STATE OF INDIANA FORCE MAJEURE LAW COMPENDIUM

(during COVID-19 pandemic)

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A. Introduction

This memorandum will seek to provide an Indiana exemplar 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 Indiana

1. Introduction

The Covid-19 pandemic (the "Pandemic") is not only a public health crisis, but also an economic one. The impact of the pandemic on commercial activity in the State of Indiana, as in other states, has been significant and likely will continue to be as commercial actors navigate an uncertain path ahead.

Within this extraordinary context, certain commercial parties may be, or may claim to be, unable to perform their obligations under contracts. These parties may rely on a number of legal theories to support their arguments, including common law doctrines of impossibility, illegality or frustration of purpose. If the contract in question contains a *force majeure* clause, however, the party may rely instead on such a clause to excuse its non-performance.

Black's Law Dictionary 718 (9th ed. 2009) defines force majeure (or, "supreme force" in French) as an "event or effect that can be neither anticipated nor controlled that includes both acts of: (1) Nature (for example, floods and hurricanes) and (2) People (for example riots, strikes, and wars)." In other words, force majeure is generally understood to mean an unexpected event or circumstance entirely outside of the parties' control.

Indiana does not have a statute defining force majeure. And certainly, to date, no cases in Indiana have been litigated to determine the applicability of a force majeure clause during the Pandemic. In general, "Indiana has very few cases interpreting force majeure clauses." *Specialty Foods of Indiana, Inc. v. City of S. Bend,* 997 N.E.2d 23, 26 (Ind. Ct. App. 2013). *Specialty Foods* appears to be the preeminent case at this time. In its opinion, the court affirmed that, under Indiana law, a force majeure clause is understood as "a 'contractual provision allocating the risk if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled'." *Id.* at 26 (internal citation omitted).

Specifically, the Indiana Court of Appeals declared that "the scope and effect of a force majeure clause depends on the specific contract language, and not on any traditional definition." *Id.* at 27. Further, the court stated, quite simply, that if parties have defined the nature of force majeure in their agreement, then "that nature dictates the application, effect, and scope of force majeure with regard to that agreement and those parties, and reviewing courts are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended." *Id*.

Accordingly, the *Specialty Foods* court held that certain "catch-all" language included in the force majeure clause of the contract in question – which read, plainly, "any other reason not within the reasonable control of [either party]" – was broad enough to include the scenario in question, and thus excused the non-performing party's obligations. *Id.* at 29. The court reinforced this point when it rejected the plaintiff's argument that the force majeure clause is inapplicable to excuse the defendant's performance because the event in question was "not unforeseeable". The court held that, "[T]he force majeure provision in this case contains nothing about foreseeability, and [the plaintiff] points to neither terms in the provision nor in the remainder of the parties' contract in support of its argument. The scope and effect of a force majeure clause depends on the specific contract language." *Id.*

If a force majeure clause specifically includes "pandemic", "epidemic" or similar language specifying a public health emergency in its enumerated list of events, then the applicability of the clause is likely to be straightforward. Even if the clause does not explicitly include such terms, the precedent of *Specialty Foods* signals that "catch-all" language in a force majeure clause is likely to be taken at its broad face value, and not artificially narrowed, by Indiana courts. In this way, *Specialty Foods* may offer an avenue by which to argue that any plain and appropriately broad "catch-all" language within a force majeure clause must be construed to include the Pandemic.

The holdings of a very recently decided federal appeals court case involving force majeure and applying Indiana state law, *Acheron Med. Supply, LLC v. Cook Med. Inc.*, No. 19-2315, WL 2188698, at *9 n.6 (7th Cir. May 6, 2020), reinforces the approach of *Specialty Foods* – namely, that the scope and effect of a force majeure clause is determined by its specific language, not any traditional definition of the term. In *Acheron*, the 7th Circuit Court of Appeals affirmed the lower court's ruling that, although Acheron breached the contract, it was not liable for any damages because the breach was excused by the specific language of the contract's force majeure clause. More specifically, the *Acheron* court found that the denial by a governmental agency of a document necessary for other parts of performance under the contract to occur was a triggering event under the force majeure clause, which included an "act of government or… agency" in its enumerated events. A non-performing party during the coronavirus pandemic could attempt to use *Acheron* to similarly argue that a governmental act (such as a stay-at-home order) renders it unable to perform its obligations under a contract; this argument may or may not be successful depending on the specific language of the contract's clause, but could also be pursued under doctrines of impossibility or illegality, as mentioned in Section 4 below.

The opinion in *Specialty Foods* is also an example of how Indiana courts likely will apply traditional principles of contract interpretation to guide their analysis of the applicability of a force majeure clause during the Pandemic. The principles of contract interpretation that Indiana courts are expected to apply include: a determination of "the intent of the parties at the time the contract was made by examining the language they used in the

contract" *Specialty Foods*, 997 N.E.2d at 26; that "contracts are to be read as a whole, and a court should construe the language in a contract so as not to render any words, phrases, or terms ineffective or meaningless" *Id.*; whether the bargaining between the parties was "free and open" *Id*. at 27; and that the "clear and unambiguous language of a contract is to be given its plain and ordinary meaning" (*Boyer Const. Group Corp. v. Walker Const. Co., Inc.,* 44 N.E.3d 119, 126 (Ind. Ct. App. 2015) (internal citation omitted).

