STATE OF MISSOURI FORCE MAJEURE LAW COMPENDIUM

(during COVID-19 pandemic)

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A. Introduction

On April 6, 2020, Governor Mike Parson issued Missouri's "Stay-at-Home" Order in an effort to prevent the spread of COVID-19. This Order remained in effect until May 4, 2020. Other local orders may remain in effect. Missouri's state-wide Stay-at-Home Order, like those of many other states, divided businesses into those that provided essential services and those that did not.[1][2] The Order also set forth social distancing requirements, limited social gatherings to ten or fewer persons, and closed Missouri schools.

As the ongoing COVID-19 crisis continues to effect commercial activity in Missouri, businesses impacted by "Stay-at-Home" orders and COVID-19 generally, need to understand their options as it pertains to the performance of contracts impacted by the pandemic. "Force majeure" clauses are one of the more common contractual provisions/legal doctrines worth examining during the current pandemic.

Accordingly, this memorandum seeks to provide guidance on invoking a force majeure clause in a contract governed by Missouri law. Force majeure clauses along with other legal doctrines are of particular importance during and after the ongoing COVID-19 crisis because the pandemic, resultant orders and their effect have led to significant disruptions in commercial activities, including business closures, both temporary and permanent, and supply chain disruptions that may persist for some time. Below is a brief summary of precedent in Missouri and other points for consideration before deciding upon a strategy moving forward.

B. Force Majeure in Missouri

A force majeure provision allocates risk if performance becomes impossible or impracticable because of an event that the parties could not have anticipated or controlled.[3] A typical force majeure clause may read as follows:

> Force majeure. No party shall be responsible for a failure or delay in performance of the obligation hereunder due wars, strikes, acts of God, terrorism, or actions of regulatory agencies, provided that the Party seeking relief from its obligations promptly advises the other Party forthwith of the Force Majeure."[4]

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[1] A copy of Missouri's "Stay-at-Home" Order may be found at: https://governor.mo.gov/priorities/stay-home-order (last visited, May 18, 2020).

[2] Missouri used guidance from the Department of Homeland Security to determine those entities that provided essential services. *See* Department of Homeland Security Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in Covid-19 Response, Version 2.0, (March 28, 2020), *available at* https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_1.pdf (last visited, May 18, 2020).

[3] *Clean Uniform Co. St. Louis v. Magic Touch Cleaning, Inc.*, 300 S.W.3d 602, 610 (Mo. App. E.D. 2009) citing Black's Law Dictionary 718 (9th ed. 2009).

[4] *See* Missouri Practice Series, Eric Ziegenhorn, Force Majeure Clause, 7 Mo. Prac., Legal Forms § 38:155.50 (3d ed.) (July 2019 Update); *see also* Missouri Practice Series, William H. Henning, Force Majeure Clause—Another Clause, 13 Mo. Prac, UCC Forms § 2-615 Form 3 (3d ed.) (November 2019 Update).

In short, the force majeure clause is akin to an escape clause, which may be available to one or more parties to the agreement, depending upon the precise wording of the clause. If successful, the party invoking the clause is relieved from liability for non-performance due to the unforeseen event.

As discussed below, Missouri Courts recognize "force majeure" clauses; however, there are few cases directly addressing them. Indeed, Missouri lacks any caselaw addressing force majeure clauses in the context of a disease, pandemic, or change in law. Still, even if a particular agreement lacks a force majeure clause, or the clause does not pertain to the current crisis, other defenses in Missouri include legal doctrines such as impossibility and commercial frustration. Knowledge of the force majeure clause in your agreement, if one is present, and the doctrines of impossibility and commercial frustration may provide for relief and/or negotiating leverage during the current pandemic.

Also important to consider is that where a force majeure event may have been relatively limited to a particular geography or industry in the past, COVID-19 has been global in nature. Businesses face tremendous uncertainty as to when activities may return to "normal". Accordingly, keep in mind that the other party to an agreement has likely been impacted as well, and due to their own performance issues, these businesses may readily accept delay or excuse performance entirely. While communication in business is always important, this is particularly true now.

1. Requirements to Obtaining Relief Using Force Majeure

While other states may define "force majeure" via statute, Missouri does not. As a result, guidance as to the application of "Force Majeure" clauses comes through Missouri caselaw pertaining to contract interpretation. Whether the clause applies to the event at issue is a function of the precise language and the event/circumstance sought to be used as an excuse for avoiding performance.

