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PERSPECTIVE

5 guidelines courts will use to decide force majeure claims in COVID-19 cases

By Marco Quazzo

COVID-19 litigation is coming soon to a courthouse near you. Litigants will disagree over whether the pandemic is a valid basis for terminating contracts, withholding rent from landlords, extending the time to perform contracts, and the like. Under what circumstances will courts release parties from their contractual obligations based on force majeure? Court precedents from historical force majeure events (e.g., 9/11, the World Wars, Prohibition, and the 1918 Spanish influenza) provide a partial roadmap of how today's courts will address force majeure arguments in the context of COVID-19 litigation. Here are five guidelines that courts are likely to follow.

1. Courts will look beyond the contract language. Force majeure provisions in contracts provide merely a starting point. Because the 2020 pandemic is a once-in-a-lifetime event beyond the control of the contracting parties, courts will apply equitable considerations and public policy in deciding COVID-19 related claims. The equitable doctrines that courts have historically applied to force majeure events include frustration of purpose, operation of law, Act of God, and impossibility.

In response to COVD-19, the government has ordered most businesses to close and most of the population to shelter in place. Businesses and individuals in California who are delayed or prevented from performing their contractual obligations by these government restrictions will be excused by the operation of law doctrine, regardless of whether the parties have contractually agreed to the contrary. *See* California Civil Code Section 1511.

Similarly, courts may excuse parties from contractual obligations when it is impossible for them to perform. The issue in one case was whether a New Yorker was entitled to a refund of her vacation deposit after the terrorist attack on September 11, 2001. The contract allowed the travel agency to keep the deposit unless the traveler canceled more than 60 days before the departure date. The would-be vacationer tried to cancel immediately following 9/11, which was more than 60 days before departure. But she could not reach the travel agency for several weeks because of the emergency, near-lockdown conditions in New York City. The court found the equitable circumstances outweighed the contract language. It held that even though the vacationer's cancellation was untimely under the contract terms, she was entitled to a deposit refund if she could prove that the events of 9/11 made it temporarily impossible for her to contact the travel agency. *See Bush v. ProTravel Int'l, Inc.,* 746 N.Y.S.2d 790 (2002).

2. Courts will require parties to show something more than economic hardship. Parties seeking relief from contractual obligations will have to show that COVID-19 and the resulting government restrictions actually prevented their performance. It will not be enough for litigants to show the pandemic caused them financial difficulties or economic hardship, even to the extent of insolvency or bankruptcy. Courts will not excuse contract performance when unexpected or unforeseen government restrictions cause economic distress, even in a force majeure context. *See Lloyd v. Murphy,* 25 Cal.2d 48, 55 (1944); *Stasyszyn v. Sutton East Associates,* 555 N.Y.S.2d 297 (1990).

3. Courts will examine whether the pandemic completely destroyed the value of the contract. Some parties will try to cancel their contracts based on the pandemic. In these cases, courts will differentiate between parties who have seen the value of their contracts completely destroyed by the pandemic, and parties who have seen the value of their contracts merely reduced. The latter group will have difficulty obtaining relief.

Parties who have seen the value of their contracts completely destroyed may rely on the frustration of purpose doctrine. This doctrine applies when parties are receiving no consideration or benefit in exchange for their performance. But courts will not find that a contract's purpose is frustrated where the contract still retains some value for the party seeking to terminate. In one case the California Supreme Court addressed the issue of whether a car dealer could terminate his five-year lease after the government restricted the sale of vehicles as part of the World War II effort. The court described the doctrine of frustration as limited "to cases of extreme hardship so that businessmen, who must make their arrangements in advance, can rely with certainty on their contracts." The court found the lease retained some of its value because the car dealer could have continued to sell some vehicles and gasoline at the premises. The court further found the dealer could have sublet or assigned the lease to a third party. For these reasons and others, the court held that the dealer's attempt to terminate the lease was invalid despite the government's restriction of vehicle sales. *See Lloyd v. Murphy*, 25 Cal. 2d 48, 54 (1944).

4. Issues of fact will be more important than issues of law. Parties seeking relief from contractual obligations will have to marshal sufficient facts to support the application of force majeure to their particular circumstances. While some facts (such as the existence of government restrictions) will be undisputed, many more facts will be disputed. Parties will likely dispute whether government restrictions related to COVID-19 delayed or prevented performance of contractual obligations (as opposed to other causes), whether the complaining party could have mitigated the harm, whether the pandemic destroyed the value and/ or defeated the purpose of the parties' contract, and similar factual issues. *See, e.g.*, *Bush v. ProTravel Int'l, Inc.* Some disputed facts will require competing expert testimony, as occurred in one case where competing experts testified on whether rodent infestation of grocery store premises constituted an "act of God" justifying relief from lease obligations. *Whole Foods Market v. Wical Ltd.*, 2019 WL 5395739 (D.D.C. Oct. 22, 2019). Such factual disputes will prevent courts from disposing of cases on summary judgment, and require courts to conduct more trials of COVID-19 cases involving force majeure and related doctrines.

5. Courts will protect many American workers by enforcing employment agreements despite force majeure. The government response to COVID-19 has included a broad economic shutdown resulting in widespread job losses and economic difficulties for American workers. The same was true for the Spanish flu epidemic in 1918. In that crisis, courts required employers to meet their obligations to unionized workers and others with employment contracts, even when government closures and the epidemic prevented workers from performing their jobs. For example, the Illinois Supreme Court held that a school district could not rely on force majeure or the act of God doctrine to avoid paying a teacher who was idled when the epidemic forced schools to close. *Phelps v. School District No. 109, Wayne County*, 134 N.E. 312 (Ill. 1922). However, courts were split on whether force majeure doctrines excused school districts from paying school bus drivers under employment contracts during the 1918 epidemic. Compare *Crane v. School District No. 14 of Tillamook County*, 188 P. 712 (Or. 1920); and *Sandry v. Brooklyn School District No. 78 of Williams County*, 182 N.W. 689, 690- 91 (N.D. 1921).

Whether courts will enforce contracts as written, or allow force majeure and related equitable doctrines to excuse performance, will depend on the individual circumstances of each COVID-19 case. The pandemic is not a get-out-of-jail-free card that will liberate parties from contracts across the board. But these unusual times will partially upend the typical rules that hold contracting parties to their bargain. Legal precedents for historical force majeure events teach us that courts will have the discretion and flexibility to excuse contract performance in appropriate circumstances. ■

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