

## FORCE MAJEURE IN THE WAKE OF THE COVID-19 PANDEMIC



Businesses across the spectrum are suddenly and severely impacted by the COVID-19 pandemic. Forced to make difficult decisions about whether and how to continue their operations, many are asking: How can I get out of this contract? How can I avoid paying rent while I am forced to limit the operations of my business?

Many business owners and commercial tenants are hearing about a funky, unfamiliar legal term: “force majeure.” Contracts may contain force majeure clauses, but what do they really mean? Further, in the absence of a force majeure clause, California law excuses contract performance in certain extreme, unpredictable circumstances. Both situations are discussed in this article.

### **Scenario 1: The Contract Contains a Force Majeure Clause**

A force majeure clause is a contract provision that excuses a party from performing one or more of its obligations under the contract in the event that an unforeseeable event or circumstances beyond the party’s control arise, making such party’s performance under the contract impossible, inadvisable, commercially impracticable, or illegal.

These circumstances are identified in the contract as “force majeure events” – meaning if they occur and impact performance under the contract, and are beyond the reasonable control of the impacted party, performance is excused. **It is critical to carefully review the “force majeure” events identified in the contract.**

Common force majeure events include, but are not limited to: natural disasters (such as earthquakes, hurricanes, and fires), epidemics and pandemics, terrorist acts, war, government action, and even union activities such as strikes.

For example, a buyer, located in the San Francisco Bay Area, wishes to purchase a commercial real estate building. This buyer must wire her purchase price to an escrow agent located out of state. The day before buyer is set to wire her funds, a major earthquake hits the Bay Area. The buyer is now unable to complete her wire transfer in time, by no fault of her own. As such, because of the force majeure clause in the purchase agreement, buyer would not be in default of her purchase agreement for failing to wire her purchase price in time.

To determine whether an event occurred that allows enforcement of a force majeure clause, the following three criteria must be satisfied:

- The unforeseeable event must be one that is out of the reasonable control of the party seeking to excuse its obligations;
- The event must actually prevent a party’s performance under the contract and make it impossible, commercially impracticable, inadvisable, or illegal; and
- The party seeking to excuse its obligations due to an event of force majeure must have actively taken all reasonable steps to mitigate the event or avoid its consequences.

In the midst of the current COVID-19 pandemic, parties to a contract for an event rental space would be forced to rely on the contract’s force majeure clause to excuse their respective obligations: the party renting an event center would not be able to use the event center due to a government-mandated shelter in place order (such as Executive Order N-25-20, issued by California Governor Gavin Newsom on March 12, 2020), and the party owning the event center would not be permitted to host events due to the same order.

While force majeure clauses generally excuse performance for certain enumerated events, they can be conditioned on other performance continuing, such as giving notice of the event, attempting to mitigate or reduce damage from the event, having and implementing a disaster recovery plan, or using diligent efforts to avoid the event or its consequences.

### **Scenario 2: There Is No Force Majeure Clause in the Contract**

In the absence of a specific force majeure clause in the contract, California law can provide relief. It may take litigation to prove this, however.

California Civil Code section 1511 provides relief when performance of an obligation is made impossible by either: an irresistible, superhuman cause; or, an act of public enemies of California or the U.S.

Keep in mind that expense alone does not excuse performance. The unforeseen event must make obligating performance both “extreme and unreasonable” – in other words, impracticable.

Impracticability means that performance, while logically possible, is excused where performance would be so extreme and unreasonable that the situation is no different from one where performance is impossible. Alternatively, the frustration of purpose defense might apply. This defense is based on the premise that the contract’s purpose no longer exists. While performance may technically be possible (similar to impracticability), performance is functionally meaningless, useless, or senseless.

For example, if a company entered into a short-term lease with a landlord to rent a studio to be used for an art exhibitor in the San Francisco Bay Area from March 18 through May 15, 2020, the purpose of the lease would be determined to be a “Non-Essential Activity” under Governor Newsom’s Shelter in Place order, and no one would be able to attend the art exhibition. If the Lease contains a force majeure clause, the company could invoke a government order to be the triggering event to excuse its obligations under the lease. However, if the lease did not contain a force majeure clause, then the company would have the ability to assert a claim of frustration of purpose, because it’s foreseeable that no one would be able to attend an art exhibition due to the Shelter in Place order.

Interpreting force majeure clauses is complicated, as is determining whether performance is excused in the absence of force majeure rights due to impracticability and/or frustration of purpose. In addition, with respect to government orders, it’s important to understand that the most stringent and restrictive government order must be followed in the event that the terms of federal, state, and county orders are in conflict.

Hoge Fenton’s qualified team is here to help guide you during this difficult time. Please do not hesitate to reach out to our team below.



**Steven Kahn**

Shareholder/Chair  
Real Estate & Land Use  
Litigation  
+1.925.460.3362  
**[email here](#)**



**Darlene Chiang**

Of Counsel/Attorney  
Corporate & Business Law  
International Law  
+1.925.460.3367  
**[email here](#)**



**Tanya Falleiro Cox**

Attorney  
Corporate & Business Law  
Real Estate & Land Use  
+1.408.947.2423  
**[email here](#)**



**Scott Stuart**

Attorney  
Business Litigation  
Insurance Coverage  
+1.408.947.2414  
**[email here](#)**

## Related Attorneys

- Steven J. Kahn
- Darlene D. Chiang
- Tanya Cox
- Scott F. Stuart