California Lawyers Association • Issue 3 2020

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A Force to Reckon With: Force Majeure in the Age of COVID-19

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Force majeure in French literally translates to "superior strength" and COVID-19 surely has flexed its muscles—completely disrupting our way of life, including commercial activity around the world. The effects and legal ramifications of the COVID-19 pandemic will continue to be felt even long after a vaccine is developed. Arguments are already being made in various arenas that public health orders and similar measures are disrupting or preventing entirely the performance of material contractual obligations. As a result, many are pulling out their contracts to examine the potential impact of force majeure on those deals. Many attorneys are trying to navigate this new post-COVID-19 pandemic world of business deals, and the implications of force majeure are at the forefront of these discussions.

Going forward, there is an expectation the impact of force majeure provisions on parties' duties to perform will be hotly contested. No California court has yet ruled on the issue of force majeure in the context of COVID-19; however, the available body of statutory and case law on force majeure can provide useful insight into how courts might rule.

Force majeure is a doctrine that has long been recognized in California. Civil Code section 3526, enacted in 1872, puts it succinctly: "No man is responsible for that which no man can control." Even in the absence of an explicit force majeure provision, an argument can be made regarding the impossibility of performance due to an act of God:

> The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:
>
> . . .
>
> 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[.][1]

To trigger force majeure, an event typically must be beyond the reasonable control of the contracting parties and have been unforeseeable at the time of contracting, unless it was specifically accounted for in the contract.[2]

In *Watson Laboratories*, the defendant, a pharmaceutical manufacturer, allegedly breached its contractual obligation to supply the plaintiff, a pharmaceutical distributor, with a hypertension drug. The parties were aware at the time of contracting that shutdown of the plant producing the drug was a possibility given the results of previous Food & Drug Administration (FDA) inspections, and specifically included in the force majeure provision contract language indicating that regulatory and other governmental action could be considered an event excusing performance.

After the contract was signed, the FDA did in fact conduct further inspections and shut down the plant in question. The defendant pointed to the specific language in the force majeure clause regarding excusing events. The court stated, while it was unclear whether the parties

intended to apply the common law doctrine of force majeure or supersede it with the contractual language, that did not matter because in either case the qualifying event must be beyond the reasonable control of either party.[3] This case came before the court on a summary judgment motion. The court denied the motion and left the question of whether the plant shutdown was beyond the reasonable control of either party for the jury.

Watson Laboratories also addressed a "separate proposition that a foreseeability requirement may be read into a contractual force majeure provision that does not expressly contain any such requirement."[4] The court noted two problems for the defendant: first, the plant shutdown was entirely foreseeable due to the parties' knowledge of previous issues with the FDA at the time of contracting; and second, the language in the force majeure clause referencing regulatory and other governmental action was boilerplate and not sufficiently specific.[5]

> [W]hen parties expressly contemplate a known risk of a regulatory prohibition, they should be expected to allocate that risk expressly, rather than rely upon a boilerplate clause enumerating a parade of horribles that are so unlikely to occur as to make them qualitatively different. In the absence of such allocation, only governmental action not previously contemplated could qualify as force majeure.[6]

Courts may not look favorably upon boilerplate force majeure clauses if a specific event that is known at the time of contracting is not included. If a precipitating event cannot be deemed to be unforeseeable, courts will look carefully at the force majeure language in the contract to see if the doctrine will apply. Thus, vaguely-described, boilerplate language may not pass muster if there was more specific information about a potential event available at the time of contracting. This is more likely to come up, as with *Watson Laboratories*, in the case of government action than with a natural disaster like a hurricane. In the case of COVID-19, where foreseeability of the pandemic is not in doubt, a contract negotiated and agreed upon at some point *after* the onset of the pandemic will likely have to include very specific language about how force majeure is triggered.

For contracts entered into prior to the onset of COVID-19, it is unlikely that courts will conclude that the pandemic was either foreseeable or not beyond the control of the parties. Accordingly, courts may look at specific language in contracts that might address force majeure, particularly language that invokes a "pandemic," "epidemic," "pestilence," or the like. In contracts without such language, courts may consider potential application of the common law doctrine of force majeure.

