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Client Alert: Is COVID-19 (Coronavirus) a Force Majeure Event that Excuses Contractual Non-Performance?

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The recent outbreak of COVID-19 (Coronavirus) has significantly affected most businesses and individuals at an unprecedented level. As a result of the global pandemic, supply chains have been disrupted and many businesses have temporarily closed (either voluntarily or by governmental mandate) or otherwise reduced operations. Consumers are staying home and have sharply reduced their spending on goods and services other than groceries, health care, and other necessaries.

It is expected that in the coming days, weeks and months, businesses may become unable to perform their contractual obligations as a direct or indirect result of the COVID-19 outbreak and its resulting economic impact. This raises the question of whether the pandemic is a *force majeure* event that could operate to legally excuse an otherwise required contractual performance. The answer may vary from jurisdiction to jurisdiction, and is highly fact-specific, but nonetheless a few general observations can be made.

First and foremost, what is a *force majeure* and how does it apply in the context of a business contract? *Force majeure* means "superior force" and is a contractual provision common in agreements for the provision of goods and services. Often considered a "boilerplate" provision, it is infrequently invoked but can have major implications when it applies. A true *force majeure* event can operate to legally delay or excuse a contracting party's performance, and can even be grounds for termination of the contract. A typical *force majeure* clause contains a list of things, such as war, riot, terrorist attack, earthquake, flood, fire, labor strike, and other Acts of God, the occurrence of which the contracting parties have agreed will have certain consequences, typically to delay or excuse the affected party's performance, or in some cases, to terminate the contract altogether.

Thus, the very first thing to consider is whether the contract even has a *force majeure* clause. If so, the obvious next question is whether COVID-19 (Coronavirus) is specified as a *force majeure* event. Given that it is a recent and novel disease, the answer may depend on whether the list of *force majeur*e events includes such things as "pandemic," "epidemic," "public health emergency," or similar phrase, that a party could

successfully argue covers the current situation.

However, it should be noted that courts generally enforce the parties' agreement as written and will not rewrite the agreement or impose new terms so as to conform the agreement to changed circumstances or current events. And a court will likely inquire into the timing of the parties' agreement to determine whether the parties' could have reasonably foreseen or anticipated the occurrence of the *force majeure* event. This will be a particularly interesting questions for contracts executed on or after December 2019 when news of the novel Coronavirus first began to surface. Additionally, courts may wrestle with issues of causation (i.e., the extent to which the COVID-19 pandemic actually caused the party's inability to perform, or whether the non-performance is attributable to other things), and whether a party is truly prevented from performing as opposed to performance that has simply become more difficult or expensive due to other factors.

It is also important to note that the absence of a *force majeure* clause (or even the presence of a *force majeure* clause that does not appear to cover the COVID-19 pandemic) does not necessarily mean that an affected party is without legal recourse. The legal doctrine known as "frustration of purpose" may provide alternative grounds for excusing an otherwise required performance. This doctrine may be applied if the essential purpose of the contract is frustrated or prevented by circumstances or events beyond the reasonable control and foresight of the parties. Other legal doctrines such "impracticability" and "impossibility" may also come into play depending on the circumstances.

As a final precaution, an affected party should read and strictly follow any notice requirements and other provisions and conditions within the *force majeure* clause to ensure that it does not unintentionally relinquish its rights or subject itself to liability. Oftentimes a party must give immediate written notice to the other party of any claimed *force majeure* event and must also take all commercially reasonable efforts to mitigate the impact and to resume performance as soon as possible. Likewise, a party on the receiving end of a *force majeure* notice should ensure the other party's compliance with all requirements and conditions and should also demand detailed information regarding the event, all mitigation efforts, and when performance is expected to resume.

For these reasons, a party potentially impacted by a *force majeure* event should consider consulting an attorney prior to taking any action or otherwise communicating with the other party. Business owners may also want to take this opportunity to review their current contracts, as well as any contract forms/templates, and discuss any questions or concerns with an attorney.

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