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PERSPECTIVE

To pay or not to pay: knowing when you can and can't rely on a Force Majeure

By Philip McDermott and Willow Karfiol

What is one way to prepare for the unexpected? A force majeure clause. The COVID-19 pandemic is the latest historical event that could neither be anticipated nor controlled by contracting parties at the time of contracting. California Appeals Courts have begun weighing the application of force majeure provisions in this context. Recent cases reveal that although COVID-19 certainly classified as a force majeure, individualized increase in expense does not present the objective impracticability required to rely on a typical force majeure clause to excuse non-performance.

Most recently, in *West Pueblo Partners, LLC v. Stone Brewing Co., LLC*, WL 3151827 (2023), the California Court of Appeal, 1st Appellate District, affirmed summary judgment on the basis that the COVID-19 pandemic force majeure event did not "delay, interrupt, or prevent" Stone Brewing from paying rent to its landlord, West Pueblo. (Cal. Ct. App., Apr. 3, 2023, No. A164022 at *7.)

In so ruling, the court of appeal reasoned that for the force majeure provision to have applied, "Stone's ability to pay rent must have been 'delayed, interrupted, or prevented' by COVID-19 because timely performance would have either been impossible or was made impracticable due to extreme and unreasonable difficulty." (*Ibid.*) However, because Stone conceded it had the ability to pay rent and instead chose not to perform due to financial constraints caused by COVID-related government regulations, the Court found that the force majeure event did not delay, interrupt, or prevent Stone from paying rent. (*Id.* at *2.)

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West Pueblo Partners, LLC follows another recent decision from January 2023 affirming summary judgment in favor of a landlord in a matter regarding non-payment of rent purportedly caused by COVID-19. (*SVAP III Poway Crossings, LLC v. Fitness International, LLC*, 87 Cal.App.5th 882 (2023).) While the trial court did agree with the tenant Fitness International that COVID-19 closure orders affecting its business were "restrictive laws," there was no supporting evidence that the cause of Fitness's inability to pay rent was such closure orders. (*Id.* at 892.) Most notably, the parties had included a provision in the contract that expressly excluded "from the definition of force majeure event any 'failures to perform resulting from lack of funds or which can be cured by the payment of money.'" (*Id.* at 892-93.)

These recent holdings are in line with the rule stated in California over 100 years ago that "[t]he impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it. If what is agreed to be done is possible and lawful, it must be done." (*Wilson v. Alcatraz Asphalt Co.* 142 Cal. 182, 188 (1904).) The mere increased cost to perform, even if relating to a true force majeure event like COVID-19, is not sufficient to make contract performance "impossible" or "impracticable due to extreme and unreasonable difficulty." But what is sufficient?

In 1909, multiple cities including Vernon entered into a contract with Los Angeles to have the latter dispose of Vernon's sewage. (*City of Vernon v. City of Los Angeles*, 45 Cal.2d 710, 713 (1955).) Over time, Los Angeles began altering its sewer system, including building a screening plant in 1923 that resulted in a series of nuisances. (*Ibid.*) Eventually in 1943, an abatement action brought by the Department of Public Health resulted in a judgment that ordered Los An-

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geles to construct a new screening plant to abate a nuisance and that the "lawful existence" of the 1923 screening plant had "expired." (*Id.* at 714,719.)

Because of this order, Los Angeles then sought to terminate its contract because continued sewage disposal for Vernon in the plant required by the abatement order would be "unreasonably excessive in cost" and the cost of this new plant's operation was something not in existence prior to the abatement order. (*Id.* at 719.) The trial court thus found in favor of Los Angeles on this point and the Supreme Court of California agreed. (*Id.* at 719,721.)

Similarly, in *Johnson v. Atkins*, 53 Cal.App.2d 430 (1942), the buyer's purchase of goods in Columbia was made impracticable when Columbian authorities denied entry of the seller's goods into the country, which was required for performance as understood by both parties at the time of contracting. (*Id.* at 435.) Unlike the tenants in *West Pueblo Partners, LLC* and *SVAP III*, the buyer established that it was outside of the buyer's reasonable control that Columbia would not grant the buyer the necessary permit for entry, causing the impracticability of performance. (*Ibid.*) Thus, the buyer's inability caused by forces outside of its reasonable control to perform the essential purpose of the contract as understood by both parties justified nonperformance under both the doctrines of impracticability and commercial frustration of purpose. (*Ibid.*)

Thus, *City of Vernon* and *Johnson* both show that a force majeure event on its own does not excuse performance unless it results in impossibility or impracticability to perform arising from the nature of the thing to be done itself, and not in the inability of the individual party to do it. This highlights how important contractual language is when drafting the particular provision defining what does and does not constitute a force majeure.

In general, performance is made impracticable "by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." (*Maudlin v. Pacific Decision Sciences Corp.*, 137 Cal.App.4th 1001, 1017 (2006).) While no one can see the future, assessing the risks when entering into a contract and setting forth the assumptions of what cannot occur for performance to be had when outside of the parties' reasonable control can be drafted into contracts (or out of them in the case of *SVAP III*.)