Force Majeure Clauses in the Face of COVID-19: Commercial Leasing Guidance (CA)

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This practice note explains what a force majeure clause is and how and under what circumstances a force majeure clause in a commercial lease may be invoked due to the novel coronavirus (COVID-19) and California's Safer at Home Order. It addresses the likelihood a force majeure clause will be enforced in California, other related impossibility defenses, and considerations for commercial lessors and lessees going forward. Have no doubt about it—if you are a lessor or a lessee (or their counsel), you will be forced to understand the concept of force majeure in the months or even years ahead.

For general guidance on commercial leasing in California see Commercial Real Estate Leasing (CA) and Office Leasing Resource Kit (CA).

For California lease forms see Office Lease Agreement (Long Form) (CA) and Retail Lease Agreement (Long Form) (CA).

California Commercial Real Estate Leases and COVID-19

Remember when the 2008 financial crisis seemed like the worst thing that could happen to a generation? Or perhaps in the past, your client's business was interrupted by bad weather, earthquake damage, or even an outbreak of norovirus or other sickness halting or disrupting operations for a short while. No one could have imagined the situation that the world finds itself in now, and we are undoubtedly just beginning to see the ripple effect that the COVID-19 pandemic will have on businesses around the world.

California is one of the states with the highest numbers of infected individuals in the country. Governor Gavin Newsom has ordered all residents of California to stay at home "except as needed to maintain the continuity of operations of the federal critical infrastructure sectors." Safer at Home Order for Control of COVID-19 (Safer at Home Order), Executive Order N-33-20 (March 21, 2020). The Safer at Home Order permits only specified essential businesses to remain open, which includes businesses in the commercial facilities sector. As a result, commercial real estate lessors and lessees have been closely reviewing their leases for a contractual basis to consider the likely mounting requests for rent relief, abatement, or waivers, excused performance, or even notices of termination. Undoubtedly, force majeure clauses are being carefully considered to determine next steps.

What Is a Force Majeure Clause?

General commercial contracts (including commercial real estate leases) often contain a force majeure clause that excuses performance of the contract under certain specified conditions. While some may equate force majeure with only excusing acts of God, such as extreme weather events (e.g., tornados, hurricanes, earthquakes, etc.), force majeure also extends to those impossibilities caused by human acts as well. Mathes v. City of Long Beach, 121 Cal. App. 2d 473 (1953); see also Emelianenko v. Affliction Clothing No. 09-07865 MMM (MLGx), 2011 U.S. Dist. LEXIS 165598 (C.D.

Cal. July 28, 2011). Human acts, as distinguished from acts of God, include governmental actions, acts of war, economic downturn, and terrorism.

In California, the test for determining if performance can be excused based on a force majeure event is "whether under the particular circumstances there is such an insuperable interference occurring without the parties' intervention as could not have been prevented by prudence, diligence and care." Horsemen's Benevolent & Protective Assn. v. Valley Racing Association, 4 Cal. App. 4th 1538, 1564–65 (1992); see Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal. 2d 228, 238 (1946).

What Does a Force Majeure Clause Do (or Not Do)?

A force majeure clause is not intended to buffer a party against the normal risks of a contract, and a court will not interpret a force majeure clause to excuse a party from the consequences of a risk that it expressly assumed if it would nullify a central term of the contract. Horsemen's Benevolent & Protective Assn., 4 Cal. App. 4th at 1565.

In California, a party seeking to invoke a force majeure clause has to show "that in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive." Oosten v. Hay Haulers Dairy Employees & Helpers Union, 45 Cal. 2d 784 (1955) (buyer refused to accept seller's milk because buyer's employees threatened to go on strike if they had to handle milk however threatened strike did not render performance impossible under the force majeure clause); see also Jin Rui Group, Inc. v. Societe Kamel Bekdache & Fils S.A.L., 2015 U.S. App. LEXIS 19285 (9th Cir. 2015) (force majeure clause did not excuse plaintiff from performing contract even though contract excused it from non-delivery "arising from any event beyond its reasonable control" where plaintiff promised to deliver paper to defendant without securing assurance from third-party supplier); and Nissho-Iwai Co., Ltd. V. Occidental Crude Sales, Inc., 729 F.2d 1530, 1540–42 (5th Cir. 1984) (noting California law reads into force majeure provisions a "good faith" requirement that the party invoking the defense did not cause the excusing event and took diligent and reasonable steps to ensure performance). In fact, just because performance of a contract obligation will be more costly than anticipated, it will not be excused by a force majeure provision unless there "exists extreme and unreasonable difficulty, expense, injury or loss involved." Butler v. Nepple, 54 Cal. 2d 589, 599 (1960).

