

Is COVID-19 A Force Majeure Triggering Event In Your Commercial Contracts or Leases?

By: Kevin M. Carrara

CONTRACTS AND LEASES IN THE WAKE OF COVID-19. As you know we are all in unprecedented times. Now is the time to consider what may happen to your commercial contracts and your commercial leases; no matter what side of the contract or lease you are on.

Generally speaking, a force majeure provision sets forth the unforeseeable circumstances that will excuse a party from performing their side of a contract. The first question we must answer is does COVID-19 prevent performance?

Engaging legal counsel in this initial stage may be crucial to acting efficiently and decisively to make the best possible arguments that performance is excused, or it is not excused.

Five-Step Framework:

1. Review the contract or lease closely and determine whether the contract or lease has a force majeure provision. If the contract or lease does have a force majeure clause, we need to analyze whether the COVID-19 pandemic might constitute a force majeure event under the terms of the specific provision and then what effect this has on contractual obligations. This may require some amount of interpretation and potentially drawing similarities to previous cases.
2. If no force majeure/impossibility provision exists in the operative contract or lease, determine whether the state providing the governing law provides for force majeure/impossibility by statute or common law impossibility and/or frustration of purpose. However, the availability and contours of these common law arguments will vary based on jurisdiction.
3. Analyze and determine if the specific facts support a triggering event under the contract or lease;
4. Be cognizant of the notice and timing requirements of the operative contractual provision or statute (this is a critical step). Determine what notice is required under the force majeure provision. Some force majeure clauses will require the party suffering a force majeure event to notify other parties of its inability to perform within a certain time frame.
5. Obtain and retain as much information as possible about any potential force majeure claim, documenting the timing, the number of impacted people/parts/facilities, and when the event is expected to conclude. If complete information is not available, the party invoking force majeure should supplement its notice as additional information becomes available

Is COVID-19 A Force Majeure Triggering Event In Your Contracts and Leases?

CONCLUSION. A proper assessment of the impact of the coronavirus outbreak requires a fact-specific analysis of a company's business and contractual relationships. Concerned company executives should review with their in-house and outside counsel the rights and obligations provided in the company's commercial contracts, leases and other relevant agreements.

Rathje Woodward LLC

About Kevin M. Carrara. Kevin joined Rathje Woodward LLC in 2001 and concentrates his practice in three main areas: (1) real estate acquisitions, finance, leasing and development; (2) corporate counsel to a wide range of organizations and individuals engaged in local, regional and national business, from multi – million dollar corporations, to mid – sized, and smaller companies and associations; and (3) commercial and construction litigation and arbitration.

Kevin counsels clients on their acquisitions, development, ownership, leasing, financing and sales of all types of commercial real estate from industrial buildings, multi-unit complexes, build-to-suit office buildings, warehouse/distribution facilities, shopping centers, vacant land and large residential subdivisions. Kevin's development and entitlement practice includes activity before municipal and county boards and commissions, and he has represented clients in hundreds of negotiations and public hearings before these governmental bodies.

In the area of real estate finance, Kevin represents both the borrower and the lender in connection with structured finance transactions, including single-asset and multi-property mortgage loans, mezzanine financing and sale/leaseback transactions. Having the experience of representing both the borrower and lender in these types of transactions allows Kevin the opportunity to utilize his familiarity of the deal structures to efficiently negotiate the loan and venture documents thereby streamlining what at times can be a difficult and costly process.

As a corporate counselor, Kevin acts as general counsel for corporations, limited liability companies, limited partnerships, homeowners' associations and medical professional corporations and their directors and executive officers with respect to a wide variety of legal matters. Kevin's corporate counsel runs the gamut from organization options, asset or stock purchases, buy-sell agreements, asset protection, shareholder disputes, to technology and intellectual property protection. In such capacities, Kevin has had significant experiences as counselor and advisor allowing him to fully understand the all-important business side of the law and he prides himself on working closely with his clients to become a trusted business adviser with a keen focus on their long term needs.

As a litigator, Kevin is mindful of the high cost of litigation and routinely counsels clients on the possibility of favorable settlements from an expense and risk standpoint, but Kevin and Rathje Woodward LLC, also understand that being willing and able to take the case to trial promotes the opportunity of a most favorable outcome for the client. Kevin litigates a wide variety of commercial and construction matters before state and federal courts and before arbitration panels and administrative tribunals.

If you would like to learn more about how we can serve your interests please call 630-668-8500. Our online contact form may be found here.

For more information regarding Rathje Woodward's litigation practice and its attorneys, please visit www.rathjewoodward.com.