



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

Prepared by:

Alia T. Scott
Williams, Porter, Day & Neville, P.C.
159 N. Wolcott, Suite 400
Casper, Wyoming 82601
(307) 265-0700
ascott@wpgdn.net

A. Introduction

This memorandum will seek to provide a Wyoming exemplar for the USLAW Network Compendium of Law of relevant considerations with respect to invoking “force majeure” clauses in contracts in light of the ongoing COVID-19 crisis.¹

B. Force Majeure in Wyoming

a. Introduction

The global, nationwide, and state orders, rules and regulations recently invoked related to the COVID-19 crisis have severely affected, and will continue to affect, business activity, both private and public, in Wyoming. Many businesses and commercial entities are faced with circumstances in which they require information regarding whether they will be liable for any inability to perform their contractual obligations under existing contracts. Additionally, businesses and commercial entities may be conducting internal analyses regarding their ability to perform contractual obligations in the coming months and may need information to assist those decisions.

Force Majeure is a term, common in commercial contracts, which means a “superior force” and speaks to an unexpected event that prevents a Party to the contract from doing or completing something that Party has agreed or planned to do.² In a commercial and business context, a force majeure clause generally provides that: in the event a certain named event occurs, which is outside of the Party’s control, that Party’s performance of its obligations under the contract may be suspended, delayed or terminated, and the Party will not be liable for costs or damages due to the lack of performance of its obligations caused by the events. Events that trigger force majeure clauses commonly include: epidemics and/or pandemics as declared by the World Health Organization, actions by Governmental authorities, national or regional emergencies, wars, work stoppages, or natural disasters. The structure and terms of a force majeure clause can be particularized to fit the circumstances and nature of individual contracts and industries. However, it is generally accepted that for an Impacted Party³ to be protected by a force majeure clause, the Party must adhere to the terms of the clause, which often includes a written notice procedure.

A contract that lacks a force majeure clause or term, results in Parties being limited to common law defenses for non-compliance with contract provisions. However, based on the uncertain and continually evolving nature of the COVID-19 crisis, and its effect on businesses and

¹ *Note: If this memorandum needs to be edited to remove specific references to COVID-19 (i.e. if a more generalized “force majeure” entry is desired), that can be easily accomplished.

² *Unicover World Trade Corp. v. Tri-State Mint, Inc.*, 24 F.3d 1219 (10th Cir. 1994).

³ The term Impacted Party in this context shall mean the Party to the contract at issue that has been impacted by an event or events that are considered to be force majeure events under the terms of the contract.

commercial activity, there may be opportunities for Parties to engage in informal negotiations regarding contract provisions. Thus, the lack of a force majeure clause may not be fatal for an Impacted Party.

b. Requirements to Obtain Relief Using Force Majeure

Wyoming does not have a statute defining “force majeure,” and there is very limited case law and rulings from the Wyoming Supreme Court interpreting force majeure clauses. Additionally, there is no Wyoming case law which specifically addresses the application of a force majeure clause in the event of a public health crisis, pandemic or outbreak of disease. However, there is case law which holds that in Wyoming, force majeure events must be both unforeseeable and beyond the control of the invoking party.⁴

The general rule in Wyoming is that a Party seeking to invoke force majeure must comply with the specific contract obligations contained in the force majeure clause.⁵ Instructive of this is, if the force majeure clause indicates that an Impacted Party shall give written notice within ten (10) days of the force majeure event, a failure to do so could be detrimental to the Impacted Party’s ability to avoid liability.

Wyoming courts will apply rules of standard contract interpretation to determine the intent of the Parties with respect to force majeure provisions in contracts. An Impacted Party seeking the protections of the force majeure clause will bear the burden of establishing: (1) that a force majeure event or events occurred, and shall do so according to the language contained in the contract; (2) that the occurrence of this force majeure event or events caused the Impacted Party’s inability to perform its obligations under the contract; and (3) any other requirement that may be contained in the force majeure clause such as: duration of inability to perform, time needed for remedy of non-performance, compliance with notice requirements, or proof of triggering event.

