York*, CTR. FOR AN URB. FUTURE (May 2018), https://nycfuture.org/pdf/CUF_Destination_New_York.pdf; Marco Torres, *State of the Chains, 2020,* CTR. FOR AN URB. FUTURE (Dec. 2020), https://nycfuture.org/pdf/CUF_StateoftheChains_2020_final.pdf.

9. Greg David, *The Other Eviction Moratorium: Storefront and Office Tenants are Hanging on. But for How Long?*, THE CITY (Nov. 3, 2020), https://www.thecity.nyc/2020/11/3/21544974/new-york-eviction-moratorium-restaurants-storefront-office-tenants.

10. *See* Gap v. Ponte Gadea, 524 F. Supp. 3d 224, 229 (S.D.N.Y. 2021).

11. *Id.* at 230.

12. *Id.*

13. *Id.* at 240–42.

tenants in these kind of pandemic-inspired lease disputes.[14] However, as mentioned above, the court in *Gap* seemingly changed this trajectory. Not only did it grant summary judgment for a COVID-19-era landlord, but the *Gap* court, in one of the first instances within the jurisdiction, refused to excuse the respective tenant from paying rent and other lease obligations due to COVID-19-related hardships.[15]

This case, a kind of first look for the federal judiciary and coming from the highly influential Southern District of New York, would undoubtedly become a model for commercial landlord-tenant, lease, and COVID-19-related disputes going forward.[16] It also makes quite clear the need for a new or even modified lease provision to protect future tenant-lessees from the lingering effects of the current, but ongoing, COVID-19 pandemic, future pandemics, and/or the events discussed below.

It remains to be seen whether a modified "force majeure event" or "casualty event" provision would have the rhetorical flexibility to shield and protect commercial tenants in another pandemic scenario. On another note, traditional contract defenses to breach, including "frustration of purpose" and "impossibility," may also need to be re-evaluated in a COVID-19 context. These sorts of questions have been, and will continue to be asked, in courthouses across the state, and with enough perspective, may just provide the needed re-evaluation for a meaningful solution. Perhaps, also, a non-legal common-sense approach would be helpful as we journey down a path of attempting to parse out the real purpose of the leases in question.

Part I of this Note will provide some background information about the *Gap* holding. This section will attempt to lay the foundation, specifically how the COVID-19 pandemic severely impacted the commercial landscape in New York City, as well as basic commercial leasing provisions relevant to this Note. Then, Part II will discuss the case at hand, *Gap*. Additionally, after parsing out the various legal arguments and relevant holdings of *Gap*, Part II will highlight several other relevant cases, in New York and Massachusetts, that may be helpful examples and provide useful models for different, but arguably more appropriate, legal conclusions with respect to the COVID-19 pandemic and contract law, specifically force majeure. Finally, Part III of this Note will branch off from these legal decisions and delve into the reasons why these holdings matter to commercial tenants, as well as to greater contract law. Part III will primarily argue that not only will the *Gap* holding be trendsetting, but the COVID-19 pandemic will have the greatest impact on the boilerplate force majeure provision—an all too often ineffective

14. Cara Mittleman Kelly, *The Empire Strikes Back: After Recent Tenant-Friendly Decisions, a Victory for Commercial Landlords*, A.B.A. (Apr. 6, 2021), https://www.americanbar.org/groups/litigation/committees/real-estate-condemnation-trust/articles/2021/gap-inc-v-ponte-gadea-new-york-covid-19/.

15. *Gap*, 524 F. Supp. 3d at 240–42.

16. Kelly, *supra* note 14.

provision. And while the impact on force majeure will be significant, it will most certainly be expected. Lastly, Part III argues that the COVID-19 pandemic should not only change the literal words "on the lines" within any given force majeure provision of a commercial lease, but also the entire orthodoxy—between the lines, so to speak—of how the provision is constructed in the first place.

I. COVID-19 & THE STATE OF AFFAIRS IN NEW YORK CITY IN MARCH OF 2020

The global effect of the COVID-19 pandemic on commercial leasing was profound and, by modern standards, unprecedented.[17] However, the impact of this global health crisis on commercial real estate, specifically within the city of New York, was particularly extraordinary.[18] New York City-based landlords, and tenants for that matter, are not at all unfamiliar with the realities of real estate market fluctuations during periods of financial turmoil or worse, all-out collapse.[19] As proof, just ask Manhattan-based commercial landlords following the 2008 financial collapse.[20] That being said, by modern standards, the COVID-19 pandemic is still uniquely unprecedented.[21] Not only were major retail chains shutting down and office spaces being vacated, but these businesses were being *mandated* by the State to close their doors and take home their computer monitors.[22] This was for good reason, however, as the state of New York bore witness to nearly a thousand COVID-19-related deaths daily, ten thousand daily positive COVID-19 tests, and nearly fourteen thousand hospitalizations by mid-April 2020.[23] Truly astonishing numbers. In fact, by April 10, 2020, New York State had more confirmed COVID-19 cases than any other *country* aside from the United States.[24] In

17. *Survey Results: How COVID-19 has impacted corporate real estate leases and decisions*, VISUAL LEASE (July 27, 2020), https://visuallease.com/survey-results-how-covid-19-has-impacted-corporate-real-estate-leases-and-decisions/.

18. Lauren Thomas, *An Entire Block of Vacant Storefronts: Delayed Office Return Plans Stymie Midtown Manhattan's Recovery*, CNBC (Oct. 7, 2021), https://www.cnbc.com/2021/10/07/midtown-manhattan-reels-from-the-highest-retail-vacancies-in-nyc.html.

19. Kevin Sun, *How Manhattan's office market responded in previous recessions: TRD Insights*, THE REAL DEAL (Apr. 22, 2020), https://preview.therealdeal.com/new-york/2020/04/22/how-manhattans-office-market-responded-in-previous-recessions-trd-insights/.

20. Christine Haughney, *Recession Has Landlords of Retail Tenants Extending Discounts of Their Own*, THE N.Y. TIMES (Jan. 31, 2009), https://www.nytimes.com/2009/02/01/nyregion/01leases.html.

21. Neil Irwin, *The Pandemic Depression is Over. The Pandemic Recession Has Just Begun.*, THE N.Y. TIMES (Oct. 3, 2020), https://www.nytimes.com/2020/10/03/upshot/pandemic-economy-recession.html.

22. Chris Francescani, *Timeline: The first 100 days of New York Gov. Andrew Cuomo's COVID-19 response*, ABC NEWS (June 17, 2020), https://abcnews.go.com/US/News/timeline-100-days-york-gov-andrew-cuomos-covid/story?id=71292880.

23. *Tracking Coronavirus in New York: Latest Map and Case Count*, THE N.Y. TIMES (last updated Feb. 9, 2023), https://www.nytimes.com/interactive/2021/us/new-york-covid-cases.html.

