



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

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## **A. General Introduction**

This memorandum provides an Ohio exemplar for the USLAW Compendium of Law on the relevant factual and legal considerations for invoking force majeure clauses with respect to the current and ongoing coronavirus epidemic (COVID-19).

## **B. Force Majeure in Ohio**

### **1. Introduction**

The COVID-19 crisis has impacted, if not fully disrupted, almost every industry in the United States. Commercial parties that are subject to Ohio law need to know and understand the principles governing liability in situations where there is an inability to perform. The existence of a force majeure provision may provide a mechanism for excusing contractual performance due to the occurrence of certain events beyond the control of the contractual parties. Such provisions, depending on their specific language and application, may suspend, delay, or terminate an obligation to perform, thereby legally excusing, in full or in part, liability. Given the detrimental impact of the COVID-19 crisis, the absence of a force majeure clause may not preclude a party from invoking the underlying concepts associated with force majeure. This memorandum also addresses the common law defenses that may apply in the absence of a force majeure provision.

### **2. Requirements for Invoking and Obtaining Relief Under Force Majeure**

A force majeure clause is a contract provision defining the scope of unforeseeable events that may excuse a party's nonperformance under a contract.<sup>1</sup> In order to invoke a force majeure clause as an excuse for nonperformance, the nonperforming party bears the burden of establishing that the event was beyond the party's control and without its fault or negligence.<sup>2</sup> Mistaken assumptions about future events or worsening economic conditions do not qualify as a force majeure event.<sup>3</sup> When a party assumes the risk of certain contingencies in entering a contract, such contingencies cannot later constitute force majeure.<sup>4</sup> A party to a contract will not be excused from performance simply because performance may prove difficult, burdensome, or economically disadvantageous.<sup>5</sup>

### **3. Scope of Force Majeure and Available Relief**

The first level of analysis involves determining whether a force majeure provision exists in the contract. If a party is able to invoke a force majeure provision, the analysis then focuses on the contract language utilized in order to determine the identifying events and scope of such a provision. Force majeure clauses are drafted to identify specific, quantifiable events that may

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<sup>1</sup> *Stand Energy Corp. v. Cinergy Services, Inc.*, 144 Ohio App.3d 410, 416, 760 N.E.2d 453 (1st Dist.2001).

<sup>2</sup> *Stand Energy Corp.*, at 416.

<sup>3</sup> *Stand Energy Corp.*, at 416.

<sup>4</sup> *Stand Energy Corp.*, at 416 quoting *Dunaj v. Glassmeyer*, 61 Ohio Misc.2d 493, 497, 580 N.E.2d 98 (1990).

<sup>5</sup> See *State ex rel. Jewett v. Sayre*, 91 Ohio St. 85, 95, 109 N.E. 636 (1914).

excuse performance and the scope and application of the clause depends on the specific language employed in the contract. If the contract defines an act of God, that definition will control. Otherwise, the Ohio Supreme Court has defined an act of God to be “any irresistible disaster, the result of natural causes, such as earthquakes, violent storms, lightning, and unprecedented floods. It is such a disaster arising from such causes, and which could not have been reasonably anticipated, guarded against, or resisted. It must be due directly and exclusively to such a natural cause, without human intervention.”<sup>6</sup>

The more specific the language is in identifying and designating qualifying events, such as government closure, pandemic, or disease preventing performance, the better opportunity a party has to successfully invoke a force majeure clause. A clause may need to specify the degree to which government action impacts a party’s performance (such as whether changing market conditions precipitated by government action qualifies as a force majeure event).

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

Ohio recognizes the defenses of frustration of purpose and impossibility of performance to varying degrees. Frustration of purpose occurs when one party creates a situation that essentially moots the basis of the contract.<sup>7</sup> Ohio courts that have addressed the frustration of purpose defense often rely on the Restatement definition: “where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.”<sup>8</sup> The doctrine of frustration of purpose is not widely accepted in Ohio.<sup>9</sup>

Impossibility of performance occurs when, after a contract is in effect, an unforeseen event arises that renders the performance of one of the contracting parties impossible.<sup>10</sup> The impossibility of performance doctrine excuses only performance under a contract when the event making performance impossible is unforeseeable.<sup>11</sup> The doctrine will not allow a party to voluntarily place itself in a position of inability to perform and then plead impossibility.<sup>12</sup> Support exists under Ohio law for either contractual party to avoid and excuse performance when

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<sup>6</sup> *City of Piqua v. Morris*, 98 Ohio St. 42, 47-48, 120 N.E. 300 (1918).

<sup>7</sup> *America’s Floor Source, L.L.C. v. Joshua Homes*, 10th Dist. No. 09AP-1193, 191 Ohio App.3d 493, 946 N.E.2d 799, 2010-Ohio-6296, ¶ 37.

<sup>8</sup> *America’s Floor Source*, at ¶ 37, citing Restatement of the Law 2d, Contracts (1981) 334, Section 265.

<sup>9</sup> *Donald Harris Law Firm v. Dwight-Killian*, 6th Dist. No. E-05-051, 166 Ohio App.3d 786, 853 N.E.2d 364, 2006-Ohio-2347, ¶ 16; *Am. Premier Underwriters, Inc. v. Marathon Pipe Line Co.*, 3rd Dist. Mercer No. 10-2001-08, 2002-Ohio-1299.

<sup>10</sup> *Truetried Service Co. v. Hager*, 118 Ohio App.3d 78, 87, 691 N.E.2d 1112 (8th Dist.1997).

<sup>11</sup> *Lehigh Gas-Ohio, LLC v. Cincy Oil Queen City, LLC*, 1st Dist. No. C-150572, 66 N.E.3d 1226, 2016-Ohio-4611, ¶ 16.

<sup>12</sup> *Arlington Housing Partners, Inc. v. Ohio Housing Finance Agency*, 10th Dist. Franklin No. 10AP-764, 2012-Ohio-1412, ¶ 40.

governmental activity renders performance impossible or illegal, absent contrary contractual terms, since parties presumably condition contracts on legality of performance.<sup>13</sup>

While the force majeure landscape may begin to change due to the COVID-19 pandemic, the authors stress the importance of having a full understanding of the specific restrictions imposed, if any, by relevant governmental authorities in order to develop a complete analysis of the impact of any such restrictions upon a party's contractual obligations.

**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>13</sup> *Glickman v. Coakley*, 22 Ohio App.3d 49, 52, 488 N.E.2d 906 (8th Dist.1984); *Security Sewage Equipment Co. v. McFerren*, 14 Ohio St.2d 251, 237 N.E.2d 898 (1968).