Insights: Alerts

Impact of the COVID-19 Pandemic on Force Majeure Defenses Under Florida Law

APRIL 22, 2020 Written by Ronald L. Raider and Jason M. Wenker

We previously wrote about the contract defenses that business may rely on when an epidemic or government orders impairs contractual performance (here and here) and recently analyzed the *force majeure* defense under Georgia, North Carolina, and Texas law.

Here are some considerations when evaluating Florida *force majeure* defenses:

- *Force majeure* is a contract defense available to a party when the contract includes a clause excusing the non-performance of one or both parties to the contract because of a *force majeure* event. Similar common law defenses of commercial impracticability or frustration of purpose may be asserted even where a contract does not include a *force majeure* clause. This Legal Alert does not address the common law defenses as applied under Florida law.
- A *force majeure* clause is "a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled." A *RHC NVWELF01, LLC v. Chatsworth at Wellington Green, LLC*, No. 18-80712-MIDDLEBROOKS/BRANNON, 2019 WL 4694146, at *3 (S.D. Fla. Feb. 5, 2019) (citation omitted) (applying Florida law in construing *force majeure* clause).
- In Florida, "*[f]orce majeure* clauses are typically narrowly construed, and will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified." Id. (citation omitted).
- Unlike many other states, Florida does not limit *force majeure* clauses to unforeseeable events. "*[F]orce majeure* clauses broader than the scope of impossibility are enforceable under Florida law, including those allowing foreseeable as well as unforeseeable events to excuse timely performance. Home *Devco/Tivoli Isles LLC v. Silver*, 26 So. 3d 718, 722 (Fla. 4th DCA 2010).
- But parties should ensure that they aren't seeking to excuse performance based on risks inherent in contracting. "A *force majeure* clause is not intended to buffer a party against the normal risks of a contract." *Chatsworth at Wellington Green*, 2019 WL 4694146, at *4 (citation omitted).

Our COVID-19 Task Force stands ready to help you navigate the unique business challenges posed by the pandemic and shelter-in-place orders. If you are interested in discussing a specific area of interest for your business, we recommend you reach out to your primary Kilpatrick Townsend point of contact. General questions may also be submitted via email to #COVID19TSTaskForce@kilpatricktownsend.com

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