

## Is COVID-19 a Force Majeure?

By Michael Ash, Esq., CRE

**T**HE PARKING AND MOBILITY INDUSTRY (like most industries) is held together through a series of interconnected contracts and agreements for goods and services. The ongoing pandemic resulted in federal, state, and local jurisdictions issuing declarations of emergency and stay-at-home orders to combat the spread of the virus. As we all stayed home to help “flatten the curve,” parking garages sat vacant and parking demand significantly declined. The legal question that will be hotly debated in the next few years will be: was the pandemic a reason to excuse non-performance of an agreement? Like most legal questions, the answer is: it depends.

### Act of God

Most contracts will include a “force majeure” clause. This term translates to “act of God,” and acknowledges a defense for non-performance of contractual obligations for unanticipated events beyond the control of the parties to a contract. Today, parties may claim that events related to the pandemic make it impossible or impractical for the parties to the contract to meet their obligations and seek to avoid contract performance without penalty. To understand if excuse for non-performance due to force majeure is available, an analysis of the contract terms and surrounding circumstances is required.

The first step to interpreting a contract is to review the actual terms in the agreement. It is possible that the contract does not specifically reference a pandemic or declaration of emergency as a force majeure event. Without a specific reference, consider if there is some other term or circumstance that could apply to this situation. If there is a circumstance of force majeure that could apply, the party seeking to enforce it must give proper notice of a claim that it cannot perform its obligations and seeks to be relieved of those obligations. Notice of asserting a force majeure defense is critical to excusing the non-performance and lack of proper notice can preclude the use of a force majeure defense.



Now, if the contract in question has a force majeure clause and if the force majeure clause applies to the COVID-19 pandemic and if the party attempting to assert the clause as a defense to non-performance has given proper notice, the specific cause of non-performance must be analyzed. It is not enough for a party asserting the defense to suffer some general hardship, reduction in business or traffic, or delay that makes performance of the contract uncomfortable or difficult. The party seeking to apply the defense must be able to demonstrate that business operations have been disrupted to the point where it is impossible or impractical to meet the contractual obligations. If performance of the contract is merely a hardship that can be overcome, the performance obligation will not be excused. The party seeking to excuse non-performance of a contract has the burden to prove its performance was impossible due to the COVID-19 pandemic. The facts and circumstances of each situation must be evaluated on a case-by-case basis. Finally, as a practical matter, the parties must take reasonable steps to overcome the disruption of the pandemic, or a force majeure defense may be unavailable.

### Options

If an agreement cannot be performed or is disrupted by the ongoing pandemic, the parties should try to work together to find a mutually acceptable alternative. There are several options available, including:

- **Abatement:** Generally meaning “a lessening, diminution, reduction, or moderation.” Rather than cancel the entire contract, can the performance obligations be reduced?
- **Deferment:** Generally meaning “the action or fact of putting something off to a later time; postponement.” Rather than cancel the contract, can the performance or payments be delayed?
- **Mitigation:** Generally meaning “the action of reducing the severity, seriousness, or painfulness of something.” Rather than cancel the contract, can the parties agree on some alternative arrangement? ♦



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