

**Force Majeure in Florida: Overview of a Standard Contract Provision
That Has Taken On New Importance During COVID-19**

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The unprecedented crisis caused by the pandemic forced firms around the world to closely scrutinize their contractual force majeure provisions. As we move past the initial trauma of a virtual global shutdown and have the benefit of a few months' hindsight, a number of considerations related to these contractual provisions are worth exploring.

Contractual force majeure provisions allocate risk of nonperformance due to events beyond the parties' control. The occurrence of a force majeure event is akin to an affirmative defense to one's obligations. Generally speaking, the provisions: define the events constituting force majeure; address causation; describe the scope of relief available; set forth duties of the party asserting force majeure to mitigate the effect of the event and allocation of performance; and establish any conditions precedent to relief, such as notice requirements. In the current pandemic, certain force majeure terms like the triggering event turned out to have particular importance.

A triggering event needs to first activate the force majeure provisions. The provision may describe the triggering event conceptually, specifically, and/or in catch-all terms. In the current climate, a specific reference to "pandemics," "epidemics," "disease," or even "acts of God" made it easier to invoke force majeure. In Florida, "force majeure clauses are typically narrowly construed, and will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified." *ARHC NVWELFL01, LLC v. Chatsworth at Wellington Green, LLC*, 18-cv-80712, 2019 WL 4694146, at *3 (S.D. Fla. Feb. 5, 2019). The force majeure provisions in *ARCH* referenced both specific events and a catch-all. *Id.* That Court found the specific event (governmental action) inapplicable when the nonperformance was not the *direct result* of the specific triggering event. *Id.* at *4. Despite the preference for specificity, however, the Court acknowledged the catch-all provision, finding it deficient for the same reason. *Id.*

The triggering event must be both outside of the control of the parties and unforeseeable. *In re Flying Cow Ranch HC, LLC*, 18-br-12681, 2018 WL 7500475, at *2 (Bankr. S.D. Fla. June 22, 2018). In Florida, however, triggering events that are foreseeable and merely frustrate performance are also contractually permissible, as long as "such events [are] provided for in the language of the contract and [do] not result in an illusory contract." *Id.* (citations omitted). As long as they are specifically stated, Florida courts will also recognize force majeure clauses that apply more narrowly or more broadly than standards for performance or nonperformance under alternative legal theories like impossibility. *Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849, 857 n.6 (11th Cir. 2009). Given the narrow interpretation of the list of triggering events and the inclination to exclude terms not specified, the list of triggering events should be closely scrutinized.

This should not lead to an unnecessary expansion of the specific triggering terms, however. Specificity is important, but expansion can be achieved without relying on verbosity. For example, if a force majeure provision does not include specific applicable language like "pandemic," "epidemic," or "disease," then it will be necessary to consider whether COVID-19, or its impact on a business or a project fall within a different concept, such as "act of God," "action by

government,” “civil commotion,” or “industrial disturbance.” The clause can apply more broadly with a catch-all clause that refers to “circumstances beyond the control of a party, whether similar or dissimilar to the circumstances listed above.”

The relevant force majeure event need not be COVID-19 itself. The broad consequences of the pandemic, and the impact upon the ability of the affected party to fulfill its contractual obligations will be relevant under the language of most contracts. For example, the seemingly ubiquitous stay-at-home orders forced many businesses into repose, making them unable to fulfill contractual obligations. Thus, while the triggering event might not specify “pandemic,” it becomes equally important to note whether it references other applicable determinants like “governmental decree.”

Once the force majeure provision is triggered, the scope of relief describes the excused nonperformance. Examples are “delay in performing,” “failure to perform,” or “inability to perform.” Some provisions excuse performance in part or in whole, while others merely allow for delay while the force majeure condition persists. Hybrid provisions will delay performance to a point, after which they excuse it altogether. Some contracts provide that they will be extended for the period of the force majeure.

Regardless of the contracted scope of relief, the party invoking force majeure is encouraged to mitigate the effects of the event or condition on its performance, and generally must perform to the extent possible. Florida courts have not directly addressed whether there is an implied or general duty to mitigate damages related to the force majeure event. They have suggested in dicta, however, that force majeure provisions may impose obligations to mitigate damages. *S&B/Bibb Hines PB3 Joint Venture v. Progress Energy Fla., Inc.*, 365 Fed. Appx. 202, 204 (11th Cir. 2010).

Lastly, a note on notice. Some provisions require notice within a stated period or “as soon as [possible/practicable].” It is also important to assess whether a time limit runs from the occurrence of an event or condition, or from its effect on performance. Regardless of the type of notice provision, a failure to adhere to the notice requirements within a force majeure provision can be a breach of contract in Florida. *Architectural Ingenieria Siglo XXI, LLC v. Dominican Republic*, 13-cv-20544, 2017 U.S. Dist. LEXIS 5410 (S.D. Fla. Jan. 12, 2017) (applying Florida law).

The slow turning of the wheels of justice makes it too early to assess the effect of the pandemic on the force majeure jurisprudence in Florida. As parties to contracts engaged them as a sword or shield, developments in this area are still uncertain, like much of the repercussions of this unmatched event in the modern world. What is sure, however, is that the force majeure provisions took center stage in moments of crisis, as the two words reverberated loudly throughout legal departments.