STATE OF IDAHO FORCE MAJEURE LAW COMPENDIUM

(during COVID-19 pandemic)

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Force Majeure in Idaho

1. Introduction

As the ongoing COVID-19 crisis continues to severely impact commercial activity in Idaho, many businesses and commercial actors need to know whether they will be liable for any inability to perform contractual obligations. "Force majeure" or "act of God" clauses are commonly included in contracts to address situations where an unexpected event prevents a party from performing contractual obligations. These clauses allow the party to suspend, delay, or terminate its performance pursuant to the contract without being held liable for the costs or damages incurred. Without this language, parties commonly are limited to the defenses of impracticability, impossibility, or frustration of purpose. However, in light of the uncertain and fluid circumstances associated with the COVID-19 pandemic, parties certainly may attempt to cooperate and negotiate to provide affordances under the contractual terms to avoid costly litigation and frustration of the contract's purpose.

2. Requirements to Obtaining Relief Using Force Majeure

Idaho Code does not specifically reference "force majeure," and only sporadically refers to "acts of God" in specific statutory contexts, generally to reduce or eliminate liability otherwise imposed or to grant administrative authority. For example, see Idaho Code §§ 49-1614(2)(c) (regarding actions against automobile dealer franchise agreements); 42-1204 (regarding liability related to the maintenance and repair of ditches); 42-1203 (regarding maintenance of embankments); 41-5605(5) (regarding due dates for medical insurance payments); 39-7111(1)(a) (regarding "hazardous substance incidents"); 39-4413 (regarding hazardous waste facility permit suspensions/revocations); 36-104(2) (regarding Fish & Game Commission's authority to close hunting and fishing); 33-1276 (regarding school district board of trustees' authority to act); 28-52-104(4)(a) (regarding the removal of a security freeze by a consumer reporting agency); 28-24-103 (regarding farm equipment suppliers' failure to deliver equipment); 25-3805(7) (regarding odor emissions at agricultural operations); and 5-246 (regarding prescriptive overflow easements). However, no general statute regarding contractual agreements addresses force majeure or act of God provisions.

In turn, Idaho case law makes some, albeit limited, discussion of "force majeure" and "act of God" matters. In the context of contracts, under Idaho law interpretation and legal effect of an unambiguous contract is a question of law, and in construing such legal instruments, a court considers the contract as whole, gives meaning to all provisions of the writing to the extent possible, and will honor, for example, provisions limiting liability as might arise from an act of God.[1] A court will look to whether the contract includes a force majeure or act of God clause, and, where included, will consider whether a potential event is included in the relevant contractual clause. A court also analyzes whether the clause provides for latitude in including additional events not expressly listed. For example, where a development contract required a facility to be completed in 18 months and the contract contained a force majeure clause which

provided that the construction deadline was subject to delays resulting from "weather, strikes, shortage of steel or manufacturing equipment or any other act of force majeure or action beyond Developer's control," the Idaho Supreme Court held that the wording of the force majeure clause did not limit the clause's application to the types of events mentioned.[2] In light of the current COVID-19 pandemic, a court may determine that the pandemic is an "action beyond the party's control" and may excuse the party's conduct for the time during which the conduct could not be performed. However, a "catch-all" clause's applicability to the COVID-19 pandemic would depend on the clause's wording and the contract as a whole; such catch-all clauses tend to be construed narrowly.

A court may also consider whether the conduct sought to be excused objectively could have been performed despite the force majeure. An impacted party may have had an obligation to mitigate or prevent the foreseeable risks of nonperformance. Where the force majeure does not objectively prevent a party from performing its duties, even where the contract provides for discharge in light of certain force majeure events, a court will not likely find the performance excusable.[3] If a party is looking to excuse its conduct based generally on the COVID-19 pandemic, but there is no indication that its performance was actually affected by the pandemic, the performance likely will not be excused. Further, a party seeking to excuse performance based on the COVID-19 pandemic will likely have to closely adhere to the notice requirements of the contract even when the COVID-19 pandemic is a widely known event. If the party fails to adhere to the notice requirements, the nonperformance may not be excused despite the presence of an applicable force majeure clause.

