

Insights: Alerts

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

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force page](#) and/or your email for updates.

Force majeure, which means superior force, is a defense to a failure to perform contractual obligations because of an “act of God” event or some other event beyond the parties’ control. The COVID-19 pandemic has caused, and will cause, breaches of contracts. The numerous declarations of emergency by nations and here in the United States by the federal, state, and local governments, as well as the shelter-in-place orders are acts beyond the control of contracting parties. *Force majeure* defenses likely will play a role in determining whether the non-performance of contract obligations are excused.

We previously wrote about the contract defenses a business may rely upon when an epidemic or government order impairs contractual performance ([here](#) and [here](#)) and recently analyzed the *force majeure* defense under the laws of [Georgia](#), [New York](#), [North Carolina](#), and [Texas](#).

Here are considerations when evaluating the application of the *force majeure* defense under Delaware law:

- “A *force majeure* clause defines an area of events that might excuse nonperformance within the contract period. *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 287 (3rd Cir. 2014).
- “*Force majeure* clauses are, as a general matter, drafted to protect a contracting party from the consequences of adverse events beyond that party’s control.” *Stroud v. Forest Gate Development Corp., Inc.*, C.A. No. 20063-NC, 2004 WL 1087373 *5 (Del. Ch. Ct., May 5, 2004).
- “Application of a *force majeure* provision, as with any other contractual provision, starts with the words chosen by the drafter.” *Stroud*, 2004 WL 1087373 at *5.
- The *force majeure* defense generally is limited to the specific events listed in the contract clause. If the event is not listed but a catch-all phrase is included, the event must be of the type of events listed. *Stroud*, 2004 WL 1087373 *5. A phrase such as “or any other reason whatsoever beyond the control of the parties” is construed narrowly to prevent the catch-all phrase from covering any and all delays.

- In *Stroud*, the court concluded: “[T]he *force majeure* clause encompasses two concepts: first, that the delay-causing event was beyond the reasonable control of [the party] and, second, that the event was not reasonably foreseeable in the ordinary course of real estate development.” *Stroud*, 2004 WL 1087373 *5.
- Delaware law holds “that reasonable, unextreme economic hardship cannot constitute a *force majeure* event itself.” *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d at 288.
- A federal district court applied the principles announced in *Stroud* to a race car sponsorship agreement. The race car sustained damage during a race and was not able to compete in four races. The race car team notified the sponsor that the damage was a *force majeure* event which excused its contractual obligation to compete in those races. The corporate sponsor contended that committing more money to repairs would allow the race car to compete sooner so there was no *force majeure* event. The court found: “The interference [with contract performance] was the damage sustained in the accident at the Lime Rock race. The fact that money can solve the problem does not mean that a lack of money caused the problem. The court finds that VICI’s failure to race the T-Mobile Le Mans car at four races was not a breach of contract because Meixner adhered to the *force majeure* procedures outlined in section 13.2 of the agreement.” *VICI Racing, LLC v. T-Mobile USA, Inc.*, 921 F. Supp.2d 317, 332 (D. Del. 2013), *aff’d* 763 F.3d at 273.

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.

Related People



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