

Coronavirus - Does Force Majeure Apply?

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The coronavirus has disrupted the economy and business activity, making it difficult or challenging for some parties to honor their contractual obligations. In fact, it is apparent that parties are terminating their obligations under agreements, e.g. cancelling event or hotel reservations. Additionally, the coronavirus is anticipated to negatively impact supply chain systems leading to delay or failure to deliver. Parties finding it difficult or challenging to satisfy their contractual obligations may seek a remedy: declare force majeure.

Force Majeure (meaning superior force) is a clause often found in agreements and is in some states provided for in a statute. As a remedy, a force majeure clause can be particularly helpful. Generally, a force majeure clause excuses a party from performing its contractual obligations if certain events occur beyond the party's control that prevented or hindered the party from performing under the contract. Although the preceding sentence illustrates the general rule, whether a party can successfully rely on force majeure as an excuse for non-performance is dependent on the specific language used in the agreement and provided for in state law. This is because (i) a force majeure clause defines what events are out of the party's control and (ii) state courts interpret and in some cases invalidate force majeure clauses.

Since declaring force majeure is agreement specific, a party should review the force majeure clause in its agreement to determine if the coronavirus falls within the definition of an event beyond the party's control. For example, if the force majeure provision states that an epidemic or disease is an event beyond the party's control, then the coronavirus may fall within that definition. Additionally, state law may

illuminate how the courts will interpret a specific force majeure clause. Florida courts, for instance, have upheld force majeure clauses and excused a party's performance for events that are either (i) unforeseeable or (ii) foreseeable as long as the event was beyond the party's control. As such, a detailed analysis of the agreement and state law will be particularly important, especially when parties seek to terminate contractual obligations or delay the delivery of supplies.

Claiming a defense to one's contractual obligations based on force majeure, however, does not come without risks. If a party improperly declares force majeure, such party may be in default and responsible for payment of damages to the non-defaulting party. The non-defaulting party may also be able to terminate the contract. These risks may dissuade parties from declaring force majeure.

Given the significant consequences of improperly declaring force majeure, we encourage you to seek out a lawyer to analyze your agreement and evaluate the relative weight of the legal risks and rewards.

For up-to-date news please follow our Coronavirus (COVID-19) Response Team page.