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Insights

Coronavirus Concerns May Implicate Force Majeure Contract Issues

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So-called *force majeure* clauses typically are contained in contracts to excuse performance by the parties for acts of God, impossibility of performance, disaster, and other circumstances beyond the control of the parties. This clause may have particular application for those of you who supply parts or equipment obtained from, for instance, China, Japan, South Korea, or Italy. The clause may have further implications, such as event or conference cancellation.

Indiana law recognizes that the scope and effect of a *force majeure* clause depends on the specific contract language used, and not on any traditional definitions of the phrase. There are many versions of a *force majeure* clause in contracts. The critical issue is what language is used in that particular contract to excuse performance. And, the party seeking to excuse its contractual performance under a *force majeure* clause bears the burden of proof in establishing the defense.

If there is no *force majeure* provision in a particular contract, the result still could be the same under the related concept of impossibility of performance. Under Indiana law, the standard for *impossibility of performance* is high. One must demonstrate that performance is not merely difficult or relatively impossible, but absolutely impossible owing to acts of God, acts of law, or the loss or destruction of the subject matter of the contract. But if the performance of a contract becomes truly impossible, non-performance can be excused, and no damages can be recovered, even in the absence of a *force majeure* clause.

On Friday, March 6, 2020, Governor Holcomb issued Executive Order 20-2, declaring that a public health disaster emergency exists in Indiana attributable to COVID-19. This declaration and other anticipated government announcements are expected to increase examination of *force majeure* and impossibility of performance issues.

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