COLUMBUS BAR ASSOCIATION

Legal Connections

LEGAL EXPERTISE FOR THE BUSINESS COMMUNITY

APRIL 28 - MAY 4, 2023

Columbus Bar members provide valuable legal guidance to business owners. Find a lawyer to answer your legal questions at www.cbalaw.org.

Jill Snitcher, Esq.
Executive Director
jill@cbalaw.org

DETAIL IN FORCE MAJEURE CLAUSES IS FORESEEABLE PT. 2

BY: BRYAN PRITIKIN

Post-pandemic contract pillars

Language will be the guiding light moving forward in litigation surrounding force majeure arguments. Much of the current litigation focuses not on whether the pandemic caused the non-performance but where the parties stand following non-performance. Despite the need for carefully tailored force majeure clauses in post-pandemic commercial contracts, there are some standard pillars upon which the clause should be built:

1. Define and limit the "triggering events" in response. Suppose your force majeure clause begins to wade too far into the weeds. In that case, a non-performing defendant can raise a defense of impracticability or impossibility (parties should still include a catch-all provision allowing for non-performance due to events out of the parties' control). Without question, courts will now look at force majeure clauses for inclusion of pandemics as "triggering events," which many pre-pandemic contracts did not include.

2. Outline the extent of permitted non-performance. This outline should also include whether the "triggering event" excuses one or both parties from performance.

3. The parties must establish a causal connection between the "triggering event" and the non-performance. In doing so, the parties should choose their language carefully because certain phrases may require or imply higher burdens of proof.

4. The parties should provide consideration for progress made under the contract. Starting at the date of non-performance, outline what is required to be completed going forward, along with all other standard contractual provisions such as date, a form of notice, and mitigation efforts.

Business owners have found it challenging to get courts to agree to excuse non-performance for a COVID-19 triggering event. Courts will likely need to find the parties intended to include COVID-19 as a triggering event at the time they executed the contract and that COVID-19 itself rendered performance impracticable or impossible, as opposed to some other intervening and foreseeable event.

Careful research and analysis are critical components in commercial contract construction in our post-pandemic world. In the face of growing litigation related to force majeure clauses, carefully drafted force majeure clauses will provide necessary guidance and allow the parties to avoid costly litigation.

Bryan Pritikin is an Associate in Carlile Patchen & Murphy's Litigation Practice Group.

THE SPRING 2023 COLUMBUS BAR LAWYERS QUARTERLY IS HERE! READ ONLINE AT WWW.CBALAW.ORG

THE CHANGING SHAPE OF TRADE SECRET TRIALS: AN INCREASING SHIFT TO JURIES

BY: JOHN MARSH

Trade secret cases are undergoing a significant shift in their litigation strategy, with an increasing number of trade secret owners pursuing claims for damages rather than seeking injunctions against former employees. This marks a major change in the way trade secret cases are typically handled, with damages claims typically being determined by a jury, which could introduce significant uncertainty and risk into the litigation process.

Traditionally, it was believed that a trade secret owner's workforce posed the greatest risk to their secrets. Studies have shown that 85% of federal trade secret cases arise from employment relationships or from parties who are well-acquainted with each other. However, recent cases show that this landscape is shifting. In the last year, three high-profile cases have resulted in significant damages awards, including Appian Corp. winning $2 billion from competitor Pegasystems Inc. in a Virginia court, Goodyear Tire & Rubber Co. being hit with a $65 million verdict by an Akron, Ohio jury for trade secret misappropriation, and a Detroit jury awarding Versata $105 million for trade secret theft and breach of a software licensing agreement by Ford Motor Company.

One theory for this shift in strategy is the perception that recent U.S. Supreme Court decisions have eroded the protection previously afforded by patents, particularly in the software industry. As a result, trade secret law is becoming more relied upon. Two of the recent verdicts, Appian v. Pegasystems and Versata v. Ford Motor, involved disputes over the misappropriation of software trade secrets. Additionally, the use of noncompete agreements, which were once a fulcrum of past trade secret litigation, has begun to erode, with legislators and regulators redoubling their efforts to limit or ban their use. As a result, courts have become more exacting in their review of the proof needed for an injunction.

Another factor driving the shift towards damages claims is that trade secret cases are tailor-made for juries. These cases present modern-day allegories of right and wrong, stealing and betrayal, battles between David and Goliath. Juries are famously unpredictable, and these disputes arise from claims of intentional misconduct, adding even more uncertainty and risk to the trial process.

Trade secret owners and their lawyers who are accustomed to seeking injunctions must adapt to this trend towards damages claims. While an injunction is still an important remedy for many trade secret owners, they should be prepared for the increasing number of cases in which damages are being sought. This may require a shift in litigation strategy, as a jury typically resolves damages claims, and may involve different legal considerations than injunctions.

To stay up to date on the latest developments in trade secret litigation and for more in-depth analysis, be sure to visit **www.tradesecretlitigator.com**

Become an
Ohio Notary
Public

Apply for a Notary Commission

At the CBA we have everything you need to prepare your application for the Ohio Secretary of State - from your background check and required education and testing to your stamps and supplies.