Enforcement and Avoidance of Contracts in Oregon After COVID-19 Events

Legal Alert
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Within the past week, Oregon Governor Kate Brown announced emergency proclamations mandating the closure of public schools, the partial closure of restaurants and bars, and the effective closure of most entertainment and recreational facilities while prohibiting all gatherings with more than 25 participants. These and other measures enacted by local, state and the federal government are certain to significantly affect the ability of parties in Oregon to perform contractual obligations. It will be particularly important in the coming weeks and months for individuals and businesses in Oregon to understand the contractual provisions and common law defenses that may be implicated by the response to COVID-19.

Relevant Contractual Provisions

When interpreting and construing contracts, Oregon courts look first and foremost at the plain language of the contract. As a result, whether you are seeking to enforce the other party's performance on a contract or seeking to be excused from performing under a contract, you should look closely at all applicable provisions of the contract.

Termination Provisions

Depending on the text and context of the agreement, parties may have the ability simply to terminate the agreement for convenience, which will discharge the parties from all obligations under the contract except those that by their terms survive termination of the contract (usually, these surviving obligations relate to warranties and indemnities). Note that such termination rights usually require the terminating party to provide advance written notice to the non-terminating party prior to such termination becoming effective.

Force Majeure Provisions

"Force majeure" clauses generally provide that a party that has been unable to perform under a contract due to the occurrence

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of certain unforeseeable and uncontrollable events may suspend, delay or avoid performance under a contract without liability. Typical force majeure clauses enumerate certain events that will be considered "force majeure events," which often include strikes, work stoppages, acts of war or terrorism, civil disturbances, natural disasters and other "acts of God." If the event in question is not specifically identified in the clause, a party may have to rely on a "catch-all provision," which may provide that other unspecified events that are unforeseeable and/or outside a party's control may also be considered force majeure events. "Pandemic" or "epidemic" is not commonly listed as force majeure events, and would therefore need to fall within the "catch-all provision" to be eligible for a claim of force majeure.

A claim to excuse performance due to a force majeure event is an affirmative defense. The party seeking the protections of the force majeure clause will bear the burden of establishing that: (1) the event in question caused the inability to perform and (2) the event in question qualifies as a force majeure event under the applicable clause of the agreement.

Considering that the COVID-19 pandemic has resulted in a multitude of restrictions and prohibitions, parties seeking the protection of a force majeure clause may be able to identify several different "events" out of their control (e.g., pandemic, governmental prohibitions on public gatherings, mandates for "dine-out" only restaurant service). Since such events are unlikely to be specifically identified in the contract, the party seeking the protection of the force majeure clause will have to rely on a catch-all provision (if there is one). Whether the party will be able to establish the elements of a force majeure claim, and what its rights and remedies will be, depends on the precise wording of the force majeure clause.

Assuming that a party is entitled to relief on the basis of a force majeure clause, the next item to consider is the scope and duration of the relief available, and what the party must do to obtain this relief. Typically, a force majeure clause will allow a party to suspend its performance during the pendency of the force majeure event, provided that such party makes a good faith effort to continue to perform during the force majeure event, and begins required performance as soon as possible following the force majeure event. It is important to note that contracts often specifically exempt monetary obligations from those obligations that may be excused or delayed by force majeure. In such a case, a retail tenant may be able to delay its required opening date in connection with a force majeure event, but rent is still going to be due on the first of the month. In addition, force majeure clauses often include specific notice requirements, which must be complied with in order to trigger the applicable rights and remedies.

The COVID-19 pandemic may complicate a determination of when the force majeure event has ended, because even though certain local measures may be repealed, state and federal measures may remain in effect.

No Oregon court has examined a force majeure clause in the context of a pandemic, and Oregon courts in general have provided little guidance in determining whether a particular event should trigger a force majeure clause. Parties should therefore bear in mind that the exact wording of the contract is crucial, and in the event of ambiguities in such wording, litigation may be necessary to resolve a dispute. Considering that several court systems have reduced their operations due to the COVID-19 pandemic, the availability of immediate relief may be limited.

