



**STATE OF
NORTH DAKOTA
FORCE MAJEURE LAW
COMPENDIUM
(during COVID-19 pandemic)**

Prepared by
Marissa Cerkoney
Ebeltoft . Sickler . Lawyers PLLC
2272 Eighth Street West
Dickinson, ND 58601
701.225.LAWS (5297)
www.ndlaw.com

A. Introduction

This memorandum will seek to provide the North Dakota 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 North Dakota

1. Introduction

The COVID-19 crisis has impacted the ability of businesses to maintain operations and fulfill existing contractual obligations. “Force majeure” is a common clause in contracts that essentially frees both parties from liability or obligation when a triggering event beyond the control of the parties causes one or both sides to be unable to perform. Generally, the North Dakota Supreme Court has examined “force majeure” clauses, also called “acts of God,” in the context of liability for negligence and liability in cases where no clause was present in a contract. It was not until 2014 that the Court examined the enforceability of a force majeure clause that was specifically written into the contract in Entzel v. Moritz Sport & Marine, 2014 ND 12, 841 N.W.2d 774. Enforcing a force majeure clause, whether it is expressly written into the contract or not, may provide a party with an outlet when it is unable to perform its end of the bargain, without breaching the contract.

2. Requirements to Obtaining Relief Using Force Majeure

Although there is no statute in North Dakota which defines “force majeure clause,” the North Dakota Supreme Court has adopted the Black’s Law Dictionary definition, which states it is “[a] contractual provision allocating the risk of loss if performance becomes impossible or impracticable, esp[ecially] as a result of an event or effect that the parties could not have anticipated or controlled.”¹

In North Dakota, the party relying on a force majeure clause to excuse performance bears the burden of proving that the event was beyond its control and without its fault or negligence.² Although North Dakota courts have not encountered a case in which it would have to apply force majeure to epidemics or pandemics, it is unlikely any court would decide that a party has caused COVID-19, and thus, it could be fairly easy to determine that a nonperformance due to COVID-19 was beyond the party’s control. However, it ultimately falls onto the party relying on the force majeure clause to prove that it was COVID-19 related events that caused the nonperformance.

When there is no specific force majeure clause present in the contract, the North Dakota Supreme Court has held that to enforce force majeure, the party must establish the “act of God” was the sole proximate cause of the damage, and if the act of God and the fault or

¹ Black’s Law Dictionary 718 (9th ed.2009).

² Entzel v. Moritz Sport & Marine, 2014 ND 12, ¶ 7, 841 N.W.2d 774.

negligence of the party combine to produce the injury, the party is still liable.³ The party seeking to enforce will need to show that nonperformance was caused solely by the COVID-19 pandemic. For example, if a business fell victim to a government mandated shutdown or it was subject to its workers being quarantined and not able to work, then it is likely that the Court would find that this was the sole proximate cause of the damage and nonperformance.

In matters that involve a specifically written force majeure clause, the North Dakota Supreme Court has established two well-known principles in interpreting these clauses enforceability: (1) the specific language of the clause is most important; and (2) the party asserting a force majeure clause to excuse performance must prove that the failure to perform was proximately caused by the triggering event and that, in spite of skill, diligence, and good faith, performance remains impossible or unreasonably expensive.⁴ If the force majeure clause specifically includes terms such as “epidemic,” “pandemic,” or “illness” then it is very likely the clause would constitute events such as the current COVID-19 crisis, especially since the World Health Organization has officially declared it a pandemic. If the force majeure clause does not include those terms as a triggering event, it is still possible that the COVID-19 could be covered under another event stated in the clause. For example, if the force majeure clause includes a phrase along the lines of an “act of governmental authority,” the nonperformance could be excused due to government mandated quarantines and closures of certain businesses that were caused by the COVID-19 crisis.

Some force majeure clauses include catch-all provisions, such as “causes beyond the parties’ control,” in an attempt to broaden the events that can fall under the clause. The majority of courts construe the broad language of catch-all provisions in force majeure clauses to be limited to unforeseeable rather than foreseeable events. In Entzel, the North Dakota Supreme Court potentially strayed from this majority approach when it noted that “[n]ot every force majeure even need be beyond the parties’ reasonable control to still qualify as an excuse” for nonperformance even though this force majeure clause contained express language to the contrary.⁵ This statement could create ambiguity for transacting parties, counsel, and courts because it suggests that North Dakota courts embrace a broader view of the types of events that will excuse nonperformance based on the force majeure clause.

