

UNFORESEEN CIRCUMSTANCES AND CITRUS SOAP:

A Tale of a Force-Majeure Clause in the Time of the Spanish Flu

A Client Update from Kurt Kruckeberg

Since the onset of the pandemic, I've heard clients and colleagues talk about dusting off force majeure clauses. Force majeure clauses are the clauses that give a contracting party an "out" due to unforeseen circumstances beyond the parties' control. Out of curiosity, I searched whether there were any reported cases interpreting force majeure clauses in the nearest historic analogue to our current crisis: the Spanish flu of 1918.

I found one Spanish-flu-force-majeure case. Oddly enough, the case was about something we've all been talking about: soap.

Here's what happened in [Citrus Soap Co. v. Peet Bros. Manufacturing Co.](#) In November of 1918, Peet Bros. ordered more than six tons of glycerin from Citrus Soap. Citrus Soap agreed to deliver the glycerin in installments as it was made. Under the contract, Citrus Soap was to deliver the final barrel of glycerin before December 31, 1918.

The contract between the parties had a force majeure clause:

This contract is made subject to suspension in case of fire, flood, explosion, strike or unavoidable accident to the machinery or the works of the producers or receivers of this material, or from any interference in plant by reason of which either buyers or sellers are prevented from producing, delivering or receiving the goods and in such event the delivery thus suspended is to be made after such disabilities have been removed; otherwise to be fulfilled in good faith. Notice, with full particulars and the probable term of the continuance of such disability,

shall be given to the other party hereto, within ten days of the date of the occurrence of such disability.

Citrus Soap delivered three barrels of glycerin before December 31. But in November and December, Spanish flu gripped San Diego—where Citrus Soap had its factory. The city adopted a quarantine that lasted for five days, which disrupted Citrus Soap's production. Citrus Soap delivered the remaining barrels of glycerin to Peet Bros. within a week after the contract deadline. Peet Bros. refused delivery of the tardy glycerin and sued for damages equal to the difference in the contract price of the glycerin and the market price at the time Peet Bros. refused delivery.

The trial court determined that Peet Bros. was not entitled to damages because of the force majeure clause. On review, the appellate court agreed. The court reasoned that the quarantine sufficiently interfered with plant operations to trigger the force majeure clause. Within a few days after the quarantine, Citrus Soap sent Peet Bros. a letter stating that the quarantine might interfere with timely delivery of the glycerin. Citrus Soap stated that it nonetheless hoped to timely deliver the glycerin. While this notice did not precisely follow the requirements of notice under the force majeure clause (i.e., it did not give "with full particulars" the anticipated length of delay), the court found it sufficient. Citrus Soap acted in good faith to give Peet Bros. a heads-up about the possible delay and acted in good faith to deliver the glycerin as close to the deadline as possible.

What can we learn from this soapy mess?

- Where appropriate, make sure your contract has a force majeure clause.
- As in 1918, interruptions to business caused by our current pandemic will likely cause contract parties to default. Be prepared and start looking at force majeure clauses in your vital contracts.

- If your force majeure clause has a notice requirement, be sure you comply and send notice to your contracting partner that you may need to invoke it.
- Courts are probably going to cut folks some slack if they try their best to act in good faith and perform the contract terms as best they can. We might see some less-than-strict construction of notice provisions in this time of coronavirus. If you're in a Citrus Soap situation, now may not be the best time to respond like Peet Bros. and strictly construe your contract without any flexibility.

Let us know if you have questions about a particular contract or need us to document a work-out or forbearance arrangement you've made with a landlord, tenant, lender, or other contracting party. We're also happy to help with new contracts to protect you and plan for the future. We're here to help in uncertain times. Now let's all go wash our hands.

Best regards,



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To learn more about Kurt, click [here](#).