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Force Majeure and Other Contract Performance Questions

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Force majeure clauses are being more closely scrutinized than ever in the thick of the current COVID-19 crises. "Force majeure" in the business world means a type of event – usually one that is unforeseeable – that renders performance of a party's obligations essentially or nearly impossible. Depending on a number of factors, including the law that governs the contract, the precise contract language and the facts at hand, events may or may not be considered one of force majeure that justifies a party's failure to perform or delays in performance.

The analysis turns on whether the event causing the failure to perform was foreseeable and whether performance is truly impossible. If complying with your contractual obligations is simply more difficult or expensive, an event will usually not excuse you from performing your obligations. While some force majeure clauses are written broadly and refer to "events beyond the reasonable control" of a party to the contract or simply "Acts of God", other clauses refer to an enumerated list of events. If a particular list of events is included in the clause, courts are less likely to read other events into the clause unless such events are extremely similar to the listed events. Typical examples of events that are considered force majeure events are hurricanes or tornados. Labor disputes and strikes are sometimes listed in clauses, but such events arguably are within the control of a party- such as if the company negotiates in good faith with the employee groups-and, therefore, may fall outside of the definition of a force majeure event.

In California, force majeure has been codified in Civil Code Section 1511 as an "irresistible, superhuman cause" or "by the act of public enemies of this state or of the United States". An "irresistible, superhuman cause" may be a hurricane that flattens a factory such that the factory cannot manufacture and ship its

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goods. An "act of public enemies" may be a terrorist attack, as we saw several cases after the 2001 events.

In assessing force majeure clauses, the language must be reviewed to determine if the terms cover both delays as well as the failure to completely perform. A clause must therefore be evaluated to determine what level of effort the party seeking relief from performance must exercise in order to do so, meaning in some cases that the party may first have to attempt to perform for a given time period. In addition, force majeure clauses may refer to a notice provision in the agreement, in which case you must ensure that you follow the guidelines on notifying the other party of your inability to perform or delay in performance. Sending an email may not suffice for notice if the contract requires notices to be sent via certified or registered mail, for example. Even if the force majeure clause does not refer to the notice provision specifically, care should be taken to follow the guidelines of how notice is to be sent. If notice is not properly tendered, a company may lose its ability to be excused from contract performance.

Force majeure clauses may indicate what specific performance under the contract is to be excused by the clause, and this may include all performance or could exclude payment obligations. However, even if a force majeure clause indicates that both performance or a failure to pay would be excused due to the event, generally, not being able to pay is not a breach that can be excused due to a force majeure event. Going back to the "impossibility" prong, one could see why this is so, as a financial hardship does not render payment impossible unless the banks are completely shut down.

Such a global pandemic of these proportions may not have been completely foreseeable, but it was certainly not out of question, particularly in scientific and medical circles. As courts tend to interpret force majeure clauses narrowly, it is questionable if cases arising out of contracts in these fields will interpret the clauses even more conservatively given that the parties objectively could have, or should have been able to anticipate, the possibility of such an event.

Many courts may not consider a pandemic or quarantine covered by the clause if there is only a broad catch-all force majeure clause. Again, this will depend on the law that governs the contract, a fact-specific analysis and of course how the language actually reads. Even when a contract lacks a force majeure clause, however, common law defenses to performance, such as impossibility, impracticability, frustration of purpose and illegality, should be considered. Without question, this is an intertwined, case-by-case analysis.

If an event occurs that seemingly and arguably would be considered a force majeure event, companies should look at mitigation efforts and alternatives. Once you have analyzed the contract with counsel and you understand your options under the contract, you may determine that talking it out with a customer honestly about your challenges may be best. The parties may work to negotiate a resolution that, although may not reflect the original intent of the contracting parties, is the best outcome in the given circumstances.

The analysis of how to interpret a force majeure clause is a complicated analysis that turns on multiple factors. We are here to assist in interpreting contract terms during this unprecedented time.