



STATE OF WISCONSIN FORCE MAJEURE LAW COMPENDIUM (during COVID-19 pandemic)

Prepared by
LAFFEY, LEITNER & GOODE LLC
325 East Chicago Street, Suite 200
Milwaukee, WI 53202
414-312-7003
www.llgmke.com

A. Introduction

This memorandum will seek to provide the Wisconsin 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 Wisconsin

1. Introduction

Economic pressure caused by the COVID-19 pandemic has caused many businesses to review and evaluate their ongoing contractual rights and obligations. Cash flow can be limited, manufacturing inputs can be scarce or altogether unavailable, contracting partners can find it impossible to fully perform or to stay in business, and government shutdowns can prevent a business from operating at all, to name but a few.

Like many states, Wisconsin recognizes common-law doctrines like impossibility and frustration of purpose that may excuse or override contracting parties’ duties and rights when unusual circumstances make one or both parties’ continued performance under the contract unreasonably burdensome or expensive. Force majeure – French for “superior force” – provisions in contracts play a similar role by specifying in advance events, out of the parties’ control, that will excuse or delay performance or trigger other consequences such as differing levels of compensation.

It is critical to keep in mind that the legal principles involved in applying force majeure provisions in contracts do not give rise to a common law doctrine separate and apart from such provisions. “[A] force majeure clause must always be interpreted in accordance with its language and context, like any other provision in a written contract, rather than with reference to its name.” *Wisconsin Electric Power Co. v. Union Pacific R.R. Co.*, 557 F.3d 504, 507 (7th Cir. 2009)(applying Wisconsin law). In other words, the mere presence of a force majeure clause is not an open invitation authorizing courts to conclude that “the parties must have meant that performance would be excused if it would be ‘impossible’ within the meaning that the word has been given in cases interpreting the common law doctrine.” *Id.* Instead, the analysis must always start with the contract language.

Consistent with the courts’ focus on the language of the provisions, force majeure clauses can be used “offensively” – that is, to give a party rights to greater compensation in the event that the unusual circumstances covered by the clause occur. *E.g.*, *Wisconsin Electric*, 557 F.3d at 507-08 (clause allowed railroad to charge a higher shipping rate based on occurrence of “an event of Force Majeure”). They can also be used “defensively” – for example, to suspend or defer an obligation to perform for the duration of an event that triggers the force majeure clause. *E.g.*, *Canadian Steel Foundries, Ltd. v. Thomas Furnace Co.*, 186 Wis. 557, 562 (1925) (seller’s failure to deliver materials as required by contract terms was excused for duration of trade embargo under force majeure clause).

Note that we found no Wisconsin decisions applying force majeure clauses in the specific factual context of an infectious disease outbreak or pandemic. This reinforces the importance of focusing on the specific force majeure language in any contract. Some clauses may specifically identify pandemics as sufficient to trigger force majeure provisions, some may be triggered by certain kinds of government action (that may or may not encompass government-mandated business closures) and some may contain broad language referring to circumstances out of the parties' control.

2. Requirements to Obtaining Relief Using Force Majeure

Wisconsin courts will not strain to interpret force majeure clauses in order to excuse parties from foreseeable hindrances to their ability to perform under a contract. The general rules – subject to specific contract language – are that the event triggering the clause must be out of the control of the party seeking to invoke the provision, **and** that the triggering event must directly cause the party's inability to perform.

For example, in holding that the term of a mining lease was not extended by a force majeure clause when a party failed to obtain government permits needed to operate the mine, the Wisconsin Court of Appeals ruled that “[f]orce majeure clauses extend leases only when the non-performance is ‘caused by circumstances beyond the reasonable control of the lessee or by an event which is unforeseeable at the time the parties entered into the contract.’” *Goldstein v. Lindner*, 2002 WI App 122, ¶ 31, 254 Wis. 2d 673, 687, 648 N.W.2d 892. Because a party knows that a government agency may delay or refuse to issue a permit or license altogether, such an event will not trigger a force majeure clause. *Id.* at ¶ 32.

Likewise, a federal district court sitting in Wisconsin rejected a party's effort to excuse its obligation to pay for goods based on the ultimate buyer's insolvency, characterizing the argument as “nonsense”: “[T]he specter of financial failure is omnipresent in human existence and so is eminently foreseeable.” *A. Raymond Tinnerman Mfg., Inc. v. Tecstar Mfg. Co.*, Case No. 12-CV-667-JPS, 2013 WL 787367 at *5 (E.D. Wis., Mar. 4, 2013).

A force majeure clause need not be mutual in order to be enforceable; in other words, the clause may give rights to suspend performance to only one contracting party without impairing its validity or opening the door to parol evidence. *Sub-Zero Freezer Co. v. Cunard Line Ltd.*, Case No. 01-C-664-C, 2002 WL 32357103 at *4 (W.D. Wis., Mar. 12, 2002); *Goldstein*, 2002 WI App 122, ¶ 34.

3. Scope of Relief

The relief available under the terms of a force majeure clause depends completely on the terms of the provision. For example, although the Seventh Circuit wondered why the parties used the term “force majeure” instead of simply specifying that the occurrence of some future event that prevented the railroad from getting backhauls on a return trip would entitle the railroad to charge a higher rate, the court enforced a contract provision that was in substance a rate

escalation clause triggered by “an event of Force Majeure.” *Wisconsin Electric*, 557 F.3d at 507-08.

More typical uses of force majeure clauses are to extend the term of a contract, such as a lease, during a period in which force majeure triggering events are preventing the lessee from making use of the premises. *E.g.*, *Goldstein*, 2002 WI App 122, ¶ 31. Similarly, a force majeure clause can be used as a defense to a claim of nonperformance, as in *Canadian Steel Foundries*, where a party successfully opposed its opponent’s argument that it committed a prior material breach excusing the obligation to pay by failing timely to deliver goods, when its failure was caused by the enforcement of a month-long embargo that prohibited shipping to the port designated by the opponent for the receipt of the goods. 186 Wis. at 562. In general, the forbearance or excuse allowed under a force majeure provision extends only as long as the force majeure event that triggers application of the clause.

4. Other Considerations

The party seeking to benefit from a force majeure clause may waive its right to rely on the clause. *Wisconsin Electric*, 557 F.3d at 508-09. Like any waiver argument, this is a fact-specific issue: in *Wisconsin Electric*, the court ruled there was no waiver because, among other things, the parties had been negotiating peacefully until the party making the waiver argument threatened litigation, and the opposing party responded by asserting its affirmative claim for damages under the force majeure provision. *Id.*

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