



STATE OF MISSISSIPPI FORCE MAJEURE LAW COMPENDIUM (during COVID-19 pandemic)

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A. Introduction

This memorandum will seek to provide the Mississippi exemplar for the USLAW NETWORK Compendium of Law on relevant considerations with respect to invoking “Force Majeure” or “act of God” clauses in contracts in light of the ongoing COVID-19 crisis.

B. Force Majeure in Mississippi

1. Introduction

While the inability to perform a contract is always a possibility and should always be considered when negotiating a contract, the COVID-19 crisis has heightened the focus on a party’s contractual liability when it cannot perform. Many contracts contain what are referred to as “Force Majeure” or “act of God” clauses. These provisions generally excuse completely or excuse a delay in a party’s performance under a contract due to an unavoidable catastrophe. In Mississippi, such clauses will be interpreted with a focus on what is said in the contract.¹

Absent such a clause in the contract, however, “[t]he courts have no authority to relieve contracting parties from the hardships often occasioned by such contracts....”² There are only three situations in which impossibility may excuse performance:

1. A subsequent change in the law, whereby performance becomes unlawful.
2. The destruction, from no fault of either party, of the specified thing, the continued existence of which is essential to the performance of the contract.
3. The death or incapacitating illness of the promisor in a contract which has for its objective the rendering of personal services.³

The first example may provide an argument for a nonessential business’s failure to perform during the time when Mississippi’s Shelter-in-Place order was in effect. But “[t]he mere fact that a contract becomes burdensome or even impossible to perform does not for that reason alone excuse performance.”⁴

A contract for the sale of goods need not include a force majeure clause. Mississippi’s UCC includes a statutory provision for force majeure clauses in such contracts.⁵ This provision only applies to the sellers—not the buyers. It provides:

Deliveries may be suspended by either party in case of Act of God, war, riots, fire, explosion, flood, strike, lockout, injunction, inability to obtain fuel, power, raw materials, labor, containers, or transportation facilities, accident, breakage of machinery or apparatus, national defense requirements, or any cause beyond the control of such party, preventing the manufacture, shipment, acceptance, or consumption of a shipment of the goods or of a material upon which the manufacture of the goods is dependent. If, because of any such circumstance, seller is unable to supply the total demand for the goods, seller may allocate its available supply among itself and all of its customers, including those not under

contract, in an equitable manner. Such deliveries so suspended shall be cancelled without liability, but the contract shall otherwise remain unaffected.⁶

As of Spring 2020, there are no Mississippi cases interpreting whether a pandemic is an Act of God or falls within the statute's or a contract's catch-all provision (such as "any cause beyond the party's control"). Extreme weather conditions have been sufficient to trigger force majeure provisions.⁷ Broken machinery, which is listed as a cause in § 75-2-617, has also triggered the protection of Mississippi's UCC statute.⁸ In contrast, "market collapse and changes in regulation" that took place over three years "are not within the meaning of the force majeure provision...."⁹

Even if your contract doesn't include a force majeure clause, not all hope is lost. As contracting parties address the circumstances caused by COVID-19, there may be opportunities to negotiate a workable solution.

2. Requirements to Obtaining Relief Using Force Majeure

The person or entity seeking relief must comply with whatever contractual obligations exist, including providing formal notice as specific in the contract. Once relief is requested, that party will bear the burden of proving (1) that the COVID-19 event (be it a restriction, interruption, or similar) is a force majeure event and (2) that the COVID-19 event caused their inability to perform the contract.¹⁰ Absent a contractual provision that includes pandemics, health crises, or the specific event that made performance impossible, the party seeking relief will need to show the cause of the failure to perform falls within a contract's generic catch-all provision.

While addressing the defense of "act of God" in another context, the Mississippi Supreme Court explained it "applies to 'events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them.'"¹¹ Courts will look beyond the claimed act of God for any other reason a party has failed to perform. If there is a viable other reason or if the use of ordinary care could have prevented the failure to perform, the court may refuse to excuse performance.¹²

3. Scope of Relief

Provided the party seeking relief can prove that it was unable to perform the contract due to a force majeure event, the party is excused from performance. This relief, however, generally only applies during the time of the force majeure event. For example, a Mississippi business may be able to prove it was unable to perform because it was shut down due to the State's Shelter-in-Place order. But once that order expired and the business was permitted to reopen, the force majeure event caused by the Shelter-in-Place order no longer provides an excuse for a failure to perform.

4. Other Considerations

If the contract in question is subject to Miss. Code Ann. § 75-2-617 and has its own force majeure provision, the statutory provision will generally apply. If, however, the parties contracted for a more expansive force majeure provision, that will apply in addition to the statute.

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.

¹ *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss. 2003) (explaining “the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy.”).

² *Mitchell v. Hancock Cty.*, 45 So. 571, 572 (Miss. 1907) (noting that “while an act of God will excuse the non-performance of a duty created by law, it will not excuse a duty created by contract.”). See also *Bunting v. Orendorf*, 120 So. 182, 183 (Miss. 1929) (“An act of God will excuse the nonperformance of a duty created by law, but will not excuse a duty created by contract, and, if a party desires relief from the performance of his contract, because of an act of God, he must contract specially against that contingency.”).

³ *Watkins Dev., LLC v. Jackson Redevelopment Auth.*, 283 So. 3d 170, 179 (Miss. 2019) (internal citations and quotations omitted).

⁴ *Id.*

⁵ Miss. Code Ann. § 75-2-617 (2020).

⁶ *Id.*

⁷ See, e.g., *Paymaster Oil Mill Co. v. Mitchell*, 319 So. 2d 652 (Miss. 1975) (drought) and *In re Int’l Marine Dev. Corp.*, 328 F. Supp. 1316, 1329-30 (S.D. Miss. 1971) (hurricane).

⁸ *Noonan Constr. Co. v. Warren Bros. Co.*, 632 F.2d 1189 (5th Cir. 1980).

⁹ *Day v. Tenneco, Inc.*, 696 F. Supp. 233, 235 (S.D. Miss. 1988).

¹⁰ See generally *Pro-Logistics Forwarding Ltd. v. Robison Tire Co.*, No. 2:13cv83, 2013 WL 6507347, 2013 U.S. Dist. LEXIS 174003, at *13 (S.D. Miss. Dec. 12, 2013) (describing force majeure as an affirmative defense) and *Stack v. Tenneco, Inc.*, 641 F. Supp. 199, 203 (S.D. Miss. 1986) (same). In 1912, the act of god defense was rejected because there was no proof “that there was a washout in the railroad,” which would have been prove “showing that the failure upon the part of the railroad to carry out its contract was occasioned by the act of God.” *New Orleans, M. & C. R. Co. v. Mauldin*, 60 So. 211, 212 (Miss. 1912)

¹¹ *Porter v. Grand Casino of Miss., Inc.*, 181 So. 3d 980, 990 (Miss. 2016) (refusing to find as a matter of law that Hurricane Katrina was an unforeseeable act of God).

¹² See generally *Huffman Towing, Inc. v. Mainstream Shipyard & Supply, Inc.*, 388 F. Supp. 1362, 1367-68 (N.D. Miss. 1975) (because Mainstream’s failure to comply was a result of its own “excessive contracting” rather than a spring flood, there was no act of God defense) and *Porter*, 181 So. 3d at 990 (in a tort case, “an injury which could have been prevented through the use of ordinary care is not an Act of God which would absolve the tortfeasor”).