

Coronavirus Business Interruption

Roetzel's Litigation Group

The spread of the novel coronavirus (COVID-19) across the globe has, and likely will continue to be, a major disruption to world economies and will affect businesses across the United States. With the acceleration of the spread of the virus in the United States, unprecedented steps are being taken to control and hopefully contain the spread of the virus.

As a result of these efforts, major business, tourist and entertainment events have been canceled, and the possibility of disruption to the manufacturing and import supply chain exists. Should mandatory quarantines or work place shut downs occur, many business and contractual obligations will likely be unfulfilled.

Corporate and Litigation Considerations

I. Contract Evaluation

Force Majeure Clauses

COVID-19 is causing supply chain disruptions, changes in demand, and other uncertainty for businesses. As businesses encounter difficulties in fulfilling contractual obligations, they will need to evaluate their rights and obligations under those contracts. In this regard, the force majeure clause of a contract, if any, will be of special consideration.

A force majeure clause allows the parties involved in a contract to agree that the occurrence of certain events will excuse a party's performance of contractual obligations. Examples of force majeure events may include earthquakes, hurricanes and other natural disasters, terrorism, government acts, labor strikes, and even pandemics. To use a force majeure clause as an excuse for nonperformance, courts have held that the nonperforming party bears the burden of proving that the event was beyond the party's control and without its fault or negligence. However, courts have held that a party to a contract cannot be excused from performance simply because performance may prove difficult, burdensome, or economically disadvantageous.

So, the question remains, does the spread of COVID-19 constitute a force majeure event? Simply stated, it depends.

In determining whether a force majeure provision applies to COVID-19, the first level of analysis involves reviewing the contractual language itself. Does it have a force majeure provision? If so, under what terms does it excuse delay or nonperformance? What specific events does it identify to excuse performance? Does it include an epidemic or a pandemic, and does it reference a standard such as the World Health Organization? What about an act of God? If the contract defines an act of God, that definition will control. Courts have been reluctant to reduce the term "act of God" to any sort of precise or technical definition; however, the explanation they provide generally involves an unusual and irresistible force of nature which man cannot resist.

Force majeure clauses expressly contemplating global health emergencies are less common than including them for events such as natural disasters and should be used cautiously. Incorrectly declaring a force majeure event can result in contract repudiation and/or a right to damages by the other party. In a related development, the China Council for the Promotion of International Trade has begun issuing

“force majeure certificates” to excuse contract performance for businesses affected by the coronavirus pandemic.

Whether COVID-19 constitutes a force majeure event is a matter of contract interpretation that requires legal advice. The coming weeks and months may bring many assertions of force majeure in response to travel restrictions, business closures, government regulations, and quarantines. The contractual language at issue is the most relevant fact in whether these assertions will be successful. If this clause is invoked, be sure to carefully review the contract provisions, gather as much information and data as possible on how the business was impacted by the force majeure events, comply with all notice requirements under the contract, and verify that there are no other means for contract compliance.

What If Your Contract Does Not Have A Force Majeure Provision?

What if the contract or lease does not contain an express force majeure clause? Does the party have no choice but to breach a contract where COVID-19 renders performance impossible?

The adverse impact of the COVID-19 pandemic may excuse a party from performance of a contract even if the contract does not contain a force majeure clause.

For contracts involving the sale of goods, Article 2 of the Uniform Commercial Code provides “gap filler” terms that may apply in a disruptive pandemic situation. In particular, Section 2-615 of the UCC (and Section 2A-405 applicable to commercial lease of goods) excuses a seller from delayed delivery or non-delivery of goods “if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.” As the Official Comments to Section 2-615 state, this section “deliberately refrains from any effort at an exhaustive expression of contingencies and is to be interpreted in all cases sought to be brought within its scope in terms of its underlying reason and purpose.”

There is also common law precedent that supports excusing contract performance due to human pestilence. In 1918, the Connecticut Supreme Court affirmed a ruling in favor of a state fair association who was excused from holding a baby pageant due to an infantile paralysis epidemic. *Handford v. Connecticut Fair Ass’n*, 92 Conn. 621 (1918). In 1857, the Maine Supreme Judicial Court affirmed a ruling in favor of a lumberjack who was excused from performing his contract on account of a cholera epidemic. *Lakeman v. Pollard*, 43 Me. 463 (1857). The lack of more recent examples can be attributed to factors such as human progress and improved contract drafting by your lawyers.

II. Government Assistance

With a crisis of this magnitude and with such far reaching economic consequences it is likely that the government will provide assistance to businesses affected. It is important that businesses monitor available assistance offered by the government and know how to access this government assistance.

If you have any questions or need any assistance, please contact Practice Group Manager, Michael Scotti III by email at msscotti@ralaw.com or by phone at 312.572.1605.

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