Westlaw Today
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Force majeure and impossibility: an entertainment lawyer's mid-pandemic review

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JULY 15, 2021

In 2020, stay-at-home orders and quarantine requirements implemented as a result of the COVID-19 pandemic wreaked havoc on the entertainment industry. Production schedules were scrapped, travel restrictions impacted distribution channels, and performances that relied on live audiences became all but extinct.

As a result, *force majeure* clauses and the common-law doctrines of impossibility of performance and frustration of purpose gained heightened attention as potential means of excusing non-performance in light of the global health crisis.

Guidance on the availability of these principles was initially sparse and outdated. Over a year later, we have a somewhat clearer picture of whether they can legitimately be invoked and in what contexts — although many questions remain.

Force majeure clauses can provide some relief, but caution is warranted

This past year, many in the entertainment industry who faced the prospect of defaulting on their contract performance obligations were relieved (or, in some cases, dismayed) to find *force majeure* clauses tucked into the boilerplate of their contracts.

Relatively few clauses drafted prior to 2020, however, listed "pandemics" or "epidemics," and thus many hoping to avoid performance obligations had to rely upon other *force majeure* language — with varying degrees of success.

Many clauses define *force majeure* to include "acts of God," but, historically, this language has applied only to extreme and unpredictable weather events, not infectious diseases. Other language, though, has proved more useful.

Although seemingly similar to acts of God, the term "natural disasters" appears to encompass a broader range of events: potentially any catastrophic emergency with natural, as opposed to man-made, origins.

On that basis, a handful of courts have held that the pandemic qualifies as a "natural disaster" within the context of a *force majeure* clause. Other courts have held that stay-at-home orders and mandated business closures constitute *force majeure* where the clause at issue lists "government action" or "government regulation."

Some clauses list "travel restrictions" or "curtailment of transportation." While guidance on this language remains sparse, it seems likely that flight cancellations would constitute a *force majeure* if they precluded travel necessary for contract performance; although it is less clear whether mere travel advisories would qualify. Cases decided in the wake of the 9/11 terrorist attacks suggest that individualized fear of travel — a performer's concern for contracting the virus while touring, for example — almost certainly would not qualify.

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The preponderance of *force majeure* litigation, both historically and recently, has concerned catchall provisions (e.g., "other events beyond the parties' control"). Courts have generally interpreted such language to refer to events similar in nature to those specifically enumerated.

New York courts, in particular, construe *force majeure* clauses narrowly to apply only to events that are identified in the clause that has been invoked. In many jurisdictions, then, catchall provisions are of limited utility.

There are other important considerations besides how the clause defines a *force majeure*. Just as critical is how the clause requires the potential *force majeure* event to impact contract performance — some require that performance be rendered impossible, while others merely require it be delayed or hindered. Clauses with less stringent requirements have, unsurprisingly, been far more useful in avoiding performance obligations during the pandemic.

Many jurisdictions also impose the extra-contractual requirement that *force majeure* events be "unforeseeable" at the time of contract formation. For contracts drafted pre-pandemic, this requirement would seem not to present a problem.

But, what if the obstacle to performance is the follow-on economic impact of the pandemic? Many courts have held that general market downturns or increases in the cost of doing business are not unforeseeable as a matter of law. In some cases, then, increased production costs may not be sufficient to excuse non-performance.

Impossibility of performance and frustration of purpose present more substantial challenges

The impossibility and frustration doctrines do not offer a silver bullet, either. They serve only as gap-fillers and do not apply where the parties have already allocated the risk of an unforeseen event's occurrence in their contract. For this reason, several courts this past year have declined to apply these doctrines where a *force majeure* clause already speaks to the event at issue.

There are jurisdictional nuances to consider, as well. Under New York law, for example, the impossibility doctrine is limited to circumstances where contract performance has been rendered "objectively impossible."

Several courts have refused to excuse non-performance merely due to a decline in business stemming from the pandemic, noting that financial difficulties alone are insufficient to invoke the impossibility and frustration doctrines.

Typically, that means that the very subject matter of the contract or the means of performance must be destroyed — for example, destruction of an event venue in the case of a live performance contract or an order enjoining a streaming platform from airing a series.

Thus far, there is scant pandemic-era precedent regarding these doctrines' application to entertainment industry contracts. This is, perhaps, not surprising. Many major industry relationships are governed by detailed collective bargaining agreements, and COVID-19 disputes under those agreements have often been negotiated to resolution. In many cases, clients feel that their dollars are better spent on new projects rather than litigating relatively untested issues.

But recent decisions issued in other contexts hint at these doctrines' limited application. Several courts have refused to excuse non-performance merely due to a decline in business stemming from the pandemic, noting that financial difficulties alone are insufficient to invoke the impossibility and frustration doctrines.

In the real estate context, several courts have rejected frustration of purpose as a basis for withholding rent payments during a state-mandated business closure, holding that a temporary shutdown does not impact the "overall purpose" of a multi-year lease.

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These cases serve as important reminders that for the frustration doctrine to apply, a non-performing party must show that the frustrated purpose was the *core* of the parties' contract — what courts have described as "so completely the basis of the contract that, without it, the transaction would have made little sense."

Many courts seem reluctant to establish precedent excusing non-performance due to COVID-19. This is likely because the precedential impact of cases regarding the impossibility and frustration doctrines is broader than that of *force majeure* cases, which are necessary limited to the contract language at issue.

Rejecting the frustration doctrine in a commercial lease dispute, one New York court recently stated it "declines to impose a rule that could indirectly impose a freeze on rent for commercial tenants; that is the province of the legislative and the executive branches."

Concluding thoughts

Ultimately, whether a party can avoid its contractual obligations will depend upon the specific language of the contract at issue, what the parties' reasonable expectations were at the time of contracting, what state law governs the contracts, existing conditions regarding COVID-19 at the time that contract performance questions arise, and the impact of the pandemic on the subject matter of the contract, among other things.

But if recent court decisions regarding other industries are any guide, entertainment industry counsel would be well advised not to view *force majeure*, impossibility of performance, or frustration or purpose as a panacea for avoiding contractual obligations due to COVID-19.

About the author

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This article was first published on Westlaw Today on July 15, 2021.