

Insights: Alerts

Impact of the COVID-19 Pandemic on Force Majeure Defenses under Georgia Law

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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* clauses 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 Texas law.

Here are some practical considerations when examining Georgia *force majeure* defenses for your business:

- In Georgia, *force majeure* is both a contractual and a statutory defense.
- Some contractual *force majeure* clauses specifically include “epidemic” or “pandemic” as qualifying events, so it is important to closely review the contract’s language. Where such terms are included, the impacts of the COVID-19 pandemic would likely be covered.
- Even if a contract does not expressly include the terms “epidemic” or “pandemic” as a *force majeure* event, the contract clause may be a broad clause because it includes language such as “including, but not limited to” and an epidemic or pandemic is similar to the types of events specifically listed.
- Another type of event that may be included in the *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 be excused for this reason.
- Even if a contract does not include a *force majeure* provision, a party may invoke a statutory “act of God” defense to non-performance of a contract under Georgia law. O.C.G.A. § 13-4-21 provides “[i]f performance of the terms of a contract becomes impossible as a result of an act of God, such

impossibility shall excuse nonperformance, except where, by proper prudence, such impossibility might have been avoided by the promisor.”

- Georgia law has not specifically addressed whether pandemics or other public health outbreaks constitute an “act of God.” The Georgia Code defines “act of God” to mean “an accident produced by physical causes which are irresistible or inevitable, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness. This expression excludes all idea of human agency.” O.C.G.A. § 1-3-3. The “such as” language provides an opportunity to argue that O.C.G.A. § 1-3-3 should be read more broadly than the events expressly listed to include similar events such as a pandemic.
- Not every unexpected event is considered an “act of God.” Foreseeable weather events such as reasonably expected rains are not. *Tasker v. Baugh & Johnson*, 124 Ga. 846, 53 S.E. 266 (1906). Neither are wars, including World War II. *Felder v. Oldham*, 199 Ga. 820, 35 S.E.2d 497 (1945).¹
- The key distinction lies between pure “acts of God” and acts involving human failure. The question is whether any “human agency” was involved. In *Central Georgia Elec. Membership Corp. v. Heath*, 60 Ga. App. 649, 649, 4 S.E.2d 700, 702 (1939), for example, the Georgia Court of Appeals held that a lightning strike was not an act of God because the failure to properly ground a house was intervening human negligence.
- Likewise, a Georgia federal court held that the “human agency” involved in the 2008 financial crisis – even though outside of the parties’ control – was not an act of God. *Elven, Inc. v. Wachovia Bank, Nat. Ass’n*, 841 F. Supp. 2d 1298, 1306 (N.D. Ga. 2011).
- Neither the Georgia Supreme Court nor the Georgia legislature has directly addressed the issue of separating pure acts of God from acts of human agency. We anticipate the Georgia legislature may address this and other pandemic-related considerations in future legislative sessions.
- Absent further court guidance or legislative action, fact-intensive litigation may arise because courts applying Georgia law treat an act of God as a question of mixed law and fact. See *Uniroyal, Inc. v. Hood*, 588 F.2d 454, 460 (5th Cir. 1979) (applying Georgia law) (“Whether a particular casualty is an act of God is a mixed question of law and fact.”).

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 Georgia-specific questions, you may also contact the attorneys listed below.

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¹ See also *Hayman v. Paulding Cty.*, 349 Ga. App. 77, 82, 825 S.E.2d 482, 486 (2019) (a fact question existed as to whether an act of God or the county's failure to maintain a storm water drainage system caused flooding); *Southern Ry. Co. v. Standard Growers' Exch.*, 34 Ga. App. 534, 534, 130 S.E. 373, 374-75 (1925) (determining that the expiration of perishable goods did not establish an injury by act of God).

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