STATE OF OREGON FORCE MAJEURE LAW COMPENDIUM

(during COVID-19 pandemic)

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A. Introduction

This memorandum provides a brief discussion of Oregon law 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 Oregon

1. Introduction

The ongoing closure of many businesses due to the coronavirus and orders by government authorities to remain closed during the pandemic has raised the question of whether businesses must still perform contractual obligations despite financial hardships and/or business closures. Many commercial contracts contain "Force Majeure" clauses generally excusing contractual performance due to circumstances outside of the parties control.[1] These causes could provide relief to businesses impacted by the coronavirus depending on the wording of the provision. Absent a contractual provisions, or absent a Force Majeure provision that does not expressly address the coronavirus pandemic, impossibility, impracticability, and frustration can be raised as defenses to a contract to excuse performance when there is a significant change in circumstances or events since the contract was formed.[2]

2. Requirements to Obtaining Relief Using Force Majeure

Oregon case law lacks in-depth common law rules regarding the manner of raising, pleading, burden of proof, and interpretation of "Force Majeure" clauses. Nor is there much case law regarding the application of such provisions. Accordingly, default rules of contract interpretation will generally apply, including the rule that contracts are to be interpreted according to their plain meeting.[3, 4]

For example, in *City of Reedsport v. Hubbard*, 202 Or 370, 374, 274 P2d 248 (1954) contractual performance was excused due to wartime conditions when the contract expressly excused

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[1] "Force Majeure" is not defined by Oregon statutes. The doctrine is also not discussed at length in Oregon case law. A Force Majeure clause is a "contractual provision allocating the risk of loss if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled. FORCE-MAJEURE CLAUSE, Black's Law Dictionary (11th ed. 2019).

[2] *See Dorsey v. Oregon Motor Stages*, 183 Or 494, 503–504, 194 P2d 967 (1948).

[3] *See* ORS 42.230 (in construing a document, the court is "to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted").

[4] *Yogman v. Parrott* also provides a robust discussion of Oregon's contract interpretation framework:

When considering a written contractual provision, the court's first inquiry is what the words of the contract say * * *. To determine that, the court looks at the four corners of a written contract, and considers the contract as a whole with emphasis on the provision or provisions in question. The meaning of disputed text in that context is then determined. In making that determination, the court inquires whether the provision at issue is ambiguous. Whether terms of a contract are ambiguous is a question of law. In the absence of an ambiguity, the court construes the words of a contract as a matter of law."

325 Or 358, 361, 937 P2d 1019, 1021 (1997) (internal citation and punctuation omitted)

performance in event of delay because of federal overtime regulations or "any other act or thing occurring over which the [defendant] has no control." There, the defendant had been obligated to construct a sawmill as part of a land sale transaction. At the time however, any such construction was required to be approved by the War Production Board based on a nationwide policy to ensure that sufficient raw materials remained available for war needs. The defendant sought approval from the WPB to construct the sawmill but was denied. Because the contractual provisions were "definite, certain, and wholly unambiguous," the Court construed the contract "according to its plain terms," *id.* at 386, and concluded that the ban on production "constituted an absolute excuse for the delay in performance," *id.* at 387.

3. Scope of Relief

The relief available under a Force Majeure clause depends on the wording of the particular provision at issue. Generally, as long as a party acts in good faith to comply with the contract, a Force Majeure clause will allow a party to delay performing its contractual obligations until the circumstances triggering the clause are no longer present. In *Hubbard*, there was no question that the defendant had acted in good faith to seek approval from the WPB to construct the sawmill. As such, the Force Majeure clause provided an excuse for delay but not a full excuse to not perform once the conditions causing delay were lifted. Accordingly, contractual performance was entirely excused for the full duration between 1942 and 1945 while the production ban remained in effect; however, once government bans against sawmill construction were removed in October of 1945, the defendant would once again have had an obligation to perform his contact if the lawsuit had not been pending. *Id.* at 388.

In summary, a party seeking to invoke a Force Majeure clause should be careful to determine that the clause in fact covers the coronavirus pandemic and the extent to which the clause excuses performance. Where a contract contains a standard Force Majeure clause, businesses faced with difficulties fulfilling contractual obligations can likely expect courts to impose a retroactive grace period to suspend contractual performance while coronavirus government orders are in place. Absent pertinent contract language, other types of relief may also be available as discussed below.

4. Other Considerations

Complying with Government Orders as a Defense

Future Oregon coronavirus litigation will likely cite *Crane v. School District No. 14*, 95 Or 644, 188 P 712 (1920) due to the similarities between the 1918 influenza pandemic and the current health crisis. The case is illustrative of the proposition that absent a Force Majeure clause, and absent a valid government order requiring business closures, contractual performance may be required notwithstanding the lack of services provided during the government ordered closure.

In *Crane*, the plaintiff had a contract with the defendant school district to provide transportation for students for the 1918-1919 school year. In response to the 1918 influenza, the superintendent closed schools in obedience of directions by the county health officer.

Schools were closed for four months between October of 1918 and February 1919. Subsequently, the transportation provider sought payment for that four-month period even though no services had been provided. The school district argued that it should not be liable for the payment because the closures were required by government authorities. Not persuaded, the court reasoned that the county health officer's order was invalid because the county health officer did not have authority to close schools. Because the order was invalid and because the contract did not otherwise excuse performance, the Oregon Supreme Court affirmed judgment for $380 in favor of the transportation provider as compensation for the four-month period between October of 1918 and February 1919.

In contrast, if there is no question as to the validity of a government order, then that order can likely be asserted as a contractual defense notwithstanding the absence of a Force Majeure provision. *See Dorsey*, 183 Or 494.

In *Dorsey*, a transportation entity agreed to lease busses from a school bus provider anytime that the transportation entity had an insufficient supply of its own buses. Subsequently, a military camp during World War II was established along the route of the transportation entity, and the government required the transportation entity to use the governments buses for transportation purposes notwithstanding the underlying previous agreement between the two private parties. In compliance, the transportation entity ceased using buses from the school bus provider. In excusing contractual performance, the Court affirmed judgment in favor of the transportation entity despite the lack of any Force Majeure provision, reasoning that where a "change in the law—statutory or administrative—occurs and prohibits further performance, the change terminates the agreement." *Id.* at 534.

Importance of Contractual Context

For businesses with services contracts as in *Dorsey* and *Crane*, reliably predicting whether businesses can rely on government orders as an excuse to contractual performance remains uncertain given that the validity of the current government orders remains unsettled. But, businesses with goods and services contracts do not face the same uncertainty. This is because, under the Uniform Commercial Code, compliance with a governmental order in good faith will excuse performance regardless of whether or not the order later proves to be invalid. *See* ORS 72.6150(1).

Validity aside, businesses should also keep in mind the nature of the contractual obligation at issue. For example, *Dorsey* involved a services contract and contract performance was directly prohibited. But the same is not necessarily true for a commercial tenant or a borrower. Although both may be impacted financially by the coronavirus pandemic, government orders on the subject do not directly forbid contractual performance in those instances, i.e. the payment of money. As such, it is uncertain whether an order could be relied upon as a contractual defense. And a mere showing of unprofitability, even if unanticipated, will not excuse performance of contract. *Savage v. Peter Kiewit Sons*', 249 Or 147, 432 P2d 519 (1967), *modified*, 249 Or 158 (1968).