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Insights: Alerts

Impact of the COVID-19 Pandemic on Force Majeure Defenses Under California Law

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main COVID-19 Task Force page and/or your email for updates.

We previously wrote about the contract defenses that business may rely on when an epidemic or government orders impairs contractual performance (here and here) and recently analyzed the *force majeure* defense under Georgia, New York, North Carolina, and Texas law.

Here are some considerations when evaluating California *force majeure* defenses:

- *Force majeure* is a contract defense available to a party when the contract includes a clause excusing the non-performance of one or both parties to the contract because of a *force majeure* event. Similar common law defenses of commercial impracticability or frustration of purpose may be asserted even where a contract does not include a *force majeure* clause. Although California law melds the elements of contractual and common law *force majeure* defenses, this Legal Alert does not delve into the common law defenses as applied under California law.
- "A *force majeure* clause is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, [especially] as a result of an event or effect that the parties could not have anticipated or controlled." *Nat. Res. Def. Council v. Norton*, 236 F. Supp. 3d 1198, 1219 n.9 (E.D. Cal. 2017) (citation omitted).
- No matter what specific events are enumerated in a *force majeure* clause, California courts will not enforce the clause unless the qualifying event is beyond the parties' control. *See Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1110 (C.D. Cal. 2001) (applying California law and noting that "elements of the common law *force majeure* defense are often read into the *force majeure* provision of a contract," including the requirement that the event be "beyond the reasonable control of either party"); *see also Nissho-Iwai Co. v. Occidental Crude Sales*, 729 F.2d 1530, 1540 (5th Cir. 1984) ("California law of *force majeure* requires us to apply a reasonable control limitation to each specified event, regardless of what generalized contract interpretation rules would suggest.").

- In California, it isn't enough that a party was inconvenienced by COVID-19 and its various effects. Rather, a party invoking a *force majeure* clause must "show 'that, in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive." *Jin Rui Grp., Inc. v. Societe Kamel Bekdache & Fils S.A.L.*, 621 F. App'x 511, 511 (9th Cir. 2015) (quoting *Oosten v. Hay Haulers Dairy Emps. & Helpers Union*, 291 P.2d 17, 21, 45 Cal. 2d 784, 789 (Cal. 1955)).
- A party seeking to excuse performance under a *force majeure* clause needs to ensure that COVID-19 has truly affected the contract in its entirety, and not just its favorable terms. *Force majeure* clauses are "not intended to buffer a party against the normal risks of a contract," such as changes in market price. *Horsemen's Benevolent & protective Ass'n v. Valley Racing Ass'n*, 6 Cal. Rptr. 2d 698, 713, 4 Cal. App. 4th 1538, 1565 (1992) (citation omitted).

Our COVID-19 Task Force stands ready to help you navigate the unique business challenges posed by the pandemic and shelter-in-place orders. If you are interested in discussing a specific area of interest for your business, we recommend you reach out to your primary Kilpatrick Townsend point of contact. General questions may also be submitted via email to #COVID19TSTaskForce@kilpatricktownsend.com. For California-specific questions, you may also contact the attorneys listed below.

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