



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

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## **A. Introduction**

This memorandum will seek to provide Kentucky 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 Kentucky**

### **1. Introduction**

The limitations placed on businesses in the Commonwealth of Kentucky due to the COVID-19 pandemic have hindered the ability of many businesses to meet certain contractual obligations. Commercial contracts may contain “Force Majeure” clauses, which generally offer some relief to parties that are unable to meet certain contractual obligations based on circumstances beyond their control, such as war, labor strikes, and acts of God or natural disasters. Typically, a party’s obligations will be temporarily suspended until the force majeure event has subsided. That being said, opportunities for negotiation and cooperation are perhaps more available now 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 contacting parties to come to a workable arrangement in the event of a lack of performance. However, if a contract does not contain a force majeure clause or similar language, and the other party is unwilling to negotiate, the breaching party is likely to be limited to common law defenses such as commercial impracticability and commercial frustration.

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

Force majeure is not defined in the Kentucky Revised Statutes, instead, courts have relied upon a combination of Black’s Law Dictionary and how the clause is defined in the contract.

<sup>1</sup> Further, Kentucky has no case law specifically addressing the application of force majeure clauses in the context of pandemics or outbreaks of disease.

In Kentucky, the party seeking to invoke a force majeure clause will bear the burden of establishing (a) that the COVID-19 triggering event is an event that meets the definition of force majeure contained in the contract, and (b) that event was reasonably beyond the control of the party that breached their contractual obligations.<sup>2</sup> As it relates to COVID-19, if the words “pandemic,” “epidemic” or the phrase “government order” are included as a triggering event, it will be relatively easy for the party to establish that the event is indeed a “force majeure” event. If the triggering event in question is not specifically identified in the contract’s force majeure clause, the party seeking the protection of the force majeure clause will need identify if there is a “catch-all” provision, which generally allows for certain unidentified events that are unforeseeable and beyond the party’s control. While no Kentucky state court has examined a force majeure clause in the context of a pandemic, the government issued “healthy-at-home” orders, and related COVID-19 executive orders, may qualify as the type of unforeseen issue that is reasonably out of the parties’ control.

In Kentucky, parties are free to set forth terms they desire in a contract, and courts will apply rules of standard contract interpretation to determine the intent of the parties with respect to force majeure clauses in contracts.<sup>3</sup> In the absence of an ambiguity, a written instrument will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence.<sup>4</sup> For example, in *Kentucky Utilities Co. v. S. E. Coal Co.*, the parties drafted that "scheduled outages for maintenance" would be considered a force majeure event, and the court enforced it, despite that not normally being a legitimate force majeure event.<sup>5</sup>

Kentucky courts have found contracts to be ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations.<sup>6</sup> Parties should bear in mind, however, that litigation may be necessary to resolve ambiguities if the triggering event is not specifically mentioned in the force majeure clause of the contract. Kentucky courts have determined that the parties' disagreement on whether the triggering event is included under the force majeure clause is considered a genuine issue of material fact.<sup>7</sup>

If relief is unavailable under a force majeure clause, parties may be able to explore the defenses of commercial impracticability and commercial frustration, which are often viewed together. A party seeking to invoke the defense of commercial impracticability must show that, through good faith compliance with a governmental regulation or order, the fulfillment of the contract has become impractical.<sup>8</sup> Likewise, a party seeking to invoke the defense of commercial frustration must show that an unforeseen event has occurred that undermines the underlying reasons for performing the contract, even though performance is possible.<sup>9</sup> While not common defenses, we expect that these defenses will become more prevalent in the coming months.

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

In the event a party is granted relief under a force majeure clause, the next step will be to determine how long the relief will be available. As previously stated, force majeure clauses typically only grant relief until the triggering event has subsided. Kentucky courts have relied upon the construction of the force majeure clauses in the contract to guide the decision for how long relief will be granted.<sup>10</sup> In *Kentucky Utilities Co. v. S. E. Coal Co.*, the court stated that the party that invoked the force majeure clause had a contractual duty to eliminate the disabling effects of the triggering event as soon as, and to the extent, possible. While, in *Kentucky Nat. Gas Corp. v. City of Leitchfield ex rel. Its Util. Comm'n*, the court did not grant relief under the force majeure clause, the court did state that the invoking party would have had the contractual duty to remedy the triggering event in a reasonable time.<sup>11</sup> However, in both cases the courts did not specify what "as soon as possible" or "a reasonable time" entailed.

Since Kentucky courts typically enforce the provisions of a contract, determining what is considered the triggering event will be essential. For example, will the triggering event be considered the broader event of the substantial decrease in commercial activity or was the triggering event the government healthy-at-home and related COVID-19 executive orders? The wording of the force majeure clause will be determinative. The ability to continue to negotiate

with the other party to the contract is essential, as such communication can potentially determine the triggering event and the appropriate length of the suspension of the contractual obligation, without the added expense of litigation.

Force majeure clauses, while providing performance relief, often do not provide for payment relief. Therefore, rent or other scheduled payments may be required during the period in which performance is not. With that being the case, the party seeking force majeure relief must continue to consider other avenues of relief, whether contractual or in the law. We advise working with your counsel on such considerations.

#### **4. Other Considerations**

A party attempting to invoke a force majeure clause must adhere to any specific contractual terms, (i.e., notice requirements or obligations to mitigate) included in the force majeure clause. Failure to adhere to contractual terms may bar a party's ability to seek relief.

**This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.**

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<sup>1</sup> *Kentucky Utilities Co. v. S. E. Coal Co.*, 836 S.W.2d 392, 400 (Ky. 1992), *as modified on denial of reh'g* (Aug. 25, 1992).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Wehr Constructors, Inc. v. Assurance Company of America*, 384 S.W.3d 680, 687 (Ky. 2012) (quoting *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky.2003) (citations omitted)).

<sup>5</sup> *Kentucky Utilities Co.* at 400.

<sup>6</sup> *Wehr Constructors, Inc.* at 687 (quoting *Hazard Coal Corporation v. Knight*, 325 S.W.3d 290, 298 (Ky. 2010)).

<sup>7</sup> *Mountain Comprehensive Health Corp. v. Gibson*, No. 2013-CA-000373-MR, 2015 WL 1194508, at \*3 (Ky. Ct. App. Mar. 13, 2015).

<sup>8</sup> § 3:108.Impracticability, 4 Ky. Prac. Methods of Prac. § 3:108

<sup>9</sup> *Sage Realty Corp. v. Jugobanka, D.D.*, No. 95 CIV. 0323 RJW, 1998 WL 702272, at (S.D.N.Y. Oct. 8, 1998)

<sup>10</sup> *Kentucky Utilities Co.* at 401.

<sup>11</sup> *Kentucky Nat. Gas Corp. v. City of Leitchfield ex rel. Its Util. Comm'n*, No. 2008-CA-000789-MR, 2011 WL 4501976, at \*6 (Ky. Ct. App. Sept. 30, 2011).