March 31, 2020

The Coronavirus Outbreak: a Force Majeure event?

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Franchisees nationwide are facing devasting impact on their businesses, and increasingly mandated store closures. Naturally, franchisees face concerns regarding impact on their franchise and lease agreement obligations to stay open, and equally important, to pay fees required by such agreements. Most, but not all, franchise agreements, and most lease agreements, provide protection to both franchisors and franchisees, and landlords, in the form of a Force Majeure or Act of God clause. These clauses act to forgive (waive) performance when business is disrupted by an "Act of God." Regardless of the existence of such provisions in the franchise agreement, franchisees are advised to seek protection from their contract obligations if their business is disrupted by an Act of God.

> ***Sample Force Majeure Clause***:
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> **If the performance of any part of this Agreement by either party is prevented, hindered, delayed or otherwise made impracticable by reason of any flood, riot, fire, judicial or governmental action, labor disputes, act of God or any other causes beyond the control of either party, that party shall be excused from such to the extent that it is prevented, hindered or delayed by such causes.**

But beware, not all Force Majeure clauses are created equally. There may be obstacles to enforcing protection under these clauses. We endeavor to provide some guidance in understanding the import, availability and limitations of the protections available in events of Force Majeure.

First, is the novel coronavirus COVID-19 outbreak considered a force majeure event?

The legal term "force majeure" generally means an unforeseeable event that could relieve a party to a contract from performing its obligations. The types of events that qualify for a force majeure are not absolute, especially in franchise agreements. In determining whether a type of event, including the COVID-19 outbreak is considered a force majeure, courts will look at how a franchise agreement defines the term and will interpret the wording and conditions agreed to by the franchising parties.

Is there an event that may bring on the force majeure provision?

Although your clause may not necessarily ultimately be considered a *force majeure event,* contracting parties should seek to invoke their force majeure clause and claim protections when a disaster strikes.

A force majeure event is generally regarded as any unforeseeable circumstance not within the control of a performing party, with typical examples being acts of war, terrorism, natural disasters, and strikes. Most franchise agreements will contain a force majeure clause; however, it is dependent upon the exact language of the clause as to what kinds of events are covered. We have seen clauses that allow a store to close, but that still require the payment of *minimum royalties* or other payments or duties. With the case of the COVID-19 outbreak, the World Health Organized officially declared it as a pandemic, and in response, U.S. states and cities are enforcing quarantines, requiring the closure of businesses, and restricting travel. If the force majeure clause lists pandemics as an example of a qualifying event, then the COVID-19 outbreak is likely to be included in that clause. If the force majeure clause is more general, such as "any act of a governmental or regulatory body where such bodies impose restrictions" the actions taken by the local and federal governments, including travel bans and quarantines, may qualify as an event covered by the clause.

Keep in mind, that during the crisis franchisees need to do what must be done with the understanding that the determination of whether the event qualifies as an *act of God* may occur months later. However, it is important to make your best judgement at the outset, and act accordingly. Make sure that you document your decisions and actions, perhaps keeping a log, to evidence your decisions down the road.

Is there an impact on the franchise contractual obligations?

It must be demonstrated that the force majeure event itself prevents or delays performance of contractual obligations. This may not be apparent or easily evidenced. The force majeure must be the *sole* operative cause of the inability to perform. If a franchise operation is affected by this coronavirus outbreak in some manner but there is or may be some other reason or circumstance that is preventing performance, then the reliance on force majeure is potentially not available. For example, if a franchise operation has an equipment failure and there is a shortage of staff resulting from imposed quarantines, your franchisor may argue that force majeure is not available because it was the equipment failure that was the initial cause of non-performance, not the lack of available staff. Franchisees will contend that regardless of the equipment failure, the business would be shut down due to the force majeure event. State laws will vary. And take note, sometimes a lease agreement may not abate rental obligations.

What if there is more than one way to perform franchise obligations?

If a franchise operation has more than one way or method to perform, then alternative methods must be utilized, and the original method cannot be the basis for force majeure reliance. Of course, if the franchise agreement or operations manual provides for a single mode of performance then force majeure may well be available.

Has the franchise operation practiced reasonable endeavors?

Some franchise agreements specify that parties must use "reasonable endeavors" to overcome or mitigate force majeure events. This term is rarely clear and what is reasonable depends on the franchise agreement and the obligations it defines considering the force majeure event. For example, a day care franchise owner who is impacted by COVID-19 should use reasonable endeavors to keep open for business, i.e., assure clients of enhanced cleaning protocols, reduce the person-to-person contact between staff and clients, and stagger employee shifts to minimize the potential for contamination. The franchisee cannot just throw up his hands and say the pandemic has caused him to break his obligations in performance; he must try to take reasonable endeavors to continue to perform.

Is there a notice requirement?

If the franchise agreement requires that notice be sent, care should be taken to ensure notice is timely sent and it includes all the necessary information. Also, it is possible that notice must be sent *before* seeking relief under a force majeure clause. In other words, if proper, timely notice wasn't given, the franchisor may use that lack of notice to negate any relief the franchisee may otherwise be entitled to from the force majeure clause.

Summary

At first glance, the novel coronavirus may well look like a force majeure event. However, before a franchise operator stops his or her obligations in running the franchise, it is best to carefully review through the requirements and qualifications of any force majeure clause found in the franchise agreement. It's only with a thorough understanding of the clause itself and adherence to any notice requirements that the franchise owner will be able to avoid any non-performance pitfalls.

Post Script. What happens if you don't have a force majeure clause in your franchise agreement or lease?

Some agreements may not include a force majeure provision. Franchisees may still have remedy.

Courts may read into a contract the concept that the parties intended to require performance only if commercially practicable. General law (common law) allows that a contractual obligation can be interrupted or discharged when a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made. Like force majeure, courts typically require the party to establish that: a contingency has occurred; the contingency made performance impracticable; and the parties did not foresee the contingency when the contract was made.

Frustration of purpose is also a common law remedy. Courts may allow an excused performance when an event, like a pandemic, prevents or frustrates performance of a basic assumption on which the agreement was made. Frustration of purpose requires that the party seeking relief cannot be at fault or in breach of the agreement.

Impossibility is usually defined to mean that there was literally no possible way for the party to perform. If the only way to perform would be to go to extreme hardship or expense, it is still "possible," the obligation may not be excused

Many State courts tend to find impossibility in a case where one of the parties died or suffered incapacitation, which would make it impossible for that person to perform. Another circumstance of impossibility may be when an item crucial to performance becomes destroyed (through no fault of the defaulting party) and there is no reasonable substitution. Third, impossibility also arises if, after the parties sign the contract, a new law comes into being that makes performing illegal. Declaration of a pandemic and quarantine may qualify.

The authors are happy to expound on these matters if there is interest to do so from the readership. Also, questions or inquiries about a particular circumstance are welcomed.

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https://www.aafd.org/the-coronavirus-outbreak-a-force-majeure-event/