



Force Majeure Clauses

Navigating the Impact of the Coronavirus Pandemic on Contract Performance Obligations

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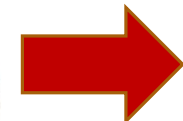
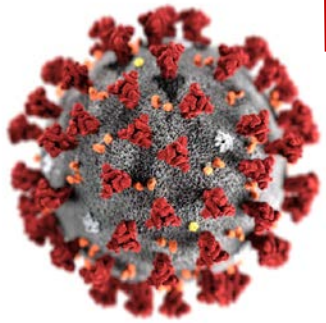
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COVID-19 Is Impacting Projects





COVID-19 Is Impacting Life



**German baker
cleans up with
toilet paper cakes**



LIVING
Walmart reports increase in sales of tops, not pants, during the coronavirus lockdown



French athlete runs entire marathon on apartment balcony



Agenda



- Interpreting *Force Majeure* Clauses
- COVID-19 As a *Force Majeure* Event
- Relevant FAR Provisions
- Considerations for Claiming Excused Performance
- Extra-Contractual Doctrines Excusing Performance



Key Takeaways



- Give Notice
- Read Contracts
- Sometimes Common Law is Enough
- Keep Good Records
- Consider Options Before Acting



Force Majeure Overview



- *Force Majeure* = French for “superior force”
- Defined by Contract
- Normally “[1] unforeseen events [2] beyond the control of both parties that [3] either make contract performance impracticable or frustrate the purpose of such performance.”
 - 2A Bruner & O'Connor Construction Law § 7:229 (“Project risks—Force majeure risks”) (quotation omitted)
- Burden of Proof: Party Asserting Performance Excused
- Effect: Excuses Contractual Performance



Analyzing If COVID-19 Is a *Force Majeure* Event



- **Step One:** What (if anything) does the Contract Say?
- **Step Two:** How is *Force Majeure* Provision At Issue interpreted?
 - Language of the Provision
 - Structure of the Provision
 - Governing Law
 - Course of Dealings
 - Totality of the Circumstances
- **Step Three:** Does the Common Law Excuse Performance?



Umbrella Term: “Act of God”



- ““Acts of God” — by definition “excusable” as beyond the “control” of mere human agency— historically have been recognized as fortuitous unforeseeable catastrophic natural events, such as earthquakes, volcano eruptions, avalanches, lightning, and the extraordinary weather related events of tornadoes, typhoons, droughts and floods.”

