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Force Majeure In Arkansas:

Contractual Provisions and the COVID-19 Pandemic

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Many Arkansas businesses are temporarily shutting their doors in light of COVID-19, leading to uncertainty regarding the status of their contracts. Most contracts have a "force majeure" clause, in which the parties agree to waive some or all responsibilities in light of unexpected activity constricting a party's operations. Parties should understand their rights and responsibilities under their contracts as they consider how to respond to the evolving COVID-19 situation.

Language of the Clause

Parties seeking to suspend performance should first look to the language of their contract's force majeure clause, which must include language encompassing COVID-19. If the clause includes examples like "pandemic" or "quarantine," the party should be able to invoke the clause. However, most force majeure clauses are not so specific. If the clause references a "government action" or "government order," a party could argue that certain mandatory governmental directives excuse performance under the clause.

Most force majeure clauses include a catch-all phrase referring, for example, to all other acts not reasonably within control of a party. Arkansas courts, however, limit these catch-all phrases to situations resembling the clause's specific terms. On the other hand, courts would interpret the catch-all provision broadly when the force majeure clause contains no specific terms.

Impossibility

To qualify for excusal under most force majeure clauses, the COVID-19 pandemic must make continued performance legal or physically impossible. Legal impossibility encompasses circumstances where government restrictions make performance illegal, giving businesses facing mandatory closures the strongest case. Physical impossibility, on the other hand, is difficult to prove. For instance, a state may strongly recommend that its residents avoid public places in light of COVID-19, leading foot traffic at a tenant's business to dissipate. The tenant cannot claim excusal under the force majeure clause based on the decline in business, for operation is still physically possible.

Alternatively, the force majeure clause may be broader, encompassing acts making performance "impossible or reasonably impracticable." However, parties should hesitate before arguing impracticability. Arkansas courts frequently distinguish between impossibility and impracticability in theory, but rarely in practice.



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Mitigation

Arkansas courts require mitigation before granting excusal, generally requiring diligent – but not extraordinary – efforts. Courts are most willing to excuse a party's breach when the party has attempted to mitigate the damage. Arkansas courts have refused to grant excusal when the breaching party did not resume performance as quickly as reasonably possible. Business owners should keep this in mind as they decide on a re-opening date.

If a party tries to cancel performance under the force majeure clause, the other party should offer mitigation options like reduced rent or delayed due dates to prevent total cancellation. Arkansas courts do not look favorably on attempts to call off performance when an open path to mitigation exists.

For many businesses dealing with COVID-19, curbside delivery and online services are effective mitigation strategies. Parties with these mitigation options may face difficulty invoking their force majeure clauses to terminate agreements in their entirety.

Notice

Most force majeure clauses require notice to the other party, and notice is a good idea even when not required. The party invoking the clause should write a letter to the other party detailing the situation, discussing why continued operation is impossible and why mitigation is unavailable. Courts in Arkansas take the notice requirement seriously.

Scope of Relief

Force majeure clauses differ in scope. For example, many force majeure clauses in leases provide for closure without violating the covenant of continuous operation but do not excuse payment of rent during the time of closure. On the other hand, clauses in leases excusing parties from "any term, condition, or covenant" of the lease would excuse payment of rent as well.

Additionally, as noted herein, Arkansas courts grant excusal only to the extent that the parties mitigate their losses. Courts, therefore, will typically excuse performance only for a reasonable time.

Other Considerations

Courts universally refuse to imply force majeure clauses in contracts. A party without a force majeure clause – or a party whose force majeure clause does not encompass the pandemic – would need to rely on the common law defenses of frustration of purpose or commercial impracticability.

Under the frustration of purpose defense, a party need not fulfill its obligations under the contract if the underlying purpose of the contract can no longer be achieved. Parties generally raise this defense when performance is possible, but enforcing the contract as written would be inequitable because of changed circumstances. Courts will typically not accept "making a profit" as the underlying purpose of a contract under

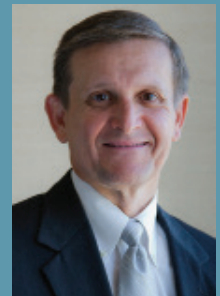
this doctrine – otherwise, performance could be excused in all unprofitable contracts. Parties raising this defense must show a non-profit purpose that was frustrated; for example, an accounting firm who contracted for cleaning services for a year could raise it to cancel the contract in whole or in part if the firm voluntarily limited access to its office. The firm's performance (payment of money) is still possible, but the purpose of the contract (a clean office) has been frustrated by the pandemic, since the employees are working from home.

The commercial impracticability defense arises when a party's performance becomes impracticable by the occurrence of an event that was assumed not to occur when the contract was made. Unlike under the frustration of purpose defense, performance here must be impossible or impracticable. This defense would thus be most effective for businesses affected by mandatory closures, as discussed above.

Finally, the parties may try to work out an agreement on their own. If the force majeure clause is not helpful to a breaching party, and the other party is willing to negotiate, the parties may sign an addendum to the contract. As is typically the case, negotiation may be the best strategy.

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