3. Scope of Relief

The language in a force majeure clause usually determines the relief available when nonperformance occurs. Performance may be excused when performance is no longer possible due to the force majeure or act of God;[4] the party whose performance has been prevented may be entitled to damages for the benefit of the bargain that would have been earned through performance.[5] Additionally, relief from performance may last only the length of time that the clause is triggered; the obligations may return once the triggering event is concluded. For example, the provision may suspend both parties' performance for the duration of the event.[6] Alternatively, the clause may not suspend payment despite the presence of a force majeure. Accordingly, the relief sought is highly dependent on the contractual language and may be limited based on mitigating factors. The party seeking to be excused from performing or, alternatively, looking to enforce performance must look to the contractual language to determine the relief therein provided. If a party fails to perform based on the COVID-19 pandemic, the party may be subject to performance once the limiting factor is lifted and/or may be subject to damages that would have been earned through performance.

4. Other Considerations

When a force majeure clause is not included in a contract, the contractual obligations may be excused based on the doctrines of supervening impossibility or impracticability. To establish impossibility, "(1) a contingency must occur; (2) performance must be impossible, not just more

difficult or more expensive; and (3) the nonoccurrence of the contingency must be a basic assumption of the agreement."[7] However, only when performance is objectively impossible may performance generally be excused under the doctrines of impossibility or impracticability; even upon a finding of objective impossibility, the contractual obligations may be only temporarily discharged if the duties are able to be performed once the objective impossibility ceases to exist.[8] Subjective impossibility is insufficient to excuse nonperformance.[9] If the impossibility is personal only to the impacted party and is not inherent to the nature of the act to be performed, it will be insufficient to discharge performance under the contract.[10] Thus, if a party is seeking COVID-19 contractual relief based on the common law doctrines of impossibility or impracticability, it must determine whether its nonperformance is objectively or subjectively impossible and whether the relief sought is a temporary or permanent discharge of its obligation. Further, in the context of fraud claims, a party is not "charged with knowledge of, or be required to anticipate, an act of God."[11]

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.

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[1] Idaho Power Co. v. Cogeneration, Inc., 134 Idaho 738, 748, 9 P.3d 1204, 1214 (2000); Jesse v. Lindsley, 149 Idaho 70, 76, 233 P.3d 1, 7 (2008), *reh'g denied* (July 22, 2008).

[2] Burns Concrete, Inc. v. Teton Cty., 161 Idaho 117, 120, 384 P.3d 364, 367 (2016), *reh'g denied* (Dec. 6, 2016). With respect to assertions of "act of God," the Idaho Supreme Court has previously stated that "[t]he distinguishing characteristic of an 'act of God' is that it proceeds from the force of nature alone, to the entire exclusion of human agency." Curtis v. Dewey, 93 Idaho 847, 849, 475 P.2d 808, 810 (1970); *accord*, Harper v. Johannesen, 84 Idaho 278, 371 P.2d 842 (1962) (affirming jury instruction defining "act of God" to reference "those events and accidents which proceed from natural causes and cannot be anticipated or guarded against or resisted.").

[3] Idaho Power Co. v. Cogeneration, Inc., 134 Idaho 738, 748, 9 P.3d 1204, 1214 (2000).

[4] State v. Two Jinn, Inc., 151 Idaho 725, 728-29, 264 P.3d 66, 69-70 (2011); Haessly v. Safeco Title Ins. Co., 121 Idaho 463, 465, 825 P.2d 1119, 1121 (1992); Sutheimer v. Stoltenberg, 127 Idaho 81, 85, 896 P.2d 989, 993 (Ct. App. 1995). However, inaction on an actionable natural force does not provide a basis to assert "act of God." Johnson v. Burley Irr. Dist., 78 Idaho 392, 398, 304 P.2d 912, 916 (1956) (no "act of God" where known gophers ignored).

[5] Sullivan v. Bullock, 124 Idaho 738, 741-42, 864 P.2d 184, 187-88 (Ct. App. 1993).

[6] Idaho Power Co. v. Cogeneration, Inc., 129 Idaho 46, 48, 921 P.2d 746, 748 (1996).

[7] Haessly v. Safeco Title Ins. Co. of Idaho, 121 Idaho 463, 465, 825 P.2d 1119, 1121 (1992).

[8] State v. Chacon, 146 Idaho 520, 198 P.3d 749 (Ct. App. 2008); State v. Two Jinn, Inc., 151 Idaho 725, 728-29, 264 P.3d 66, 69-70 (2011).

[9] Id.

[10] Id.

[11] Anderson v. Michel, 88 Idaho 228, 235, 398 P.2d 228, 232 (1965).