



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

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## **A. Introduction**

This memorandum will seek to provide a Virginia exemplar for the USLAW NETWORK Compendium of Law on relevant considerations with respect to invoking force majeure clauses in contracts given the ongoing COVID-19 crisis.

## **B. Force Majeure in Virginia**

### **1. Introduction**

Managing a business has become increasingly difficult during the COVID-19 pandemic and across the country businesses are unable to follow through with contract obligations. A force majeure or an “Act of God” clause provides an excuse to suspend performance due to circumstances beyond a party’s control.

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

To obtain relief in Virginia, courts will look at whether a party was unable to fulfill an obligation due to an event beyond the party’s control. While a natural disaster or pandemic would be considered an Act of God, Virginia courts would analyze the enforceability of a force majeure clause based on whether a party could have taken measures to avoid or minimize the detrimental effects of such an event. In *United States v. Hampton Roads Sanitation Dep't*, the Eastern District of Virginia considered the enforceability of a force majeure provision in a sanitation contract and a dispute over whether Hampton Roads could have prevented multiple sewage discharges. 2012 WL 1109030. The court stated the standard of review for the subject force majeure clause was whether “by a preponderance of the evidence... the discharge at issue was caused by an event beyond [the party’s] control.” *Id.* at 7. The court concluded that Hampton Roads could not rely on the Act of God clause because it had control over the sewage discharges in question and could have prevented them.

In another case, landowners sued for damages caused by flooding after a dam burst. *Cooper v. Horn*, 248 Va. 417, 448 S.E.2d 403 (1994). The Supreme Court of Virginia upheld the trial court’s determination that the flood from the failed dam did not meet the definition of an “Act of God” because “it must appear that the act of God was the sole proximate cause of the injury.” *Id.* at 408. The court reasoned that the dam had not been properly cared for and thus the flooding could have been prevented. Accordingly, in Virginia, a force majeure clause cannot be relied on without proving by a preponderance of the evidence that an Act of God solely caused a party’s inability to perform a contract obligation.

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

If a force majeure clause applies, the affected party can avoid liability for the damages caused by the subject event.

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

A key consideration in Virginia is whether the party invoking a force majeure clause could have mitigated the effects caused by the event at issue. COVID-19 and the resulting government closures have caused significant damages, but a party in a contract dispute must still show he or she did not contribute to those consequences. If COVID-19 was not the sole proximate cause of the damages, it will be difficult to invoke a force majeure clause.

To increase the chances that a force majeure clause will be enforced, the language of the provision should list the types of disasters and events that would be examples of an Act of God. This helps show that the parties have considered and negotiated the risks inherent in such events. Additionally, the clause should specifically indicate that a party will take reasonable best efforts to mitigate damages if an Act of God occurs. In Virginia, courts have reasoned that a party must show that he attempted to avoid or mitigate the damages caused by an Act of God. *United States v. Hampton Roads Sanitation Dep't.*, 2012 WL 1109030.

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