

Is COVID-19 an act of God?

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The business implications of the COVID-19 pandemic are wide-ranging and significant. Many businesses are dissecting the force majeure provisions in their contracts to determine if they can negotiate any relief from the pressure points caused by the pandemic. The most common force majeure event is an “act of God.” This article asks: under some circumstances, can the COVID-19 pandemic qualify as an act of God that triggers a force majeure clause?

The COVID-19 pandemic has significantly impacted the global economy and will continue to impact business for the foreseeable future. As the pandemic swept the nation, so did shelter-in-place orders shutting down “non-essential” businesses.

Businesses that were able to keep operating were often operating in a limited capacity. In some cases, portions of companies’ workforces contracted the virus and companies shut down operations to prevent further spread of the illness. In other cases, companies have decided to limit or cease operations because they cannot afford to maintain operations given the economic slow-down.

As a result, certain companies are looking to force majeure clauses to obtain relief related to contract performance.

LANGUAGE MATTERS

Whether a force majeure clause is triggered is a question of contract interpretation based on the language of the particular contract; however, force majeure is generally defined as an event beyond the control of the parties that prevents a party’s performance and excuses the party’s obligations.

The first step in any force majeure analysis is to review the force majeure “events” listed in the contract, which courts generally construe narrowly. *See Team Mktg. USA Corp. v. Power Pact, LLC*, 839 N.Y.S.2d 242 (N.Y. App. Div. 2007).

A common force majeure event included is an “act of God.”

WHAT IS AN ACT OF GOD?

The phrase “act of God” has been found in force majeure clauses for centuries. Most dictionary definitions define an act of God as a “natural event” that is not caused by any human action and cannot be predicted.

For example, Black’s Dictionary defines an “act of God” as: “[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado.”² Although the examples relate to weather, the definition does not exclude other “forces of nature.”

Similarly, Merriam-Webster Dictionary defines an act of God as “an extraordinary interruption by a natural cause (such as a flood or earthquake) of the usual course of events that experience, prescience, or care cannot reasonably foresee or prevent.”³ Again, weather is used as an example, but the focus is on “nature” as opposed to being human-driven.

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Statutory definitions also focus on “nature” and the exceptional, unanticipated, non-human-controlled aspects of the event. *See* 42 U.S.C. § 9601 (“The term ‘act of God’ means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.”);⁴ Fla. Stat. § 377.371(3)(c) (defining act of God as “an unforeseeable act exclusively occasioned by the violence of nature without the interference of any human agency”); Me. Stat. tit. 38, § 1319-G (same); *see also Elavon, Inc. v. Wachovia Bank, N.A.*, 841 F. Supp. 2d 1298 (N.D. Ga. 2011) (defining an act of God as an “overwhelming, unpreventable event caused exclusively by forces of nature” and holding that the 2008 financial crisis was not an act of God).

WHERE DOES COVID-19 FALL?

Consensus appears to hold that COVID-19 has natural origins, despite some circulating conspiracy theories that the virus was developed in a governmental laboratory in China.

The impact of COVID-19 on the economy, on government and on everyday life has been exceptional — with some thought leaders identifying the COVID-19 pandemic as a watershed moment that is reshaping society in lasting ways. Thus, there may be a basis for



the argument that the effects of COVID-19 resulted from an act of God triggering a force majeure provision.

The fact that courts have historically recognized illnesses as acts of God would support such an argument. For example, in *Weber v. Rogers*, 85 N.Y.S. 232, 234 (N.Y. Sup. Ct. 1903), the court noted that “involuntary illness has been held to be [an] ‘act of God’” in the context of lease agreements in which a tenant was unable to vacate the property at the end of the term due to illness.

In *Grover v. Zook*, 87 P. 638, 640 (Wash. 1906), the court held that “‘illness,’ being beyond the power of man to control or prevent, is the act of God” in the context of the inability to perform a marriage contract.

And in *Fenton v. Clark*, 11 Vt. 557, 563 (Vt. 1839), a party was discharged of his contractual obligation to deliver a certain horse when that horse died due to illness not caused by negligence, which the court determined was an act of God.

More recently, in *Rio Properties v. Armstrong Hirsch Jackoway Tyerman & Wertheimer*, 94 F. App’x 519, 521 (9th Cir. 2004), the court held that an illness rendering Rod Stewart’s performance at a concert impossible was a reasonable interpretation of the force majeure provision.

IS COVID-19 PREVENTING CONTRACT PERFORMANCE?

While it is possible that COVID-19 would fit into this line of case law, to constitute a force majeure event, it must be COVID-19 – and not a human reaction to the virus – that prevents the party’s contract performance.

Thus, it will be important to determine whether the COVID-19 virus itself is impeding contract performance or government orders or voluntary business actions taken in response to COVID-19. “Case law is fairly clear that human interference or influence on what could otherwise be considered an act of God ... precludes an ‘Act of God’ legal defense.” *Am. Nat’l Red Cross v. Vinton Roofing Co., Inc.*, 629 F. Supp. 2d 5, 9 (D.D.C. 2009).

A body of school closure cases, though dated, illustrates the hurdle some contracting parties may face when trying to establish that COVID-19, and not the human responses thereto, prevented contract performance.

