STATE OF ARKANSAS FORCE MAJEURE LAW COMPENDIUM

(during COVID-19 pandemic)

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A. Introduction

This memorandum will seek to provide a summary of Arkansas law for the USLAW Compendium of Law on relevant considerations with respect to invoking "force majeure" clauses in contracts in light of the ongoing COVID-19 crisis.

B. Force Majeure in Arkansas

1. Introduction

Many Arkansas businesses are temporarily shutting their doors in light of the COVID-19 pandemic, leading to uncertainty regarding the status of their contracts. Most contracts have a "force majeure clause," in which the parties agree to waive some or all of their responsibilities under the contract in light of certain unexpected activity putting a strain on a party's operations. In the absence of applicable force majeure language, parties are limited to the common law defenses of impracticability and frustration of purpose. As businesses consider shutting down or cutting back on operations, attorneys must analyze the language of each contract to determine each party's rights and responsibilities.

2. Requirements to Obtain Relief Using Force Majeure

Arkansas does not define "force majeure" by statute and has little case law on the subject. The following discussion therefore relies on standard force majeure principles, incorporating Arkansas law where applicable.

a. *Language of the Clause*

Parties seeking to suspend performance must first look to the language of their contract's force majeure clause, which must include language encompassing the COVID-19 pandemic. If the clause includes examples like "epidemic," "pandemic," or "quarantine," the party should clearly be able to invoke the clause. However, most force majeure clauses are not so specific.

If the clause references a "government action" or "government order," or even "government labor restrictions" (in light of a quarantine), then a party could argue that certain directives from the federal, state, and local governments excuse performance under the clause. However, the government directive must be mandatory, not a recommendation, as further discussed below.

Most force majeure clauses include a catch-all phrase referring, for example, to acts "not reasonably within control of a party and which the party is not able to overcome wholly or in part by the exercise of due diligence." Arkansas subscribes to the common-law contract rule of *ejusdem generis* for interpreting general terms following a series of specific terms, limiting the general terms to a meaning substantially similar to the specific terms. *Union Bankers Ins. Co. v. Natl. Bank of Com. of Pine Bluff*, 241 Ark. 554, 557, 408 S.W.2d 898, 900 (1966). Thus, parties in Arkansas may find their catch-all phrases limited to situations resembling the clause's specific

terms. On the other hand, parties may interpret the catch-all provision more broadly when the force majeure clause contains no specific terms.

b. *Impossibility versus Impracticability*

To qualify for excusal under most force majeure clauses, the COVID-19 pandemic must make continued performance legally or physically impossible. Legal impossibility encompasses those circumstances where it may be physically possible to continue performance, but government restrictions make performance illegal. The Arkansas Supreme Court has found legal impossibility, for example, when the Arkansas Oil and Gas Commission required a minimum amount of pooling exceeding the maximum pooling allowed in an oil lease. *Gordon v. Crown Cent. Petroleum Co*., 284 Ark. 94, 679 S.W.2d 192 (1984) (force majeure excused the breach).

The party asserting physical impossibility, on the other hand, must show that "he took virtually every action within his power to perform his duty under the contract" and that "the thing to be done cannot be effected by any means." *Frigillana v. Frigillana*, 266 Ark. 296, 302-03, 584 S.W.2d 30, 33 (1979). Courts are willing to excuse performance when the parties prove physical impossibility. For example, the Eighth Circuit, applying Arkansas law, excused performance when an oil contract provided for delivery of oil from a specific pipeline which was damaged by fire. *N. Am. Oil Co. v. Globe Pipe Line Co*., 6 F.2d 564 (8th Cir. 1925).

Physical impossibility is often difficult to prove. For instance, a state may strongly recommend that its residents avoid public places in light of COVID-19, leading foot traffic at a tenant's business to dissipate. The tenant cannot claim excusal under the force majeure clause based on the decline in business, for operation is still physically possible. *See e.g.*, *Polzin v. Beene*, 126 Ark. 46, 189 S.W. 654, 655 (1916) ("Inconvenience or the cost of compliance with the contract or other like thing cannot excuse a party from the performance of an absolute and unqualified undertaking to do that which is possible and lawful.").

Alternatively, the force majeure clause may be broader. For example, if the clause encompasses acts making business "impossible or reasonably impracticable," then a party may argue reasonable impracticability. Arkansas courts frequently distinguish between impossibility and impracticability in theory, *see Serio v. Copeland Holdings, LLC*, 2017 Ark. App. 280, 11, 521 S.W.3d 131, 138 (2017) ("The law of impossibility has evolved into a broader and more equitable rule of impracticability."), but rarely in practice.

c. *Mitigation*

Arkansas courts read a mitigation requirement into force majeure clauses. Mitigation generally involves reasonable and diligent but not extraordinary efforts. A trio of Arkansas cases imply certain principles regarding mitigation in force majeure contexts.

In *Cassinger v. Poinsett Cty. Rice & Grain, Inc*., the Arkansas Court of Appeals held that a force majeure clause excused a delay in pickup caused by flooding, for the breaching purchaser offered

to pay for the seller's storage costs and interest during the delay. 2010 Ark. App. 308. As shown here, courts are most willing to provide a breaching party the protection of the force majeure clause when the breaching party has attempted to mitigate the damage.

