



# **STATE OF KANSAS FORCE MAJEURE LAW COMPENDIUM (during COVID-19 pandemic)**

**Prepared by**

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## **A. Introduction**

This memorandum will seek to provide a Kansas exemplar for the USLAW NETWORK Compendium of Law on relevant considerations with respect to invoking “force majeure” clauses in contracts in light of the ongoing COVID-19 crisis.

## **B. Force Majeure in Kansas**

### **1. Introduction**

As the ongoing COVID-19 crisis continues to severely impact commercial activity in Kansas, many businesses and commercial actors need to know whether they will be liable for any inability to perform contractual obligations. “Force Majeure” clauses—common to many commercial agreements—generally provide that a party that has been unable to perform under a contract due to the occurrence of certain events outside of their control (such as wars, work stoppages, or natural disasters) may suspend, delay or terminate its performance and will not be liable for costs or damages due to the lack of performance caused by the event. In the absence of any such force majeure language, parties are likely limited to the common law defenses of impracticability or frustration of purpose. That being said, opportunities for negotiation and cooperation are perhaps more available than in pre-COVID 19 times given the uncertain and fluid nature of this crisis, so a lack of a force majeure clause is not necessarily fatal to the ability of contracting parties to come to a workable arrangement in the event of a lack of performance.

### **2. Requirements to Obtaining Relief Using Force Majeure**

Although Kansas statutes reference the term “force majeure”, there is no definition of the term found within Kansas statutes. Furthermore, no Kansas court has specifically addressed the application of force majeure provisions in the context of pandemics or outbreaks of disease.

Kansas Courts state that the general purpose of a force majeure clause is to relieve a party from its duties or obligations under a contract (or the penalties associated if failure to meet the same) when, due to circumstances beyond its control, performance would be untenable or impossible. *N. Nat. Gas Co. v. Approximately 9117 Acres In Pratt, Kingman, & Reno Ctys., Kan.*, 114 F. Supp. 3d 1144, 1155–56 (D. Kan. 2015), *aff'd in part, rev'd in part sub nom. N. Nat. Gas Co. v. L.D. Drilling*, 862 F.3d 1221 (10th Cir. 2017). Of course, the scope and effect of any force majeure clause depends upon its wording, but courts have construed these clauses in light of their general purpose and have limited them to circumstances beyond the party’s control that cannot be overcome with due diligence. *Id.* Kansas Courts will often rely on precedent analyzing the doctrine of impossibility and impracticability when interpreting a force-majeure clause. *Hutton Contracting Co. v. City of Coffeyville*, 487 F.3d 772, 779 (10th Cir. 2007).

In analyzing the impact of force majeure clauses, Kansas courts will apply rules of standard contract interpretation to determine the intent of the parties. *Kansas Penn Gaming, LLC v. HV Properties of Kan., LLC*, 727 F. Supp. 2d 1100, 1114 (D. Kan. 2010), *aff'd sub nom. Kansas Penn Gaming, LLC v. HV Properties of Kansas, LLC*, 662 F.3d 1275 (10th Cir. 2011). In construing a contract, the intent of the parties controls. *Id.* The Court determines the parties' intent by

examining the four corners of the document, looking to all sections rather than to a critical analysis of any isolated provision. *See, Akandas, Inc. v. Klippel*, 250 Kan. 458, 464–65, 827 P.2d 37, 44 (1992); *Wiles v. Wiles*, 202 Kan. 613, 620, 452 P.2d 271, 277 (1969). Where the contract is clear and unambiguous, however, there is no need to apply rules of construction. *See Desbien v. Penokee Farmers Union Coop.*, 220 Kan. 358, 363, 552 P.2d 917, 923 (1976).

In Kansas, the party seeking the protections of the force majeure clause will bear the burden of establishing that the COVID-19-related event makes its ability to perform under the contract untenable or impossible in light of the general purpose of the contract.

### **3. Scope of Relief**

The most common scope of relief sought through the application of a force majeure clause is to suspend a specific obligation or duty under the contract or agreement. Similarly, a party may seek relief under a force majeure clause when faced with a claim for liquidated damages asserted by the non-breaching party. If a party seeks to avoid paying damages under the contract due to a triggering event under the force majeure clause, it must show, as with any claim for damages under a contract, that it attempted to mitigate its damages. As shown by the above, Kansas Courts give great deference to the contract’s specific wording, and therefore, careful analysis of the contract language is important to determining what relief, if any, is available pursuant to a force majeure provision.

If a contract does not contain a force majeure provision, a party should also consider seeking relief from its obligations under a contract through the common law defenses of impossibility of performance, commercial frustration, and/or impracticability of performance, all of which are recognized as affirmative defenses under Kansas law.

### **4. Other Considerations**

At least one Kansas Court has recognized that governmental actions can constitute force majeure events. *See, N. Nat. Gas Co. v. Approximately 9117 Acres In Pratt, Kingman, & Reno Cty.s., Kan.*, 114 F. Supp. 3d 1144, 1155–56 (D. Kan. 2015) (holding that payment of shut-in royalties was not necessary upon cessation of production notwithstanding clear contract provision requiring the same because cessation of production was due to state court order). Although the Court did not analyze the force majeure clause in connection with a pandemic, it is apparent that Kansas Courts are at least willing to entertain the idea that governmental orders can trigger force majeure clauses. The question that remains is whether the economic impact created by current governmental orders or recommendations is sufficient enough to render the purpose of the contract untenable or impossible.

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