

COVID-19 and Force Majeure Claims in Performance of Contracts

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Executive Summary: As the COVID-19 pandemic rapidly spreads across the globe, disrupting public life as we know it, many businesses and employers are probably wondering, “Do I still have to perform my obligations under this contract?” As lawyers love to say, “It depends.” Attorneys and courts will likely spend months or even years sorting out whether the COVID-19 pandemic is a *force majeure* that may excuse contractual performance. This article will discuss *force majeure* clauses and whether they may be used to excuse performance on account of the global pandemic.

WHAT IS A FORCE MAJEURE?

In contracts, a *force majeure* clause usually excuses performance of contractual obligations — either temporarily or permanently — because of the occurrence of a *force majeure* (“superior force”). Black’s Law Dictionary defines a *force majeure* clause as “a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled.” A claim of *force majeure* operates as an affirmative defense, and the party relying on a *force majeure* clause bears the burden of proving, by a preponderance of the evidence, that the event in question was truly a *force majeure*.

To count as a *force majeure* under Florida law, an event typically must be both (1) unforeseeable and (2) outside of the parties’ control. *In re Flying Cow Ranch HC, LLC*. Such events can include hurricanes, floods, fires, labor strikes, wars, material shortages, government action, or “Acts of God.” In Florida, *force majeure* clauses may include events that merely frustrate performance rather than make performance impossible. However, whether any specific event counts as a *force majeure* will depend on the language in the *force majeure* clause.

1. Government Action

If a contract provides that “pandemics” are a *force majeure*, the party seeking to avoid performance is probably in luck (at least with respect to that contract). In the absence of this definition, however, parties should next look to whether the *force majeure* clause includes “government action.”

With numerous states issuing shelter-in-place orders, many businesses are closing and non-essential business deals are being put on hold. Even in areas that have not yet been ordered to shelter-in-place, government restrictions on social gatherings and sales of certain items could frustrate the purpose of many contracts. For example, before any shelter-in-place order had been issued, the state of Florida suspended the sale of alcoholic beverages by the drink, limited restaurants to take-out and delivery only, and ordered gyms and fitness centers to close. This governmental action could frustrate the

purpose of many contracts within those industries, and a shelter-in-place order would have an even greater impact.

Beware, however, that in order to count as a *force majeure*, government action typically must make performance impracticable or impossible — not just *unprofitable*. The government action must also have a *direct* impact on the party's ability to perform. Government action that has the attenuated effect of raising the cost of goods, increasing interest rates, or worsening the economy would not likely be a *force majeure* event, but government action that explicitly closes someone's business might be. As one federal court said, "A *force majeure* clause is not intended to buffer a party against the normal risks of a contract." *Seaboard Lumber Co. v. United States*.

2. Catch-All Phrases

If neither pandemics nor government action are listed as *force majeure* events in the contract, the party should next see whether the *force majeure* clause contains a catchall phrase. For example, in *Flying Cow Ranch*, the clause contained a catch-all that included "any other cause not reasonably within the control of Seller or Buyer and which by the exercise of due diligence the non-performing party is unable in whole or in part to prevent or overcome." Typically, courts will only excuse performance if the event that caused nonperformance is specifically listed in a *force majeure* clause. Given the unprecedented nature of the COVID-19 pandemic, however, parties should consider the effect of a catch-all phrase.

Florida case law on *force majeure* events tends to show that a global pandemic would likely qualify. In *Flying Cow Ranch*, a federal bankruptcy court held that the failure to obtain permits and zoning approvals was not a *force majeure* event because it was neither unforeseeable nor wholly outside the parties' control. On the other hand, courts have held that excessive rain and a company president's heart attack were *force majeure* events. See *Devco Dev. Corp. v. Hooker Homes, Inc.*, (excessive rain); *Camacho Enters., Inc. v. Better Constr., Inc.*, (heart attack). This is because those events — while not outside the realm of possibility — were wholly outside the parties' control. As the Eleventh Circuit Court of Appeal has stated: "No seller can command the sky to open up and more rain to fall, and we are not aware of anyone deliberately inflicting a heart attack on himself to delay the performance of a contractual duty." *Stein v. Paradigm Mirasol, Ltd. Liab. Co.*, Like these other natural occurrences, the COVID-19 pandemic is unprecedented in this generation and outside of any individual's control.

WHAT IF THERE'S NO *FORCE MAJEURE* CLAUSE?

This global pandemic will likely leave many parties scouring their contracts for *force majeure* clauses. If there's no such clause to be found, don't despair; parties may still try to avail themselves of legal or equitable doctrines such as impossibility, impracticability, or frustration of purpose. In Florida, "[t]he courts generally agree an act of God that renders a contract impossible to perform excuses performance." *State v. Allstar Bail Bonds*.

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The absence of a *force majeure* clause can also serve as a learning opportunity. In many ways, after the COVID-19 pandemic, life — and business — will never be the same again. From now on, ensure your contracts have a *force majeure* clause, and make sure that the clause can be used to excuse performance in the event of another pandemic.

i If you have any questions about *force majeure* clauses or their application, please feel free to contact [Emily Chase-Sosnoff](mailto:echase-sosnoff@fordharrison.com), (813) 261-7853 or echase-sosnoff@fordharrison.com.