

Insights: Alerts

Impact of the COVID-19 Pandemic on Force Majeure Defenses Under North Carolina Law

April 13, 2020

Written by Richard J. Keshian, Chad D. Hansen and Jason M. Wenker

Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force page](#) and/or your email for updates.

Force majeure defenses excuse performance because of an “act of God” event. Where a contract dispute arises because of the COVID-19 pandemic, *force majeure* defenses will likely play a key role in determining whether a failure to perform contract obligations is excused.

We [previously wrote](#) about the contract defenses that businesses may rely on when an epidemic impairs contractual performance, and we recently analyzed *force majeure* clauses under [Georgia](#) and [Texas](#) law.

Here are some practical considerations when evaluating North Carolina *force majeure* defenses:

- The French law term *force majeure* translates literally as “a superior force.” Black’s Law Dictionary (11th Ed. 2019).
- In North Carolina, *force majeure* is a contractual defense to performance under a contract. Many *force majeure* provisions specifically excuse performance due to “Acts of God,” and the two terms (*force majeure* and “Act of God”) are often used interchangeably.
- Though North Carolina state courts have not addressed the issue, a North Carolina federal court has held that the burden of proof is on the party seeking to have its performance excused to show that a *force majeure* clause applies. *In re McAlpine Grp., LLC*, Bankr. No. 10-32663, 2012 WL 6138195, at *7 (W.D.N.C. Bankr. Dec. 11, 2012) (citing *Phillips Puerto Rico Core, Inc. v. TradaxPetroleum, Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985)).

- Some contractual *force majeure* or “Act of God” clauses specifically include “epidemic” or “pandemic” as a qualifying event, but many do not. *South College St., LLC v. Charlotte School of Law, LLC*, 2018 WL 3830008, at *5, 2018 NCBC 80 (N.C. Super. Aug. 10, 2018) (discussing *force majeure* clause in lease including the term “acts of God”). Where such terms are listed, the impacts of the COVID-19 pandemic would likely trigger the clause.
- Even if a contract does not expressly include the term “epidemic” or “pandemic” as a *force majeure* event, the clause may nevertheless be broad enough to encompass the COVID-19 pandemic if the listed events are not intended to be all inclusive because the clause includes language such as “including, but not limited to” language and lists similar events or categories.
- Another type of event that may be included in a *force majeure* clause that may excuse performance is a “government law, order or restriction” that renders contract performance impracticable or impossible. The “shelter-in-place” orders where the contract is performed or where goods or services are to be delivered may lead to excused performance under this type of provision.
- In fact, government orders restricting performance may be more likely to excuse contract performance than the pandemic itself. Government orders frequently mandate the closure of retail stores, events, and other commercial activities while the pandemic does not. It is important to keep these distinctions in mind when evaluating potential options.
- Acts of God can be foreseeable or unforeseeable. The North Carolina Supreme Court has held that a one hundred year flood was an act of God even though it was a “reasonably foreseeable event.” *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 615-16, 304 S.E.2d 164, 174 (1983) (“It remains true that an unforeseeable flood is one the coming of which is not to be anticipated from the usual course of nature.”).
- In another case, a severe thunderstorm in the Charlotte area was not found to be an act of God because the storm was “not so extraordinary that the history of climatic variations and other conditions of the particular locality afforded no reasonable warning of it.” *Olan Mills, Inc. v. Cannon Aircraft Executive Terminal, Inc.*, 273 N.C. 519, 526, 160 S.E.2d 735, 741 (1968) (“The storm was not so far outside the range of human experience that ordinary care did not require that it should be anticipated or provided against.”).
- It is also important to keep in mind that, under well-established North Carolina law, “a person is not liable for injuries or damages caused by an act which falls within the meaning of the term ‘act of God.’” *Safeguard Ins. Co. v. Wilmington Cold Storage Co.*, 267 N.C. 679, 687, 149 S.E.2d 27, 34 (1966) (quoting

1 Am. Jur. 2d, Act of God § 11). However, “one may be held liable for his own negligence even through it occurs with an act of God.” *Id.*

- Although the North Carolina Supreme Court has recognized that an act of God is not one “attributable in any sense to ‘human agency,’” *Lea Co.*, 308 N.C. at 615-16, 304 S.E.2d at 174 (quoting Black’s Law Dictionary, 31 (rev. 5th ed. 1979)), neither that court nor the North Carolina General Assembly has directly addressed the issue of separating pure acts of God from those that involve some level of human agency. We anticipate the General Assembly may address this and other pandemic-related considerations in future sessions.

Our [COVID-19 Taskforce](#) stands ready to help you navigate the unique business challenges posed by the pandemic. If you are interested in discussing a specific area of interest for your business, we recommend that you reach out to your primary Kilpatrick Townsend point of contact. General questions may also be submitted via email to: #COVID-19KTSTaskForce@kilpatricktownsend.com. For North Carolina-specific questions, you may also contact the attorneys listed below.

Jason M. Wenker
Winston-Salem Office
336.607.7416
jwenker@kilpatricktownsend.com

Richard J. Keshian
Winston-Salem Office
336.607.7322
rkeshian@kilpatricktownsend.com

Related People



Richard J. Keshian

t 336.607.7322
rkeshian@ktslaw.com



Chad D. Hansen

t 336.607.7308
chadhansen@ktslaw.com



Jason M. Wenker

t 336.607.7416

jwenker@ktslaw.com