In addition, unless a contract explicitly identifies an event as force majeure, the event must be unforeseeable at the time of contracting to qualify as such. Watson Laboratories Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1111 (C.D. Cal. 2011) (FDA shut down of plant was foreseeable and thus not a force majeure event excusing performance); Free Range Content, Inc. v. Google, Inc., 2016 U.S. Dist. LEXIS 64365 (N.D. Cal. 2016) (given burden was explicitly placed on the plaintiff and did not identify the invalid activity as a qualifying force majeure event, performance not excused). Absent agreement to the contrary, responsibility for reasonably foreseeable force majeure delays generally falls on the party responsible for performing the work. McCulloch v. Liguori, 88 Cal. App. 2d 366, 372 (1948).

Furthermore, the nonperforming party has the burden to prove impossibility of performance under a force majeure clause. Butler v. Nepple, 54 Cal. 2d 589, 598 (1960). If there is substantial evidence in the record that a force majeure clause does not excuse performance, a court will find the nonperforming party in breach of the contract. Warner Bros. Pictures, Inc. v. Bumgarner, 197 Cal. App. 2d 331 (1962). In addition, to constitute a force majeure, a qualifying event must be the proximate cause of nonperformance of the contract. Hong Kong Islands Line America S.A. v. Distribution Services Limited, 795 F. Supp. 983, 989 (C.D. Cal. 1991).

In other words, a force majeure is not a get out of jail free card that can be used for every act of God or other unforeseeable event to excuse performance, and it will not automatically excuse performance because of COVID-19 or the Safer at Home Order. If you are a lessor, the provision may not protect you if you fail to perform the duties and obligations owed under the lease terms (e.g., making premises available, providing for utilities, etc.). For a lessee, despite the unprecedented and outrageous nature of our current circumstances, you may not be excused from your rent payment obligations or other duties owed under the lease terms.

Does Your Force Majeure Provision Excuse Performance of the Lease?

Whether you are a lessor or lessee, and whether you are trying to determine if your or the other party's performance is excused under the force majeure provision (or other defense), the first thing to figure out is whether the force majeure provision in your lease excuses the specific performance that concerns you. Assuming such a provision exists in your agreement, consider the following questions:

- What events are specifically identified?
- Is the language general and overbroad?
- Does the language specifically excuse the relevant performance? (e.g., is there language that excuses payment of rent due to a specified force majeure event?)
- Does it excuse a lessor from providing access to real estate in the event of a force majeure event? -and-
- Is the language ambiguous or overly broad?

Note that California courts have scrutinized the language of force majeure provisions and generally require that they excuse performance by a party only if the terms unambiguously excuse the specific performance at issue. In Vanguard Integrity Professionals, Inc. v. Team Gordon, Inc., 2008 U.S. Dist. LEXIS 127188 (C.D. Cal. 2008), for example, the plaintiff tried to cancel its sponsorship obligations for an international off-road race due to terrorist threats. The contract allowed the plaintiff to terminate if the defendant failed to perform any of the material obligations without cure. The contract specifically assigned the risk of loss to the defendant if it failed or refused to provide a race vehicle for three races for any reason, whether or not due to factors within or beyond the defendant's reasonable control. The race was cancelled due to a terrorist risk. Because the force majeure language did not clearly state that the defendant assumed the risk of race cancellation due to an event like a terrorist threat, the court found that the defendant was not in breach even though the race was cancelled due to factors beyond defendant's control. Accordingly, given the ambiguity, there was a triable issue on the applicability of the force majeure provision.

