

Has Your Business Reviewed Its Force Majeure Clauses?

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As a result of the ongoing COVID-19 pandemic, CNN reported on March 24, 2020, that 13 states and 16 municipalities, including the nation's three largest cities (Chicago, New York, and Los Angeles), have ordered approximately 45% of the U.S. population to stay home. These new realities are making it nearly impossible for many businesses to live up to the terms of their agreements to timely manufacture, distribute, or sell their products. In light of these fast-changing circumstances, many clients are reviewing force majeure clauses in their contracts for the very first time. Rarely used, force majeure clauses are contractual provisions that excuse a party's non-performance due to "acts of God" or other extraordinary and unforeseen events out of the control of the contracting parties.

As the COVID-19 pandemic continues to disrupt ongoing business operations, Lippes Mathis is urging clients to take proactive steps and review these provisions before operations are disrupted further. A company's ability to utilize a force majeure clause is dependent on the contractual language itself and the facts relevant to the particular agreement and businesses involved. However, many force majeure provisions require the party seeking to excuse its non-performance to take affirmative steps to terminate the agreement by a date certain. Thus, absent prompt action, a party may waive the ability to utilize a contract's force majeure clause.

Finally, given that courts will often narrowly construe force majeure provisions and the enforcement of any such provision can be dependent on the foreseeability of the risk, companies should ensure that during the ongoing COVID-19 pandemic, new contracts properly address the continued threat to businesses operations. Similarly, if your company does not have a *force majeure* clause in its contracts, these clauses should be immediately added and should explicitly address pandemics and government actions resulting from a pandemic.

Please contact Richard M. Scherer, Jr. (rscherer@lippes.com) with any questions regarding these issues or any other business disputes you may be facing as a result of the ongoing COVID-19 pandemic.