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# Do Force Majeure Clauses Cover a Coronavirus Pandemic

A coronavirus pandemic (or even the threat of such a pandemic) could easily make it more difficult for parties to perform their obligations under many types of contracts—especially contracts requiring travel or involving the delivery of goods and services. In the event that one of the parties to a contract can't perform as a result of an actual or potential coronavirus outbreak, would the doctrine of force majeure allow them to suspend their performance or terminate the contract?

## **Whether Contractual Force Majeure Provisions Apply to the Coronavirus**

In most commercial contracts, one or more contractual provisions will specifically address the parties' rights in the event of a so-called "force majeure" event. Whether a party can be excused from a contract on account of force majeure is a fact-specific determination that will depend on the nature of the party's obligations and the specific provisions of the contract. More specifically, in the context of a coronavirus outbreak, the parties' obligations will depend on, among other factors:

- the extent to which the parties' contract provides for suspension of performance (or termination of the contract altogether) as a result of force majeure;
- the factors that the contract requires must be considered in determining whether a force majeure event has occurred;
- the extent to which the outbreak actually prevented the party asserting force majeure from performing; and
- whether the party asserting force majeure had the ability to mitigate the effects of the pandemic and its ability to perform under the contract.

Parties seeking to assert force majeure should also carefully review their contracts to determine whether any specific notices are required to be delivered to the other party—and whether there are time limits that apply to the ability to give notice of a force majeure event.

## **Some Contracts Don't Contain Force Majeure Provisions**

If a contract does not contain a force majeure provision—or if an event falls short of triggering a contractual force majeure provision—the parties may need to consider whether the doctrine of "frustration of purpose" applies. That doctrine can excuse a party from performing a contract if:

- the subject matter of the contract or the means of performance have been destroyed, making it impossible for the party to perform; or
- the central purpose of the contract has been frustrated by an event that the parties could not have reasonably anticipated at the time they entered into the contract.

It can be difficult to prove a frustration of purpose, however, and courts will typically not allow the parties to overcome the language of their contract by asserting frustration of purpose.

Moreover, when the parties entered into the contract will play a crucial role in determining whether a potential or actual coronavirus pandemic constitutes a frustration of purpose. Those parties who entered into contracts before December of 2019 may have an easier time proving frustration of purpose because they had no reason to anticipate a pandemic occurring just two-to-three months later. By contrast, if parties enter into a contract after the likelihood of a pandemic became apparent, then it will be much more challenging for either party to argue that the impacts of the pandemic could not have been reasonably anticipated at the time of contracting. In other words, given the escalating news and other reports surrounding the potential for a coronavirus pandemic, at what point did a pandemic become reasonably foreseeable? That question may become the subject of significant debate and case law in the near future.

The right to assert force majeure is typically governed by the provisions of the parties' agreement. Whether a potential or actual coronavirus pandemic is a force majeure event will typically depend on the language of those provisions, as well as the extent to which the coronavirus made a party's performance impossible—as opposed to merely delaying it or making it more expensive. Another potential factor is when the parties entered into the contract vis-à-vis when the impact of the coronavirus on the construction industry and larger economy became reasonably foreseeable. Because every deal and every project is unique, we recommend consulting with an attorney to help evaluate these factors under the applicable contract.

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*This document is intended to provide you with general information regarding the impact of a potential or actual coronavirus pandemic on obligations under many types of contracts and the possible application of the force majeure doctrine. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*