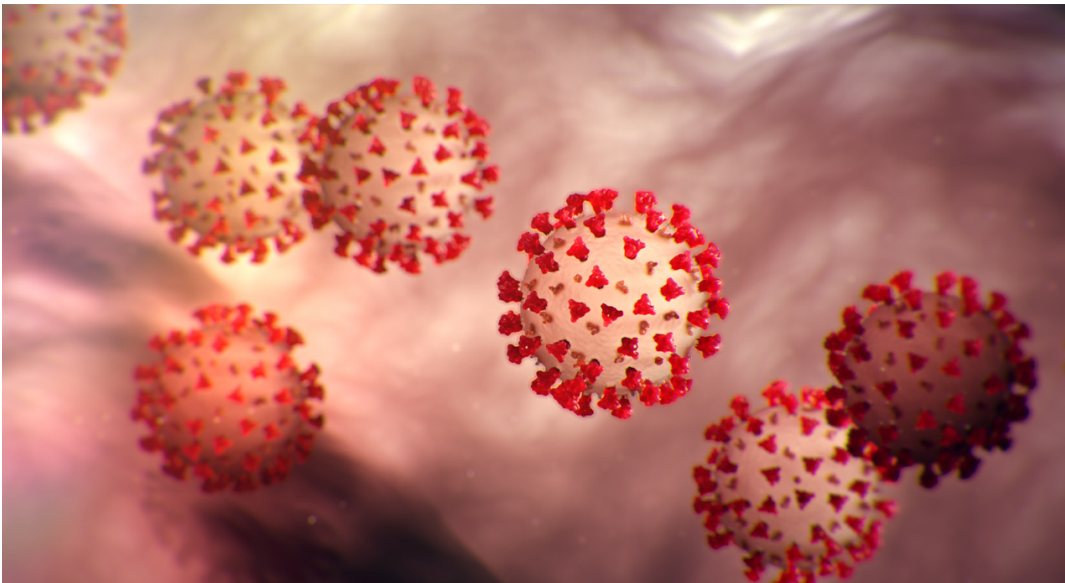


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CAR CORONAVIRUS ADDENDUM AND CANCELOATION OF CONTRACTS

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The California Association of Realtors Residential Purchase Agreement does not have a force majeure provision in the contract, so a buyer or seller wishing to cancel or delay should review their signed escrow instructions for further guidance. They should not rely on their brokers in giving them any legal advice, because the finding of whether a contract could be breached will depend on the facts and law of each individual case and on the judge who hears it.

A force majeure provision assumes that there is an event outside the control of both parties to the contract that either makes contract performance impracticable or frustrates the purpose of such performance. Typically, those provisions excuse nonperformance of a contract for certain events. They also require some sort of notice that should be done as prescribed by the contract.

However, even if there is a force majeure provision in the parties' signed escrow instructions, there is no guarantee how a court will read it. First, a court can read the provision narrowly and only consider the events described in the agreement provision itself. Typical language might say something like, "natural disasters such as floods, tornadoes, earthquakes and hurricanes and acts of people such as acts of terrorism, riots, strikes, wars and medical epidemics." Second, in order to invoke a force majeure clause, there must be causation between the

force majeure event and the affected party's failure to perform. A buyer being concerned about their job if he/she was not fired and if the buyer's loan was approved, may defeat a causation argument. Finally, a party may be required to show that it made a reasonable effort to mitigate the effects of the force majeure event. Namely, the event does not have to make performance impossible, but at the very least, performance must be impracticable, unreasonable, or fundamentally at odds with the business purpose of the breaching party. In fact, a force majeure may not be ground for termination, but only for postponement.

For contracts that contain a force majeure clause with wording about an epidemic or pandemic, COVID-19 will likely qualify as a force majeure event. Other general force majeure clauses that reference broader categories may also apply, such as, "acts of God," "acts of government," or "other circumstances beyond the parties' reasonable control." Still further, a government directive (e.g., mandatory quarantines) would also likely trigger a force majeure provision.

If there is no force majeure provision in the escrow instructions, nonperformance may still be excused. For example, if the performing party's principal purpose of the contract has been frustrated (a seller planning to move for a job that just got cancelled), the party may seek to suspend its performance under the frustration of purpose doctrine. Alternatively, a party may seek excuse from performance under the doctrine of impracticability or impossibility. Impracticability may provide relief (for a listing broker for example) where superseding events occur (e.g., quarantine), the nonoccurrence of the event which was a basic assumption on which the contract was made (broker being able to conduct open houses) and it would be unreasonable or commercially senseless to require performance in light of such events. The more difficult doctrine to establish, is impossibility, which requires a party to establish that performance was rendered objectively impossible for any similarly situated party.

The California Association of Realtors created a new Coronavirus Addendum that should be provided for new contracts. This Addendum changes the Residential

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Purchase Agreement terms. A party to an existing signed contract cannot be forced to change its existing terms. Yet, the reason this Addendum is important for new contracts, is that it explains to the parties in a new contract that there is an issue they need to address. Because the new contract would be entered into at a time when the potential risks of COVID-19 are already well known, even if the parties add a force majeure provision into their new contract they may not be able to rely on a force majeure clause as an excuse for nonperformance. They may not be able to later claim that COVID-19 surprised them and caused them damages.

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