



STATE OF COLORADO FORCE MAJEURE LAW COMPENDIUM (during COVID-19 pandemic)

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A. Introduction

The spread of the COVID-19 pandemic has raised a number of significant and novel legal questions. One of the most important of these questions to the business community is how COVID-19 interacts with the “force majeure” clauses which are included as a matter of course in contracts of all varieties. This memorandum provides an overview for the USLAW NETWORK Compendium of Law on relevant considerations with respect to invoking “force majeure” clauses in contracts in light of the ongoing COVID-19 crisis.

B. Force Majeure in Colorado

1. Introduction

As the ongoing COVID-19 crisis continues to severely impact commercial activity in Colorado, many businesses and commercial actors need to know whether they will be liable for any inability to perform contractual obligations. “Force Majeure” clauses—common to many commercial agreements—generally provide that a party that has been unable to perform under a contract due to the occurrence of certain events outside of their control (such as wars, work stoppages, or natural disasters) may suspend, delay or terminate its performance and will not be liable for costs or damages due to the lack of performance caused by the event. In the absence of any such force majeure language, parties are likely limited to the common law defenses of impracticability or frustration of purpose.

Though these clauses are gaining significant attention during this crisis, these clauses have not been frequently invoked in Colorado in the past, and there is a dearth of case law in Colorado interpreting these clauses as a result.

2. Requirements to Obtaining Relief Using Force Majeure

Any force majeure litigation will likely turn on the question of whether the COVID-19 pandemic is the kind of event that triggers this provision. “A party relying on a force majeure clause to excuse performance bears the burden of proving that the event was beyond its control and without its fault or negligence.” Williston on Contracts § 77-31. Moreover, the application of any force majeure clause depends heavily on the particular clause’s language.

Terms like “pandemic” sometimes appear in the enumerated list of force majeure events, but the COVID-19 pandemic could also fall under other categories of force majeure events such as “act of God” or “disaster.” Parties could also point to “government regulations” restricting non-essential activities, given that Colorado courts have recognized regulatory action (or inaction) as a potential force majeure event. *See Gillespie v. Simpson*, 588 P.2d 890, 578-79 (Colo. App. 1978) (holding government’s delay in enacting drilling regulations constituted force majeure). More generally, parties might argue that the pandemic falls within a force majeure clause’s catch-all provision, for example, “any other unforeseeable emergency beyond the party’s control.”

Another potential avenue for safe harbor under a force majeure clause may come from economic hardship.

Although force majeure clauses do not guard against ordinary economic risks, they can apply where unforeseeable changes in circumstances make it impossible to profitably carry out the enterprise motivating the contract. In *Smith v. Long*, 578 P.2d 232, 234 (Colo. App. 1978), after the Atomic Energy Commission cancelled its uranium purchase program, the Colorado Court of Appeals held a “lack of market” provision in force majeure clause applied because “commercial mining would not be profitable” to a lessee; the clause did not require the lack of “any market, albeit unprofitable.” The Colorado Court of Appeals explained:

The lessee, as well as the lessor, is entitled to a profit. Such an interpretation is fair and reasonable, and is preferred to one that effects a harsh or unreasonable result. Under this type of covenant, the lessee does not have an obligation to engage in an unprofitable endeavor.

Id. (citations omitted). Although it is arguably dicta, this language suggests a surprisingly liberal approach to force majeure clauses based on parties’ economic situations, and it will probably play a significant role in litigation over any Colorado force majeure clause.

Another issue is whether the COVID-19 outbreak renders the performance of a party’s obligations impossible, as force majeure clauses generally require. In some cases, this requirement will be easy to satisfy: for example, where a promised performance constitutes non-essential work forbidden by government regulations. But in other cases, the party might be able to perform its obligations strictly construed—for example, paying a promised fee or liquidated damages sum—but unable to make any use of the goods or services contracted for.

Such cases will turn on whether the relevant “obligation” to be performed is rendering payment or making use of the contracted-for goods or services. Although it is an open question, the Colorado Court of Appeals rejected the narrower approach (construing the “obligation” merely as payment) in one case. In *Gillespie v. Simpson*, 588 P.2d 890, 578-79 (Colo. App. 1978), the Colorado Court of Appeals rejected the argument that “lessees’ obligation to pay rent was not affected by the force majeure [because] the lessees . . . had the ability to pay rent.” The clause in that case read: “If Lessee is rendered unable wholly or in part by force majeure to carry out the obligations of Lessee under this lease, . . . the obligations of Lessee so far as they are affected by the force majeure shall be suspended during the continuance of the force majeure The term ‘force majeure’ as used herein shall mean . . . action by the federal or state government regulating or interfering in any way with Lessee's Rights and obligations under this lease” *Id.* The court of appeals reasoned that the clause “specifically defined force majeure as any action by the state which interferes with lessees’ rights,” and that the event here (the government’s delay in enacting regulations that would have allowed gas and oil lessees to begin drilling) interfered with the lessees’ rights by preventing them from generating

income—notwithstanding the plain text requiring the event to “render” a lessee “unable . . . to carry out the obligations . . . under this lease.” *Id.*

Parties seeking to enforce contracts could argue the holding in *Gillespie* was limited to the language of the force majeure clause there, which broadly defined triggering events. Parties seeking to avoid contractual obligations could argue that the force majeure clause in *Gillespie* had two elements—the definition of a force majeure event and the requirement that that event “render” a party “unable wholly or in part” to carry out its contractual obligations. The Court of Appeals elided these two elements, essentially holding that any event meeting the force majeure definition automatically rendered a party unable to meet its obligations, even though the party in *Gillespie* plainly had the ability to fulfill its narrow obligation of paying what it owed.

3. Scope of Relief

There is very little law in Colorado outlining the scope of relief in the force majeure context. The scope of the force majeure clause will also depend on the terms of the clause. Still, a force majeure clause typically may excuse a party for delayed performance or non-performance based on the COVID-19 outbreak (or its various consequences, such as government regulations). Colorado courts have held that force majeure clauses, when warranted, can suspend the duties owed by one party to the contract. *See Gillespie*, 588 P.2d at 578-79. Other Colorado cases have held that a force majeure clause can completely relieve a given party’s duty to perform. *Smith*, 578 P.2d at 234.

4. Other Considerations

Unlike some states, Colorado does not read a “best efforts” provision into force majeure clauses. Unless parties specifically provide in their contract, Colorado courts do not consider whether a party invoking force majeure has exhausted all alternative ways of fulfilling the contract. *See Smith*, 578 P.2d at 234 (declining to find “an implied covenant . . . requiring the lessee to explore all claims, and that only after exploration can a determination of non-profitability be made”).

Additionally, parties on either side of a potential force majeure dispute may also want to consider how the invocation of a force majeure clause may impact other remedies available to that party. No Colorado case directly addresses the question whether a contractual force majeure clause supplants other legal and equitable remedies based on changed circumstances, such as frustration of purpose. *But see Qdoba Rest. Corp. v. Taylors, LLC*, 2010 WL 1240410, at *6 (D. Colo. Mar. 23, 2010) (unpublished) (noting that “[t]he frustration of purpose defense is not available if the event allegedly frustrating the purpose of the contract was foreseeable at the time the parties entered in the agreement and the parties could have addressed the issue in their bargaining.”). Persuasive authority on this issue is likewise sparse, but the existing authority reveals two fairly well-accepted principles: (1) a force majeure clause does not, as a matter of law, automatically supplant a frustration of purpose defense; but (2) language in a

force majeure clause may supplant equitable defenses if the language indicates the parties intended to make that clause their sole remedy for unforeseeable changes in circumstances.

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.