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Insights: Alerts

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

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Written by **Jason M. Wenker** and **Ronald L. Raider**

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.

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 Illinois *force majeure* defenses:

- A "*force majeure*" is "an event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (*e.g.*, floods and hurricanes) and acts of people (*e.g.*, riots, strikes, and wars)." *Stepnicka v. Grant Park 2 LLC*, 2013 IL App (1st) 113229-U, ¶ 6 n.2 (unpublished) (citation omitted); *see also Horwitz-Matthews, Inc. v. City of Chi.*, 78 F.3d 1248, 1251 (7th Cir. 1996) (applying Illinois law and explaining that a *force majeure* clause "excus[es] nonperformance under stated conditions").
- Where a contract has specific *force majeure* requirements, those requirements will supersede Illinois common-law concepts of impossibility and impracticability. *See Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs.*, 731 F. Supp. 850, 855 (N.D. Ill. 1990) ("[T]he [common-law] doctrine of impossibility is an 'off-the-rack' provision that governs only if the parties have not drafted a specific assignment of the risk otherwise assigned by the [*force majeure*] provision.").
- To succeed on a *force majeure* defense, a defendant must prove that its nonperformance of contract obligations was proximately caused by an event contemplated in the force majeure clause. *See N. Ill. Gas Co. v. Energy Co-op., Inc.*, 122 Ill. App. 3d 940, 949–52, 461 N.E.2d 1049, 1057–58 (1984) (counter-claimant was entitled to summary judgment where counter-defendant's breach was not proximately caused by *force majeure* event).
- Companies operating under fixed-price contracts should be wary of seeking to invoke a *force majeure* clause on the basis of price fluctuations. "A *force majeure* clause is not intended to buffer a party against the normal risks of contract[,] [and a] normal risk of a fixed-price contract is that the market price will change." *N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986).

- Companies should avoid exacerbating the business effects of COVID-19, since at least one Illinois federal court has determined that parties to a contract containing a *force majeure* clause have a duty to "take reasonable measures to prevent conditions constituting *force majeure* from arising, and to cure them if they do arise." *Heritage Commons Partners v. Village of Summit*, 730 F. Supp. 821, 824 (N.D. Ill. 1990) (citing *Dezsofi v. Jacoby*, 36 N.Y.S.2d 672, 674 (N.Y. Sup. Ct. 1942)).

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

Jason M. Wenker

t 336.607.7416

jwenker@ktslaw.com

Ronald L. Raider

t 404.532.6909

rraider@ktslaw.com