In Missouri, if a party to a contract desires that its performance be excused upon the happening of a post-contract event, and the event is reasonably foreseeable at the time of contracting, that party must expressly provide for that possibility in the contract.[5] This is generally true even if the event would render performance impossible, impractical, or commercially-frustrated.[6] The justification for this is Missouri's overriding goal of preserving the certainty of contracts.[7]

Missouri's enforcement of "force majeure" clauses is limited because the courts will not excuse liability for events in a force majeure clause captured by "catch-all" provisions such as "other causes beyond the parties' control". In other words, Missouri Courts will not excuse performance through a force majeure clause if the event was foreseeable and was not specifically described in the contract.[8][9] Missouri Courts will assume the obligor assumed the risk.[10]

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[5] *Clean Uniform Co. St. Louis*, 300 S.W.3d at 608; *see also Werner v. Ashcraft Bloomquist*, *Inc.*, 10 S.W.3d 575, 577 (Mo. App. E.D. 2000).
[6] *Clean Uniform Co. St. Louis*, 300 S.W.3d at 608.
[7] *Werner v. Ashcraft Bloomquist*, *Inc.*, 10 S.W.3d 575, 578 (Mo. App. E.D. 2000).
[8] *Clean Uniform Co. St. Louis*, 300 S.W.3d at 608.
[9] Because Missouri lacks significant caselaw pertaining to force majeure clauses, one must largely look to cases addressing impossibility and commercial frustration, some of which are discussed in Part 3 below, as it pertains to foreseeability.
[10] *Id.*

In situations where a contract contains a force majeure clause that lists specific events followed by some sort of catch-all phrase, Missouri will apply the principle of *ejusdem generis*. This means that if the clause references specific events, only those of a similar kind will be excused. In the case of *Clean Uniform Co. St. Louis v. Magic Touch Cleaning, Inc.*, this meant that the strike or lockout language in the "force majeure" clause did not excuse Magic Touch's ongoing performance in a multi-year contract with Clean Uniform when Magic Touch's primary customer did not renew its contract with Magic Touch. The Court found the non-renewal of a contract by a third-party to be foreseeable such that Magic Touch could have addressed such an occurrence in its contract with Clean Uniform.

While Missouri may lack significant caselaw excusing performance based upon "force majeure" clauses, it stands to reason that Missouri Courts will enforce a "force majeure" clause and excuse liability if the clause specifically mentions "disease" or "pandemic" or other similar language, assuming the party seeking to avoid performance was impacted by the disease or pandemic. This is because Missouri Courts will enforce contract as written to maintain their certainty.

Although this situation is unprecedented, and while COVID-19 has been widespread, provisions pertaining to "disease" or "pandemic" may be strictly construed to mean the party seeking to avoid performance was directly impacted by COVID-19. Further, the odds of a given contract specifically referencing "disease" or "pandemic" may be remote; however, a force majeure clause which references changes in the law or illegality are more common. The principles above suggest that a business involved in non-essential activities, activities that have essentially been prohibited, or those that rely upon businesses deemed non-essential, may be excused from performance based upon state-wide or local "stay-at-home" orders—again assuming the performance was made illegal and/or impossible by the order.

2. Scope of Relief

Assuming a particular agreement contains a force majeure clause that would apply to the current circumstances, the question becomes what relief may be obtained. Since Missouri caselaw on "force majeure" clauses is largely limited to *Clean Uniform Co. St. Louis v. Magic Touch Cleaning, Inc.*, where the Court determined the clause did not apply, relief is likely dependent upon the language of the specific clause, the terms of the agreement, and the specific circumstances.

If the contract calls for a singular performance, and that performance is to occur during the time where performance has been rendered impossible, it will likely be excused or delayed. If partial performance is possible, it will likely be required.[11] If the agreement is one that calls for repeated performances, it stands to reason that only the performance or performances directly prevented by the outbreak will be excused.

If the "force majeure" clause references disease or pandemic, there likely becomes a fact issue as to when the effects of the disease or pandemic has ceased such that performance may occur. Other fact intensive situations may include those where performance was to occur outside of the

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[11] *See* Mo. Rev. Stat. § 400.2-615, cmt 11 (stating in part, "An excused seller must fulfill his contract to the extent which the supervening contingency permits, and if the situation is such that his customers are generally affected he must take account of all in supplying one. […].).

prohibited timeframe, but where preparations were largely prevented by the outbreak. In such situations, one might look to other doctrines related to performance that counsel all reasonable steps be taken to ensure performance.

3. Impossibility and Commercial Frustration

Missouri also recognizes the doctrines of impossibility and commercial frustration. However, the application of each are again rather limited to preserve the certainty of contracts.

A. Impossibility

As to impossibility, the Missouri Supreme Court has stated, "If a party, by contract, is obligated to performance that is possible to be performed, the party must make good unless performance is rendered impossible by an Act of God, the law, or the other party."[12] A party will not receive relief under this doctrine unless they can demonstrate "that virtually every action possible to promote compliance with the contract has been performed." Further, because Missouri law implies a covenant of good faith and fair dealing in each contract, the party seeking relief cannot place itself in a position to render performance impossible.[13]

In the context of the current pandemic, Missouri caselaw suggests that if the contract was formed after COVID-19 reached the United States, or when stay-at-home orders were on the horizon, the parties should have foreseen the possibility of disruptions and accounted for the same in their agreement. Further, if preparations could reasonably be made during the current pandemic or applicable "stay-at-home" order, a party will be not be excused from performance if they did not undertake such efforts. On the other hand, if reasonable efforts were made, yet performance was rendered impossible, it seems likely that "stay-at-home" orders will excuse performance based upon impossibility.

