

COVID-19 And Force Majeure: Lessons From Early Cases

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As America continues on its second month of social distancing and travel restrictions, COVID-19-related lawsuits have begun to spread, with parties variously portraying the pandemic to suit their respective positions, dissecting the often clumsy prose of force majeure clauses or, absent such provisions, dusting off common law doctrines of impossibility, impracticability and frustration of purpose to excuse contractual performance.

Though it is too soon to report on how courts will react, the pivot points framed by five early cases spotlight key phrases, or outright gaps, in force majeure and related provisions by which parties now must attempt to resolve emerging disputes and, as important, preempt future ones.

Three Cases Examining Force Majeure Provisions

In *Pacific Collective LLC v. Exxonmobil Oil Corp.*,^[1] the parties entered into a real estate agreement, and buyer Pacific Collective notified Exxonmobil that it intended to redevelop the property immediately after closing. Although the agreement contains a force majeure provision which delays closing in the event of 18 separate catastrophes, it omits pandemics, epidemics or contagions.

Undaunted, Pacific Collective argues that the litany of government orders in response to COVID-19 rendered it impossible to both physically attend a closing on the sale and to redevelop the property in the manner that both parties knew was a core assumption of the agreement. The case therefore will pivot on whether, especially in light of the force majeure clause's conspicuous gaps, Pacific Collective can prove that Exxonmobil was sufficiently aware of Pacific Collective's ultimate intended redevelopment, and whether such shared intention was indeed a basic assumption of the contract.

In *E2W LLC v. Kidzania Operations SARL*,^[2] E2W has sued Kidzania Operations for allegedly breaching the parties' franchise agreement by terminating the agreement following E2W's invocation of a force majeure clause. E2W had invoked force majeure because it could not lawfully operate its facility — an amusement park — in the midst of the pandemic, and therefore arguably could not make required payments to the franchisor.

The operative clause, however, excuses nonperformance due to enumerated events, including "governmental orders" and acts of God; it makes no specific reference to an outbreak like COVID-19. E2W therefore has also resorted to the common law principles of impossibility and frustration of purpose, arguing not only that COVID-19 was an event whose nonoccurrence was a basic assumption upon which the contract was made, but so too were the indefinite closure of E2W's facility and termination of its development activities.

Ultimately, whether E2W is successful will depend on how broadly the court is willing to interpret the "governmental order" element of the force majeure clause, and whether that



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breadth may be widened by reference to common law doctrines.

Finally, in *Palm Springs Mile Associates Ltd. v. R&R Goldman Associates Inc.*,^[3] landlord Palm Springs seeks payment of rents and costs, and a declaratory judgment that the operative force majeure provision does not excuse R&R Goldman's refusal to pay rent. Significantly, Palm Springs makes clear that it "recognizes the hardships posed by COVID-19," but points out that the governing force majeure provision explicitly does not "excuse either party from the payment of any monies due pursuant to the terms of [the] Lease."

The case therefore will pivot on whether such exception trumps the arguably overarching intent of the force majeure provision, and may well have implications for other disputes over delinquent payments where the governing clauses contain no such exception.

Two Cases Examining Contracts Without Force Majeure Provisions

A different argumentative twist is taking shape in *Level 4 Yoga LLC v. CorePower Yoga LLC*.^[4] Level 4 Yoga has sued to prevent CorePower from backing out of its commitment to purchase Level 4 Yoga, where CorePower contends that, by March 24, "the transaction was no longer as attractive ... as it had been before the shutdowns caused by COVID-19."

On March 24, CorePower formally suspended the closing process, claiming Level 4 Yoga had failed to operate its studios in the normal course of business by virtue of its pandemic-related shutdowns. In response, Level 4 Yoga claims that COVID-19 imposed a "new normal," pursuant to which it was operating as expected within a COVID-19-adjusted course of business.

Thus, rather than arguing that the effects of COVID-19 create circumstances that are not normal, Level 4 alleges that COVID-19 merely shifted the paradigm of "normal" for a temporary period, and that the governmental responses to COVID-19 necessitating business closures are simply "general market conditions, the risk of which Defendant agreed to incur in the Agreement."

Whether Level 4 is ultimately successful will depend largely on whether the court agrees with its assessment of what "normal" means amidst pandemic, and whether CorePower assumed the risk of such a change in market conditions.

Finally, in *In re Pier 1 Imports Inc.*,^[5] debtor Pier 1 is seeking an indefinite suspension of its rental payment obligations. It has no force majeure clause on which to rely, so it too invokes common law theories of impossibility, impracticability and frustration of purpose.