24. *Id.*

response to these alarming statistics, the federal government and New York State imposed a series of lockdowns and stay-at-home orders starting in March 2020.[25] A state of emergency was declared by New York State on March 7, 2020, while State universities and New York City public schools were ordered to close and transition to remote schooling.[26] By March 20, a state-wide stay-at-home order was declared, and all non-essential businesses were ordered to close.[27] By June 22, 2020, in-store retail shopping was allowed, but with a maximum capacity of fifty percent (in Phase 2).[28]

Unsurprisingly, these state-mandated stay-at-home orders, in combination with global travel restrictions, severely reduced foot traffic by tourists, commuters, office workers, and residents, throughout New York City, especially in the earlier stages of the COVID-19 pandemic.[29] It is estimated that foot traffic fell by more than ninety percent in key corridors of Manhattan during the initial months of the COVID-19 pandemic and still remained below fifty percent of its 2019 levels nearly a year later.[30] Before the pandemic, the retail sector in New York City accounted for 32,600 establishments, 344,600 private sector jobs, and sixteen billion dollars in total wages in 2019.[31] By April, retail employment positions had dropped to 245,000 positions. Even more, clothing retail employment decreased to nearly forty percent below the level of the year prior.[32] Similarly, taxable sales of the clothing and accessories industry (a subsector of general retail) fell by more than seventy percent from March 2020 to May 2020.[33] The point being that the impact of this pandemic was, and continues to be, truly profound. For this reason, it has been argued that a full recovery of the aforementioned industries will occur at a snail's pace, or worse, that New York City retail may never return to pre-pandemic levels.[34]

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25. Francescani, *supra* note 22.

26. OFFICE OF GOVERNOR ANDREW M. CUOMO, EXEC. ORDER NO. 202, DECLARING A DISASTER EMERGENCY IN THE STATE OF NEW YORK (Mar. 7, 2020).

27. Francescani, *supra* note 22.

28. *Phase 2 of Reopening NYC: What Workers Need to Know*, NYC CONSUMER AND WORKER PROT. (June 18, 2020), https://www.nyc.gov/assets/dca/downloads/pdf/workers/NYC-Business-Reopening-Phase2-WhatWorkersNeedToKnow.pdf.

29. *The Retail Sector in New York City, Recent Trends and the Impact of COVID-19*, OFF. OF THE N.Y. STATE COMPTROLLER (Dec. 2020), https://www.osc.state.ny.us/reports/osdc/retail-sector-new-york-city-recent-trends-and-impact-covid-19.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Kevin Stankiewicz, *New York City may take a decade to recover from coronavirus pandemic, says developer Don Peebles*, CNBC (Aug. 21, 2020), https://www.cnbc.com/2020/08/21/don-peebles-new-york-city-may-take-decade-to-recover-from-coronavirus.html; *see* OFF. OF THE N.Y. STATE COMPTROLLER, *supra* note 29.

A. COMMERCIAL LEASING 101: BOILERPLATES

To best understand the impact and future implications of the COVID-19 pandemic on commercial leasing, it is important to first recognize the various elements or provisions that make up a typical commercial lease contract. By definition, a commercial lease, or any lease for that matter, is a contract that creates a legally binding, often long term, relationship between a landlord and tenant for almost any kind of space or purpose (e.g., office, industrial, or retail).[35] On its face, a commercial lease contract will often contain terms most favorable to the landlord.[36] Regardless of size and complexity, most leases will address several fundamental principles that, depending on the drafting of the provisions in question, may benefit the landlord, the tenant, or both parties.[37] Boilerplate provisions common to commercial lease agreements include (but are not limited to): "*Rent*" (detailing a tenant's obligation to pay base rent, additional rent, and whether a lease is "all inclusive" or in "gross"); "*Permitted use*" (controlling how the tenant can use the space); "*Notice*" (how and when a party can terminate the lease or increase rent); "*Choice of law*" (establishing what jurisdictional law will be used to interpret the contract); "*Forum selection*" (stipulates where suits relating to the lease must be brought); and, "*Attorney's Fees*" (providing that where a lawsuit is brought relating to the lease, the party that prevails in court may recover its attorneys' fees from the losing party).[38]

Notably, commercial lease contracts almost always also feature "force majeure" (French for "superior force") and "casualty event" provisions.[39] While there is no definitive boilerplate force majeure clause, as each clause is uniquely shaped by the negotiations of the parties, force majeure clauses often follow a particular pattern while addressing similar items.[40] Further, a force majeure clause is a contract provision that allocates risk and relieves a party from mandatory performance of its contractual obligations if certain circumstances—beyond its control—arise and make contract performance

35. Stephen Falla Riff, *Commercial Leases: Lease Strategies for Tough Times . . . or Any Time*, N.Y.C. BUS. SOLS., http://www.nyc.gov/html/sbs/downloads/pdf/commercial_leasing_supplementary_information.pdf (last visited Nov. 20, 2021).

36. *Id.*

37. Adam M. Silverman, *The Basics: Commercial Leases* (2010).

38. The phrase "boilerplate," as it's used in law, is used to describe provision which are "made to fit many uses" but are often "nonnegotiable" provisions of any given contract. *Boilerplate*, BLACK'S LAW DICTIONARY (last visited Feb. 9, 2023); Neal Hefferren, *10 Boring Boilerplate Commercial Lease Clauses You Should Understand*, PROP. METRICS (Dec. 9, 2016), https://propertymetrics.com/blog/10-boring-boilerplate-commercial-lease-clauses-you-should-understand/.

39. *Force Majeure Clauses: Key Issues*, WEST L. PRAC. COM. TRANSACTIONS, https://us.practicallaw.thomsonreuters.com/5-524-2181 (last visited Nov. 16, 2021).

40. Andrew A. Schwartz, *Contracts and COVID-19*, 73 STAN. L. REV. 48, 55 (July 2020), https://www.stanfordlawreview.org/online/contracts-and-covid-19/

impractical or impossible.[41] Circumstances that are often covered under the force majeure clause include natural disasters (or "acts of God"), war, civil disorder, fire, disease, and *sometimes* even medical epidemics or outbreaks.[42] Because a force majeure provision often lists out events in this manner, courts tend to interpret them narrowly and, most importantly, only take into consideration the events explicitly listed within the plain text of the clause.[43]

Similar to force majeure provisions, "casualty" provisions also tend to be staples of any ordinary commercial lease.[44] Casualty provisions outline both the landlord and tenant's obligations in the event the leased premises are damaged by, among other things, flood, fire, hurricane, or other natural disasters, sometimes described as acts of God.[45] Specifically, casualty event provisions typically detail a tenant's right to repairs by the landlord, the right to terminate the lease in the event of the casualty event, and the right to an abatement of rent should the leased space be inhabitable and thus incapable of being occupied by the tenant due to the damage.[46]

II. RECENT DECISIONS ON COVID-19 & FORCE MAJEURE

A. GAP V. PONTE GADEA NEW YORK

On March 8, 2021, U.S. District Judge Laura Taylor Swain issued a memorandum opinion and order in *The Gap v. Ponte Gadea New York*, granting summary judgment in the landlord's favor and dismissing the tenant's complaint.[47] Located at the corner of Fifty-Ninth Street and Lexington Avenue in Manhattan—arguably one of the most highly trafficked intersections in the borough—Gap (the tenant) operated a Banana Republic and Gap store under a commercial lease with defendant Ponte Gadea New York LLC (the landlord).[48]

Contained within the four corners of the lease between the two parties were several particularly relevant provisions to the court and to this discussion. Specifically, Section 1.7(H) and all of Article 16.[49] Section 1.7(H) of the lease defined a "Force Majeure Event" as follows:

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41. Janice M. Ryan, *Understanding Force Majeure Clauses*, VENABLE LLP (Feb. 2011), https://www.venable.com/insights/publications/2011/02/understanding-force-majeure-clauses.

42. *Id.*

43. *See Gap*, 524 F. Supp. 3d at 240–42; *but see generally* 188 Ave. A Take Out Food v. Lucky Jab Realty, No. 653967/2020, 2020 WL 7629597 (N.Y. Sup. Ct. Dec. 21, 2020).