B. Commercial Frustration

The doctrine of commercial frustration is somewhat broader than impossibility as it developed through demands of the commercial world to excuse performance in situations of extreme hardship. The primary difference between the impossibility and commercial frustration is that in cases of commercial frustration, performance remains possible, but the expected value of performance in the party seeking to be excused has been significantly diminished.[14] As with invocation of impossibility, the event must have been unforeseen and beyond control of the parties.[15] If the unforeseen event "destroys or nearly destroys the value of the performance or the object or purpose of the contract, then the parties will be excused from delay or further performance."[16] Still, the doctrine will not provide relief for simply making a bad deal

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[12] *Breitenfeld v. School Dist. of Clayton*, 399 S.W.3d 816, 835 (Mo. banc 2013) citing *Farmers' Elec. Co-op, Inc. v. Missouri Dep't of Corr.*, 977 S.W.2d 266, 271 (Mo. banc 1998).
[13] *Farmer' Elec. Co-op, Inc.,* 977 S.W.2d at 271 (holding the Department of Corrections could not invoke impossibility where it requested annexation by a nearby city such that Farmers' Electric Cooperative could no longer provide it with electricity based upon law pertaining to rural electric cooperatives.).
[14] *Werner v. Ashcraft Bloomquist, Inc.*, 10 S.W.3d 575, 577 (Mo. App. E.D. 200).
[15] *Abdar, L.C. v. New Beginnings C-Star*, 103 S.W.3d 799, 801 (Mo. App. E.D. 2003).
[16] *Id.*

and is similar to Uniform Commercial Code provisions adopted in Missouri addressing excuse by failure of presupposed conditions.[17]

Missouri caselaw provides many examples of situations where courts have refused to apply the doctrine of commercial frustration. These include the seller of soybeans refusing to deliver when excess rain damaged his crops, but the contract did not specify where the soybeans were to be grown; a developer discovering that concrete in a 100 year-old building would not support a parking garage; and where a contractor entered into a subcontract for the temporary removal and re-hanging of signs, but the building owner later determined it did not need the signs.[18] In each instance, performance was not significantly impaired or the events hampering performance were reasonably foreseeable to the party looking to avoid performance.

Still, while application of the doctrine in Missouri is narrow, it is an equitable doctrine such that it may lend itself to the current pandemic. In *Howard v. Nicholson,* where Missouri first recognized the doctrine, a developer contracted with a builder to construct a bridal salon.[19] Prior to completion, the bridal salon went bankrupt. The Court found the bankruptcy of a particular company to be unforeseeable and allowed the developer to avoid the remainder of the contract. The developer was obligated to pay for the builder's labor, work, and materials prior to the developer's termination of the agreement, but the remaining performance was excused because each party knew the building was meant for a specific purpose. Here, Missouri courts, particularly state courts, may seek equitable solutions in line with *Howard v. Nicholson*.

4. Other Considerations

There may be many other provisions in an agreement that may impact a party's ability to avoid performance. As a result, the agreement or contract should be read and considered in its entirety. As referenced at the outset, a force majeure clause may be one-sided. There may also be specific notice provisions or provisions that detail the length of period for which performance may be delayed, and there may be choice of law provisions or third-party dispute resolution provisions dictating what law applies and where the case may be heard.

In addition, there are concerns outside of the agreement to be considered. A business should consider past and future relations with the opposing party, including their position and willingness to negotiate. Depending upon the agreement, there may be publicity concerns or reporting requirements if contract pertains to a regulated subject matter. Further, one should also consider whether there is the potential for insurance coverage for a party's losses.

If the matter cannot be resolved outside of the courts, a party should raise the defenses of force majeure, impossibility, and/or commercial frustration at the outset of litigation. While Missouri Courts are to liberally allow amendments to pleadings when justice so requires, a defense, including all of the above, which is not raised may be deemed waived.[20] Relatedly, a party should document or consider what evidence

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[17] *Missouri Public Service Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo. App. W.D. 2001) (declining to apply doctrine where coal company recognized future costs would increase, but agreed to use price escalator that proved inadequate such that it lost $3.4 million dollars by the time of trial); Mo. Rev. Stat. § 400.2-615.

[18] *Semo Grain Co. v. Oliver Farms, Inc.*, 530 S.W.2d 256 (Mo. App. 1975); *Colon Group, Inc. v. City of St. Louis*, 980 S.W.2d 37, 40-41 (Mo. App. E.D. 1998); *Werner*, 10 S.W.3d at 578.

[19] *Howard v. Nicholson*, 566 S.W.2d 477 (Mo. App. 1977).

[20] *Semo Grain Co.*, 530 S.W.2d at 258.

it has in support of its defenses, including the efforts it took to complete performance. Remember, the party seeking to avoid performance will bear the burden of proving its defense.

Finally, keep in mind that while the application of these defenses has been historically limited in Missouri, the current pandemic is unprecedented. There is currently uncertainty abound, but one can perhaps take advantage of such uncertainty in reaching agreed upon resolutions and expect further guidance from the courts and/or the legislature in the future.

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.