

Key Considerations For Louisiana Contract Parties In The Face Of COVID-19-Related Failures To Perform

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OVERVIEW

The COVID-19 pandemic's rapid onset has dramatically disrupted almost every aspect of our lives. In a matter of days, vibrant springtime plans of festivals, conferences, weddings, vacations, and social gatherings have been replaced with words and phrases like "quarantine," "flattening the curve," "social-distancing," "postponed," and "canceled." In the face of government orders and growing concern for public safety, many businesses have been forced to suspend, drastically modify, or even shut down operations.

Difficult decisions made as a result of the COVID-19 pandemic have certainly yielded emotional disappointment. On a more technical level, reactions to the COVID-19 pandemic have also resulted in, and will continue to result in, many unperformed or underperformed contractual obligations. Consider, for example, a bride forced to cancel her wedding and her contracts with her wedding vendors, or a business forced to suspend operations that can no longer afford to pay its monthly debt service. Given the science-fiction-like uniqueness of our current circumstances, are these parties liable for failing to carry out their contractual obligations? Or, are their failures to perform excused?

This article provides several key questions for parties to Louisiana contracts to consider when analyzing failures to perform contractual obligations during these unprecedented circumstances. This article pertains to Louisiana contracts, generally. Other laws may apply to specific types of contracts, such as leases.

DOES YOUR CONTRACT HAVE A FORCE MAJEURE CLAUSE?

As a starting point, parties should review their contracts to determine whether they contain a "force majeure" clause addressing non-performance in certain circumstances.

A "force majeure" clause states, in essence, that a party is excused (i.e., not liable) for not performing a contractual obligation if its performance is "prevented" or "hindered" by, or if its non-performance is "caused" by, or "due to," an event, condition, or other circumstance that is "beyond the party's control," or "beyond the party's reasonable control," or "not reasonably within the party's control," or similar language.

Importantly, the precise language of a force majeure clause varies from contract to contract. As a result, the presence of a force majeure clause in a contract is not, in and of itself, dispositive of whether a COVID-19-related failure to perform under that contract is excused. Instead, the answer to that question will largely depend on the language used in the clause.

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DOES THE FORCE MAJEURE CLAUSE INCLUDE AN INCLUSIVE OR EXCLUSIVE LIST OF EVENTS?

A typical force majeure clause contains a list of circumstances that constitute a force majeure event, such as Acts of God, war, government action, labor strikes, and so on. The length, content, and detail of the list varies considerably from contract to contract. Moreover, while the list is usually presented as mere examples of what constitutes a force majeure, sometimes the contract is worded such that the excusing circumstance must be one of those listed specifically in the contract, and then only if it is also beyond the party's control. Often a force majeure clause specifically excludes certain circumstances (such as financial or economic events) or certain performance obligations (such as obligations to pay money).

The content of a force majeure clause's list, and whether such list is an inclusive list of examples or an exclusive list of events, will play a role in determining whether a COVID-19-related failure to perform is covered under the force majeure clause.

DOES THE FORCE MAJEURE PROVISION REQUIRE NOTICE AND/OR MITIGATION?

A typical force majeure clause will require the party claiming excuse to give written notice of the circumstance claimed to be a force majeure within a certain period of time. Additionally, the clause may require that such notice be delivered through a certain method (e.g., certified mail, registered mail, overnight courier service, etc.). The force majeure clause may also expressly require the party claiming excuse to use some degree of efforts to mitigate, work around, and/or overcome the circumstance constituting the force majeure.

Even if a force majeure clause would otherwise excuse a COVID-19-related failure to perform, such failure to perform may not be excused if the party claiming excuse does not strictly comply with the clause's notice and mitigation requirements.

DO THE LOUISIANA CIVIL CODE'S GENERAL PROVISIONS ON OBLIGATIONS APPLY?

The Louisiana Civil Code's general provisions on obligations excuse failure of performance in certain situations, and these provisions may work to excuse performance in the absence of an applicable contractual force majeure clause.

The Louisiana Civil Code provides a possible "force majeure" excuse for each party to a contract governed by Louisiana law: under the Civil Code, "[a]n obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible." Civil Code art. 1873. To sustain the excuse and thus avoid liability for a failure to perform a contractual obligation, a party must show two key elements: that there was a "fortuitous event" and that it made the performances sought to be excused "impossible."

Importantly, given the very recent onset of COVID-19-related failures to perform, the applicability of the Louisiana Civil Code's general provisions on obligations to such failures remains to be seen. Nevertheless, parties to Louisiana contracts should be aware of the potential applicability of these provisions.

KEY TAKEAWAYS

Parties to Louisiana contracts dealing with COVID-19-related failures to perform should review their contracts to determine whether these contracts contain force majeure clauses. If so, parties should review these force majeure clauses carefully to determine whether the clause applies to the failure to perform, and to analyze whether all notice and mitigation requirements under the clause have been met. Parties should also be aware that the Louisiana Civil Code's general provisions on obligations could potentially work to excuse certain COVID-19-related failures to performance.

Stone Pigman Walther Wittmann L.L.C. wishes you and your families continued health and safety. We stand ready to dedicate our expertise, time and resources to helping you navigate the challenges of this difficult time.