

May the "Force" Majeure Be With You: Is COVID-19 a Force Majeure Event?

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The COVID-19 pandemic has impacted all aspects of our daily interactions. And, its effect on many businesses' ability to function cannot be overstated. It has been devastating. As you are well aware, the pandemic has also added a number of new words and phrases to our vocabulary—"social distancing" and "flattening the curve" to name just a couple—but here is another that may become more familiar to you: force majeure.

Translated from its French origin, the term means simply "superior force." Black's Law Dictionary defines the term as "an event or effect that can be neither anticipated nor controlled"^[1] and if you are a party to a contract, there is likely a force majeure provision included. Although the types of events that constitute a force majeure event depend on the specific language of the contract, generally, force majeure provisions excuse a party's failure to perform due to unusual and unavoidable circumstances such as natural disasters, acts of terrorism, fires, or other catastrophes.^[2] In the wake of COVID-19, several businesses across the country have already filed lawsuits arguing that the pandemic excuses their failure to perform under force majeure provisions.^[3]

As for how an Arkansas court might analyze a force majeure provision, *Cassinger v. Poinsett Cty. Rice & Grain, Inc.*, 2010 Ark. App. 308 provides a good example. In *Cassinger*, a rice exporter and a rice farmer entered into a contract for the sale of over 250 tons of rice for delivery between February 1, 2008 and March 31, 2008.^[4] During the delivery period, flooding caused the Mississippi River to rise to dangerous levels, making it unsafe to load barges until late April.^[5] The exporter contacted the farmer and assured him that he would pick up the rice as soon as he was able to resume loading, and he even offered to pay interest and storage costs for the period of delay.^[6] However, on April 10, 2008, the farmer sold the rice to another buyer for a higher price; the exporter was then required to pay substantially more for another shipment of rice to meet his pre-existing contractual obligations.^[7] In response to the exporter's action against the farmer, the farmer argued that the flooding did not extend the delivery date under the contract. The Court rejected the farmer's argument and ruled in favor of the exporter, stating: "[T]he force majeure clause excused delays beyond the control of the contracting parties for such time as would be reasonable under the facts and circumstances of the particular case."^[8]

In addition, in *Suburban Newspapers of Greater St. Louis, Inc. v. Kroger Co.*, the Eighth Circuit Court of Appeals addressed a case decided under Missouri contract law, which provides an instructive illustration of how certain conduct and contractual language can preclude the enforcement of a force majeure provision.^[9] In *Suburban Newspapers of Greater St. Louis, Inc.*, a grocery chain contracted with a local newspaper to carry its advertisements. The force majeure clause in that contract protected against issues "due to any contingency beyond its reasonable control."^[10] The grocery chain decided to close its stores for economic reasons and attempted to cancel the advertising contract.^[11] The newspaper company

sued for breach of contract and the grocery chain asked the Court to apply its force majeure provision to excuse its failure to perform.^[12] The lower court found that the grocery chain failed to provide sufficient facts showing that the closings were “beyond its reasonable control”^[13] and the Court of Appeals affirmed the decision.^[14] The author of a prominent treatise on contracts articulates a similar rule, noting that one must support “an express force majeure clause” with proof that the failure to perform was caused by a contingency that “in spite of skill, diligence, and good faith on the promisor’s part, performance remains impossible or unreasonably expensive.”^[15]

To be sure, these cases help crystalize a critical question: Is COVID-19 a force majeure event? The unsatisfying short answer is: it depends. Whether COVID-19 excuses a party’s failure to perform depends on the express language of the contract, the effect the pandemic had on performance, and the possibility of mitigating efforts to avoid nonperformance. In any event, businesses attempting either to enforce a force majeure provision or to defend against one should account for and consider these relevant factors.

^[1] Force Majeure, Black’s Law Dictionary (11th ed. 2019).

^[2] Jennifer Sniffen, In the Wake of the Storm: Nonperformance of Contract Obligations Resulting from A Natural Disaster, 31 Nova L. Rev. 551, 554 (2007).

^[3] See Pacific Collective, LLC v. ExxonMobil Oil Corp., Complaint, No. 20-STCV-13294 (Cal. Sup. Ct. Filed Apr. 3, 2020) (involving a California retail developer who argues that the state’s coronavirus lockdown is a force majeure that prevents the developer from completing a property purchase); E2W, LLC v. Kidzania Operations, S.A.R.L., No. 1:20-cv-02866 (S.D.N.Y. Filed Apr. 6, 2020) (contract dispute involving an amusement park franchisee who argues that force majeure provision applies because it cannot operate its facility due to COVID-19 restrictions).

^[4] 2010 Ark. App. 308, 3.

^[5] Id.

^[6] Id. at 3–4.

^[7] Id. at 3.

^[8] Cassinger, 2010 Ark. App. 308, at 3–4; see also Wilson v. Talbert, 259 Ark. 535, 540, 535 S.W.2d 807, 809 (1976) (interpreting a force majeure clause in a mineral rights lease).

^[9] 886 F.2d 1060 (8th Cir. 1989).

^[10] Id. at 1062.

^[11] Id.

^[12] Id. at 1061.

^[13] Suburban Newspapers of Greater St. Louis, Inc., 886 F.2d at 1062.

^[14] Id.

^[15] 30 Richard A. Lord, Williston on Contracts § 77:31 (4th ed. & Supp. 2019).