Can the COVID-19 Pandemic Excuse Contract Performance?

A Look at Ohio Caselaw

Sweeping changes to how we conduct business are coming at us rapidly, causing businesses and local agencies to react quickly. With these disruptions come inherent uncertainty. National, state and local governments have declared states of emergency, recommended social distancing, ordered businesses closed, imposed travel restrictions and limited public gatherings. Many organizations are ramping up efforts to facilitate remote work arrangements, navigate employee absences and school closures and cancel previously scheduled events.

The disruption to "business as usual" have many Ohio businesses and local agencies asking whether the COVID-19 pandemic is sufficient to constitute a "force majeure" event or otherwise excuse contract performance. A "force majeure clause" in a contract defines the scope of unforeseeable events that might excuse nonperformance by a party, according to the 2016 Ohio Court of Appeals decision in Haverhill Glen, L.L.C. v. Eric Petroleum Corp.

However, merely including a force majeure clause in a contract does not automatically relieve a party of performance. Is the COVID-19 pandemic sufficient to suspend performance in your contract? The answer, of course, is "it depends." Whether a force majeure event has occurred, and the repercussions of that event, depend on the specifics of the contractual language.

Importantly, "[t]he party who relies on a force majeure clause to excuse performance bears the burden of proving that the event was beyond the party's control and without its fault or negligence," As the appeals court found in 2001 in Stand Energy Corp. v. Cinergy Services.

Some force majeure provisions specifically include reference to epidemics or pandemics. However, many standard force majeure clauses simply include the standard reference to "act of God" – with no further definition.

The term "act of God," in its legal significance, means any unpreventable disaster, the result of natural causes, such as earthquakes, violent storms, lightning and unprecedented floods. It is such a disaster, arising from such causes, and which could not have been reasonably anticipated, guarded against or resisted. It must be due directly and exclusively to such a natural cause, without human intervention. It must proceed from the violence of nature or the force of the elements alone, and with which the agency of man had nothing to do. If the injury is caused by the agency of man, co-operating with the violence of nature or the force of the elements, it is not the "act of God," according to 1918's Piqua v. Morris.

Though an epidemic or pandemic may logically seem to be an "act of God," the agreement language and context will govern. It is important to first determine how a force majeure clause is described in your agreement and what remedies are available. It is also essential to pay close attention to any notice and timing requirements. If "Act of God" is not specifically defined in your agreement, courts are likely to interpret this language as is common between the parties and the industry and as is consistent with applicable law.

A Good Time to Revisit Agreement Language and Insurance Coverage

To be sure, it is worth revisiting standard contract language with your legal advisors to consider whether the addition of language "including but not limited to an epidemic or pandemic" is appropriate in your particular situation. Consider insulating contracts at the outset by carefully negotiating termination and cancellation policies. Though these provisions are often regarded as "boilerplate," they are extremely consequential when ability to perform is compromised.

This may also be a good time to review insurance policies to confirm what coverage may be in place to compensate you or your organization for loss of revenue or claims by the other contracting party for damages based on a contract cancellation. It may also be beneficial to ask what other coverages may be available to insure against such losses and at what cost.

Finally, do not underestimate the power of simple communication. These are extraordinary times and a party on the other side of your contract may also be facing challenges to performance. Flagging potential delays and disruptions in performance early can ensure a meeting of the minds and a leveling of expectations. Additionally, a party may have obligations to provide notice or take other mitigation efforts in the event of nonperformance. Early communication may help an organization meet those obligations.

Of course, each contract, organization and situation is different. Should you have any questions about your obligations under a contract in light of employment changes, event cancellations or other barriers to performance, please reach out to me.

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