44. Hefferren, *supra* note 38.

45. James O. Birr, III, *Five Key Commercial Lease Provisions for Commercial Tenants*, REAL EST. DEV., SALES AND LEASING INDUS. LEGAL BLOG (Mar. 11, 2021), https://www.jimersonfirm.com/blog/2021/03/key-commercial-lease-provisions/.

46. *Id.*

47. *Gap*, 524 F. Supp. 3d at 224.

48. *Id.*

49. *Id.* at 228.

> [A] strike or other labor trouble, fire or other casualty, governmental preemption of priorities or other controls in connection with a national or other public emergency or shortages of fuel, supplies or labor resulting therefrom, or any other cause beyond Tenant's reasonable control.[50]

Next, Article 16, titled "Casualty," set forth the parties' restoration obligations, termination rights, and rent obligations in the event of a "fire or other casualty."[51] Importantly, Section 16.4 provided for the proportional abatement of rent if, "as a result of a fire or other casualty, all or a portion of the [p]remises shall not be usable by [t]enant for a period of more than 14 days."[52] Likewise, Section 16.7 provided that either party could terminate the lease if "the [p]remises are substantially damaged by a fire or other casualty that occurs during the period of one year preceding the end of the lease."[53]

As mentioned above, New York City began experiencing significant COVID-19 pandemic-related disruptions in brick-and-mortar retail in March 2020, starting with New York State's March 7 emergency declaration.[54] Soon after, on March 19, 2020, Gap closed the doors to all its stores to the general public. That same month, Gap ceased rent payments under its lease to the defendant-landlord, Ponte Gadea.[55]

On June 8, 2020, Ponte Gadea served Gap with a notice of termination for failure to pay rent.[56] On June 8, New York City entered "phase one" of its reopening plan, which allowed Gap to offer curbside pickup (which it did offer in only *one* store), although, both stores continued to remain closed to in-person shopping.[57] On June 12, 2020, in response to the defendant's notice, Gap brought an action against the defendant-landlord in District Court, Southern District of New York, claiming breach of contract, declaratory judgment, rescission, reformation, money had and received, and unjust enrichment.[58] The foregoing assertion was that Gap's lease was terminated, rescinded, or reformed as a result of the COVID-19 pandemic and events which followed.[59]

In support of its case, Gap asserted five main arguments: (1) the COVID-19 pandemic constituted a casualty event under the lease; (2) the purpose of the lease was frustrated; (3) as a result of the pandemic, its performance under the lease was rendered impossible, illegal or impracticable; (4) there was a failure of consideration under the lease due to the pandemic; and finally, (5)

50. *Id.*
51. *Id.*
52. Gap v. Ponte Gadea, 524 F. Supp. 3d 224, 228 (S.D.N.Y. 2021) (internal quotation marks omitted).
53. *Id.* at 228–29 (internal quotation marks omitted).
54. Francescani, *supra* note 22.
55. *Gap*, 524 F. Supp. 3d at 229.
56. *Id.* at 230.
57. *Id.*
58. *Id.* at 231.
59. *Id.*

that there was a mutual mistake as a result of the parties' failure to address a worldwide pandemic within the lease itself.[60]

The court first addressed Gap's argument that the COVID-19 pandemic constituted a casualty event under Article 16 of the lease, thus entitling Gap to an abatement of its rent obligations.[61] In what was a continuing theme in this case, the court narrowly read and interpreted the casualty provision within Article 16 of the lease to encompass only "singular incidents, like fire, which have a physical impact in or to the premises," and not "a pandemic, occurring over a period of time, outside the property, or the government lockdowns resulting from it."[62] The court saw "no reasonable reading of the [l]ease's casualty provision . . . that would be triggered by the pandemic-related changes cited by Gap."[63]

Next, the court addressed Gap's second theory as to why the lease was terminated in March 2020: the COVID-19 pandemic and resulting governmental shutdowns frustrated the principal purpose of the lease.[64] The doctrine of frustration of purpose relieves a party of its contractual obligations where a "wholly unforeseeable event renders the contract valueless to one party."[65] In other words, the initial purpose of the contract is so important that, with its absence, the transaction makes little sense.

The court held first that the aforementioned state-mandated shutdowns were not wholly unforeseeable, but rather, that such prohibitions were, in fact, referenced in the lease between Gap and Ponte Gadea.[66] Additionally, the court disagreed with Gap's assertion that the purpose of the lease (i.e., the operation of a first-class retail business) was "so completely" frustrated by the COVID-19 pandemic that "the transaction [made] little sense . . . ."[67] Ultimately, Gap continued to operate the stores at issue, offering curbside pickup, throughout the COVID-19 pandemic.[68] While "undeniably unfortunate," the court maintained that the temporary prohibition on in-person shopping and Gap's "business decision" to keep its stores at 59th and Lexington closed further into the pandemic did not amount to a frustration of the lease's purpose, thereby relieving Gap of its obligations as tenant.[69]

Gap asserted several additional theories as to why it bore no liability for rent under the lease after March 2020.[70] First, Gap argued that its lease was

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60. Gap v. Ponte Gadea, 524 F. Supp. 3d 224, 231 (S.D.N.Y. 2021).
61. *Id.* at 232.
62. *Id.*
63. *Id.* (the court continues to support its conclusion as being in-line with other decisions on casualty clauses and the general authority of the meaning of the term "casualty").
64. *Id.* at 233–34.
65. Gap v. Ponte Gadea, 524 F. Supp. 3d 224, 234–236 (S.D.N.Y. 2021); *see also* United States v. Gen. Douglas MacArthur Senior Vill., 508 F.2d 377, 381 (2d Cir. 1974).
66. *Gap*, 524 F. Supp. 3d at 234–36.
67. *Id.*
68. *Id.* at 235.
69. *Id.* at 231.
70. *Id.*

terminated in March 2020 of the COVID-19 pandemic, and the resulting governmental restrictions rendered the parties' performance under the lease impossible.[71] Second, Gap theorized that the COVID-19 pandemic led to a "failure of consideration" under New York law.[72] Third, Gap argued that the parties made a "mutual mistake" in drafting the lease, failing to foresee—and address contractually—the possibility that Gap could have to operate the store during a global pandemic.[73]

Addressing Gap's argument that the lease terminated in March 2020 (because performance was rendered impossible as a result of the COVID-19 pandemic and government-mandated shutdowns), the court noted that the theory of "impossibility," as a defense to a breach, was only within reach when performance is rendered "objectively impossible" by an unforeseen event.[74] However, this theory should be applied narrowly and only in extreme circumstances.[75] Referencing the force majeure provision at issue, the court found that the provision "demonstrate[ed] that the conditions that Gap claim[ed] render[ed] [its] performance impossible were foreseeable . . .". Further, Gap failed to raise a genuine issue of material fact since it continued to offer curbside pickup at the locations at issue, *and* in-person shopping at other locations throughout the COVID-19 pandemic.[76] Though performance of the contract here was burdensome, it was not, as it must be, objectively impossible.[77]

Gap's attempted failure of consideration defense also fell short.[78] Reading the language narrowly, the court rejected Gap's argument that because of the COVID-19 pandemic, there was a failure of consideration under the lease, and therefore that it should be rescinded. Instead, the court found that Gap continued to receive the consideration promised to it according to the lease (e.g., retail premises for its operations to house and sell merchandise).[79]

