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Force Majeure and the Coronavirus

March 19, 2020

Governor Gavin Newsom and Los Angeles Mayor Eric Garcetti have recently ordered the limiting of public gatherings and the closing of all gyms, bars, wineries, breweries, and restaurants (other than take-out and delivery). The San Francisco Bay Area has issued "shelter-in-place" orders leaving many businesses to wonder if they are even allowed to remain open. As these precautions against the coronavirus continue, the threat of businesses being unable to meet the obligations of their leases, loans or other contractual obligations increases dramatically.

In this unprecedented and uncertain time for landlords and tenants, there are three words on the top of everyone's mind: "Seriously, no tests?!". Following closely behind those are most likely "Force Majeure Clauses." This article addresses how California courts might approach "force majeure" clauses (or lack thereof) in commercial leases or loan documents during this period.

"Acts of God"

"Force Majeure" is sometimes more commonly referred to as "Acts of God." Not to be taken literally, this label applies when, whether man-made or not, there is an insurmountable interference with a party's ability to meet its contractual obligations. This interference must be no fault of the non-performing party and unpreventable even after exercising all necessary diligence and care.[1]

Agreements Without A Force Majeure Clause

Section 1511 of the California Civil Code excuses performance of a party's contractual obligations "when it is prevented or delayed by operation of law" or by an "irresistible, superhuman cause." In other words, this section acts as a default "force majeure" clause for a contract without one. Therefore, a party may still be able to take advantage of force majeure protections even if the agreement does not contain a "force majeure" clause.

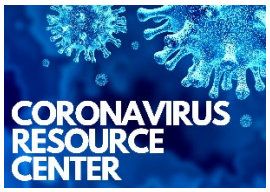
To do so, however, the non-performing party must be able to prove that (1) the force majeure, in this case the coronavirus pandemic, is responsible for the inability to pay, and (2) it was unforeseeable. While this global catastrophe was almost certainly unforeseeable, a business that was already suffering might not be able to use the virus as an excuse without proving a direct connection to its failure to make rent. Additionally, any burden resulting from the coronavirus must be more than an increase in expense or financial difficulty. The breach must result from circumstances that are "extreme and unreasonable."[2] This means the calculation may vary depending on the tenant: results may differ for Nike compared to a local mom and pop greeting card store.

Authors

Lee Dresie
310.201.7466
ldresie@ggfirm.com

Ken Fields
310.201.7462
kfields@ggfirm.com

Daniel Parino
310.201.7504
dparino@ggfirm.com



[1] *Pac. Vegetable Oil Corp. v. C. S. T., Ltd.*, 29 Cal. 2d 228, 238 (1946).
[2] *Butler v. Nepple,* 54 Cal. 2d 589, 599 (1960).

Agreements with a Force Majeure Clause

When an agreement of any kind does contain a "force majeure" clause, California courts have traditionally given the clause a strict interpretation, honoring the way the parties drafted the clause. "A *force majeure* clause is not intended to buffer a party against the normal risks of a contract.... A *force majeure* clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract."[3] Courts have said that when parties exclude certain "acts of God" or fail to include certain events within a list of permissible excuses, the breaching party will remain liable.

California courts' tendency to honor force majeure clauses may extend even to a lease or loan provision exempting obligations to pay from the clause's protection. Though no California case has directly dealt with this sort of a provision specifically within a lease, it has been upheld in the context of a sales contract. A court held in an unpublished opinion that a term reading "Force majeure shall not, however, excuse the obligation of a party to make any payments required under this Agreement" precluded the application of a force majeure defense to the payments required.[4]

Enforcing such provisions would be consistent with California's general approach to commercial leases and loans—that the commercial leasing market is competitive, and landlords and tenants should be able to freely contract in their own best interest. For example, as recently as February of 2020, a California court upheld a ***50%*** increase in rent for a holdover tenant who remained after the expiration of its lease.

These are Uncertain Times

In either case, whether relying on Section 1511 or a force majeure clause, an ***extreme or unreasonable*** difficulty or expense might justify excusing or delaying lease obligations. Most of the preventative health measures California has taken currently extend through the end of March or beginning of April. However, authorities do not know how long these mandates will remain in place. While a shutdown of two to three weeks may not qualify as extreme or unreasonable for some tenants, a lockdown of two to three months might.

Also of note, while California Civil Code 1511 allows parties to contract around the excuse of "irresistible, superhuman causes," delay or failure to honor an obligation resulting from operation of law will be excused "***even though*** there may have been a stipulation that this shall not be an excuse." This might force a court to have to evaluate how much responsibility falls on the pandemic itself and how much rests with the government's reaction. How courts might weigh these factors is difficult to foresee.

Parties to leases should also be aware that many courts are closed at the moment and many jurisdictions have already issued moratoriums against both residential and commercial evictions. This may give landlords more incentive to reach reasonable accommodations with tenants, perhaps through partial rent deferrals.

Given the uncertainty in all of this, parties on either side of a lease and/or loan documents would be best served by being proactive and communicating how the coronavirus and its accompanying restrictions are affecting their businesses and their properties. Likewise, parties entering into an agreement should address possible COVID-19 protections from the outset. By attempting to work out (reasonably and fairly) how this world-changing event will affect an agreement before a dispute lands in front of a judge, parties can attempt

[3] *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.*, 4 Cal. App. 4th 1538, 1565 (1992), *modified* (Apr. 6, 1992).
[4] *Citizens of Humanity, LLC v. Caitac Int'l, Inc.*, 2010 WL 3007771, at *15 (Cal. Ct. App. Aug. 3, 2010).

to avoid much of the unpredictability that will surely accompany pandemic-related litigation. As we have seen from the recent news, pretending it isn't happening leads to the worst of all worlds.

Should you have any questions or need for fact-specific advice, please do not hesitate to contact our attorneys at Greenberg Glusker.