STATE OF MICHIGAN FORCE MAJEURE LAW COMPENDIUM

(during COVID-19 pandemic)

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A. General Introduction

This memorandum provides a Michigan exemplar for the USLAW Compendium of Law on the relevant factual and legal considerations for invoking force majeure clauses with respect to the current and ongoing coronavirus epidemic (COVID-19).

B. Force Majeure in Michigan

1. Introduction

The COVID-19 crisis has impacted, if not fully disrupted, almost every industry in the United States. Commercial parties that are subject to Michigan law need to know and understand the principles governing liability in situations where there is an inability to perform. The existence of a force majeure provision may provide a mechanism for excusing contractual performance due to the occurrence of certain events beyond the control of the contractual parties. Such provisions, depending on their specific language and application, may suspend, delay, or terminate an obligation to perform, thereby legally excusing, in full or in part, liability. Given the detrimental impact of the COVID-19 crisis, the absence of a force majeure clause may not preclude a party from invoking the underlying concepts associated with force majeure. This memorandum also addresses the common law defenses that may apply in the absence of a force majeure provision.

2. Requirement for Invoking and Obtaining Relief Under Force Majeure

There is a paucity of Michigan cases interpreting force-majeure clauses.[1] The general purpose of a force majeure clause is to relieve a party from penalties for breach of contract when circumstances beyond the party's control render performance untenable or impossible.[2] Force majeure clauses are narrowly construed such that the clause will generally excuse only a party's nonperformance if the event that caused the party's nonperformance is specifically identified.[3]

3. Scope of Force Majeure and Available Relief

A leading Michigan case, *Kyocera Corp v. Hemlock Semiconductor, LLC*, illustrates how a clause needs to specify the degree to which government action impacts a party's performance. In that case, Kyocera, a solar panel manufacturer in a take-or-pay supply contract brought a declaratory judgment action alleging that acts by the Chinese government in flooding the market with less expensive solar panels, constituted a force majeure event. Kyocera sought to invoke the "acts of the Government" language in a force majeure provision to excuse performance.[4] Both the trial and appellate courts denied Kyocera's effort to invoke the force majeure clause,

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[1] *Kyocera Corp. v. Hemlock Semiconductor, LLC*, 313 Mich.App. 437, 446, 886 N.W.2d 445, 451 (2015) citing *Erickson v. Dart Oil & Gas Corporation*, 189 Mich.App. 679, 689, 474 N.W.2d 150 (1991).
[2] *Kyocera Corp*., at 438-439.
[3] *Kyocera Corp*., at 447; *In re Cablevisions Consumer Litigation*, 864 F. Supp.2d 258, 264 (E.D.N.Y., 2012) citing *Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433, 434, 822 N.Y.S.2d 8 (2009).
[4] *Kyocera Corp*., at 446-448.

holding that the parties could have specifically included the governmental action of market manipulation in defining a force majeure but did not.[5]

4. Other Considerations

Michigan law recognizes the defense of impossibility of performance. There are two kinds of impossibility: original and supervening. Supervening impossibility develops after a contract is formed.[6] Under the impossibility of performance doctrine, a promisor's liability may be extinguished in the event the contractual promise becomes objectively impossible to perform.[7] The question of whether a promisor's liability is extinguished in the event a contractual promise becomes objectively impossible to perform may depend upon whether the supervening event producing impossibility was reasonably foreseeable when he entered into the contract.[8] Risk of nonperformance of a contract should not fairly be thrown upon the promisor, if an unanticipated circumstance had made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.[9]

Michigan recognizes the frustration of purpose doctrine. Frustration of purpose is generally asserted where a change in circumstances makes one party's performance virtually worthless to the other, thereby frustrating the purpose in making the contract.[10] In order to invoke the frustration of purpose doctrine, the following conditions must be present: (1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; and (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed.[11] There is no authority in Michigan that provides for rescission based on frustration of purpose.[12]

While the force majeure landscape may begin to change due to the COVID-19 pandemic, the authors stress the importance of having a full understanding of the specific restrictions imposed, if any, by relevant governmental authorities in order to develop a complete analysis of the impact of any such restrictions upon a party's contractual obligations.

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[5] *Kyocera Corp.*, at 449-450.
[6] *Roberts v. Farmers Insurance Exchange*, 275 Mich.App. 58, 74, 737 N.W.2d 332, 342 (2007) citing *Bissell v. L.W. Edison Co.*, 9 Mich.App. 276, 284, 156 N.W.2d 623 (1967).
[7] *Roberts*, at 73-74 citing *Bissell*, at 284.
[8] *Roberts*, at 74, citing *Vergote v. K Mart Corp.*, 158 Mich. App 96, 110, 404 N.W.2d 711, 717 (1987).
[9] *Vergote*, at 110, citing *Bissell*, at 285.
[10] *Liggett Restaurant Group, Inc. v. City of Pontiac*, 260 Mich.App. 127, 133–34, 676 N.W.2d 633 (2003) citing Restatement, § 265, comment a, p 335.
[11] *Liggett Restaurant Group, Inc.*, at 134-35 citing *Molnar v. Molnar*, 110 Mich.App. 622, 626, 313 N.W.2d 171, 173 (1981).
[12] *Liggett Restaurant Group*, at 132.

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