COVID-19 Pandemic and Force Majeure Clauses

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Does your contract provide a valid defense to non-performance for reasons related to COVID-19? Depending on the language, it just might.

It is a bedrock principle of contract law in America, dating back to Roman law, that the obligations of a valid contract must be honored and that any breach thereof must be accompanied by payment of damages to the party injured by the breach. In Latin the principle is known as *pacta sunt servenda* – "agreements must be respected." This principle is embedded in the foundation of commercial law in every U.S. jurisdiction, and functions as a key safeguard of the marketplace on both a domestic and international scale.

What is Force Majeure?

Yet this principle of respecting the agreement is not without exception. Perhaps most notably, the countervailing consideration of *force majeur*e may intervene to absolve the breaching party of its obligations. Force majeure is French for "superior force" and typically applies when an unforeseeable intervening event or circumstance renders performance of the contractual duty impossible through no fault of the breaching party, and in a way that could not be mitigated through reasonable care.

Under US law, force majeure events are not dealt with by statute, but rather, are managed through contractual provisions by agreement of the parties. Parties typically set out broad categories of the circumstances that would render performance so burdensome or impossible as to effectively negate the purpose of the contract and thereby absolve the performing party of its responsibilities under the contract. They list a parade of deplorable events to provide a general classification of the sort of catastrophe that would negate the contract.

Is COVID-19 an Act of God as Detailed in Most Force Majeure Clauses?

The vast majority of force majeure clauses make some reference to an "Act of God." A reader might fairly assume that COVID-19 necessarily classifies as an Act of God given that it is a pandemic of epic proportions, akin to plague – one of the four horsemen of the apocalypse dispatched by God as described in *Revelations*. To the contrary, however, because the Courts are constrained by the

separation between church and state enshrined in the First Amendment, they are loathe to discern which secular matters are caused by a divine entity and which are not. Accordingly, Courts nullify the Act of God language and focus instead on the laundry list of catastrophes itemized in the force majeure clause itself in order to determine whether the circumstances giving rise to the party's inability to perform are of the same color and stripe as those detailed on the list. If the shoe fits, then the non-performing party is absolved and will not be held liable for damages.

There is no broad based statutory or common law guideline as to what constitutes force majeure. Rather, the analysis will invariably come down to the precise language of the force majeure clause in the contract – the two examples below are illustrative.

- In Clause 1, there is no direct reference to public health crises or pandemics, nor any reference to the secondary effects of pandemics. Accordingly, COVID-19 does not fall within the definition of force majeure in this Contract and is not a valid defense to the obligations contained therein.
- Similar to Clause 1, Clause 2 does not contain a direct reference to public health crises or pandemics either, but it does in fact make reference to adverse state action, which is a secondary effect of the pandemic. Accordingly, the direct consequences of COVID-19 fall within that force majeure definition and give rise to a valid defense against a breach of contract claim.

Force Majeure Clause 1

Neither party shall be liable for contamination, loss of, damage to or destruction of any Commodities or property, or for any delay or nonperformance, when any of the foregoing is caused in whole or in part by any cause not within the reasonable control of said party, whether now or hereafter existing (a "Force Majeure Event"), including without limitation, any act of God or of a public enemy or terrorist act, or by labor troubles, strikes, lockouts, riots, nonavailability of machinery, embargoes, congestions or interventions, or failure or delay of manufacturers or suppliers to deliver same, except that Customer shall be responsible to pay all charges arising from this Agreement when due regardless of any Force Majeure Event affecting Customer.

There is no reference to pandemics and no reference to any secondary effects of the pandemic in this clause. Because Courts are conditioned to interpret force majeure clauses narrowly, they are unlikely to find anything within the underlined list above similar enough to a pandemic for COVID-19 to be included by inference in the list. The pandemic is not a valid defense to the obligations in this contract.

Force Majeure Clause 2

No party shall be subject to liability to another Party under this Agreement for failure or inability to perform in conformity with this Agreement where such failure or inability results from an event or occurrence beyond the reasonable control of the Party affected thereby and without the negligence or

fault of the Party affected thereby (other than obligations of such Party to pay or expend monies for or in connection with the performance of such Party's duties and responsibilities under this Agreement), such as, but not limited to, acts of God, war, insurrection, riots, strikes, labor disputes, labor or material shortages, fires, explosions, floods, unusual or extreme weather conditions, embargoes, orders or acts of civil or military authority, laws, regulations or administrative rulings, or other events or conditions, whether similar or dissimilar to the foregoing examples.

COVID-19 is far more likely to qualify as a valid defense under Clause 2 than Clause 1. The principal reason is that the language includes "orders or acts of civil or military authority, laws, regulations or administrative rulings" that might render performance impossible.

Although pandemics or global health crises are not mentioned specifically, the secondary effects of "shelter in place" orders or directives prohibiting gatherings of people are likely to qualify as "orders or acts of civil authority," or "administrative rulings" that render performance impossible. Given that many states have issued orders that cease or severely curtail operations for all sorts of business enterprises, it is entirely possible that performance by those businesses will be excused for the duration of the civil order by relevant force majeure language in a contract. This may also be the case for businesses that are indirectly crippled by state action taken in response to the virus.

Conclusion

Depending on the language of the force majeure clause, a great number of businesses that are directly affected by a primary or secondary consequence of COVID-19 may in fact have a valid defense to their obligations to perform.

Please reach out to the attorneys at Bailey Glasser if you wish to have a review of your force majeure clause and an analysis of your case.

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