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"Force Majeure" and COVID-19: A Commercial Tenant's Guide

By Ronald L. Richman

The Covid-19 pandemic and statewide mandatory stay-at-home directives have negatively affected so many businesses. The loss of revenue associated with shuttering a business during the pandemic is putting a strain on commercial tenants' ability to meet their obligations under commercial leases, and in particular, monthly payment obligations. In these unprecedented times, a commercial tenant must look for ways to manage its lease obligations while shuttered.

Force Majeure Clause Basics

Most commercial leases include a "force majeure" clause that operates to either temporarily delay, or excuse, certain landlord and tenant obligations while the business is shuttered. However, many, if not most, "force majeure" clauses in commercial leases temporarily delay or excuse performance of obligations except for the tenant's obligation to continue to make its lease payments.

A "force majeure" clause in a lease is triggered when exceptional and/or unforeseen circumstances deemed beyond the control of the landlord and tenant prevent performance under the lease. In California, the concept of "force majeure" has its origin in two statutes enacted in 1872. Cal. Civ. Code § 3526 states: "No man is responsible for that which no man can control". Cal. Civ. Code § 1511(2) states a party is excused from performance under a contract:

[w]hen it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state of the United States, unless the parties have expressly agreed to the contrary

A "force majeure" clause in a commercial lease was historically triggered by an exceptional or unforeseen circumstance, beyond the control of the parties, often referred to as "an act of God". Today, "force majeure" is construed much more broadly. It may include, in addition to acts of God, strikes, lockouts, labor disputes, acts of war, terrorism, terrorist activities, inability to obtain services, labor, or materials or reasonable substitutes therefor, governmental actions, civil commotions, fire, flood, earthquake or other casualties.

In determining what is and is not considered a "force majeure" event to affect performance of the lease obligations, California courts look to the specific language of the "force majeure" clause in the lease. See generally *Watson Laboratories Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp.2d 1099, 1111 (CD Cal. 2001); *InterPetrol Bermuda Ltd. v. Kaiser Aluminum Intern. Corp.*, 719 F.2d 992, 998-99 (9th Cir. 1983).

Common "Force Majeure" Clauses

The following are some common "force majeure" clauses taken from commercial leases:

Force Majeure. Whenever a period of time is prescribed for the taking of an action by Landlord or Tenant (*other than the payment of Rent or the Security Deposit*), the period of time for the performance of such action shall be extended by the number of days that performance is actually delayed due to strikes, acts of God, shortages of labor or materials, war, terrorist acts, civil disturbances and other causes beyond the reasonable control of the performing party (each a "**Force Majeure Event**").

Force Majeure. Any prevention, delay or stoppage due to strikes, lockouts, labor



disputes, acts of God, acts of war, terrorism, terrorist activities, inability to obtain services, labor, or materials or reasonable substitutes therefore, governmental actions, civil commotions, fire, flood, earthquake or other casualty, and other causes beyond the reasonable control of the party obligated to perform, except with respect to the obligations imposed with regard to Rent and other charges to be paid by Tenant pursuant to this Lease (collectively, a "Force Majeure"), notwithstanding anything to the contrary contained in this Lease, shall excuse the performance of such party for a period equal to any such prevention, delay or stoppage and, therefore, if this Lease specifies a time period for performance of an obligation of either party, that time period shall be extended by the period of any delay in such party's performance caused by a Force Majeure.

Some leases now include viruses and pandemics as "force majeure" events. However, their inclusion does not help the tenant who is still obligated to make lease payments during a "force majeure" event.

Payment Obligations Under a "Force Majeure" Clause

Unfortunately, and especially now dealing with Covid-19 and the shuttering of non-essential businesses, it is more often the case that the tenant's obligation to continue its lease payments are neither delayed nor excused under a "force majeure" clause. A tenant seeking relief from its lease obligations under a "force majeure" clause must first look to the specific language of the "force majeure" provision to determine: (1) what events qualify as "force majeure"; and (2) whether the clause temporarily delays, or excuses, the lease payments during the mandatory shut-down period.

If the "force majeure" clause does not excuse or delay the lease payments during a force majeure event, a tenant can try to obtain relief from lease payment obligations under the theory of impossibility of performance. California law has long recognized that if it becomes impossible for one party to perform its obligations under a contract, the party may be completely excused from further performance. See generally *In re Toyota Motor Corp.*, 790 F.2d 1152, 1175 (C.D. Cal. 2011). If, on the other hand, the period of impossibility is temporary, California courts hold the obligation is not excused, but temporarily suspended, during the period of impossibility. *Maudlin v. Pacific Decision Sciences Corp.*, (2006) 137 Cal. App.4th 1001, 1017.

The Future

Because of the Covid-19 pandemic, we expect future commercial lease negotiations to involve a greater push by tenants to: (1) include viruses and pandemics in the definition of the "force majeure"; and (2) expand the "force majeure" clauses to either excuse or allow a delay of lease payments during the "force majeure" event. In the meantime, even if the "force majeure" clause does not excuse or delay the lease payments during the Covid-19 shut-down, the tenant should contact the landlord about the possibility of some relief from lease obligations during the mandatory shut-down period.