As specifically related to events surrounding the COVID-19 crisis, if an Impacted Party’s force majeure clause includes language specifically identifying a pandemic, state or national epidemic, or governmental order to limit the outbreak of a disease, then establishing the existence of a triggering event would be straight forward. If an Impacted Party’s force majeure clause contains a catch-all provision, such that any unforeseeable event beyond the Party’s control would be considered a triggering event, then party may be able to cite that provision to invoke the protections. However, if an Impacted Party’s force majeure clause does not contain either specific COVID-19 related language or a catch-all provision, the Impacted Party will have to apply the triggering events included in its applicable force majeure provision to its circumstances at hand.

⁴ *Unicover World Trade Corp. v. Tri-State Mint, Inc.*, 24 F.3d 1219 (10th Cir. 1994).

⁵ *W. Texas Utilities Co. v. Exxon Coal USA, Inc.*, 807 P.2d 932, 936 (Wyo. 1991) (holding that telephone calls do not comply with the contract provision requiring prompt written notice for claimed force majeure events.)

c. Scope of Relief

If an Impacted Party is able to successfully invoke a force majeure clause, it must also abide by the duration and scope of its relief. Generally, a force majeure clause will allow a party to suspend its obligations under the contract during the force majeure event, or for finite period of time. Additionally, a duty to mitigate may also be included in the force majeure clause. The Impacted Party will be obligated to use diligent efforts to end the failure or delay of its performance and ensure the effects of the force majeure events are minimized. Furthermore, the clause may contain a requirement that the Impacted Party state the duration of its anticipated inability to perform, and obligate it to resume performance of its obligations as soon as reasonably practicable after the removal of the force majeure events. It is possible that the duty to resume performance will be determined by the language of the clause.

As specifically related to events surrounding the COVID-19 crisis, the scope of a business' or commercial entity's ability to claim relief under the force majeure clause may be limited based on that industry's ability to continue operations. Depending on the language of the force majeure clause, the relief may not cover losses or a continued inability to perform after the event in question has passed. Thus, businesses that were closed due to the COVID-19 crisis but are now permitted by the state and local governments to reopen, may not be able to claim that a triggering event is still occurring. However, a business that is permitted to be open, but is unable to provide employment or continue its services due to additional state and local orders due to COVID-19 may have a second layer of protection under its force majeure clause.

In the event a business or commercial entity continues to suffer severe financial hardship due to events related to COVID-19 and invokes the force majeure clause, a court may look to when the Impacted Party truly began suffering economic hardship. If it is determined that its nonperformance was not attributable to, or occurred prior to, the outbreak of COVID-19, a court may not afford it the protections under the force majeure clause.⁶

d. Other Considerations

A party claiming to be an Impacted Party and invoke a force majeure clause should do so cautiously and be conscious as to the true effect on its business. It is prudent to establish that the Party's inability to perform under the terms of the contract is actually being prevented by the COVID-19 crisis, rather than merely increasing a business' financial hardship incurred in performing its contractual obligations. If a nonperformance of a Party's obligations was litigated and the notice of force majeure was the focus of the Impacted Party's defense, it would be crucial that the Party's ability to perform was actually impacted.

If the COVID-19 crisis continues and certain industries are unable to reopen or operate as

⁶ *Champlin Petroleum Co. v. Mingo Oil Producers*, 841 F.2d 1131 (10th Cir. 1987) (holding that force majeure clause was unavailable based on the fact the Party's financial problems began prior to the triggering event)

they did pre-COVID-19, there is a possibility that under force majeure clauses, the triggering event will not have a foreseeable end. If this is the case, businesses and corporate entities may need to negotiate new contract terms, since it is unlikely that a force majeure clause would provide long term relief or protection from liability.

C. Conclusion

In the event a business or corporate entity is impacted by state and local rules, orders, and regulations due to the COVID-19 crisis, to a degree that renders it incapable of performing its obligations under a contract, the business or corporate entity may be able to seek relief under a force majeure clause. In Wyoming, the terms and scope of relief is generally determined on a case-by-case basis. Thus, it is key to first review the provisions of any and all contracts to which the business or corporate entity is a party in order to ensure compliance with the express terms and conditions of the force majeure clause.

A force majeure clause will not permanently or completely relieve a Party from its obligations under a contract. However, it may afford the Impacted Party with the ability to suspend, delay or postpone its obligations of performance under existing contracts. An Impacted Party that properly invokes a force majeure clause can be provided relief from liability for noncompliance or nonperformance under a contract. It is best practice for a business or corporate entity to contact its attorney to properly understand the scope of relief afforded by a force majeure clause.

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.