In response, the landlord creditor contends that the doctrine of impossibility cannot excuse an inability to pay rent, especially where the debtor's primary argument centers on lacking the liquidity that it would like during "a time of economic difficulty." The creditor further argues that Pier 1's reliance on impracticability and frustration of purpose fails because it cannot demonstrate the occurrence of an event that the parties assumed would not occur.

Most significantly, the creditor frames that reasonably anticipated occurrence not as the emergence of the COVID-19 pandemic, but rather as simply a decline in Pier 1's use of the premises, regardless of the underlying cause.

Thus, according to creditor, because "it was not a basic assumption ... that the Debtor's retail premises would remain in full operation at all times," Pier 1 cannot rely on the doctrines of impracticability or frustration of purpose. The court's ultimate assessment

therefore may well turn on whether no arguable use of the premises at all meets the threshold for excuse by impracticability.

Force Majeure Clauses Going Forward

In cases like Pier 1 and Level 4 Yoga, parties are stuck in the unenviable position of reconciling common law principles with incomplete written agreements. Yet, even where contracts include force majeure clauses, the scope of those clauses is often ambiguous.

This failure is clear in the three cases above, where none of the provisions mentions epidemics, contagion or stay-at-home orders, leaving the parties to squabble over whether COVID-19 is a "disaster" or "act of God"— a term more frequently invoked for earthquakes, floods and fires — or whether social distancing and other restrictions are mandatory "governmental orders or regulations."

What's more, the typical force majeure provision generically excuses a party's failure or delay in performing under a contract, but keeps silent about any impact on the parties' other rights and obligations. This not only fails to clearly protect the invoking party, but also leaves the noninvoking party vulnerable to common law arguments that arguably supplement the invoker's force majeure rights.

The growing fuss over force majeure makes apparent that drafting these clauses demands more careful consideration. Going forward, a well-drafted provision will include:

- A relationship-specific definition of triggering events. While litigants in the above cases are forced to rely on broad phrases like "act of God" or "events not reasonably within [the parties'] control," counsel is well served to expressly include epidemics and contagion, and to remember that the next catastrophe is unlikely to resemble the current. Counsel therefore should spend time considering the full parade of horrors that a particular client in a particular industry may someday face; while many force majeure clauses include language that broadly extends to "any event outside the parties' control," many courts are loath to implement such catch-all definitions in the wake of specifically enumerated examples.
- Articulation of events that should not trigger force majeure. Beyond the obvious — a snowplowing contract's clause should not include snowstorms — counsel should consider whether either party is particularly suited to anticipate and mitigate, or is acutely and comparatively vulnerable to, any specific event, and should outline the parties' obligations should that particular event occur.
- An explanation of force majeure's impact on other contractual obligations. For example, the E2W contract's failure to fully outline force majeure's impact leaves open whether it allowed payment obligations to be placed on hold. Counsel should craft a clause that addresses all of the major contract terms that may be impacted, answering questions like: Does invoking the clause excuse the noninvoking counterparty from performing its own obligations? Does force majeure excuse or allow changes to fees for late or unfilled deliveries? Does it allow for price adjustments? And what about extensions of deadlines or notice periods?
- Clarification of the parties' common law rights, and specification as to which of those rights the clause supports. The contract should also address some of the points on which such common law claims turn — including the contract's purpose, and any major assumptions on which the contract relies — and specify that the force majeure

clause is the sole recourse in the event of impossibility or impracticability. For example, a statement that "the rights and obligations imposed under this contract do not rely on the continuation of present general market conditions" may have saved the plaintiff in Level 4 Yoga from the uncertainty (and expense) of now litigating the issue.

These early cases and their emerging lessons remind us that the days of relying upon force majeure boilerplate are but a quaint memory. By listening closely as courts speak over the coming months, counsel should be able to craft clauses that more nimbly address the threshold issues highlighted above, while more effectively allowing parties to reform — rather than terminating — their business arrangements in the post-pandemic marketplace.

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[1] Pacific Collective LLC v. Exxonmobil Oil Corp., Complaint, No. 20STCV13294 (Cal. Sup. Ct. Filed Apr. 3, 2020).

[2] E2W LLC v. Kidzania Operations S.A.R.L., No. 1:20-cv-02866 (S.D.N.Y. Filed Apr. 6, 2020).

[3] Palm Springs Mile Associates Ltd. v. R&R Goldman Associates Inc., No. 1:20-cv-21656-XXXX (S.D. Fl. Filed Apr. 6, 2020).

[4] Level 4 Yoga LLC v. CorePower Yoga LLC, No. 2020-0249- (Del. Ch. Filed Apr. 2, 2020).

[5] In re Pier 1 Imports Inc., No. 20-30805 (KHR) (Bankr. E.D. Va. Filed Feb. 17, 2020).