Finally, the court addressed Gap's argument that its lease should be modified because of a mutual mistake on behalf of both parties, for failing to address the possibility of a global pandemic.[80] The court once again rejected this defense. It found that although the parties failed to anticipate the direct and indirect limitations of the COVID-19 pandemic (to Gap's detriment), such "mistaken assumptions about the future do not amount to mutual

71. Gap v. Ponte Gadea, 524 F. Supp. 3d 224, 231 (S.D.N.Y. 2021).
72. *Id.*
73. *Id.*
74. *Id.* at 237.
75. *Id.*
76. Gap v. Ponte Gadea, 524 F. Supp. 3d 224, 237 (S.D.N.Y. 2021).
77. *Id.* at 237–38.
78. *Id.* at 238.
79. *Id.* at 224, 237.
80. *Id.* at 234, 239.

mistakes warranting rescission of a contract."[81] There exists a "heavy presumption" that a signed written agreement properly expresses the parties' intentions. Moreover, Gap failed to demonstrate that the alleged mistake "exist[ed] at the time" the lease was entered into.[82]

Gap illustrates a general principle, although not explicitly addressed in the holding, which is even better supported by other factually similar decisions, addressed later in this Note. A contracting party seeking to be excused from performance "must prove that it acted with diligence and in good faith to overcome the force majeure event."[83] In this case, the court seemed particularly attentive to the fact that Gap chose to close the stores at issue to in-person shopping (only offering curbside pickup), although no government order prevented these stores from remaining open to in-person shopping.[84] Gap then advanced arguments in support of its relief based in-part on the closing of these very same stores to in-person shopping.[85] It appears then that there existed an issue as to whether Gap acted to mitigate the financial burden placed on it due to the COVID-19 pandemic (the alleged force majeure event). This was ultimately a major obstacle in support of the finding that the force majeure event, as defined, had indeed occurred.[86]

B. THE GAP HOLDING IN CONTEXT

As previously alluded to above, one of the primary reasons for *Gap's* significance at the time it was decided was its apparent break not only with the political direction of the country at the time, but more importantly, previous tenant-friendly holdings even from the Southern District of New York.[87] A prime example of both the former and latter assertions can be found in the decision of *JN Contemporary Art v. Phillips Auctioneers*.[88] In this case, an art dealer had a contract with an auctioneer to sell paintings at an auction house in New York City.[89] The auctioneer canceled the auction and subsequently terminated the contract following Governor Cuomo's state of emergency declaration and later executive orders prohibiting the operation of non-essential businesses due to the COVID-19 pandemic.[90]

81. Gap v. Ponte Gadea, 524 F. Supp. 3d 224, 239–40 (S.D.N.Y. 2021).
82. *Id.*
83. Timothy Murray, *Force Majeure and Coronavirus (COVID-19): Seven Critical Lessons from the Case Law*, THE LEXIS PRAC. ADVISOR J. SUMMER 2020 (June 17, 2020) https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/force-majeure-and-coronavirus-covid-19-seven-critical-lessons-from-the-case-law.
84. *Gap*, 524 F. Supp. 3d at 230, 235.
85. *Id.* at 231.
86. *See generally id.*; *see also* Pennington v. Cont'l Res., 932 N.W.2d 897 (N.D. 2019); Murray, *supra* note 83.
87. Mittleman Kelly, *supra* note 14.
88. JN Contemp. Art v. Phillips Auctioneers, 507 F. Supp. 3d 490 (S.D.N.Y. 2020), aff'd, 29 F.4th 118 (2d Cir. 2022).
89. *Id.* at 495.
90. *Id.* at 497.

The art dealer sued the auctioneer (to enforce the contract) also in District Court for the Southern District of New York.[91] However—seemingly at odds with its findings in *Gap* only a year later—the Southern District dismissed the case as a matter of law in favor of the auctioneer, relying on the contract's force majeure provision.[92] In *Phillips*, the force majeure provision of the contract read:

> 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. . .[93]

Importantly, this particular force majeure provision, as was the case with most of the force majeure provisions written prior to the COVID-19 pandemic, did not specifically list out a pandemic, epidemic, or anything related to a public health crisis as a force majeure event.[94] Most relevantly to the argument of this Note, however, was the broadly written catch-all introductory language preceding the force majeure event list.[95] Specifically, the phrase "circumstances beyond our or your reasonable control, including, without limitation . . ." in addition to the broad reference to "natural disaster," is what was relied on by the court.[96] These phrases ultimately relieved the defendant of its contractual obligations due to the COVID-19 pandemic—although it was never actually mentioned under force majeure.[97] At first-glance, *Gap* may seem at odds with the holding in *Phillips*. However, these two seemingly contrasting decisions—by the same court and just a year apart—are separated merely by the inclusion of a catch-all phrase and the words "natural disaster."[98]

Loosely reading the phrase "natural disaster," the *Phillips* court found that, despite the explicit reference to it, the contracting parties intended for a pandemic to fall under the purview of force majeure.[99] Among other things, the court relied on dictionary definitions in determining "that the COVID-19 pandemic [was] a natural disaster."[100] Furthermore, the *Phillips* court broadly

91. *Id.* at 498.

92. *Id.* at 502–04, 508; *see generally Gap*, 524 F. Supp. 3d at 241.

93. *Phillips Auctioneers*, 507 F. Supp. 3d at 496.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 501, 506.

98. *See Phillips Auctioneers*, 507 F. Supp. 3d at 496; *see generally Gap*, 524 F. Supp. 3d at 241.

99. *See Phillips Auctioneers*, 507 F. Supp. 3d at 500–01; *see also* David Farren, *Force Majeure and the Coronavirus Pandemic a Case Law Update*, JD SUPRA (Feb. 12, 2021), https://www.jdsupra.com/legalnews/force-majeure-and-the-coronavirus-9145251/.

100. *Phillips Auctioneers*, 507 F. Supp. 3d at 501 (citing *Black's Law Dictionary* which "defines 'natural' as '[b]rought about by nature as opposed to artificial means,' and 'disaster' as '[a] calamity; a catastrophic emergency.'").

interpreted the catch-all language preceding the force majeure list to include any circumstances beyond the parties' reasonable control, including "a pandemic requiring the cessation of normal business activity."[101]

Since the force majeure provision explained that such circumstances included "without limitation" a natural disaster, the broad language within the provision could not necessarily be constrained.[102] And as a basic principle of contract construction, the inclusion of the listed items could not narrow the general definition of the provision, especially when the contract directly indicates that the listed items are not to limit the overall scope.[103] Therefore, the COVID-19 pandemic and the subsequent government shutdowns fell "squarely under the ambit" of the parties' force majeure provision. The court's broad interpretation of the phrases "natural disaster" and "circumstances beyond [the parties'] reasonable control," therefore, was arguably also without limitation.[104]

While filed outside of New York, *UMNV 205-207 Newbury v. Caffé Nero Americas* (*Newbury*) provides another alternative, and perhaps useful, model for the legal interpretation of many of the lease-contract provisions discussed above. In *Newbury*, the landlord brought an action in Massachusetts Superior Court against the tenant-restaurant who, following the March 2020 shutdowns in the state of Massachusetts, ceased paying rent.[105] The Massachusetts Superior Court denied the plaintiff-landlord's partial summary judgment motion for breach of contract and related damages, instead ruling in favor of the tenant here.[106] The court found that the state-mandated shutdowns of businesses in Massachusetts in response to the COVID-19 pandemic, and the tenant's inability to host diners inside its restaurant, frustrated the purpose of defendant tenant's lease and excused its rent obligations.[107] Responding to the landlord's claim that the force majeure clause of the lease carved out any rent exemptions, the court—as others have—interpreted the force majeure clause more broadly, disagreeing that it addressed the complete frustration of the contract by an external event outside either parties' control.[108]

