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.

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

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/](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