Indiana courts' analysis of the specific language and applicability of a force majeure provision will also include any related notice provisions. In *State v. Int'l. Bus. Mach. Corp.,* 51 N.E.3d 150 (Ind. 2016), the Supreme Court of Indiana held that although a force majeure event had occurred, because the nonperforming party failed to provide notice of its nonperformance in accordance with the terms of the clause, the nonperforming party could not rely on the force majeure clause to excuse performance.

Whether a governmental authority's stay-at-home or business closure order during the Pandemic may be considered a force majeure event excusing performance will be a fact-sensitive inquiry that will depend primarily on the specific language of the contract (such as whether such a governmental order is included in a list of enumerated force majeure events or may be interpreted to be included through broad "catch-all" language in the clause). Even if the contract lacks a force majeure clause or such a clause is found not to apply, a party could still seek to excuse a delay or a total absence of performance due to compliance with a governmental order under certain common law doctrines, as explained further in Section 4 below.

2. Requirements to Obtaining Relief Using Force Majeure

When claiming force majeure, the burden of proof lies with the party seeking to excuse its performance under the contract. The nonperforming party must (1) prove that the event in question is covered by the language of the force majeure clause, and (2) that the event is the actual cause of the party's non-performance. In addition, as noted above with respect to the holding in *Int'l. Bus. Mach.*, the non-performing party must adhere to any force majeure notice requirements in the contract, otherwise the clause will not be applicable regardless of the nature of the event. If the language of the contract requires specific mitigation measures or there is an implied good faith duty to mitigate, the non-performing party may also need to demonstrate that those measures were taken before being able to successfully invoke the clause to excuse its non-performance.

3. Scope of Relief

If the non-performing party prevails in its argument, relief will generally consist of the excusal of its performance and no liability for damages. If the court finds that the party's non-performance is not excused and constitutes a breach of contract, the non-performing party will be subject to an action for damages.

The exact scope of relief available will depend primarily on language in the contract to that effect, including any stated duties to mitigate a delay in performance or minimize losses. The court may also look to any implied good faith duties to minimize loss, damage or delay. Finally, even if the court finds that performance is excused in some way, there may be terms of the contract that specify an allowable time period or extent of non-performance.

As noted above, Indiana has very little case law interpreting force majeure provisions, so the exact scope of relief will depend heavily on the specific facts litigated against the backdrop of the specific language and requirements found in the contract.

4. Other Considerations

Even in the absence of a force majeure clause in the contract, performance may be excused by the doctrines of impossibility, frustration of purpose or illegality. This overview does not purport to examine these doctrines in any detail but does include mention of them here so they may be considered in any analysis of non-performance of a contractual obligation.

Impossibility is generally an affirmative defense invoked as a defense to an action for damages. Under Indiana law, the party seeking excusal of performance must meet a high standard under the doctrine of impossibility, as the party's performance must be rendered absolutely impossible, not "merely very difficult or relatively impossible". *Wagler v. W. Boggs Sewer Dist.*, 980 N.E.2d 363, 378 (Ind. Ct. App. 2012) (internal citations omitted).

Frustration of purpose may apply when there has been an unforeseen event or change of circumstances that renders one party's basic reason or purpose for entering the agreement practically meaningless. The Restatement (Second) of Contracts, § 265 (Am. Law Inst. 1981), defines frustration of purpose as: "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or circumstances [of the contract] indicate the contrary." Severe disruption to the operation of a business may enable the non-performing party to rely on this doctrine; a determination made by a judge, not a jury.

A non-performing party could also assert the doctrine of illegality to excuse performance during the Pandemic. The party may argue that a government authority's business closure or stay-at-home order renders the performance of certain contractual obligations unlawful because performance would require contravention of such an order. The conclusion may depend, in part, on a determination of the government's express authority to issue such an order. *See Gregg Sch. Twp. v. Hinshaw,* 76 Ind. App. (1921). Further, it is possible that performance may be excused as impossible or illegal

during the Pandemic for certain types of contractual obligations but not others (*e.g.*, mere payment obligations vs. specific performance obligations). Indeed, relying on reasoning in *Acheron*, a non-performing party in Indiana could argue that a governmental action has rendered its performance impossible or illegal, or has frustrated its purpose.

In the case of a contract for the sale of goods, the Uniform Commercial Code's doctrine of "commercial impracticability" may apply, which generally is a lower standard to meet than the common law doctrine of impossibility.

With very little litigation in the area of force majeure clauses, Indiana courts provide signals, but not certainty, as to how the issue may be considered in the context of the Pandemic. Ultimately, under Indiana law as it currently stands, the ability of a party to use a force majeure clause to excuse its non-performance during the Pandemic and escape liability for damages will depend heavily upon the specific, actual language of the clause and on the standards of general contract interpretation employed by Indiana courts, all as discussed above.