101. *See id.* at 501–02.
102. *See generally id.*; *see also* Farren, *supra* note 99.
103. *Phillips Auctioneers*, 507 F. Supp. 3d at 503 (internal citations omitted).
104. *Id.* at 501–02; *see also* Farren, *supra* note 99.
105. UMNV 205-207 Newbury v. Caffe Nero Americas, No. 2084CV01493-BLS2, 2021 WL 956069 at *2 (Mass. Super. Feb. 8, 2021).
106. *Id.* at *8.
107. The court applied a four-part test to determine frustration of purpose in this case. It evaluated: (1) the main purpose of the contract; (2) whether an event occurred that: caused a changed in circumstances so that the purpose of the contract can no longer be performed; and, destroyed the value of continuing to perform; (3) whether the non-occurrence of the even was a basic assumption of the contract; and, (4) whether the contract allocated the risk of that event to the party seeking to be excused. *Id.* at *5–6.
108. *Id.* at *6–7.

While the *Phillips* holding may have passed a hypothetical "conflict test" in the face of the *Gap* decision, there still appears to be disagreement within New York circuits on the issue of the COVID-19 pandemic in relation to many of the aforementioned contract provisions.[109] For example, in *188 Ave. A Take Out Food Corp. v Lucky Jab Realty Corp.* (*188 Ave.*), a New York trial court heard a claim involving another lease dispute between a plaintiff-tenant (a restaurant) and a landlord-defendant.[110] This particular landlord-tenant dispute hinged primarily on whether the tenant owed several months' rent to the defendant landlord, or if the New York State-mandated suspension of indoor dining in response to the COVID-19 pandemic amounted to a casualty under the provisions of the lease.[111]

The tenant in *188 Ave.* argued that the premises were "rendered partially unusable."[112] Additionally, it argued that "the state of emergency in New York engendered by the COVID-19 pandemic and consequent suspension of indoor dining for several months" fell under the casualty provision of the lease.[113] The court here agreed and held, among other things, that the "state-mandated suspension of indoor dining at restaurants, constituted a sudden, unexpected, unfortunate set of circumstances and, hence, a 'casualty' within the meaning of the lease that rendered the premises unusable for a period of time, and thus relieved the tenant of its obligation to pay rent."[114]

Admittedly, while the facts of the above decisions are nuanced and somewhat different, there remains several key lessons that can be extracted and learned from when looking at the decisions *en masse*. Initially, Gap's failure to self-mitigate the alleged negative effects of the COVID-19 pandemic in the face of loosening government restrictions seems to have been a major obstacle toward its own relief. Additionally, the industry in which a particular landlord-tenant dispute takes place is also a significant factor in any given court's ruling. Retailers, especially those that continued to provide alternative shopping experiences, will likely have a tougher time having performance excused than, for example, restaurants, where the pure dining experience is paramount. Most importantly, however, is the foreseeable tendency of the court to interpret all-inclusive force majeure lists narrowly (as discussed above), which illustrates a growing need for a reinvigorated "big-picture" approach to force majeure language drafting and list construction.

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109. *See generally Phillips Auctioneers*, 507 F. Supp. 3d at 503; *Gap*, 524 F. Supp. 3d at 231; Farren, *supra* note 99.
110. *Lucky Jab Realty*, 2020 WL 7629597.
111. *Id.* at *1–2.
112. *Id.* at *2.
113. *Id.*
114. *Id.* at *5–6.

III. THE BROADER IMPLICATIONS FOR CONTRACT DRAFTING

A. THE PROBLEM WITH THE TRADITIONAL APPROACH

In terms of its direct implications, it seems very likely that the most noticeable effects of the COVID-19 pandemic, and specifically the *Gap* holding, on not only commercial leasing but greater contract law, will be seen within the force majeure provision.[115] Prior to the COVID-19 pandemic, virtually all contract drafters failed to address the idea of a pandemic within the lines of their contract's force majeure clause.[116] In fact, a Westlaw search performed a month after the filing of *Gap* would have returned *zero* cases where force majeure clauses included the term pandemic within them.[117] The force majeure provision within the lease agreement at issue in *Gap* similarly failed to mention a worldwide pandemic or anything of that nature.[118]

The unfortunate reality here is that although the COVID-19 pandemic was unprecedented by modern standards, it was not the first pandemic this planet has seen, nor is it likely that it will be the last pandemic that could substantially hinder the performance or purpose of a lease or contract.[119] Accordingly, lease drafters must now consider not only the possibility of a future pandemic, but, even more so, the contractual risks it would expose landlord-tenant clients to.[120] And, as already witnessed, the failure to explicitly address a pandemic within the narrowly constructed language of Gap's force majeure provision led *it* to bear the full brunt of these risks.[121] For this reason, it seems likely that moving forward, contracting parties (*certainly*, Gap) will be steadfast on the inclusion of certain new key items (i.e., *pandemic* or *epidemic*) into the long-winded list of events within their own force majeure provisions which may ultimately excuse their performance.[122]

This sort of reaction by contracting parties would actually be quite expected.[123] Following the terrorist attacks of September 11, 2001 (9-11), contracting parties in New York City began addressing and including terrorism within their force majeure provisions as an excuse to contract

115. *See generally* Mittleman Kelly, *supra* note 14.
116. Schwartz, *supra* note 40.
117. *Id.*
118. *Gap*, 524 F. Supp. 3d at 228.
119. *Past Pandemics*, CDC (Aug. 10, 2018), https://www.cdc.gov/flu/pandemic-resources/basics/past-pandemics.html; Marco Marani, et al., *Intensity and Frequency of Extreme Novel Epidemics*, PNAS (Aug. 23, 2021), https://www.pnas.org/doi/10.1073/pnas.2105482118.
120. Paul M. Bagger, *The Importance of Force Majeure Clauses in the COVID-19 Era*, ABA (Mar. 25, 2021), https://www.americanbar.org/groups/litigation/committees/commercial-business/boilerplate-contracts/force-majeure-clauses-contracts-covid-19/; *see also* Marani, *supra* note 119.
121. *Gap*, 524 F. Supp. 3d at 237.
122. Schwartz, *supra* note 40, at 58; *see also* Bagger, *supra* note 120.
123. *See generally* Schwartz, *supra* note 40, at 58–59.

performance.[124] Prior to the tragic events of 9-11, the terms "terrorism" and "terrorist" were virtually absent from force majeure provisions of the same kind.[125] In a similar manner, references to "earthquakes" became commonplace within the force majeure provision following the 1989 Loma Prieta earthquake in California.[126] The point here is that in a commercial leasing context, a modified force majeure provision—one that accounts for a pandemic—would thus provide an avenue of relief for tenants in the event of another COVID-19-like pandemic.[127]

For all the hardship it caused, perhaps the COVID-19 pandemic has triggered a surprising realization that contract drafters have all along been thinking wrongly about the force majeure provision. Perhaps the customary drafting approach, i.e., attempting to list as many force majeure events as one's mind can possibly conceive and imagine, is counterintuitive and has exposed commercial tenants to more risk than it has actually shielded from.

