



LAW ALERT

March 24, 2020

By: Ross J. Kartez, Esq.

RMF
RUSKIN MOSCOU FALTISCHEK P.C.
Smart Counsel. Straight Talk.

COVID-19 — Navigating the Impact on Your Business

COVID-19 and the government's response has affected almost everyone and their businesses in numerous and, in some cases, catastrophic ways. Ruskin Moscou Faltischek, P.C. has been providing guidance on a number of issues, including: contractual protections under *force majeure* clauses (and other provisions related to unforeseeable circumstances beyond the parties' control); insurance claims related to business interruption; and government regulations. As the global crisis escalates, consulting counsel with a comprehensive understanding of contractual remedies and insurance coverage is crucial to protecting your business.

I. Force Majeure, Impossibility, or Frustration

Force majeure provisions are contractual "clauses excusing nonperformance due to circumstances beyond the control of the parties..."[1] Many contracts include *force majeure* (or similar) provisions that excuse nonperformance, in light of certain unexpected events beyond the parties' control. Most businesses, during the negotiation of their contracts, could not have anticipated the impact of COVID-19 or the government's response, and may be searching for protections under their agreements.

A close review of your contract(s) and your specific circumstances is necessary to understand whether you have a *force majeure* (or similar) provision that excuses nonperformance. For example, in Bouchard Transp. Co. v. New York Islanders Hockey Club, LP,[2] the court found that a league-wide labor dispute was a *force majeure* event that excused the parties' nonperformance. However, in Aukema v. Chesapeake Appalachia, LLC,[3] nonperformance was not excused when the government implemented new regulations that severely affected the parties' agreement related to gas and oil exploration rights. In both Bouchard Transp. Co. and Aukema, the parties sought nonperformance to be excused due to circumstances beyond their control, but the outcomes varied. This was due to the unique contractual language and circumstances of each case.

While the economic downturn and government regulation has affected business, "[m]ere impracticality or unanticipated difficulty is not enough to excuse [non]performance." [4] In fact, "[e]conomic factors are an inherent part of all sophisticated business transactions and, as such, while not predictable, are never completely unforeseeable; indeed, 'financial hardship is not grounds for avoiding performance under a contract...'" [5] Generally, a party will need to demonstrate something more to avoid contractual obligations.

[1] *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902 (1987).

[2] 40 A.D.3d 897 (2d Dep't 2007).

[3] 904 F. Supp. 2d 199, 210 (N.D.N.Y. 2012).

[4] 720 F. Supp. 312, 318 (S.D.N.Y. 1989).



Perhaps *force majeure* is not applicable to your situation; instead, you or your adversary seek to excuse nonperformance under the doctrine of **impossibility of performance** or **frustration of purpose**. Impossibility comes into play when: (i) the contract does not expressly allocate the risk of the event's occurrence to either party; and (ii) to excuse the party who is unable to perform would comport with customary risk allocation. "Frustration of purpose, on the other hand, focuses on events which materially affect the consideration received by one party for his performance. Both parties can perform but, as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place." The doctrine excuses performance when a "virtually cataclysmic, wholly unforeseen event renders the contract valueless to one party." [6]

Available options will differ from contract to contract, and from situation to situation. Keep in mind that seeking protection under *force majeure* (and similar) clauses generally requires prompt notice, along with adhering to specific condition precedents. Whether you are seeking nonperformance to be excused or insisting that your counterpart perform, understanding the contractual tools available is an important first step in mapping out your legal and business strategy.

II. Insurance Claims for Business Interruption and Civil Authority

Many commercial property insurance policies include coverage for business interruptions resulting from "direct physical loss or damage" to the insured's property due to a covered peril that causes a suspension of the insured's business. For example, when a company sustains a fire to its factory, its insurance policy might afford coverage for the physical damage to the factory and business property (e.g., factory equipment) and cover financial losses the company sustained from the work stoppage at the factory. With COVID-19 and the government's response, many companies have been reviewing their insurance policies wondering whether the loss from the work stoppage is covered; and if there has been a "direct physical loss or damage" that triggers such coverage. This will depend on your insurance policy's coverage provisions, and the specific language of those provisions.

For example, in Roundabout Theatre Co. v. Cont'l Cas. Co., [7] a New York City theatre sought business interruption coverage when the City of New York closed the street denying access to the theatre after a nearby construction accident. The court upheld the insurance denial, emphasizing the need for direct physical "damage" to the insured's property to trigger business interruption coverage – in that case, the damage was to a neighboring building and not to the insured's property. In denying the insured's claim, the court noted that the theatre relied on distinguishable cases (involving successful coverage claims),

[5] 88 A.D.3d 1224, 1226 (3d Dep't 2011).

[6] United States v. Gen. Douglas MacArthur Senior Vill., Inc., 508 F.2d 377, 381 (2d Cir. 1974).

[7] 302 A.D.2d 1 (1st Dep't 2002).



where those policies contained Civil Authority extensions and/or Ingress/Egress clauses (“providing coverage for ‘loss(es) sustained during the period of time when ... ingress to or egress from real and personal property ... is thereby prevented’”).[8] In Sloan v. Phoenix of Hartford Ins. Co.,[9] a different theatre obtained business interruption coverage after the Governor imposed curfews that cost the theatre thousands of dollars. The court found that the Civil Authority extension of the insured’s policy afforded coverage when, as a result of a covered peril (i.e., riots), access to the insured’s premises was prohibited by government order. Direct physical loss or damage was not required to trigger business interruption coverage under the policy’s Civil Authority extension. Thus, even for very similar insurance claims, coverage depends on the language of the policy.

A review of your insurance policy and the circumstances surrounding the decline or closure of your business is necessary to understand the extent of your insurance coverage. While a claim for business interruption might be possible, your likelihood of obtaining coverage could improve substantially by relying on other provisions/sub-provisions (e.g., Civil Authority, Ordinance or Law, and/or Ingress/Egress clauses). Ruskin Moscou Faltischek, P.C. regularly assists clients in pursuing business interruption claims, and has successfully litigated such claims against insurance companies after a denial was issued.

[8] Id at 8-9.

[9] 46 Mich. App. 46 (1973).

If you have any questions, please contact
Ross J. Kartez, Esq.
(516) 663-6651
rkartez@rmfpc.com