California courts tend to view the doctrine of force majeure relatively broadly compared to other states, such as New York, which narrowly examine qualifying events. Force majeure "is not necessarily limited to the equivalent of an act of God. 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."[7] In *Pacific Vegetable*, defendant, a seller of copra (dried meat or kernel of the coconut), C.S.T., Ltd., failed to deliver a cargo of copra from the Fiji Islands to the plaintiff buyer, Pacific Vegetable Oil Corporation in San Diego. The parties were subject to certain rules of the Foreign Commerce Association of the San Francisco Chamber of Commerce, including the following force majeure clause:

> Seller shall not be responsible to Buyer for delayed or non-shipment directly or indirectly resulting from a contingency beyond his control, such as embargo, act of government, strike, fire, flood, drought, hurricane, war, insurrection, riot, explosion, epidemic, pestilence, earthquake, accident, perils of the sea, tidal wave, or any other contingency beyond Seller's control not herein enumerated. If, due to any of the causes provided herein, shipment by steamer is not made within two months or by sailing vessel within three months after the contractual time for shipment, contract shall terminate with respect to any goods not then shipped.[8]

Delivery of the copra was prevented by the United States' entry into World War II and resulting impossibility of obtaining necessary permits.[9] Whether failure to deliver was directly caused by the war itself, or indirectly by the changes to permitting and regulations resulting from the war, was of no consequence in evaluating the applicability of force majeure:

> War in either case was the "force majeure" or superior force which . . . sustained cancellation of the contract under the same rule which also provided that if, due to such contingency, shipment be not made within two months after the contractual time for shipment, the contract should terminate.[10]

California courts will likely evaluate the potential applicability of force majeure in the context of coronavirus along similar lines. It may be irrelevant if performance under a contract can be argued to have been thwarted by the "pandemic itself," or rather by some attendant legal effect downstream of the pandemic. The pandemic in either case would likely be determined to be the superior force sustaining cancellation of the contract at issue.

It could be argued the virus is not an "act of God" along the lines of a hurricane or other natural disaster, since the spread of the virus is caused by the actions of people. Such an argument would be heavily scrutinized by courts, however. *Pacific Vegetable* states the proper inquiry is whether "the exercise of prudence, diligence and care" could have prevented interference with a contract party's performance. It may be difficult for a party seeking to enforce a contract to demonstrate that any amount of prudence, diligence, and care could have anticipated the COVID-19 pandemic, its resultant spread, and disruption to commerce.

Certainly not every case in which force majeure is raised as a defense is an appropriate case for application of the doctrine. In the coming months and years, we can anticipate parties to raise as a defense the issue of significantly increased cost in complying with new laws and regulations meant to limit the spread of the coronavirus. However, "[e]ven in the case of a force majeure provision in a contract, mere increase in expense does not automatically excuse performance unless . . . 'extreme and unreasonable difficulty, expense, injury, or loss [is] involved.'"[11] In *Butler*, the plaintiff, the assignee of a lease, sued to recover rentals due under an oil and gas lease. Defendant, a drilling company, countered that because it could not obtain a drill casing necessary to perform work on the property at issue due to a steel strike, a force majeure provision in the contract obviated the need to pay any rent. Defendant sought a drill casing from another supplier, ultimately rejected it as overpriced, and failed to provide any information substantiating the gross price differential:

> [O]ther than characterizing the used casing available as "grossly overpriced," "completely out of line with the going price," and "way over the regular prices," defendant did not testify to what those prices were or by how much they exceeded the normal price for the same quality and type of casing.[12]

"[O]ther than his own characterization of the increased prices above noted, defendant gave the court no factual evidence upon which to base a finding that the increase in price was 'extreme and unreasonable.'"[13] Absent specific evidence, the court could not determine whether the price difference was extreme enough to properly invoke force majeure. Courts may be more inclined to make a finding of "extreme and unreasonable" business conditions if provided with specific information on which to base such a finding.

Following this rationale, expect courts to look for distinctions that may exist between contract terms that are verifiably "extreme and unreasonable" and those that would "merely" impose a price hike or some other onerous, but arguably not extreme or unreasonable, condition on performance. The latter would not qualify as excused under the force majeure doctrine.

In the entertainment and sports industries, this analysis might arise in the case of a film or television production, an industry trade show, a concert, a theater, a sporting event, or some other large-scale gathering that institutes new protocols to address COVID-19 and the related governmental regulations. Consider whether the changes in protocols are reasonable or whether those changes will rise to the level of being "extreme and unreasonable" as compared to pre-COVID-19 parameters. For example, a film set that must implement additional safety protocols such as hand sanitizing stations and having cast (while not filming a scene) and crew wear masks may not be unreasonable, while a live theater or music venue that mandates their performers, crew, and audience wear face masks and also limits seating to 50% capacity may be considered closer to "extreme and unreasonable." In live sports, if teams conduct events in arenas sans spectators, a significant amount of revenue will be lost from ticket sales, vendors, merchandise, and food services; this lost

revenue could be considered "extreme and unreasonable" and thus potentially implicate force majeure. The recent COVID-19 outbreak involving at least eighteen players and coaches on the Miami Marlins baseball team exemplifies how the pandemic can implicate theories of impossibility or impracticability of performance in live sports, and going forward may lead to other similar occurrences in all sports being deemed foreseeable.[14]

Courts may also look for terms in recently negotiated contracts that expressly address COVID-19 and how to address issues of performance in the post-COVID-19 climate. Parties negotiating contracts at present should give careful thought and consideration to the potential ramifications of COVID-19 on their obligations, as any pertinent contractual language will likely be deemed to control over the common law force majeure doctrine. Force majeure clauses in entertainment industry contracts may already describe the effect of guild strikes and other potential work stoppages in more detail than similar clauses in other industries, given the reasonable expectation that such events might affect a production. Parties should seriously contemplate additional contractual language necessary in the COVID-19 environment to trigger or prevent force majeure application in this new climate. Is travel likely to be an issue? What about the location of the production? Does anyone involved have a pre-existing health condition making them more susceptible to COVID-19? Are there any scenes, like kissing, that present unique potential exposure issues to actors? What attempts at mitigation are appropriate to require under the circumstances?

