



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

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A. Force Majeure in Tennessee

1. Introduction

Force majeure applies to contracts in two different contexts. First, parties may decide to include force majeure language in their contracts. In that case, rules of contract interpretation are invoked to determine if the situation leading to nonperformance falls under the specific force majeure clause agreed upon by the parties. Secondly, a nonperforming party may raise force majeure as an affirmative defense to non-performance, which Tennessee case law defines as an “act of God.” As of the writing of this article, Tennessee courts have not discussed whether a pandemic disease qualifies as an act of God. Because the issue is still unclear, parties should endeavor to work together to reach a mutually agreeable arrangement concerning the performance of the contract if at all possible.

2. Requirements to Obtaining Relief Using Force Majeure

a. Force Majeure Clause in a Contract

If the contract lists “force majeure” as an excuse for nonperformance, then the courts will look to contract interpretation rules to determine whether the current situation is covered by the contractual terms. For example, if the force majeure clause describes specific circumstances such as acts of terrorism, acts of government, civil unrest, times of war, etc., is there a condition such as pandemic, epidemic, or disease that would apply to the facts at issue? If there is not a specifically listed circumstance that applies, then the parties must look to what constitutes force majeure under Tennessee law. “Force majeure” is mentioned in certain areas of the Tennessee Code and in certain Tennessee regulations. The Tennessee Code mentions force majeure in reference to workers compensation insurance. In reference to a particular filing required under the law, the statute permits extension “for acts of God, public enemies, fire, flood, storms, or similar events constituting force majeure that cause the group to require more time to meet the filing requirements.” Tenn. Code Ann. § 50-6-405(c)(4)(A). The statute became applicable in 2014, but there are no Tennessee cases further interpreting the force majeure reference as provided in the statute. Additionally, three Tennessee regulations mention force majeure. First, two Department of Health regulations governing hospitals and health insurance providers state that penalties can be delayed for failure to comply with certain provisions “if the failure to correct is due to force majeure or other events of extraordinary circumstances clearly beyond the control of the hospital.” Tenn. Comp. R. & Regs. 1200-07-03-.04 & 0780-01-79-.06. Secondly, with regard to procurement contracts entered into by the State of Tennessee, “[a]ll contracts subject to these Rules shall contain a provision that relieves the contracting parties of performance in the event of a force majeure, which includes, by way of example, acts of God, war, or civil unrest.” Tenn. Comp. R. & Regs. 0690-03-01-.17. Although these references do not offer a guarantee that a court will find the current COVID-19 situation constitutes a force majeure event in a contract that does not specifically list

pandemic, epidemic, or disease, these laws may be used as an argument that the extraordinary and unanticipated COVID-19 situation is a force majeure event.

In contracts with force majeure clauses, the parties should also look to see if there is any catchall language such as “without limitation” or “but not limited to” that could include other events not listed but out of the parties’ control. If the force majeure clause does not list specific circumstances or those listed do not include pandemic or a similar occurrence, courts will look to the agreement as a whole to ascertain whether the parties intended to include the event at issue. *D & E Const. Co. v. Robert J. Denley Co.*, 38 S.W.3d 513, 518–19 (Tenn.2001) (considering the entire written agreement). It is important that anyone wishing to invoke a force majeure clause review the contract language carefully to make sure any and all notice requirements are followed.

b. Force Majeure as an Affirmative Defense

Unfortunately, most contracts do not anticipate a pandemic as an excuse for nonperformance. In that case, parties should look to whether there is an affirmative defense that excuses nonperformance. In Tennessee, the affirmative defense of force majeure is known as “an Act of God.” Tennessee courts have defined an event as an Act of God “when it happens by the direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention.” *Butts v. City of S. Fulton*, 565 S.W.2d 879, 882 (Tenn. Ct. App. 1977). In addition, “[the event] must be of such character that it could not have been prevented or escaped from by any amount of foresight or prudence, or by the aid of any appliances which the situation of the party might reasonably require him to use.” *Id.*

While that definition of Act of God arguably covers pandemics and disease, courts have found that events such as implementation of a new government regulation or times of war are not qualifying events for the force majeure affirmative defense. *Am. Book Co. v. Consol. Grp. of Cos., Inc.*, No. 3:09-CV-112, 2011 WL 11969 at *2 (E.D. Tenn. Jan. 4, 2011); *Elsley v. Stamps*, 78 Tenn. 709, 714 (1882) (finding that it was no excuse to performance of a contract to deliver whiskey that it was a time of war and the whiskey likely would have been seized, or it would have been dangerous to deliver the whiskey). Because the issue of whether a disease or pandemic constitutes an Act of God that can be used as an affirmative defense to breach of contract has not been determined by Tennessee courts, parties should be careful in relying on this defense. Litigation on this matter is anticipated in the near future.

Tennessee Rule of Civil Procedure 8.03 lists “illegality” as an affirmative defense. Additionally, Tennessee courts “will not enforce obligations arising out of a contract or transaction that is illegal.” *Ledbetter v. Townsend*, 15 S.W.3d 462, 464 (Tenn. Ct. App. 1999). This means that if there has been a governmental order forbidding certain events, contracts concerning those events may be discharged due to illegality. However, as discussed above, courts have also found that a new government regulation did not qualify as an affirmative force majeure event. This issue is unclear under Tennessee law.

3. Scope of Relief

When dealing with a contract containing a force majeure clause as to non-performance, the contract itself should list the scope of relief provided by the force majeure event. For example, the contract may state that the force majeure event is a complete non-excuse for performance or, it may state that performance is merely delayed because of the event.

As to the scope of relief for the affirmative defense of force majeure in Tennessee, whether the event completely discharges the contract or is an excuse for late, incomplete, or otherwise insufficient performance depends on the specific situation. Courts will look to whether performance was viable at a later date or whether substitute performance would suffice.

4. Other Considerations

Parties should also examine any relevant insurance policies. For example, property and commercial general liability insurance might offer coverage for a pandemic or epidemic. Event cancellation policies may also provide coverage. If you are dealing with another party breaching a contract, be sure to mitigate your damages to the extent possible by looking for alternative goods or substitute performance. While this may not be possible, document your efforts to mitigate in case this evidence is needed later.

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.