

Pandemic Prompts Urgent Review of Overlooked Contractual Clause

Description

PS&H Partner Jim Hahn, a member of the firm's Business and Banking & Financial Institutions Regulatory Compliance Practice Groups, was featured in the *Rhode Island Lawyers Weekly* recent article exploring "force majeure" clauses in contracts. Often considered part of a contract's boilerplate language, the clause's relevance has become the center of attention as the coronavirus continues to spread across the country impacting virtually every industry.

"Whether the mere existence of a pandemic will reach the level of force majeure will depend on the exact language used in the contract, including the intentions of the parties if the language is unclear," said Jim.

He explained that while a contract's use of "pandemic" will be helpful to a party hoping to invoke force majeure in the current crisis, more vague terms such as "act of God" will invite disputes.

The issue of government action could also be a basis for excusing performance under a contract. According to Jim, "government orders are often within the list of defined force majeure events, and it may be that a shutdown order could justify the defense of impossibility, depending on the facts."

Jim emphasized that the ultimate inquiry for the purposes of accepting or rejecting a defense of impossibility is whether the intervening changes in circumstances were so unforeseeable that the risk of increased difficulty or expense should not be properly borne by the non-performing party.

"The mere fact that performance of a contract becomes more difficult or expensive than originally anticipated is not usually sufficient grounds to set it aside," he said.

Jim went on to say that a widespread pandemic may not offer a reasonable excuse under some contracts, and that care should be taken in invoking force majeure as it could potentially lead to a claim of anticipatory breach.

"It is important to analyze fully the terms of the contract, the negotiating leverage of the parties, and who benefits from termination before adopting any course of action," he said.

To read the *Rhode Island Lawyers Weekly* article, please [click here](#). (Subscription required)

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