The re-occurring question in these cases is whether a school district that closed its schools due to contagious disease was required to pay teachers. The schools argued performance (paying the teachers) was excused by the contagious disease.

“The general rule established by all the decisions [considering the question] is that, where performance of the contract is rendered impossible by act of God . . . the district is relieved from liability, but where the school is closed on account of a contagious disease . . . and the teacher is ready and willing to continue his duties under the contract, no deduction can be

made from his salary for the time the school is closed.” *Phelps v. Sch. Dist. No. 109, Wayne Cty.*, 134 N.E. 312, 312 (Ill. 1922).

“[T]he closing of a school by the order of a school board or a board of health is not the act of God, however prudent and necessary it may have been to make such an order.” *Gear v. Gray*, 37 N.E. 1059, 1061 (Ind. App. 1894).

More recent cases also adopt such an approach to the force majeure causation analysis. In *Rembrandt Enterprises v. Dahmes Stainless*, No. 15-cv-4248, 2017 WL 3929308 (N.D. Iowa Sept. 7, 2017), a farmer sought to cancel an order for a commercial dryer pursuant to a force majeure provision.

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Avian flu had decimated the farmer’s egg production operations, forcing the farmer to cease plans to build a new location. The court determined that because the avian flu did not prevent the ability of the supplier to build and deliver the dryer, the avian flu did not constitute a force majeure rendering the contract impossible to perform. *Id.* at *12 (but noting that the farmer may have a frustration of purpose argument).

Similarly, in *Vinton Roofing*, the defendant contractor did not ensure that a roof was watertight prior to leaving the worksite for the day; as a result, defendant could not rely on an act of God defense even though a heavy rainfall that subsequently damaged the property may have constituted an act of God. *Vinton Roofing Co., Inc.*, 629 F. Supp. 2d at 9. The cause of the damage was human, not natural — and thus the act of God defense did not apply.

And in a recent case from the District of Columbia, the court entertained the notion that a rodent infestation might qualify as an act of God, but only if the infestation was “of such character that it could not have been prevented or avoided by foresight or prudence.” *Whole Foods Mkt. Grp., Inc. v. Wical Ltd. P’ship*, CA No. 1:17-cv-01079, 2019 WL 5395739, at *3 (D.D.C. October 22, 2019).

On the other hand, in negligence cases, an act of God — such as a sudden illness rendering the driver of an automobile unconscious, causing the driver to crash and cause injury — liability has been excused so long as the act of God was not foreseeable and was the sole proximate cause of the incident. *See, e.g., Lewis v. Smith*, 517 S.E.2d 538 (Ga. Ct. App. 1999).⁵

But even then, the defendant must also establish that there was no contributory negligence on her part. *Halligan v. Broun*, 645 S.E.2d 581, 582-83 (Ga. Ct. App. 2007).

IS COVID-19 AN ACT OF GOD? MAYBE

In the case of a personal services business left with few workers who could perform the work of the business, perhaps COVID-19 is the “event” that rendered performance of the contract impossible, and COVID-19, being an act of God, should excuse performance.

On the other hand, in the case of a business that was forced to shutter temporarily because of the government’s response to COVID-19, perhaps the human reaction of the government to the virus (an act of God) was the cause of the company’s inability to performance.

A body of school closure cases, though dated, illustrates the hurdle some contracting parties may face when trying to establish that COVID-19, and not the human responses thereto, prevented contract performance.

In 2003, the American Association for Cancer Research (“AACR”) canceled its annual meeting mere days before the event was scheduled to begin, blaming the SARS epidemic.⁶ AACR claimed that it was excused from its contracts with over twenty hotels and the convention center due to force majeure and/or frustration of contract.⁷

Disputes between AACR and the hotels and convention center were confidentially settled, so one may only speculate how courts would have decided the issue. But this scenario

will likely play out in courts due to COVID-19. The answer will be left for the Courts to decide and will depend greatly on how the virus affected a particular business.

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Notes

¹ While many force majeure clauses reference the complete prevention of performance, some state that the event need only delay, hinder, or impede performance.

² ACT OF GOD, Black’s Law Dictionary (11th ed. 2019).

³ “Act of God.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://bit.ly/2UflYIN>. Accessed 18 May. 2020.

⁴ See also, e.g., Del. Code Ann. tit. 7, § 9103(1); Mich. Comp. Laws § 324.20101(a); Minn. Stat. § 115B.02; Or. Rev. Stat. § 249.005(2); N.Y. Pub. Health Law § 1389-e(4)(b).

⁵ See also *Beiner v. Nassau Elec. R.R. Co.*, 191 A.D. 371, 372 (N.Y. Sup. Ct.—App. Div. 1920) (holding that driver was not liable for injuring plaintiff in wagon versus trolley car accident where driver “fell senseless” before the accident and noting that, “Such illness is recognized as an act of God.”) (collecting cases).

⁶ Eugene Russo, AACR convenes SARS-cancelled meeting, The Scientist (July 10, 2003), <https://bit.ly/36S010Q>.

⁷ Martha Collins, Cancellation and Force Majeure Issues in the SARS Era, MeetingsNet (March 1, 2005), <https://bit.ly/36Rkjrjw>.

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