**COVID 19 AND YOUR CONTRACT RIGHTS – FORCE MAJEURE AND IMPOSSIBLITY OF PERFORMANCE**

The COVID 19 epidemic is forcing many businesses to cancel contracts and suddenly “force majeure” clauses – that is, contract clauses that excuse performance of a contract due to circumstances beyond the control of the parties such as acts of God – are being carefully reviewed or sorely missed when absent from a contract. Don’t worry, if the contract you can’t perform doesn’t have a “force majeure” clause, California law may nevertheless protect you.

“Force majeure” clauses are based on the common law doctrine of impossibility of performance. Not only is this doctrine alive and well under California law (although strictly interpreted by the courts), the concept of performance being excused by a “force majeure” event – an event beyond your control - has been codified in California’s Civil Code.

California Civil Code section 1511(2) provides that the failure to perform a contract, in whole or in part, or a delay in performance, is excused:

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

Does a pandemic such as COVID 19 constitute an “irresistible, superhuman cause” under California law? It is hard to believe that the California Legislature chose to use this language when codifying these rules. “Irresistible” is probably an adjective you would much sooner associate with your puppy or adorable 2-year old than with a serious human health threat. However, COVID 19 is likely to constitute an “irresistible, superhuman cause” within the meaning of the California Civil Code because it is a cause beyond the control of humans which we can’t resist.

In summary, Civil Code section 1511(2) may support your failure to perform, or a delay in the performance of your contract obligations, if you are unable to perform because of the COVID 19 epidemic.

The common law doctrine of impossibility of performance may also provide grounds for you or your business not to perform or to delay performance of a contract. If a contract has only one objective and that objective is “wholly impossible of performance,” your obligation to perform is excused as a matter of law. For example, if you scheduled an event in March or the first week in April, and have contracts with performers, caterers or others, your performance is likely to be excused in light of the Order of the Monterey County Public Health Department prohibiting “non-essential gatherings” through April 7, 2020. If the current circumstances make a contract to which you are a party only temporarily impossible to perform, the doctrine of impossibility of performance may not excuse performance entirely but may allow for a suspension or delay of performance.

While we share these general legal principles, each situation must be analyzed separately according to the specific facts of the case. If you are seeking to understand your rights under the contracts to which you or your business are a party in these difficult times, we are available to assist you.

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