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LEGAL BRIEFING: LITIGATION
COVID-19 AND THE INABILITY TO MEET CONTRACTUAL OBLIGATIONS

- Pg. 1 of 2

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“Act of God” or Just Bad Luck? COVID-19 and the Inability to Meet Contractual Obligations

In the first quarter of 2020, the entire world has been forced to make unprecedented and difficult adjustments to the new realities of life brought on by the COVID-19 pandemic. We have seen its effects on just about every industry imaginable – healthcare, travel, education, food & beverage and many more. We will undoubtedly continue to see the detrimental ripple effects hit other industries as well. Companies have been faced with temporary closures, either voluntary or government mandated, impacting their employees, their bottom lines, and their contracts/business with other companies. No matter which side, vendor, supplier or customer, companies are facing disruption and an inability to meet their contractual obligations and forcing companies to revisit their available remedies for defaulting upon commercial contracts.

One crucial item to evaluate is whether the contract contains a “force majeure” clause. This clause covers a party’s inability to perform its contractual obligations due to an “act of God” such as hurricanes, earthquakes, typhoons, and other violent natural events. But is a global pandemic considered an “act of God”? Is a company’s inability to perform its contractual obligations due to shutdowns and hardships resulting from COVID-19 excused under a force majeure clause? Although there is no straightforward answer to those questions, looking at the language of the contract could help provide some insight into the issue. Clauses that are wider in scope could be interpreted to include global pandemics as covered events. Clauses that are narrower in scope, or which contain more definitions for key terms, may not consider a global pandemic as an “act of God.” However, the party utilizing the force majeure clause must show that it was impossible to perform its obligations. If the party had other reasonable ways to perform under the contract or mitigate the damages, force majeure may

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not be applicable. It is also important to note that invoking a force majeure clause may result in neither party being liable for the other party's damages as a result of the force majeure event.

When reviewing your contract's force majeure clause, there are a few important aspects to consider. One aspect is notice requirements – the time and manner of providing notice to the other party of the inability to perform the contract. Another important aspect of the clause is the remedies for the party relying on it once the event triggers its application. Depending on how the clause is worded, available remedies may include excuse from performance on a temporary basis, excuse from performing certain duties, or (in rare circumstances) excuse from performing altogether.

If the contract does not include a force majeure clause, there still may be some avenues of relief. Companies should inspect the entire agreement for other performance, delay, and default provisions to analyze whether non-performance could be excused or lessened under an alternative provision. Additionally, common-law remedies, such as frustration of purpose, may be available. However, some common-law remedies carry a stricter standard and burden of proof compared to contractual provisions, making it more difficult to excuse the default.

Although there is little, if any, precedent for including a global pandemic under a force majeure clause, it remains to be seen how the courts interpret such a scenario in light of current events moving forward. With the lack of past legal precedent, and the changing economic climate, companies should be cognizant of how they draft and negotiate future contracts to cover performance impossibility by emergencies such as COVID-19.

Our team has extensive experience in drafting, reviewing, and litigating commercial contracts and counseling clients of their contractual rights and remedies. If you have any questions about this Legal Briefing and how the COVID-19 pandemic may affect your company or contract, please contact any member of the Firm at (585) 730-4773.

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