

Litigation Alert: COVID-19 and Force Majeure Provisions: The Lingering Effects of a Pandemic on Contractual Obligations

Several months after the inception of the pandemic, COVID-19 continues to disrupt U.S. businesses. Stay-at-home orders intended to prevent the spread of the virus have interrupted business as usual. Large meetings and gatherings have had to be cancelled, workforces have been reduced, contractual obligations delayed, and business protocols turned upside down. How have courts responded to the unexpected changes? Have courts enforced contractual obligations that simply cannot be met because of the continuing impact of the COVID-19 pandemic? What protections have the courts given a company that cannot perform under its contract? How have the courts addressed a company's attempts to enforce its rights under a contract that has been delayed or terminated because of the impact of the COVID-19 shutdowns and orders?

Your contract's *force majeure* clause is intended to protect a company against contractual obligations it can no longer meet due to an unforeseeable "event" described in the clause. In order to establish that the COVID-19 pandemic excuses or delays performance under your contract's *force majeure* provision, you should generally be prepared to establish that:

- The event falls within the clause;
- It was beyond a party's reasonable control; and
- It made performance impossible or impracticable.

Common law doctrines such as impossibility of performance or frustration of purpose may also be applicable to your situation, if you cannot perform your contract, performance is no longer feasible, or there is simply no longer a need for it.

No "One Size Fits All" Approach

A party seeking to invoke *force majeure* protection should carefully examine the contract and consider whether the event falls under the "events" in the clause. Some clauses may have a provision explicitly addressing diseases, outbreaks, and pandemics. However, if your clause fails to explicitly address pandemics, the COVID-19 pandemic and related government regulations may trigger another *force majeure* event. For example, *force majeure* provisions may protect against a newly enacted government regulation, national emergency, act of God, or supply chain shift. Many *force majeure* provisions include a "catch-all" event, referring to any other cause or event beyond a party's control. **This analysis is fact-sensitive.** A court will consider how the pandemic and/or government regulation impacts the contract and a party's ability to perform.

A party should also carefully review any applicable notice provisions. Courts may require strict compliance with any notice provisions in the contract. Courts have been reluctant to relax any notice requirements due to the COVID-19 pandemic or terminate a contract that fails to have an express and clear *force majeure* provision that covers the COVID-19 pandemic or viruses generally.

To avoid or delay performance of your contract, litigation may be necessary. For example, in *Rembrandt Enterprises v. Dahmes Stainless, Inc.*, No. C15-4248-LTS, 2017 WL 3929308 (N.D. Iowa Sept. 7, 2017), the Court considered whether an outbreak of the avian flu excused performance of the plaintiff's contract to purchase equipment from the defendant under the doctrine of frustration of purpose. In that case, an outbreak of the avian flu, fatal to domestic poultry, cut the plaintiff's egg production capacity and triggered other market repercussions, including reduced supply and sales, soaring egg prices, and a halt to prior expansion plans. The court noted that the parties should consider, among other things, the specific moment that the contract was frustrated and whether and how the plaintiff's conduct contributed to the failure to perform.

In a bankruptcy case, *In re Hitz Restaurant Group*, 2010 WL 2924523 (N.D. Ill. June 3, 2020), the court held that the governor's

stay-at-home order partially relieved the debtor/lessee of its obligation to pay rent. In that case, the debtor was not totally off the hook, as the debtor, a restaurant, could not have customers on the premises but was permitted to continue take-out and curbside pick-up.

Contracts impacted by the COVID-19 pandemic are making their way through the courts. Courts are focusing on the language of the *force majeure* provision and the circumstances of the parties. Thus, a party seeking to invoke *force majeure* protection should carefully review its contract, the events described in the *force majeure* clause, and any applicable notice or other provisions.

In situations where the *force majeure* clause does not provide the needed protection, the doctrines of frustration of purpose and impossibility of performance may do so.

Litigation may be necessary to determine whether the facts and circumstances faced by a business excuse or delay performance. We are available to assist in a review of your contracts to ensure your company is protected.

For further review of your contract provisions to determine if your contract protects against unforeseen events and circumstances, please contact:

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