To recap, following all three of the arguably significant events discussed above, all of which implicated force majeure, the force majeure provision seemingly failed to adequately protect, or rather, provide a defense to breach for lessees within their respective contracts or in New York courts.[128] More precisely, force majeure provisions were silent on the possibility of terrorism prior to the terrorist attacks on 9-11.[129] Again following the 2008 financial recession, force majeure failed to protect commercial tenants in court against a generational economic downturn.[130] And finally, following the onset of the global COVID-19 pandemic in New York City, tenants like Gap are, and continue to be, left holding the bag in court (or Zoom room), unprotected by force majeure provisions crafted to protect not just any ordinary main-street boutique storefront, but multi-billion-dollar retail conglomerates with teams of in-house lawyers.[131]

We witnessed the response of contract drafters following the terrorist attacks on 9-11, and the Great Recession of 2008.[132] Following these events,

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124. *Id.*

125. *Id.*

126. Murray, *supra* note 83.

127. *See* PRAC. COM. TRANSACTIONS, *supra* note 45; *see also* Ronald Richman, "*Force Majeure" and COVID-19: A Commercial Tenant's Guide*, BULLIVANT HOUSER (Apr. 2020), https://www.bullivant.com/force-majeure-and-covid-19-a-commercial-tenants-guide/.

128. *See* Richman, *supra* note 127; *see also* Robert Travisano & Robert Lufrano, *Lessons on Force Majeure Application from Past Crises*, LAW360 (June 12, 2020), https://www.law360.com/articles/1281855; *Force Majeure After 911: New Issues in a New World*, OUTSOURCING CTR., https://www.outsourcing-center.com/force-majeure-after-911-new-issues-in-a-new-world-article/ (last visited Nov. 18, 2021).

129. Schwartz, *supra* note 40, at 58–59.

130. Andrew C. Smith et al., *Tour de Force: Do the Current Economic Conditions Caused by COVID-19 Constitute a Force Majeure Event?*, PILLSBURY (July 1, 2020), https://www.pillsburylaw.com/en/news-and-insights/tour-de-force-3.html.

131. Schwartz, *supra* note 40, at 57.

132. *See id.* at 59; *see also* Cathryn A. Reynolds, *The Contract Law Aftermath of September 11: Force Majeure and "MAC" Clauses Re-examined*, ROBINSON & COLE (2001),

drafters quite literally expanded force majeure to include trending (and now necessary) terms (e.g., terrorism and recession).[133] And so, following the COVID-19 pandemic, we should again expect the same response, whereby phrases like "pandemic" will begin to appear in force majeure in mass.[134] Indeed this revamping process has already begun.[135] But we must ask, is this where the story for force majeure in the "Covid-era" ends? Are we really to expect that in the continued aftermath of a worldwide pandemic, contract drafters will quietly insert a few new words or phrases—to cover global pandemics—in their otherwise unmodified force majeure provisions, proceeding on until the next global catastrophe ravages their clients' businesses? From a historical perspective, this would seem to be the case.[136]

B. A NEW APPROACH

A different, albeit unconventional, approach may be more beneficial to a risk-averse commercial tenant.[137] Rather than creating an exhaustive list of events that fall under force majeure, contract drafters should consider scraping this traditional listing technique and instead incorporate overly broad catch-all phrases like "unanticipated events beyond the control of the parties."[138] The rationale behind such an approach would be two-fold. First, history demonstrates that contract drafters—attorneys—are incapable of predicting the future, specifically, unforeseeable events which may make contractual performance impossible for tenants.[139] Second, recent court decisions (discussed above) seem to indicate that the more exhaustive the force majeure list, the narrower the court will interpret the force majeure provision.[140]

From both a political and economic perspective, arguments have been advanced that the terrorist attacks of September 11 and the financial recession

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https://rc.com/publications/upload/978877_v5.pdf; Jamie Gottlieb Furia, *Client Alert: How Will Courts Interpret Force Majeure Clauses in the COVID-19 Crisis Response? Look to 2008 Recession Fallout for Clues*, LOWENSTEIN SANDLER (Apr. 6, 2020), https://www.lowenstein.com/news-insights/publications/client-alerts/how-will-courts-interpret-force-majeure-clauses-in-the-covid-19-crisis-response-look-to-2008-recession-fallout-for-clues-litigation.

133. *See* Reynolds, *supra* note 132; *see also* Gottlieb Furia, *supra* note 132.

134. *See* Daniel Sharma, *Coronavirus: The Second Wave and Force Majeure*, DLA PIPER PUBL'NS (Dec. 9, 2020), https://www.dlapiper.com/en-ie/insights/publications/2020/12/covid-19-the-second-wave-and-force-majeure.

135. *See id.*

136. *See* Reynolds, *supra* note 132; *see also* Gottlieb Furia, *supra* note 132.

137. Schwartz, *supra* note 40, at 60.

138. *See Phillips Auctioneers*, 507 F. Supp. 3d at 501; *see also* David Farren & Jaburg Wilk, *Force Majeure and the Coronavirus Pandemic a Case Law Update,* JD SUPRA, https://www.jdsupra.com/legalnews/force-majeure-and-the-coronavirus-9145251/ (last visited Nov. 19, 2021).

139. *See* Schwartz, *supra* note 40, at 60; *see also* Reynolds, *supra* note 132; Gottlieb Furia, *supra* note 140.

140. *See* Schwartz, *supra* note 40, at 60; *see also generally Phillips Auctioneers*, 507 F. Supp. 3d at 501–502; *Gap*, 524 F. Supp. 3d at 231, 237.

of 2008 could and should have been foreseen.[141] These arguments, however, were mostly directed at those holding power and at the highest levels of leadership on Wall Street and Capitol Hill, rather than the attorneys who failed to account for these events in the force majeure provisions of their lease agreements.[142] However, lawyers are not off the hook entirely. They also failed to adequately address the COVID-19 pandemic contractually, best evidenced by the increasing recommendations by law firms to clients for pandemic language to be included in force majeure provisions going forward.[143]

Contract drafters also seem to have fallen short in foreseeing the events of Hurricane Katrina in 2005, and the Great East Japan Earthquake of 2011 (and the subsequent Fukushima Daiichi nuclear accident) as possible force majeure events.[144] The point of these examples is not to shame an entire industry as being bad at predicting economic recessions, pandemics, and natural disasters. Even the most informed industry experts failed to do so. Rather it is to illustrate the problem with this habitual practice of attempting, and then failing, to predict the future.

Contract drafters have been historically lackluster at creating an exhaustive force majeure list that has actually succeeded in protecting commercial tenants in truly "unprecedented times" or during unforeseeable circumstances.[145] And as discussed, the legal industry reacted to these failures by recommending to clients the inclusion of that very same event or circumstance under force majeure moving forward.[146] This cycle of bad

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141. THE 9/11 COMMISSION REPORT, EXECUTIVE SUMMARY, NAT'L COMM. ON TERRORIST ATTACKS UPON THE U.S., (Aug. 21, 2004), https://govinfo.library.unt.edu/911/report/911Report_Exec.htm ("The 9/11 attacks were a shock, but they should not have come as a surprise. Islamist extremists had given plenty of warning that they meant to kill Americans indiscriminately and in large numbers."); Jeffry A. Frieden, *The Financial Crisis Was Foreseeable and Preventable*, THE N. Y. TIMES (Jan. 30, 2011), https://www.nytimes.com/roomfordebate/2011/01/30/was-the-financial-crisis-avoidable/the-financial-crisis-was-foreseeable-and-preventable ("But there should be no dispute over the fact that there were major warning signals before the crisis. Nor should there be any dispute over the fact that more appropriate policies could have reduced the impact of the crisis, or avoided it altogether.").

