Guideposts for Navigating Contract Disputes in Georgia amidst COVID-19 Economic Upheaval

By Patrick Fagan • fagan@bmelaw.com

With the onset of COVID-19, economic change has come to Georgia at a pace unseen in recent memory. In the past two weeks, President Trump, Governor Kemp, and Mayor Bottoms have declared states of emergency. We are now living with closed schools, idled businesses, and rising layoffs. This sudden confluence has set the stage for myriad contract disputes. A contract obligation that was beneficial last week may be an existential threat now. And any business facing decreased cash flow is likely reviewing their contractual obligations to chart a prudent path forward.

In light of all of this, we built a list of guideposts for reference in today's contract disputes. Many are lessons from plaintiff's and defense work in the wake of the Great Recession. Others are common to high-stakes contract disputes. And others are a new front as a global pandemic meets Georgia law. These points may seem obvious to lawyers. But past litigation shows they are not top of mind as business decisions are made. Of course, context is key and this list is no substitute for legal advice with actual facts. But considering these points now may help you avoid or, if necessary, prevail in litigation.

1) **Locate and review the controlling contract documents now:** This may seem obvious, but even locating the operative contract when a dispute arises can create costly delay and confusion. In reality, business is often conducted from memory, not by reference to actual contract terms. However, given today's uncertainty, now is the time to locate the controlling contract and review it. Otherwise, challenges may arise after: (1) key positions are taken based on memory, not the actual contract terms; or (2) institutional memory is lost to layoffs or other attrition.

2) **Force majeure:** "Force majeure" is "[a]n event or effect that can be neither anticipated nor controlled; esp., an unexpected event that prevents" someone from doing something that he agreed to do. Black's Law Dictionary. These contract clauses allocate risk if a force majeure makes performance impossible or impracticable. They also often have notice and timing requirements and require that non-performance be caused by the force majeure. Given the variety of terms used and risks if improperly invoked, force majeure clauses bear careful review with counsel.

3) **Impossibility:** Georgia's impossibility statute (O.C.G.A. § 13-4-21) may excuse performance for someone directly impacted by COVID-19. Under this statute, if performance "becomes impossible as a result of an act of God, such impossibility shall excuse nonperformance, except where, by proper prudence, such impossibility might have been avoided by the promisor." The scope of this protection in the era of COVID-19 will be hotly litigated.

An "act of God" means "an accident produced by physical causes which are irresistible or inevitable, such as . . . sudden death, or illness." O.C.G.A. § 1-3-3(3). But an "Act of God" "excludes all idea of human agency." *Id.* And Great Recession cases hold that financial inability and economic downturns alone do not qualify. Since courts are unlikely to apply this statute broadly to the fallout from COVID-19, a party may not wish to pin its entire litigation strategy here.

4) **Notice provisions:** Notice provisions should be reviewed, specifically when notice must be provided, the form and content of the notice, and to whom it should be sent. Failure to provide required notice can have serious consequences, such as barring a breach claim or defense. And be careful in your review, because notice provisions may be sprinkled throughout the contract for items such as default, breach, delay, repair, termination, force majeure, change of address, change of contact, etc.

5) **Termination and cure or remedy provisions:** Although some contracts permit "termination for convenience," many more require written notice and an opportunity to cure before termination or other remedies are available. Ignoring cure or remedy provisions can have catastrophic and irrevocable consequences, such as forfeiture of contract rights and enormous liability for breach.

6) **Wherever possible, document changed arrangements:** Amidst the fallout of COVID-19, contracting parties are undoubtedly acting quickly to keep business moving. For clarity and speed, oral communications are necessary. Nevertheless, these calls and conversations are also the seeds for future fact disputes. Uncertainty can be mitigated with simple, confirming emails.

7) **Modifications:** Most contracts have a clause requiring any modification to be in a (signed) writing. These clauses protect the contract's original terms through the uncertainty of future performance. However, these provisions are not bulletproof, as even no-modification clauses may be waived by conduct under Georgia law. Given that modifications can lead to costly and uncertain fact disputes, any modifications should be documented per the contract's modifications clause.

8) **Temporary mutual departures:** Given the challenges from COVID-19, deviations from strict contract terms can occur. Georgia law recognizes temporary mutual departures (O.C.G.A. § 13-4-4), where contract obligations may be suspended by a pattern of mutual conduct. When this arises, parties should consider: (1) noting that it is temporary, not a permanent modification or a new agreement; and (2) sending a notice of return to the original terms before seeking to enforce the contract.

9) **Georgia's attorneys' fees statute (O.C.G.A. § 13-6-11) favors early involvement of litigation counsel:** Finally, as contract disputes ripen and cannot be resolved, a claim for attorneys' fees should also be considered. First, the contract should be reviewed for such provisions. Second, you should also consider retaining counsel early so you can seek fees under O.C.G.A. § 13-6-11. Under this statute, a breaching party that acts in bad faith or is stubbornly litigious can be liable for attorneys' fees. But these fees are generally only available for plaintiffs. This creates an incentive for plaintiffs and a risk for defendants. It is yet another reason to consult litigation counsel early in a contract dispute.