If a force majeure provision is broadly worded, a court may also find that it could possibly cover an event that prevents performance. In Rio Properties v. Armstrong Hirsch Hackoway Tyerman & Wertheimer, 94 F. App'x 519 (9th Cir. 2004), for example, the force majeure provision broadly stated that it applied if "any party's performance became impossible by any [] cause" (except for any cause that either party had knowledge of). The court found that Rod Stewart's performance could be considered impossible due to his illness, even though the contract did not explicitly identify that as a force majeure event.

Take a close look at your force majeure provision because this is the first place the courts look to determine whether performance under your lease is excused. Is it possible that the language would excuse performance under the lease due to the COVID-19 or the Safer at Home Order? Or is the language so ambiguous and/or overbroad as to potentially include it as a force majeure event?

What Events Qualify as Force Majeure Event?

As for events that may or may not qualify as force majeure events, there is no California case law that addresses a situation even remotely similar to the COVID-19 pandemic. The closest events that could be applicable here are those involving world wars or governmental actions that prevent performance. Given that commercial leases vary greatly as to types of properties, uses, and contract language, it is important to understand the existing legal authority interpreting force majeure.

The following events have been held to be force majeure events that excused performance:

- **Wars**. Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal. 2d 228, 238 (1946) (World War II excused performance under a force majeure clause).
- **Illness**. Rio Properties v. Armstrong Hirsch Hackoway Tyerman & Wertheimer, 94 F. App'x 519 (9th Cir. 2004) (Rod Stewart's illness rendered his performance impossible, and broadly phrased force majeure applied).
- **New laws / unlawfulness**. Industrial Development & Land Co. v. Goldschmidt, 56 Cal. App. 507 (1922) (after signing lease for a winery and liquor business, the prohibition law came into effect making it unlawful to operate; lessee not bound for remainder of the lease term).
- **Specifically identified event**. InterPetrol Bermuda Limited v. Kaiser Aluminum International Corp., 719 F.2d 992 (9th Cir. 1984) (failure or delay of seller's supplier of product and transportation was a force majeure event because it was specifically called for in the force majeure language agreed upon).

The following events have **not** been sufficient force majeure events to excuse performance:

- **Limiting or restricting government regulation**. County of Yuba v. Mattoon, 160 Cal. App. 2d 456 (1958) (lessee agreed to lease land for percent of rice grown (or minimum rent) but did not use the land because it had to grow rice on other land; lessee was ordered by Department of Agriculture to limit rice production but performance not impossible and lessor was entitled to minimum rent); see also San Mateo Community College Dist. V. Half Moon Bay Ltd. P'ship, 65 Cal. App. 4th 401 (1998) (air quality regulations impeded drilling but did not render performance impossible).