5 Bruner & O'Connor Construction Law § 15:46 (footnotes omitted)



“Act of God” – Doesn’t Cover Everything

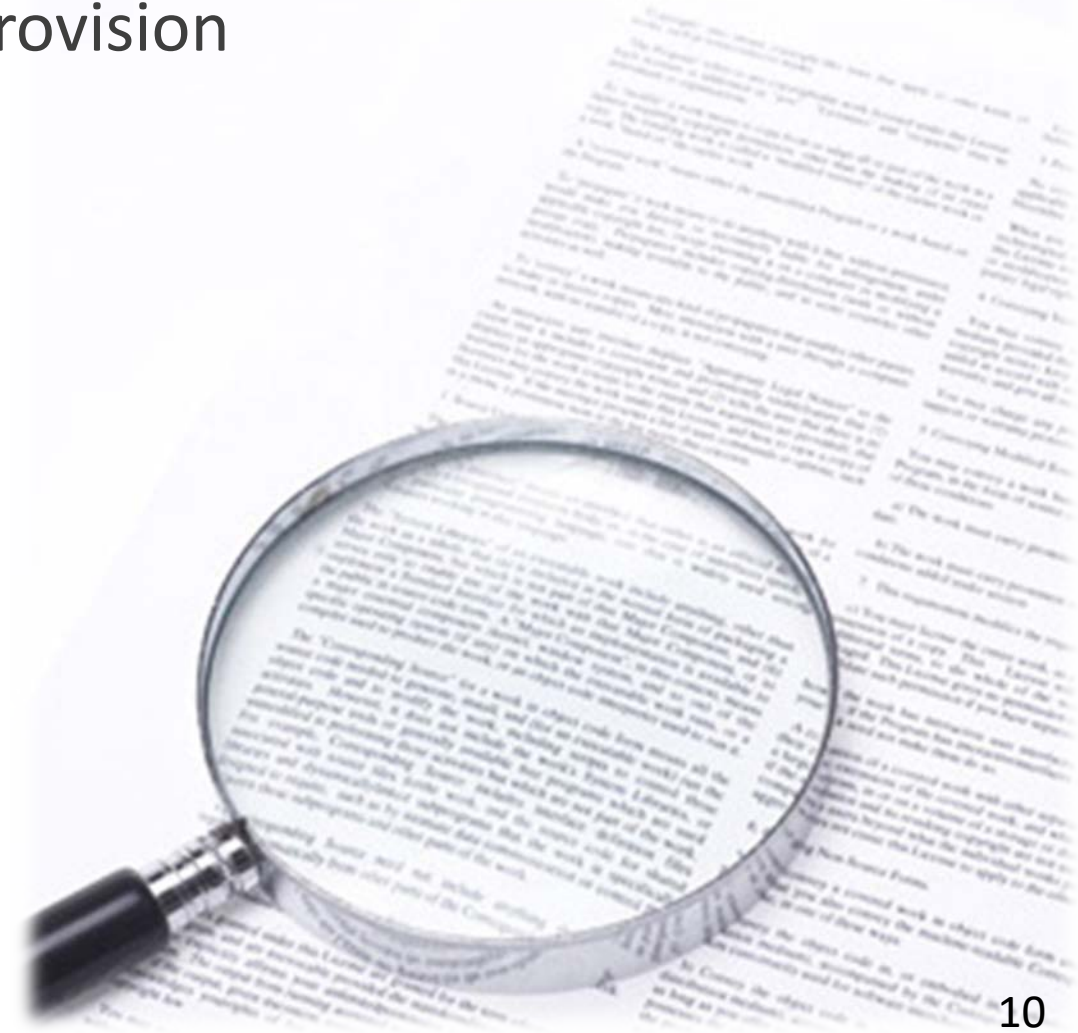




Check Contract for *Force Majeure* Provisions



- Explicit *Force Majeure* / “Act of God” Provision
- Delays / Extension of Time Provision
- Misc. Provisions
- Cost Escalation Provision
- Change in Law Provision





Common *Force Majeure* Clause Structures



- Broad Clause: No List of Triggering Events
- Specific Clause: List of Triggering Events





Broad Clause: Interpretation



*Commercially
Unreasonable*

*Unreasonable
Financial Hardship*

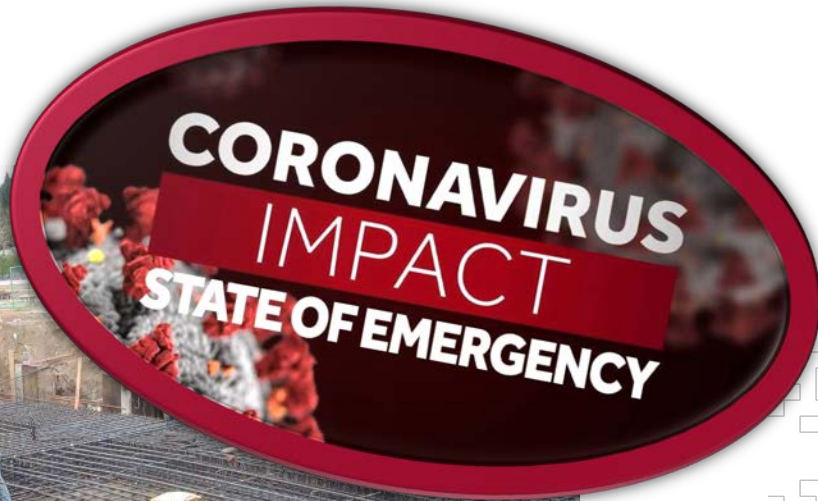
*Commercially
Impracticable*

Impossible

BURDEN



Hypothetical: Effect of Qualifications on Broad Clause





Broad Clause: Example



“If the performance of any part of this contract by [either party] is prevented, hindered or delayed by reason of any cause or **causes beyond the control of [either party]**, as the case may be, and which cannot be overcome by due diligence, the party affected shall be excused from such performance ...”

Source: West's McKinney's Forms Uniform Commercial Code § 2-301, Form 13



Broad Clause: COVID-19 Covered?



- “Causes Beyond Parties’ Control” = Arguable Covered
- More Burdensome Qualifications = Arguable Not Covered



Specific Clause: Interpretation



“Ordinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused.”

-*Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902–03, 519 N.E.2d 295, 296 (1987)



Specific Clause: Example No. 1



“9. *Force Majeure*. [The Performing Party] shall not be deemed to have failed to meet any obligation under this agreement if [it’s] performance or failure to perform or delay in performance has been caused by any Act of God, war, strike ... electrical outage, fire, explosion, flood, blockade, governmental action, or other catastrophe (hereafter, “force majeure”).”

Source: *Kleberg Cty. v. URI, Inc.*, 540 S.W.3d 597, 604 (Tex. App. 2016), rev'd, 543 S.W.3d 755 (Tex. 2018)



Specific Clause: Example No. 2



“If either party to this [contract] shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance of such obligation shall be excused for the period of the delay.”

Source: *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902, 519 N.E.2d 295 (1987)



Specific Clause: Example No. 3



“The Company shall not be liable for any failure in the performance of its obligations under this agreement which may result from strikes or acts of labor union [sic], fires, floods, earthquakes, or acts of God, War or other conditions or contingencies beyond its control.”

