



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

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## **A. Introduction**

This memorandum will seek to provide a West Virginia 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 West Virginia**

### **1. Introduction**

As the ongoing COVID-19 crisis continues to severely impact commercial activity in West Virginia, many businesses and commercial actors need to know whether they will be liable for any inability to perform contractual obligations. West Virginia does not have a standard or widely applicable definition of force majeure. However, the Supreme Court of Appeals of West Virginia has considered Black’s Law Dictionary time and again to be an “accepted legal authority” in the state. *See Parker v. Sayre*, 2013 WL 6153063, at \*3 (Supreme Court of W.Va., Nov. 22, 2013); *see also Slotnick v. Sayre*, 2013 WL 6153153, at \*3 (Supreme Court of W.Va., Nov. 22, 2013). Based on the regulatory interpretations of force majeure events, as well as case law illustrating West Virginia’s acceptance of secondary sources such as Black’s Law Dictionary to provide insight on legal interpretation when there is not case law on the topic, it appears that contractual performance impacted by COVID-19 may be a good circumstantial candidate for asserting the defense of force majeure.

“Force Majeure” provisions are present in many commercial contracts. Black’s Law Dictionary defines force majeure as “[a]n event or effect that can be neither anticipated nor controlled; esp., an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do.” Black’s Law Dictionary (11th ed. 2019). Prior to COVID-19, in the absence of a force majeure provision in the contract, parties would likely be limited to common law defenses such as impossibility, impracticability, or frustration of purpose. However, due to the uncertain and fluid nature of the pandemic, opportunities for negotiation and cooperation are more available than in pre-COVID-19 times, and the lack of a force majeure provision in the contract may not be fatal as parties attempt to come to a workable agreement in the event of a lack of performance.

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

#### *Statutory and Case Law Interpretation*

While many states define “force majeure” more specifically via statute, West Virginia only defines force majeure in one provision of the West Virginia Code which pertains specifically to the construction of hotels on racetrack properties. W. Va. Code § 29-22C-8 broadly defines force majeure as “events or conditions beyond the reasonable control of the racetrack licensee.” Further, West Virginia has little to no case law addressing the interpretation of force majeure clauses, much less specifically addressing the application of force majeure provisions in the context of pandemics or outbreaks of disease.

## *Regulatory Interpretation*

Specific regulations pertaining to Electric Utility Metering define force majeure as “any act of God, labor disturbance, act of the public enemy, war, acts of terrorism, insurrection, riot, fire, storm or flood, explosion, breakage or accident to machinery or equipment, any order, regulation or restriction imposed by governmental, military or lawfully established civilian authorities, or any other cause beyond a Party’s control.” *See* W. Va. Code St. R. § 150-33-8 (6.5.1). Additionally, the regulation clarifies that a force majeure event “does not include an act of negligence or intentional wrongdoing.” *Id.* Per the regulation, if a party is affected by a qualifying force majeure event, they must notify the other party of the existence of the event. *Id.* at 6.5.2. The notification must specify in reasonably detail “the circumstances of the Force Majeure Event, its expected duration, and the steps that the Affected Party is taking to mitigate the effects of the event on its performance, and if the initial notification was verbal, it should be promptly followed up with a written notification.” *Id.* The Affected Party is required to keep the other Party informed on a continuing basis of “developments relating to the Force Majeure Event until the event ends.” *Id.*

Another West Virginia regulation provides a slightly different definition for a force majeure event. Under W. Va. Code St. R. 60-3 APP. B, force majeure means “conditions or circumstances beyond the reasonable control of Applicant which could not have been overcome by due diligence and shall include, without limitation, acts of God, action or inaction of other governmental agencies, or administrative or judicial tribunals or other third parties, or strike or labor disputes . . . which prevent or delay Applicant from complying with the work plan.” *Id.* In order to assert this defense, an Applicant must provide notification verbally within three days and in writing no longer than seven days after the force majeure event. The notification must include components such as “the anticipated length of delay, the cause or causes of the delay, the measures taken or to be taken by Applicant to minimize the delay, and the timetable by which these measures will be implemented.” *Id.* It is the Applicant that has the burden of proving that the event is a qualifying force majeure event.

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

While West Virginia statutes and case law do not provide much significant insight on the application of force majeure provisions in West Virginia, a specific regulation pertaining to electric utility metering lays out requirements for asserting force majeure and the extent of relief available. This regulation could be used as a template for other entities attempting to assert force majeure defenses.

Under W. Va. Code St. R. § 150-33-8 (6.5.2) the “Affected Party will be entitled to suspend or modify its performance of obligations under this Agreement (other than the obligation to make payments) only to the extent that the effect of the Force Majeure Event cannot be reasonably mitigated by the Affected Party.” Also, the Affected Party must “resume its performance as soon as possible.” *Id.*

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

The limited interpretation and definition of force majeure events in West Virginia makes it difficult to advise as to how the courts would interpret these provisions. Guidance from the few regulations that define force majeure illustrate an approach historically consistent with many other states. Based on the regulatory interpretations of force majeure events, as well as West Virginia's acceptance of secondary sources such as Black's Law Dictionary to provide insight on legal interpretation when there is not case law on the topic, it appears that contractual performance impacted by COVID-19 may be a good candidate for an assertion of the defense of force majeure. However, given the unique situation presented by COVID-19, these provisions could take on an entirely new meaning.

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