

COVID-19 AND DEVELOPMENT/TAKEDOWN DEALS: KNOWING WHEN FORCE MAJEURE DOES AND DOES NOT APPLY

March 20, 2020

Posted: March 20 at 1:30 PM

Key Points:

- A *force majeure* clause in a development or takedown agreement describes events that would excuse either: (1) a party's performance under the agreement; or (2) a party's delay in performance under the agreement.
- There is no standard interpretation of a *force majeure* clause. The language of an individual development or takedown agreement controls.
- Do not assume COVID-19: (1) triggers your agreement's *force majeure* clause; or (2) excuses your performance or another party's performance.
- Notice requirements in your agreement's *force majeure* clause may mean time is of the essence for you or another party to your agreement to claim protection under the *force majeure* clause.
- Contact attorneys at Bell Nunnally to help you discern a path forward with your development or takedown agreement.

As a result of market downturns, disruption of supply chains and depletion in workforces caused by the COVID-19 pandemic, developers, owners, design and construction professionals face great uncertainty as they try to find a way forward with ongoing development or takedown deals. Bell Nunnally's experienced construction attorneys can help chart that course with you, especially if one of your development partners unilaterally decides to pull out of a deal because of COVID-19.

The central focus of any attempt to scrap a development or takedown deal will be a contracting party's belief that COVID-19 triggers an agreement's "*force majeure*" clause. *Force majeure* clauses – clauses many parties once considered part of the "boilerplate" of any agreement – provide that the occurrence of certain events will either excuse a party's performance under that contract or excuse delay in a party's performance.

Force majeure clauses are not "one size fits all." A pandemic may or may not be an event that triggers a *force majeure* clause. Further, even if the pandemic triggers a *force majeure* clause, it may not excuse your performance or another party's performance entirely. Also, one cannot assume that the existence of a *force majeure* event is automatic – there may still be obligations to provide notice of the event.

If a *force majeure* clause specifically identifies an event, such as a pandemic, then performance is either excused or delay of performance is excused by the occurrence of that event, depending on the terms of the *force majeure* clause. The issue becomes more complicated if the *force majeure* clause does not specifically list the event in question. Most *force majeure* clauses will include a "catch all" provision. For example, after listing a number of events – floods, fires, employee strikes or trade embargoes, for instance – the clause may also state "or other event or cause not enumerated that is beyond the reasonable control of the party or parties affected" to encompass other *force majeure* events that the parties did not list. Accordingly, in the present situation, if a *force majeure* clause does not specifically list "pandemic" or similar event as a *force majeure* event, the question will become whether pandemic falls under a catch-all clause, if one exists in the *force majeure* provision. Though the specific wording used in the catch-all clause will control its application, many courts impose a requirement that an unlisted event be unforeseeable at the time of contracting for a party to successfully make use of a *force majeure* clause. Whether an event is unforeseeable and falls within a catchall clause is the frequent subject of contract litigation.

In addition, *force majeure* clauses also frequently include notice requirements. These notice provisions may require notice to be in writing and sent within a certain number of days following the *force majeure* event. Accordingly, time may be of the essence for you or a party to one of your agreements to claim protections of a *force majeure* clause.

If you think you need to invoke a *force majeure* clause because of COVID-19 in a current development or takedown deal or if another party is using a *force majeure* clause to back out of a deal, please contact Mike Bowers or Scott Larson.

For further discussion of Texas law regarding *force majeure* clauses, please see [this additional article](#) in the Bell Nunnally COVID-19 Legal Resource Center.

Related Practices

Litigation