142. *See generally* NAT'L COMM. ON TERRORIST ATTACKS UPON THE U.S., *supra* note 141; Frieden, *supra* note 141.

143. *See* Smith et al., *supra* note 130; *see also An Updated Checklist & Flowchart for Analyzing Force Majeure Clauses During the COVID-19 Crisis*, GIBSON DUNN (Aug. 4, 2021), https://www.gibsondunn.com/wp-content/uploads/2021/08/an-updated-checklist-and-flowchart-for-analyzing-force-majeure-clauses-during-the-covid-19-crisis.pdf.

144. *See* Smith et al., *supra* note 130. *See* Stephan Michael Guderian, *Force Majeure Clauses and the Threat of Nuclear Disaster: A Japanese Case Study* (July 22, 2011) (MLB thesis, Bucerius Law School), https://www.gbv.de/dms/buls/668433973.pdf. *See generally* Steven F. Griffith Jr. & Mark W. Frilot, *Newsletter - Construction News, Force Majeure in Louisiana in the Wake of Hurricanes Katrina and Rita*, BAKER DONELSON (Jan. 17, 2007), https://www.bakerdonelson.com/Force-Majeure-in-Louisiana-in-the-Wake-of-Hurricanes-Katrina-and-Rita-01-17-2007.

145. *See* Schwartz, *supra* note 40, at 55; *see also* Reynolds, *supra* note 132; Gottlieb Furia, *supra* note 132.

146. *See* Schwartz, *supra* note 40; *see also* Reynolds, *supra* note 132; Gottlieb Furia, *supra* note 132.

imagination and bad predictions, and reactionary contract drafting as a result, is where the problem lies. What good is a force majeure provision to a tenant that can't shield it from certain events until *after* they've occurred and *after* their attorneys have had the opportunity to react to them? After all, a fundamental principle of contracts is that they are forward-looking, written to memorialize the parties' intentions and obligations, and protect them if disputes arrive in the *future*.

A force majeure provision is practically useful in that it can excuse a tenant's performance on a lease and allocate the risk of the unforeseeable.[147] However, the current dynamic has reduced the role of tenant's lawyers to mere "Monday-morning-quarterbacking," constantly trying to reconcile inadequate force majeure provisions with the catastrophe of the day. Certainly, the varying interpretations between courts have further complicated things, considering that open-ended catch-all language has been relied upon by courts in finding certain unincorporated events to still fall under force majeure (although, this lends to later conclusions within this Note).[148]

The inability of contract drafters, particularly over the past twenty years, to foresee significant generational events yields the additional question: where exactly does it end? Events beyond our imagination, "unknown unknowns," a phrase coined by former Secretary of Defense, Donald Rumsfeld, will continue to exist as long as the world around us continues to change and develop, which it inevitably will.[149] While this time around it was a once-in-a-lifetime global pandemic, there is no telling what exactly lies in store for this planet and its inhabitants.[150] Will it be global internet failure from cyberterrorism?[151] Maybe prolonged power grid failure, or maybe even disastrous global supply chain disruptions spurred on by the current pandemic?[152]

147. Bagger, *supra* note 120.

148. *See Phillips Auctioneers*, 507 F. Supp. 3d at 490, 498; *Caffe Nero Americas*, No. 2084CV01493-BLS2, 2021 WL 956069; *see contra Gap*, 524 F. Supp. 3d at 228.

149. Michael Shermer, *Rumsfeld's Wisdom*, SCI. AM. (Sep. 1, 2005), https://www.scientificamerican.com/article/rumsfelds-wisdom/ (during a "February 12, 2002, news briefing, Secretary of Defense Donald Rumsfeld explained: 'There are known knowns. There are things we know we know. We also know there are known unknowns. That is to say, we know there are some things we do not know. But there are also unknown unknowns, the ones we don't know we don't know.'").

150. Secretary General of the United Nations, Antonio Guterres, *All hands on Deck to Fight a Once-in-a-Lifetime Pandemic*, UNITED NATIONS (last accessed Nov. 19, 2021), https://www.un.org/en/un-coronavirus-communications-team/all-hands-deck-fight-once-lifetime-pandemic.

151. *See* Gabriel Weimann, *Special Report, Cyberterrorism, How Real is the Threat?*, U.S. INST. OF PEACE, 6–7 (Dec. 2004), https://www.usip.org/sites/default/files/sr119.pdf.

152. *See* Rene Marsh, *Energy experts sound alarm about US electric grid:'Not designed to withstand the impacts of climate change'*, CNN (June 2, 2022), https://www.cnn.com/2022/05/31/us/power-outages-electric-grid-climate-change/index.html; Karen Levesley, *Supply Chain Issues and Force Majeure Clauses*, GATELEY LEGAL (Mar. 17, 2021), https://gateleyplc.com/insight/quick-reads/supply-chain-issues-and-force-majeure-clauses/.

Furthermore, it appears that drastically changing weather conditions, due to global climate shifts, could also lead to increasingly never-before-seen unprecedented weather events—beyond what scientists, let alone attorneys—can anticipate. While it is argued that these changing weather conditions could have lasting implications on how a court might define "unusually severe weather" under force majeure and how the same would analyze foreseeability (in the context of weather events), it also illustrates the increasing unpredictability of the world we now live in. Weather events may just be another category of events contract drafters will fail, once again, to imagine and account for.

The general consensus among the legal community seems to be that a properly crafted force majeure provision should include, among other things, a carefully construed list of every possible force majeure event, alongside a standard catch-all phrase.[153] Occasionally, a contract will simply provide a list, some long and some short, of potential force majeure events.[154] In this way, the better the imagination of the contract drafter, the more comprehensive the list, and thus, the logic goes, the less risk for the tenant. This is almost always the advice found in law firm publications and client alerts on the topic.[155] This traditional approach may seem sensible in the interest of transferring risk away from a tenant, especially considering the sheer number of unforeseeable possibilities which could hinder contractual performance, some of which were laid out previously. However, as asserted above, such an approach may do more harm than good, especially inside a New York courthouse.[156]

A force majeure provision that merely lists out every potential force majeure event is seemingly inconsistent with the presumptive purpose of the provision that the parties are grappling with the *unforeseeable* and attempting to negotiate and allocate the corresponding risk to one another.[157] It is well supported by the case law, particularly in New York, that a force majeure provision that includes an exclusive and exhaustive list of qualifying force majeure events will be construed narrowly by courts.[158] From a tenant's perspective, a narrow reading of a force majeure provision is, of course,

153. *See* Bagger, *supra* note 120; *see also* David A. Shargel et al., *Revisiting Force Majeure and Other Contractual Considerations Amid COVID-19*, THE NAT'L L. F. (Nov. 6, 2020), https://nationallawforum.com/2020/11/09/revisiting-force-majeure-and-other-contractual-considerations-amid-covid-19/.

154. Bagger, *supra* note 120.

155. *See id.*; Swata Gandhi, *Force Majeure and Contracting Strategies for the COVID-19 Era*, 67 PRAC. L. 55 (2021), https://www.mslaw.com/swata-j-gandhi/publications/force-majeure-and-contracting-strategies-for-the-covid-19-era; Travisano & Lufrano, *supra* note 128.

156. *See* Schwartz, *supra* note 40; *see generally* Bagger, *supra* note 120.

157. Bagger, *supra* note 120 ("Occasionally, a contract will simply provide a list, long or short, of potential force majeure events, although this approach seems inconsistent with the presumption that the parties are grappling with the unforeseeable when negotiating a force majeure clause.").