- **Threatened strike**. Oosten v. Hay Haulers Dairy Employees & Helpers Union, 45 Cal. 2d 784 (1955) (force majeure language referenced strike; threatened strike not enough).
- **Non-impacting strike**. Butler v. Nepple, 54 Cal. 2d 589, 595-599 (1960) (although a force majeure clause in an oil drilling lease excused performance while the lessee was prevented from complying with its oil drilling obligations, in whole or in part, by strikes, the court of appeal upheld the trial court's decision that the lessee could have drilled for oil despite a steel strike because substantial evidence in the record showed that lessee had a list of casing companies willing to perform and it was not an excuse that lessee would have to pay premium prices for the casing due to the steel strike); see also Warner Bros. Pictures, Inc. v. Bumgarner, 197 Cal. App. 2d 331 (1962) (despite a force majeure clause in an employment contract that excused performance (paying of an actor's salary) if the preparation, production, or completion of motion pictures was prevented or materially hampered or interrupted by reason of strike, a writer's strike did not suspend production because there was substantial evidence in the record that production was scheduled to start subsequent to the writer's strike, and in years past scripts were not needed until right before production).
- **Increased expense / economic impact**. Butler v. Nepple, 54 Cal. 2d 589, 599 (1960) (increased prices of oil drilling casing due to a steel strike did not absolve a lessee's performance despite a force majeure clause that excused performance from strikes because there was no evidence that the expense was extreme or unreasonable); Horsemen's Benevolent & Protective Assn. v. Valley Racing Association, 4 Cal. App. 4th 1538, 1564–65 (1992) (force majeure provision could not be construed "to countenance a unilateral modification of payouts merely because the revenues were not as projected"); Hong Kong Islands Line America S.A. v. Distribution Services Limited, 795 F. Supp. 983, 989 (C.D. Cal. 1991) (force majeure provision required nonperforming party to prove that the claimed events made shipments "impossible" or "unprofitable;" however nonperforming party chose not to comply with the contractual obligations and instead chose another carrier to ship cargo; claimed force majeure events did not proximately cause the nonperformance); San Mateo Community College Dist. v. Half Moon Bay Ltd. P'ship, 65 Cal. App. 4th 401 (1998) (force majeure did not apply because market was poor, does not show impossibility); Citizens of Humanity, LLC v. Caitac Intern., Inc. No. B215232, 2010 Cal. App. Unpub. LEXIS 6194, at *44–45 (Aug. 3, 2010) (nonperforming party's was aware of decline in Japanese market at the time agreement was signed and could not rely on any force majeure to excuse performance; in addition, contract provided, "[f]orce majeure shall not, however, excuse the obligation of a party to make any payments required under this Agreement.").
- **Normal risks**. Emelianenko v. Affliction Clothing, 2011 U.S. Dist. LEXIS 165598 (C.D. Cal. July 28, 2011) (defendant unable to rely on doctrine of force majeure because plaintiff's opponent became ineligible to fight as a result of testing positive for steroid use given plaintiff had presented evidence from which a jury could have reasonably concluded that the opponent's ineligibility was one of the "normal risks" of a bout contract).

Other Principles Related to Excused Performance of Contractual Obligations

In addition to the force majeure provisions in your lease, the principles of impossibility, impracticability, and frustration of purpose can also come into play and excuse performance for parties to a lease.

- **Impossibility**. The doctrine of impossibility excuses performance that becomes impossible to perform or impractical because of extreme and unreasonable difficulty, expense, injury, or loss involved. Impossibility also requires that the event causing it is not foreseeable at the time the contract was entered into. Like force majeure, impossibility can also be based on an act of God. Cal. Civ. Code § 1511, for example, excuses performance of a contract when a party "is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary." See also Cal. Civ. Code § 1441 (holding that a contract that is impossible or unlawful to fulfill is void); Cal. Civ. Code § 1596 (the object of a contract must be lawful when the contract is made and possible and ascertainable by the time the contract is to be performed).
- **Impracticability**. The doctrine of impracticability excuses performance that becomes impractical due to "excessive and unreasonable expense" but does not include "mere difficult, or unusual or unexpected expense."
- **Frustration of purpose**. The doctrine of frustration will excuse performance if the purpose of the contract has been frustrated by "a supervening circumstance that was unanticipated such that performance is substantially destroyed."

Like a force majeure provision, these doctrines can be used to excuse performance; however, they too have their limitations.

General Case Law

Impossibility excuses performance when it has literally become impossible. In Collins Hotel Co. v. Collins, 4 Cal. App. 379 (1906), for example, a building height ordinance prevented the builder from building the promised hotel, which would have exceeded the height limits. See also Dairy Food Store, Inc. v. Alpert, 116 Cal. App. 670 (1931) (street widening prevented erection of building with certain frontage dimensions because it became impossible to do); Miranda v. Williams, 2008 Cal. App. Unpub. LEXIS 9239 (2008) (city refused to issue permit to build house and builder excused from performance).

Alternatively, if there are increased costs associated with performance or one that could have been reasonably anticipated, the doctrine of impossibility will not apply. See Kennedy v. Reece, 225 Cal. App. 2d 717, 724–25 (1964); Ellison v. City of San Buenaventura, 48 Cal. App. 3d 952, 962 (1975). If a governmental act or law makes the performance either more expensive or unprofitable but still possible, then performance will also not be excused. See McCulloch v. Liguori, 88 Cal. App. 2d 366 (1948) (delay in construction caused by government regulations was reasonably foreseeable and did not excuse performance); Connick v. Teachers Ins. & Annuity Assoc., 784 F. 2d 1018 (9th Cir. 1986) (retired employee could not get lump sum payment because IRS code change did not constitute changed circumstances to justify voiding the contract).