On the other hand, in *Stiles v. Van Briggle*, breaching sellers could not claim performance excusal under the force majeure clause when flooding delayed shipment because the seller had refused buyer's offers of additional time for delivery. 196 Ark. 1179, 118 S.W.2d 588 (1938). Under *Stiles*, breaching parties lose the protection of the force majeure clause by failing to take advantage of a mitigation opportunity offered by the other party.

Finally, in *Wilson v. Talbert*, a lessor under an oil lease terminated the lease after one of the tenant's oil tanks ruptured. 259 Ark. 535, 535 S.W.2d 807 (1976). The court found that the force majeure clause would have prevented the lessor from terminating the lease in response, but only if the tenant resumed production within a reasonable time. The court upheld the landlord's termination of the lease here because an unreasonable time had passed; the rupture occurred in March, and the tenant did not begin repairs until July. Under *Wilson*, then, parties seeking excusal under a force majeure clause must mitigate losses specifically by resuming performance as quickly as reasonably possible.

Under Arkansas law, if a breaching party tries to cancel performance completely under the force majeure clause, the other party may offer certain mitigation options – just as the buyers offered an expanded time for delivery in *Cassinger* and *Stiles* – and prevent the breaching party from total cancellation. Arkansas courts do not look favorably on parties attempting to call off performance when an easy path to mitigation exists.

For many businesses dealing with COVID-19, curbside delivery and online services are effective mitigation strategies requiring only reasonable efforts. Depending on the business, then, parties may face difficulty invoking their force majeure clauses to terminate agreements.

d. *Notice*

Most force majeure clauses require notice to the other party, and notice is a good idea even when not required. The party invoking the clause should write a letter to the other party thoroughly describing the situation. The letter should discuss why continued operation is impossible or impracticable and why mitigation has been unsuccessful.

Courts in Arkansas take the notice requirement seriously. In a federal order applying Arkansas law, a judge refused to grant a breaching seller's motion for judgment on the pleadings when the force majeure clause required notice "promptly in writing" and the seller might not have provided adequate notice. *BAE Sys. Ordnance Sys., Inc. v. El Dorado Chem. Co*., No. 1:15-CV-01035, 2016 WL 10647120, at *2 (W.D. Ark. Sept. 27, 2016).

3. Scope of Relief

Counsel should be careful to examine the exact coverage of the force majeure clause. For example, many force majeure clauses in leases provide for a suspension of operation without a violation of a covenant of continuous operation but do not excuse rent during that time. On the other hand, if the clause includes language excusing parties from "any term, condition, or covenant" of the lease, then the payment of rent would also be excused.

Additionally, Arkansas courts grant excusal only to the extent that the parties mitigate their losses. As noted herein, the Arkansas Supreme Court in *Wilson* held the force majeure clause to only excuse performance under the oil lease for a reasonable time. Likewise, the Eighth Circuit in the *Globe Pipe Line Co*. case excused performance when the pipeline was destroyed by a fire, but only until the damaged pipeline was repaired (a period of about two weeks).

4. Other Considerations & Alternatives

Though no Arkansas court has expressly stated so, courts universally refuse to imply force majeure clauses in contracts. *See e.g., Gen. Elec. Co. v. Metals Res. Grp. Ltd.*, 293 A.D.2d 417, 418 (N.Y. App. Div. 1st Dept. 2002) ("The parties' integrated agreement contained no force majeure provision, much less one specifying the occurrence that defendant would now have treated as a force majeure, and, accordingly, there is no basis for a force majeure defense.").

A party without a force majeure clause – or a party whose force majeure clause does not encompass the pandemic – would need to rely on the common law defenses of frustration of purpose or impracticability.

Arkansas recognizes the frustration of purpose defense, in which a party need not fulfill its obligations under the contract if the underlying purpose of the contract can no longer be achieved. *See e.g.*, *Deutsche Bank Nat. Tr. Co. v. Austin*, 2011 Ark. App. 531, 8, 385 S.W.3d 381, 387. Courts will typically not accept "making a profit" as the underlying purpose of a contract under this doctrine – otherwise, performance could be excused in all unprofitable contracts. *See Vibo Corp. v. State ex rel. McDaniel*, 2011 Ark. 124, 23, 380 S.W.3d 411, 426 ("[T]he fact that performance of the contract has become economically burdensome is not a sufficient reason to excuse . . . performance."). This doctrine would therefore not help most parties in the COVID-19 pandemic, unless the party can show that performance is impossible.

Arkansas likewise recognizes the defense of commercial impracticability, which arises when, by no fault of the party, a party's performance becomes impracticable by the occurrence of an event that was assumed not to occur when the contract was made. *See Serio*, *supra*. Because this doctrine looks for impracticability, parties may have more success with it than with the frustration of purpose doctrine, requiring impossibility. However, as noted herein, Arkansas courts frequently equate impracticability and impossibility in practice; parties therefore rarely find success with this defense.

Finally, the parties may try to work out an agreement on their own. If the force majeure clause is not helpful to a breaching party, and the other party is willing to negotiate, the parties may sign an addendum to the contract. As is typically the case, negotiation may be the best strategy.

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.