

STRAIN, STRAIN, GO AWAY, I'LL PERFORM ANOTHER DAY: COVID-19 FORCE MAJEURE CLAIMS IN MISSOURI

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The latest strain of coronavirus, COVID-19, has many wondering about potential force majeure claims. Please note that the following research is based on Missouri law so to the extent another state governs a party's contract, this analysis may change.

What is a Force Majeure Clause?

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A **force majeure clause** is a contractual provision that allocates the risk of non-performance in the event that it becomes impossible or impracticable for a party to perform its obligations under a contract (especially as a result of an event that the parties could not have anticipated or controlled). Force Majeure clauses are common in many commercial contracts including leases, purchase agreements, supply agreements, and license agreements.

EXAMPLE FORCE MAJEURE PROVISION

Neither party shall be liable to the other party for delays or failures in performance of any of its obligations under this Lease because of acts of God; acts of a public enemy; acts of war, whether declared or undeclared; acts of terrorism; floods; insurrections; riots; fires; explosions; epidemics; quarantine restrictions; acts of government; failures of transportation; freight embargoes; strikes or other labor disputes causing work to be stopped, slowed, or interrupted; provided, however that such delays or failures were beyond that party's reasonable control and were not caused by its fault or negligence ("Force Majeure"). If a delay or failure of performance occurs that is excusable under this provision, the period for performance shall be extended for a time equal to the time lost because of the Force Majeure event.

The force majeure clause can be traced back to the **doctrine of impossibility**, a gap-filler in contracts that are silent on how to handle unexpected changes in circumstances that occurred *subsequent* to contracting and rendered performance by one party actually impossible (such doctrine is now often referred to as the **doctrine of impracticability** since literal impossibility is no longer required).

Because literal impossibility *was* required under the doctrine of impossibility, in order to excuse a

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party's performance, force majeure clauses began appearing in contracts to expand upon what could excuse a party's performance (outside of absolute impossibility).

Thus, it's important to note that just because a contract does not have a force majeure clause, does not mean that this argument is not still available (e.g, through the doctrine of impracticability or the frustration of purpose doctrine).

It is also equally important to note that just because a contract does contain a force majeure clause, does not mean a party can always avoid performance. Depending on the language of such a provision, performance may only be suspended or delayed. Therefore, it's important to review each force majeure clause on its own – conducting an independent analysis based on each provision's unique language.

Wording to Look For in Your Force Majeure Clauses:

Focusing specifically on **force majeure** clauses, whether COVID-19 constitutes a force majeure event depends upon the language of the contract. For example, in the wake of 9/11, many force majeure clauses began incorporating "acts of terrorism" as an event that can excuse a party's performance. With COVID-19, the phrase "**pandemic**" is key.

Pandemic:

Because the World Health Organization has classified COVID-19 as a pandemic, if a party's contract contains a force majeure clause that specifically excuses performance for a "**pandemic**", COVID-19 is within the scope of such force majeure.

However, it is likely that most force majeure clauses do not include wording akin to "pandemic" (though it is advised that they do going forward). In order to suspend or avoid performance of contractual obligations, many will need to look to other language in their force majeure clauses, such as "**act of God**" or "**events beyond the party's control**".

Act of God:

An "Act of God" has been repeatedly defined by Missouri courts as an occurrence due to natural causes that could not be foreseen *and that was not due to the participation of man*.

Even though COVID-19 is caused by a virus that is part of "nature," due to man's arguable participation/exacerbation of COVID-19 (and the volume of media attention on it), it is possible that COVID-19 will **not** be deemed an "Act of God."

Put another way by the Missouri Supreme Court:

"When the result in part is ascribable to the participation of man, either through active intervention or neglect or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the acts of God"

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Events Beyond the Party’s Control:

The purpose of a general, catch-all phrase, such as "events beyond the party's control," is to relieve a party of liability when the parties' expectations are frustrated due to an unforeseeable occurrence which is beyond the parties' control. Thus, Missouri courts have held that *foreseeable events* are not encompassed in such a catch-all provision and, therefore, must be expressly set out in a contract to relieve a party of liability.

In this context, foreseeability refers to whether the party desirous of excusing performance could have anticipated or foreseen the event(s). As such, for foreseeability purposes, *the timing of execution of the contract is important*, as a foreseeability analysis of a contract signed two years ago will differ from a foreseeability analysis of a contract signed yesterday.

Practical Consideration for Applying Force Majeure to COVID-19

As mentioned above, if you are a party to a contract and you (or the other party) intend to rely on the force majeure provision, then it is important that you closely review the language of your particular provision and consider the unique circumstances presented.

In doing so, we recommend that you consider the following in order to mitigate your risk and/or maximize your rights under your contract:

Definition	Carefully review the definition of force majeure in that contract. Does it specifically mention pandemics? If not, is there another event expressly identified which incorporates events such as COVID-19 and/or its related repercussions (e.g., “acts of government” or “quarantine restrictions”)? If not, is there general language sufficient to include COVID-19 and/or its related repercussions?
Causation	Consider what contractual obligation is not able to be performed and then determine whether the failure to perform this obligation is due to the direct or indirect consequences of COVID-19 as opposed to a different reason. If it is not, the force majeure provision is likely not applicable.
Mitigation	Consider whether the party claiming an inability to perform under the contract (i) followed all official guidance; and (ii) took commercially reasonable efforts to perform in a different manner or to otherwise mitigate the effect of the force majeure event. If the party did not take these actions, it may be harder for such party to rely on the force majeure provision. If you are the party claiming an inability to perform, be sure to maintain records of your efforts to prevent or mitigate the impact of COVID-19 on your ability to perform.

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Notice Requirements	Does the contract contain a notice requirement? If so, consider whether a certain notice must be provided in order to allow reliance on the force majeure provision. You should also be aware of any related timing requirements or requirements related to how/where such notice is delivered.
Consequences	Evaluate the consequences of a successful claim for force majeure. For example, does the provision excuse performance or merely allow for a delay in performance equal to the number of days of the force majeure event. Alternatively, some clauses may provide a right to source from an alternate provider or to terminate the contract for non-performance after a certain period of time.

Don't Forget About Force Majeure Gap-Fillers:

Though not all force majeure clauses may be worded to relieve a party from performance during the COVID-19 outbreak, don't forget that there are other contracting tools available, such as the gap-fillers discussed above.

We are also a tool you should feel free to use and are here and happy to help, should you need us.

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