Source: *Seitz v. Mark-O-Lite Sign Contractors, Inc.*, 210 N.J. Super. 646, 649, 510 A.2d 319, 321 (Law. Div. 1986)

“Force Majeure: Notwithstanding anything to the contrary contained herein, [defendant] shall not be liable to [plaintiff] if Promotion is not able to take place or [plaintiff] is rendered unable to timely perform any of its obligations hereunder for any reason, including, without limitation, strikes, boycotts, war, Acts of God, labor troubles, riots, and restraints of public authority” (emphasis added).”

Source: *Team Mktg. USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 942, 839 N.Y.S.2d 242 (2007) (brackets in original)



Specific Clause: COVID-19 Covered?



■ Are Relevant Triggering Events Listed?

- Epidemic / Disease: A+
- Quarantines: A+
- State Emergency: ?
- Government Acts: ?
- Labor Shortages: ?

■ Scope of the “Catch-All”

- Qualified / Similarity Requirement?
- Cannon of Ejusdem Generis (“of the same kind”)
- Construction under Applicable Law





Consequences of Claiming Excused Performance



- Is Excused Performance in Party's Best Interest?
- Potential Consequences
 - Contract Termination
 - Increased Cost / Lost Performance
 - Reputation
 - Relationships





Prerequisites to Claiming Excused Performance



- Timely Notice
 - Schedule Analysis?
- Mitigation of Damages
- Alternative Dispute Resolution
- Other Possible Required Actions
 - Exploration of Potential Alternatives
 - Good Faith Negotiation of Amendment
 - Proof of Impossibility



Additional Considerations and Recommendations



Create and Keep Detailed Evidence

Consider Good Faith Attempt to Perform

Consider Renegotiation with Other Businesses Who Make Claims For Non-Performance

Monitor Government Actions

Consult Experienced Counsel!



Work with Counsel On Future Contract Language



Assess Consequences of Claiming Right Not to Perform

Review All Insurance Policies



Follow All Contractual Obligations



Federal Contracts: FAR § 52.249-14 -Excusable Delays



“(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. Default includes failure to make progress in the work so as to endanger performance....”



Federal Contracts: FAR § 52.249-10- Default (Fixed-Price Construction)



“...(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if -

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and...”



Doctrine of Impossibility/ Impracticability



“A contracting party has no duty to perform an obligation in the agreement if performance is rendered impossible or impracticable, through no fault of its own, because of a fact that existed at the time when a contract was made and about which this party neither knew nor had reason to know, and the nonexistence of which was a basic assumption of the parties' agreement.”

-30 Williston on Contracts § 77:31 (4th ed.)



Doctrine of Impossibility and the Spanish Flu



Napier v. Trace Fork Mining Co., 193 Ky. 291, 235 S.W. 766, 766–67 (1921)

“Plaintiff did not complete the grade until December 10th, and it is contended ...that he is excused for not completing it ...because of an **epidemic of influenza** which made it impossible for him to procure the necessary labor. That his work was hindered and delayed by this condition which developed after the execution of the contract is thoroughly established, but it is by no means satisfactorily proven that the completion of the contract within the specified time was rendered impossible or other than more difficult and expensive.”





Doctrine of Frustration



“Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.”

-Restatement (Second) of Contracts § 265 (1981)



Other Issues



- California 60-day Grace Period on collection of premium
- Public Construction and Housing is typically considered Essential Business/Essential Infrastructure
- Social Distancing
- Notice, Notice, Notice
- Call an attorney if you have questions



Concluding Remarks And Questions



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For more Coronavirus resources, visit our website at www.watttieder.com



RICARDO LARA
CALIFORNIA INSURANCE COMMISSIONER

NOTICE

TO: All Admitted and Non-Admitted Insurance Companies, All Licensed Producers, and Other Interested Parties
FROM: Commissioner Ricardo Lara
DATE: March 18, 2020
RE: 60-Day Grace Period for Insurance Premium Payments Due to the Disruption Caused by the Novel Coronavirus (COVID-19) Outbreak

The novel coronavirus (COVID-19) outbreak and emergency public health measures by state and local leaders are contributing to widespread interruptions and loss of income for many California consumers and businesses.

In response to the disruption caused by the outbreak, Insurance Commissioner Ricardo Lara is requesting that all insurance companies provide their insureds with at least a 60-day grace period to pay insurance premiums so that insurance policies are not cancelled for nonpayment of premium during this challenging time due to circumstances beyond the control of the insured. This request is directed to all admitted and non-admitted insurance companies that provide any insurance coverage in California including, life, health, auto, property, casualty, and other types of insurance.

In addition, Commissioner Lara is requesting that all insurance agents, brokers, and other licensees who accept premium payments on behalf of insurers take steps to ensure that customers have the ability to make prompt insurance payments. This should include alternate methods of payment, such as online payments, to eliminate the need for in-person payment methods, in order to protect the safety of workers and customers.

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