Case Law That Might Provide Guidance for COVID-19 Situations

Lessors and lessees of commercial real estate should pay particular attention to the following decisions which, while old, may provide guidance to courts in dealing with the issues and claims arising out of the COVID-19 situation and Safer at Home Order.

In Mitchell v. Ceazan Tires, Ltd., 25 Cal. 2d 45 (1944), the California Supreme Court did not invalidate a lease by commercial frustration where the United States' involvement in a war was imminent and the federal government imposed a war time restriction on the sale of new automobile tires. The lessee had rented space in a building for the purpose of operating a tire wholesale outlet store and the court held that the value of the lease was not completely destroyed, and the lessee was still free to operate a business related to the sale of tires or sublease the premises. See also Rose v. Long, 128 Cal. App. 2d 824 (1954) (even though county building department posted notice that building was unsafe for occupancy, lessee still required to pay rent because lessee could have taken steps to test right to occupy building, did not make any repairs before abandoning property, and did not wait to see whether the proposed ban on use would be enforced). If courts follow these rulings in response to attempts to excuse performance as a result of COVID-19 or the Safer at Home Order, it is possible that if leased premises can still operate as an essential service, there may be little relief.

Thus, similar to force majeure authority, the doctrines of impossibility, impracticability, and frustration of purpose are fact specific and dependent on the language of the lease.

Does the COVID-19 Pandemic or California's Safer at Home Order Constitute a Force Majeure Event?

Examine the Lease's Language

Whether the COVID-19 pandemic or the Safer at Home Order constitute a qualified force majeure event under your lease will depend, in large part, on the language of your lease. Does the force majeure provision:

- Specifically identify epidemics, pandemics, health crises, viruses, illnesses, or governmental actions as qualifying events?
- Have broad language that could encompass any of the above events or anything outside of the parties' control?
- State the exact performance that will be excused?
- Give guidance on what remedies exist if performance is excused?

Ask These Questions about Actions You Can Take

You will still need to take all measures within your reasonable control to perform under the lease. Whether you are a lessor or lessee, consider what you can still perform. Consider the following questions:

- Is the property still open for use, and is it considered an essential business?
- Is there any requirement that the property be closed down?
- If you have a mixed-use property where some businesses are considered essential and can remain open while others cannot, will that excuse the performance for those portions that are required to close?

- What if a business is capable of being open (e.g., a bar that is capable of serving take-out delivery) but is not in operation by choice?
- What if the leased premises are not necessarily essential for the operation of the business (e.g., online businesses)? -and-
- Will any performance for those leases be excused?

Considering these facts along with the Safer at Home Order and specific city or county level ordinances is essential to determine whether performance will be excused. Putting aside the possibility that the legislature may provide relief, the legal authority suggests that courts conduct a case-by-case analysis to determine whether performance has been excused.

Consider the Possible Long-Term Implications of COVID-19

Given the amount of uncertainty that surrounds the duration of the Safer at Home Order and the continued spread and duration of COVID-19, it is difficult to predict the long-lasting impact for commercial real estate. Options and issues that lessors and lessees should consider and address include:

- Whether premises will be abandoned
- Whether premises are permitted to remain open
- Whether businesses located at the premises have any chance of surviving and if so, for how long
    - Does the business rely on consumer/retail operations?
    - Is the business one that can continue to operate at a profit during the Safer at Home Order?
- Whether monthly lease payments should be halted, reduced, waived for a specified period, abated, and/or amortized
- Whether the lease term should be extended
- Whether any improvement obligations should be excused, enforced, or extended
- The role business interruption insurance plays in covering losses of lessors and lessees
- How the COVID-19 pandemic impacts the negotiation and drafting of force majeure provisions and commercial real estate leases more generally

Whether you are a lessor or a lessee (or their counsel), navigating the legal complexities and unknowns surrounding COVID-19 can seem daunting, and new case law will certainly arise during this unbelievable time. The considerations discussed above should, however, give you a foundation and understanding of how force majeure and the related doctrines of impossibility, impracticability, and frustration of purpose will impact performance of commercial real estate leases in California.

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