158. *See* Schwartz, *supra* note 40; *see generally Gap*, 524 F. Supp. 3d at 224; Gibson Dunn, *supra* note 143.

disadvantageous, especially if the event or circumstance at issue is not explicitly listed as a force majeure event.[159] It follows then that, considering contract drafters' less than proven track record of force majeure imagination, tenants should seek the broadest possible interpretation of their force majeure provisions.[160] In doing this, the attorney may be leaving the door open to some varying, and perhaps unpredictable, interpretations of the courts. However, the case law, and specifically a case such as *Phillips*, indicates that this could still be advantageous.[161]

This is not to say that lawyers should refrain entirely from listing out force majeure events within force majeure provisions (considering the force majeure provision at issue in *Phillips* still listed force majeure events), but rather that these lists should tend toward the shorter, and more importantly, broader side.[162] While *Phillips* demonstrates the tangible benefits of a broadly-worded force majeure provision, *Gap* shows the flip side of the coin—the detriments of too much specificity.[163] Ultimately, what separated the force majeure provisions in *Phillips* and *Gap*, the former being triggered and the latter not, was not necessarily the breadth of the force majeure event list used, but rather, the adequacy of the catch-all phrase, i.e., "circumstances beyond our or your reasonable control*, including, without limitation* . . . ."[164]

Incidentally, some commentators, looking through a business lens, argue that the addition of pandemic terminology in the force majeure umbrella may also have negative contractual effects, in that it could reduce a contracted-for amount of a product or, on the other hand, raise the rent amount of a lease.[165] While this may be true, it may also be true that the even more business-savvy move, from a *purely* cost-effective point of view, would be to welcome the total removal of a force majeure provision altogether, and instead rely on the common law defense of impossibility in force-majeure-type-situations.[166]

Such a business recommendation is likely to be totally at odds with legal orthodoxy. Nevertheless, it remains an interesting concept, considering the highly contestable nature of the force majeure clause and the historical failure for it to protect tenants when needed most.[167] Furthermore, this narrow

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159. *See generally Gap*, 524 F. Supp. 3d at 224.
160. *See* Bagger, *supra* note 120.
161. *See Phillips Auctioneers*, 507 F. Supp. 3d at 498; *Caffe Nero Americas*, No. 2084CV01493-BLS2, 2021 WL 956069.
162. *See Phillips Auctioneers*, 507 F. Supp. 3d at 501.
163. *See id.* at 500–01; *see also Gap*, 524 F. Supp. 3d at 237 (S.D.N.Y. 2021).
164. *See* Farren, *supra* note 99; *see also Phillips Auctioneers*, 507 F. Supp. 3d at 496.
165. *See* Schwartz, *supra* note 40, at 59 ("[f]rom a lawyer's perspective, then, it seems obvious to add "pandemic" to all Force Majeure clauses from here on out. From a business perspective, however, things are more complicated. Contract negotiations are dynamic, and your counterparties will respond if you seek to include "pandemic" to the Force Majeure clauses contained in future contracts. All else being equal, they will offer a lower price, because you are foisting the risk of nonperformance on to them.").
166. *Id.*
167. *Id.*

interruption often means that only the events and circumstances specifically mentioned within a force majeure clause will be covered.[168] While imagining and listing out every possible event that might occur in a force majeure provision might seem wise, it could have inverse effects.[169] Certain events and circumstances are beyond the imagination of lease drafters and negotiators and would thus be uncovered by a force majeure. The more terms listed within the force majeure provision then, the narrower the court will interpret the same.[170]

C. AN ADDITIONAL FALLBACK: FRUSTRATION OF PURPOSE

The point of this Note is certainly not to make the argument for a weakened force majeure provision *per se*. On the contrary, it advocates for a different perspective that has the potential to perhaps strengthen force majeure and tilt the scale back in favor of tenants. However, this is not to say that without an ironclad force majeure provision, arguments in defense of breach will all but fall by the wayside.[171] Common law defenses to breach, specifically frustration of purpose, would still provide potential avenues for contractual relief for tenants even without the additional protection of force majeure.[172]

Additionally, while specific boilerplate contract provisions like force majeure may be impacted by the *Gap* holding and the COVID-19 pandemic, it seems that common law contract doctrine may also experience developments following *Gap* and other decisions that will undoubtedly follow in its footsteps.[173] Specifically, the court's finding regarding Gap's frustration of purpose argument is significant plainly due to its apparent harshness. Other decisions, involving relatively similar facts, have produced far more generous outcomes for tenants due to more laxed court interpretations.[174] The primary difference is often the kind of industry of the lease, e.g., retail versus hospitality.

168. *Id.*

169. *See* Bagger, *supra* note 120. *See also* Schwartz, *supra* note 46 at 56–69.

170. *See* Schwartz, *supra* note 40.

171. *See* UMNV 205-207 Newbury v. Caffe Nero Americas, No. 2084CV01493-BLS2, 2021 WL 956069 (Mass. Super. Feb. 8, 2021); *see also* Shireen Barday et al., *When a Commercial Contract Doesn't Have a Force Majeure Clause: Common Law Defenses to Contract Enforcement*, GIBSON DUNN (Apr. 24, 2020), https://www.gibsondunn.com/wp-content/uploads/2020/04/when-a-commercial-contract-doesnt-have-a-force-majeure-clause-common-law-defenses-to-contract-enforcement-1.pdf; Andrew A. Schwartz, *A COVID-19 Quandary: Does a Force Majeure Clause Displace the Frustration Doctrine?*, THE CLS BLUE SKY BLOG (Apr. 5, 2021), https://clsbluesky.law.columbia.edu/2021/04/05/a-covid-19-quandary-does-a-force-majeure-clause-displace-the-frustration-doctrine/.

172. Barday et al., *supra* note 171.

173. Schwartz, *supra* note 40, at 49, 52, 60.

174. *See Caffe Nero Americas*, No. 2084CV01493-BLS2, 2021 WL 956069.

In cases involving restaurants, for example, courts *have* been willing to find the "in-person experience" so fundamental to the lease that without it, such has been frustrated.[175] It is puzzling, then, why the in-person experience was seen as inferiorly important to a retail store like Gap. It also raises an additional question: what would the outcome of this case have been *had* Gap's business model been so fundamentally based on the in-person shopping experience? Sure, retail consumers can shop in-store and online, and they can receive their goods via curbside pickup. However, the same is true for restaurant diners who can also order online and receive their food *via* delivery or curbside pickup. The point is that frustration of purpose, although a contracted-for element of most leases, may entail more subjectivity and rely more on perspective than previously thought.

CONCLUSION

Undoubtedly, the COVID-19 pandemic created significant difficulties for commercial tenants and landlords across the globe. Arguably, no city was hit harder than New York City. From a tenant perspective, the most effective way to avoid similar difficulties and retain the intended-for protection of the force majeure provision is through broad catch-all language, designed to expand the protective bubble of force majeure, rather than narrow it, as exhaustive lists often do. While history teaches us that contract drafters will unironically insert pandemic language into the force majeure provision going forward, the lessons detailed in this Note, from *Gap*, and other related decisions, should inspire contract drafters to finally consider a new approach, or risk repeating the same mistakes once again.

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175. 188 Ave. A Take Out Food v. Lucky Jab Realty, No. 653967/2020, 2020 WL 7629597 at *6 (N.Y. Sup. Ct. Dec. 21, 2020).

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