

Insights: Alerts

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

April 22, 2020

Written by Ronald L. Raider, Jason M. Wenker and Nancy L. Stagg

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.

Jon Michaelson
Silicon Valley Office
650.614.6462
jmichaelson@kilpatricktownsend.com

Nancy L. Stagg
San Diego Office
858.350.6156
nstagg@kilpatricktownsend.com

Related People



Ronald L. Raider

t 404.532.6909
rraider@ktslaw.com



Jason M. Wenker

t 336.607.7416
jwenker@ktslaw.com



Nancy L. Stagg

t 858.350.6156

nstagg@ktslaw.com