3. Scope of Relief

A force majeure clause relieves one of liability only where nonperformance is due to causes beyond the control of a person who is performing under a contract.⁶ The effect of a force majeure clause is to allocate the risk of loss.⁷ To determine which party bears the risk of loss,

³ Huber v. Oliver County, 1999 ND 220, ¶ 9, 602 N.W.2d 710 (citing North Shore, Inc. v. Wakefield, 542 N.W.2d 725, 729 (N.D. 1996); Lang v. Wonnemberg, 455 N.W.2d 832, 836 (N.D. 1990); Hoge v. Burleigh County Water Management Dist., 311 N.W.2d 23, 29 (N.D. 1981); Dempsey v. City of Souris, 279 N.W.2d 418, 420 (N.D. 1979); Frank v. County of Mercer, 186 N.W.2d 439, 443 (N.D. 1971).

⁴ Entzel, 2014 ND 12, ¶ 7, 841 N.W.2d 774 (explaining “[w]hat types of events constitute force majeure depend on the specific language included in the clause itself”).

⁵ Id.

⁶ Id.

⁷ Id.

the Court looks to the provisions of the contract itself.⁸ If the force majeure clause is found to extend to nonperformance due to the COVID-19, then the nonperforming party would be relieved of liability and will be able to suspend its performance during the time of the force majeure event, so long as that party makes a good faith effort to continue to perform during the force majeure event and begins performance as soon as it is able. "Whether a party acted in good faith is a question of fact."⁹

4. Other Considerations

A party must take caution to adhere to any specific notice requirements included in the contract in relation to the invocation of the force majeure clause. In North Dakota, the failure to properly adhere to contractual notice requirements may constitute a bar to relief.

Although it does not specifically reference "force majeure" clauses, North Dakota Century Code Section 9-11-04 provides a statutory avenue for possible excuse of performance:

The want of performance of an obligation or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes to the extent to which they operate:

1. When such performance or offer is prevented or delayed by the act of the creditor or by the operation of law, even though there may have been a stipulation that this may not be an excuse;
2. **When it is prevented or delayed by an irresistible superhuman cause¹⁰** or by the act of public enemies of this state or of the United States, unless the parties have agreed expressly to the contrary; or
3. When the debtor is induced not to perform or offer performance by any act of the creditor at or before the time at which such performance or offer may be made and which the creditor has not rescinded before that time.

As (1) and (3) of N.D.C.C. § 9-11-04 refer to nonperformance or delay caused by the creditor, it is unlikely that these would apply to nonperformance triggered by the COVID-19. However, it is possible that nonperformance by a party could fall under N.D.C.C. § 9-11-04(2) if COVID-19 is considered an "irresistible superhuman cause." The North Dakota Supreme Court has found that "irresistible superhuman cause" to be used in the same sense as "act of God,"¹¹ which in turn has been used synonymously with "force majeure." Although North Dakota's case law in

⁸ Mayville-Portland Sch. Dist. No. 10 v. C. L. Linfoot Co., 261 N.W.2d 907, 912 (N.D. 1978).

⁹ Martin v. Marquee Pac., LLC, 2018 ND 28, ¶ 23, 906 N.W.2d 65.

¹⁰ Emphasis added.

¹¹ Clay County v. Simonsen, 46 N.W. 592, 1 Dakota 403 (N.D. 1877); Resolution Trust Corp. v. Gosbee, 536 N.W.2d 698 (N.D. 1995).

regards to this statute is lacking, the North Dakota Supreme Court has determined that nonperformance or delay is found to be due to an irresistible superhuman cause if it is without any aid or interference from man.¹²

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¹² Clay County, 46 N.W. 592, 1 Dakota 403 (accidental fire, therefore, not caused by lightning, is not "an irresistible superhuman cause," and will not excuse from the performance of an obligation unless specially so stipulated, or when the party is bound only to the exercise of reasonable care and diligence); Resolution Trust Corp., 536 N.W.2d 698 (the Court found that "temporary economic adversity" is not an act of God amounting to an irresistible superhuman cause).