



MAY THE FORCE BE WITH YOU IN THESE UNCERTAIN TIMES

By Teri T. Pham and Chris Pacetti



Just when you thought everything was going good, nature -- or Big Brother -- throws you a curveball. What can you do when unforeseeable events like the COVID-19 pandemic and government shutdown orders wreak havoc in your personal life and business and prevent you from otherwise complying with your contractual obligations such as payment of rent or vendors or delivering goods and services? Well, there is a very common clause lawyers include in almost every contract, but which is seldom actually invoked -- the force majeure clause. The term *force majeure* literally means “superior strength” in French and the clauses are intended to cover situations beyond the control of the contracting parties, such as floods, earthquakes, natural disasters, and importantly, epidemics. Such “acts of God” would alleviate the parties of their obligations under the contract

where beyond the reasonable control of a party.

Notably, force majeure is not necessarily limited to the equivalent of an act of God. A party can invoke force majeure to excuse performance due to events that originate from humans. Examples include war, terrorism, workers’ strike, and, yes, potentially quarantine.

Nor is the application of force majeure limited to contracts which contain a force majeure clause. California Civil Code §1511 provides a defense to nonperformance: “(1) When such performance or offer is prevented or delayed by the act of the creditor, *or by the operation of law*, even though there may have been a stipulation that this shall not be an excuse; . . . (2) *When it 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 [.]”

Whether an express provision of the contract or caused by an act of God or humans, however, there must be a

nexus between the event and the inability to perform under the contract. The test is whether under the particular circumstances there was such an “insuperable interference occurring without the party’s intervention as could not have been prevented by the exercise of prudence, diligence and care.” *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.* (1945) 29 Cal.2d 228, 238. There must also exist “extreme and unreasonable difficulty, expense, injury, or loss involved.” *Butler v. Nepple* (1960) 54 Cal.2d 589, 599. While a contract technically does not need to be impossible to perform for force majeure to apply, courts tend to interpret and apply force majeure clauses narrowly.

For example, a downturn in the market alone is not enough for courts to invoke force majeure to allow parties to avoid rent payment and payments to vendors. *See San Mateo Community College Dist. v. Half Moon Bay Limited Partnership* (1998) 65 Cal.App.4th 401 (finding that the force majeure provision in a lease to an oil and gas company did not excuse the oil and gas company from

performance where there was a downturn in demand for oil and gas; *see also Citizens of Humanity, LLC v. Caitac Intern., Inc.* 2010 WL 3007771 (jean distributor's attempt to invoke force majeure to avoid payments to vendor under distribution contract due to market conditions rejected).

Similarly, the California Supreme Court has rejected the force majeure defense where a worker's strike renders compliance with a contract more expensive. *See Butler v. Nepple* (1960) 54 Cal.2d 589 (lessee precluded from invoking force majeure to avoid compliance with lease due to worker's strike increasing vendor costs for necessary materials).

In these rulings, courts have reasoned that where the unforeseen event is temporary and does not preclude performance completely, or the event's occurrence does not relate in time to the breach, force majeure does not apply.

Cases where courts have upheld force majeure include situations involving natural phenomenon, as well as government actions preventing performance. *See Johnson v. W. Air Express Corp.* (1941) 45 Cal.App.2d 614, 621 (force majeure upheld where jury

found airplane crash was due to "unusual forces of nature ... which could not have been reasonably anticipated, guarded against or resisted."); *Nat'l Pavements Corp. v. Hutchinson Co.*, 132 Cal. App. 235, 238 (1933) (sub-contractor excused from performance under Civil Code 1511 where city cancelled the general contractor's contract.)

Courts have yet to rule on the applicability of force majeure due to COVID-19 -- or more importantly, the government's responses and restrictions as a result of COVID-19. However, it is likely that businesses and individuals directly affected by these government orders (ie. travel restrictions and business closures) will be able to invoke the principles of force majeure and Civil Code Section 1511. In order to determine whether force majeure applies to their particular situation, individuals and businesses should carefully examine their contracts and determine what rights, remedies and requirements exist under the force majeure provision.

Some contracts may provide strict requirements which must be followed in order to assert the force majeure clause. One such common requirement is that the party invoking force

majeure must give notice to the other side. Courts have rejected the force majeure defense where adequate notice was not given. Other contracts may limit the types of situations where force majeure may apply, or limit the remedies available to a party invoking the clause.

In addition, obtaining and recording as many facts in support of the defense is critical. The burden is on the party asserting the defense to prove all necessary facts to support the defense.

Business owners should also consider whether it is commercially reasonable to perform under the contract, and whether there has been an effort to cure the breach or nonperformance. Courts will look to these efforts in determining whether a party's obligations should be suspended or excused.

These are just a few of the types of issues and considerations individuals and businesses must consider if seeking to apply force majeure. Clients should seek proper legal advice before attempting to invoke the defense, and to assist them in navigating through these uncertain times. ■

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