

Recent Litigation Pitfalls and How to Avoid Them Through Better Contracting

IADC Contracts Committee Meeting

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Topics

Force Majeure Clauses

Chapter 56 Lien Waiver Provisions

Wire Fraud Liability Issues

Arbitration & Jury Waivers in the Age of COVID

Force Majeure Provisions

The Tip of the Spear in COVID Litigation

Is a “Pandemic” a Force Majeure Event?

- Uncertainty around Applicability
 - Is COVID-19 a “Natural Disaster”?
 - When did COVID-19 “occur”?
 - What is the triggering event for the FM claim?
 - Does performance have to be impossible or simply more difficult?

Force Majeure Provisions

The Tip of the Spear in COVID Litigation

Is a “Pandemic” a Force Majeure Event?

- Uncertainty around Causation Issues
 - Government shut-down orders and travel restrictions
 - Trade and supply chain delays
 - Job-site or office exposures
 - Regulatory issues

Force Majeure Provisions

The Tip of the Spear in COVID Litigation

Is a “Pandemic” a Force Majeure Event?

- Uncertainty around “Foreseeability”
 - Are additional COVID “waves” foreseeable?
 - Are indefinite travel restrictions now foreseeable?
 - Are supply chain disruptions foreseeable?

Force Majeure Provisions

The Tip of the Spear in COVID Litigation

Is a Winter Weather a Force Majeure Event?

- When is weather unforeseeable as a FM Event?
- 2-3 weeks notice; sufficient time to mitigate FM impacts?
- Similar impacts from 2011 Winter Storm
- How long does FM Event last if the weather has warmed, but the impacts are still being felt?
 - Is the FM Event the weather or the consequences of the weather?

Force Majeure Provisions

The Tip of the Spear in COVID Litigation

How to Create Contractual Certainty

- Expressly include or exclude COVID-19 as an FM Event (and future pandemics)
- Contract for definite deadlines during which COVID-19 may be claimed as an FM Event
- Address the level of impact (impossible, impracticable, difficult)
- Address government shut-down orders and travel restrictions
- **Ambiguous FM Clause may create a “fact-issue” that takes years to resolve in court.**

Chapter 56 Lien Waivers

The Newest Wrinkle in Texas Complex Lien Laws

Overview of Texas Lien Statutes

- TPC Chapter 53
 - Lien statute for work performed on general construction projects.
 - Prospective Waiver of Chapter 53 lien rights is **unenforceable**.¹

- TPC Chapter 56
 - Lien statute for “mineral activities.”
 - **Silent** as to waive-ability of Chapter 56 lien rights.

¹ See Tex. Prop. Code § 53.286.

Chapter 56 Lien Waivers

The Newest Wrinkle in Texas Complex Lien Laws

Can Chapter 56 Lien Rights be Prospectively Waived?

- Probably so after the *Mesa* decision.¹
- Avoid losing Chapter 56 lien rights:
 - Strike Lien Waiver Provisions
 - Watch out for “Payment of Claims” clauses
 - Watch out for limitation of liability clauses applicable to parents, affiliates, and owners

¹ *Mesa S. CWS Acquisition, LP v. Deep Energy Expl. Partners, LLC*, 2019 WL 6210213, (Tex. App.—Houston [14th Dist.] 2019, no pet.)

Wire Fraud Liability Issues

Stealing Cold Cash in 2021

- Gain access to target company email account
- Impersonate a payment recipient
- Change wire payment instructions
- Diverting legitimate payments, often intended for vendors, to account controlled by criminals
- According to the FBI, between 2016 and 2019, the scam netted fraudsters **\$26 billion**, with the losses jumping almost exponentially year-over-year.

Wire Fraud Liability Issues

Stealing Cold Cash in 2021

— Conflicting Case Law:

- *Bain v. Platinum Realty, LLC* – Federal District Court in Kansas
 - Misdirected closing payment \$200K for home purchase because of hacked real estate agent email account
 - *Bain* **jury** verdict: 85% liability on party “**sending**” the email changing wire information. I.e., the party whose email account was hacked.

Wire Fraud Liability Issues

Stealing Cold Cash in 2021

— Conflicting Case Law:

- *Arrow Truck Sales v. Top Quality Truck* – Federal District Court in Florida
 - Misdirected purchase payment of \$570K for twelve semi-trucks
 - Both parties were “hacked”
 - *Arrow Truck* **bench** verdict: 100% liability on party “**receiving**” the email changing wire information. I.e., the party who executed the fraudulent wire instructions
 - Rationale: payor is in last, best position to prevent the fraud and should have questioned change in wire instructions

Wire Fraud Liability Issues

Stealing Cold Cash in 2021

— Contract Practices:

- Include language in agreements or escrow agreements that a party cannot change payment instructions by email and cannot verify a change by calling a phone number sent by email.
- A common problem is calling a phone number provided by the scammers. Avoid this by having an agreed contact phone number in the contract documents.
- Include language allocating risk for misdirected funds, i.e., language requiring the payment of funds without regard to the negligent or criminal conduct by the parties or third-parties.
- Require cyber-theft insurance riders and have your company added as an additional insured.

Arbitration & Jury Waivers in the Age of COVID

Securing Timely Justice

Texas State Judiciary Backlog:

- In 2019, Texas averaged 186 jury trials weekly.
- Between March–June 2020 Texas had **ZERO** jury trials.
- Since trials have resumed, only several dozen jury trials have been held, a number of which ended in mistrial because of COVID.
- Texas trial docket backlog expected to reach 10,000 cases by April 2021.¹

¹ Statistics available at <https://www.texastribune.org/2021/01/05/texas-jury-trials-coronavirus/>

Arbitration & Jury Waivers in the Age of COVID

Securing Timely Justice

Accelerating Dispute Resolution:

- Jury trial waivers
- Agree to virtual mediation for pre-suit dispute resolution
- Agree to arbitration
- Prospective waiver of rights to in-person proceedings
- Agree to virtual dispute resolution process, including virtual depositions



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