If a contract does not contain a force majeure clause, the party seeking to excuse its performance may need to investigate other common law defenses.

Common Law Defenses

If a party seeking to avoid performance is not able either to terminate the agreement or to assert a force majeure clause as a defense, the party may still be able to assert certain common law defenses available in Oregon. Some of the defenses that are likely to be raised as a result of COVID-19 related events include: impossibility, impracticability and frustration of purpose. Each of these defenses may excuse a party's breach of contract and serve as a means of avoiding liability for damages that result from the breach.

Generally, the defenses of impossibility, impracticability and frustration of purpose are applicable only to unexpected occurrences not contemplated by the parties at the time the contract was created and that are not otherwise addressed by provisions in the contract.[1]

The breaching party bears the burden of proving these defenses in court. The breaching party may seek to avoid liability for economic damages caused by the breach or, in some circumstances, it may wish to go one step further and ask the court for a remedy consistent with rescission, meaning that it would ask the court to put the parties back into the position they were in before entering the contract.

Impossibility/Impracticability

In Oregon, an impossibility defense can arise when, after entering a contract, certain events that a contracting party had "no reason to anticipate, and for the occurrence of which he is not in contributing fault, render performance of the contract impossible."[2] Related to impossibility, impracticability may exist where an unexpected difficulty or expense may approach such an extreme that a practical impossibility exists.[3]

Impossibility and impracticability defenses usually require a party to show that the hardship of performance is so extreme as to be outside any reasonable contemplation of the parties.[4] Unforeseen circumstances that cause performance to be more expensive (and commercially less profitable) than anticipated have often not proven sufficient to excuse performance under an impossibility or impracticability defense.[5]

Some contracts may excuse performance based upon impossibility of performance resulting from an "act of God." In the absence of a definition of an "act of God" in the contract, Oregon courts have defined such events as "a natural occurrence of "extraordinary" and "unprecedented proportions… not foreshadowed by the usual course of nature, and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight."[6] Other examples of circumstances giving rise to an impossibility defense include fire, outbreak of war, or the death of the promisor.[7]

Frustration of Purpose

In addition to impossibility and impracticability, Oregon courts have recognized the doctrine of frustration of purpose to excuse performance on a contract. This defense focuses on whether the overall purpose of the contract has been "substantially frustrated" by the occurrence of an unexpected event "the non-occurrence of which was a basic assumption on which the contract was made."[8] Although the frustration of purpose defense has not often proved successful in Oregon's appellate courts, the unprecedented nature of the COVID-19 events may change that trend.

In summary, if you are seeking to enforce or avoid a contractual obligation in Oregon, you should carefully look for any provisions (including a force majeure clause) addressing future unexpected events such as an "act of God" or changes in governmental actions. If the contract does not provide otherwise, the extraordinary events related to COVID-19 may implicate common law defenses excusing a party's performance or even resulting in termination of the contract entirely.

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1. Savage v. Peter Kiewit Sons', 249 Or 147, 152 (1968); *see also Rose City Transit Co. v. City of Portland*, 18 Or App 369, 423 (1974), modified, 271 Or 588 (1975).

2. Savage, 249 Or at 152 (citing Restatement of Contracts § 457 (1932)).

3. Id.

4. Id.

5. Id.

6. Schweiger v. Solbeck, 191 Or 454, 464 (1951) (citations omitted); *see also Nw. Mut. Ins. Co. v. Peterson*, 280 Or 773, 776–77 (1977).

7. See, e.g., Eggen v. Wetterborg, 193 Or 145, 153 (1951) (applying impossibility defense where accidental fire destroyed buildings that were subject to a lease making performance under lease impossible).

8. Restatement (Second) of Contracts § 265; *see also Smith Tug v. Columbia–Pac. Towing*, 250 Or 612, 641 (1968) and *Wah Chang v. Pacificorp*, 212 Or App 14 (2007).