Closely related to force majeure are the doctrines of impossibility of performance and frustration of purpose. These doctrines may factor into an argument by a party to a contract that performance is made impossible or frustrated by COVID-19 in addition or in lieu of, a force majeure argument, and should not be overlooked.

A party asserting frustration of purpose must demonstrate that: (1) the frustration was so severe and harsh that the basic purpose of the contract was destroyed;[15] (2) the supervening circumstance or event was unforeseen and not the fault of one of the parties asserting frustration of purpose;[16] (3) the frustration was of the type not regarded as within the risks that were assumed under the contract;[17] and (4) the frustration was recognized by both parties to the contract (that is, both parties' purposes were frustrated).[18] The doctrine of impossibility is closely related to the doctrine of frustration of purpose but has one key difference: it hinges on the very *impossibility* of performance.[19]

Following from these elements, analysis of the potential application of the doctrines of frustration of purpose and impossibility of performance would closely track analysis of the application of force majeure. A good example in the entertainment industry context is a 1947 case involving plaintiff actor, Gene Autry, and defendant film production company, Republic Productions. Autry signed a contract prior to the commencement of World War II; by the end of the war, however, his physique and physical ability had changed so dramatically that he sought excuse of his performance as an actor on the basis that his physicality in roles as a tough cowboy was a primary source of his popularity and professional engagement by defendant. The court held that he was so excused, noting that "impossibility as excuse for nonperformance of a contract is not only strict impossibility but includes impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved."[20] Again, note the court's use of the phrase "extreme and unreasonable." As with the doctrine of force majeure, courts analyzing whether performance is excused by the doctrines of impossibility and frustration of purpose will likely look at where cases fall along the gradient from a "mere" increase in cost or some other condition of production to an outright "extreme and unreasonable" situation.

Force majeure and the related doctrines of impossibility of performance and frustration of purpose may be shaping the future contractual landscape post COVID-19 in ways not anticipated before the onset of the pandemic. Parties should carefully analyze their agreements negotiated prior to COVID-19 to see if there are any implications presented by the pandemic, and should negotiate future contracts with a keen eye toward new details that may be necessitated in our "new normal." It is always advisable to seek experienced counsel who can help navigate the post-pandemic legal and business landscape.

Endnotes

1 Cal. Civ. Code § 1511.

2 Watson Labs, Inc. v. Rhone-Poulenc Rorer, 178 F. Supp. 2d 1099, 1109-1114 (C.D. Cal. 2001).

3 *Id.*at 1110.

4 *Id.* at 1111.

5 *Id.* at 1113.

6 *Id.* at 1113-14 (italics in original).

7 Pac. Vegetable Oil Corp. v. C.S.T., Ltd., 29 Cal. 2d 229, 238 (1946).

8 *Id.* at 230.

9 *Id.*

10 *Id.* at 238.

11 Butler v. Nepple, 54 Cal. 2d 589, 599 (1960) (quoting Oosten v. Hay Haulers etc. Union, 45 Cal. 2d 784, 788 (1955)).

12 *Id.* at 598.

13 *Id.* at 599.

14 Analis Bailey, *Miami Marlins Season on Pause After Coronavirus Outbreak: What We Know Now*, USA Today (July 29, 2020), https://www.usatoday.com/story/sports/mlb/marlins/2020/07/29/miami-marlins-covid-19-outbreak-latest-updates/5528087002/.

15 Dorn v. Goetz, 85 Cal. App. 2d 407, 410-11 (1948); Brown v. Oshiro, 68 Cal. App. 2d 393, 397 (1945).

16 Gold v. Salem Lutheran Home Ass'n of Bay Cities, 53 Cal. 2d 289, 291 (1959); *Dorn*, 85 Cal. App. 2d at 412-13.

17 FPI Dev., Inc. v. Nakashima, 231 Cal. App. 3d 367, 398-99 (1991).

18 *Dorn*, 85 Cal. App. 2d at 412-13.

19 Peoplesoft USA, Inc. v. Softek, Inc., 227 F. Supp. 2d, 1116, 1119 (N.D. Cal. 2002).

20 Autry v. Republic Prods., 30 Cal. 2d 144, 148-49 (1947).

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