

# HAS COVID-19 QUARANTINED MY CONTRACT?

Michael E. Blumenfeld  
Baltimore Office  
443-392-9402  
[michael.blumenfeld@nelsonmullins.com](mailto:michael.blumenfeld@nelsonmullins.com)



# HAS COVID-19 QUARANTINED MY CONTRACT?

## **TODAY'S PRESENTATION**

- Speaker Introductions
- What Does Force Majeure mean?
- The Business Impact of Covid-19
- Commercial Leases
- Commercial Contracts
- Defenses Other than Force Majeure
- Practical Considerations
- Final Points & Questions



# ***FORCE MAJEURE DEFINED***

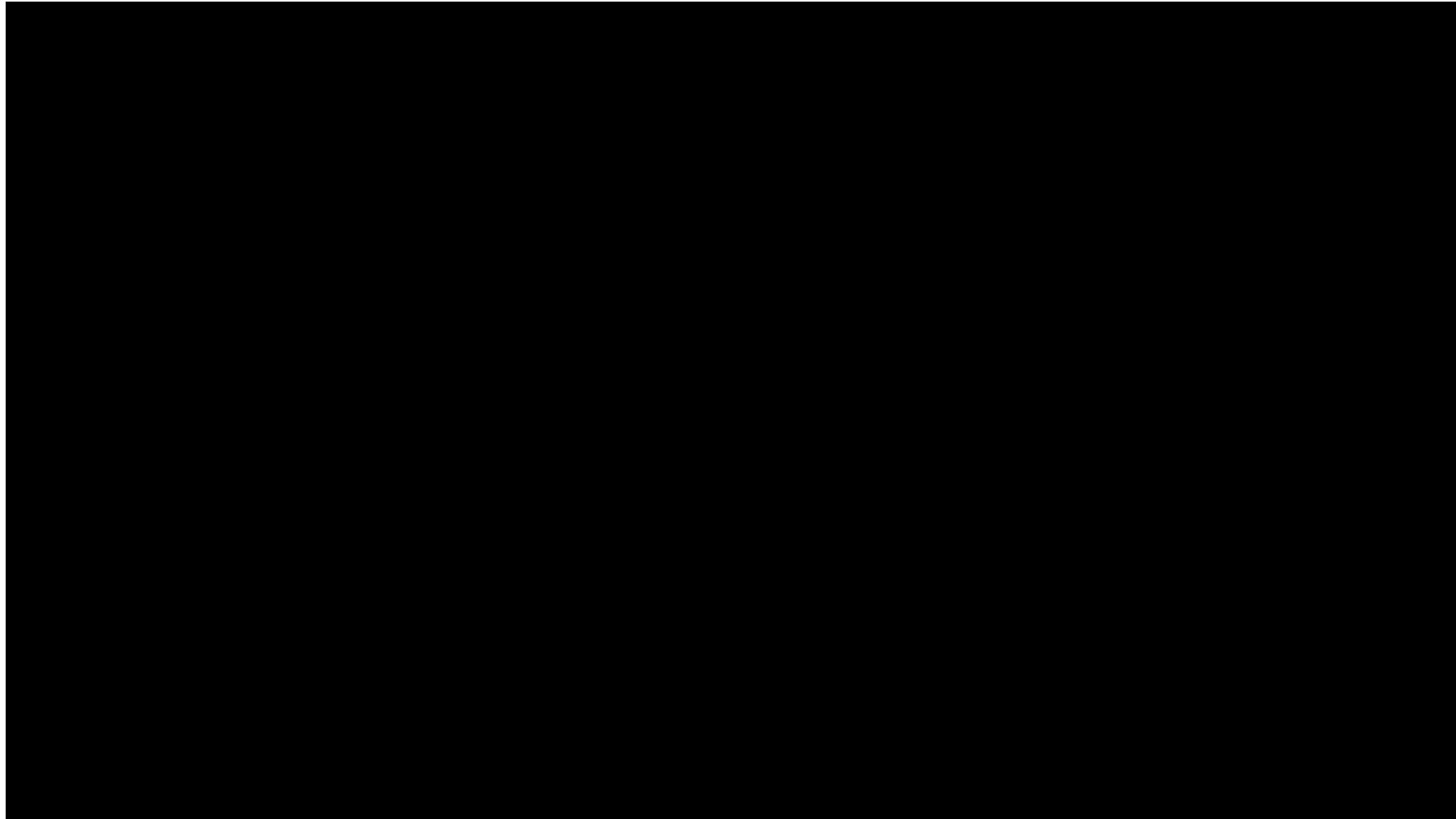
- “Overpowering or irresistible force.”
- Acts of God or acts of third parties outside of the control of the parties to the contract.
- The devil is in the details.
- One of the least negotiated provisions in contracts.
- But . . . in situations like we find ourselves today, they become the most important.



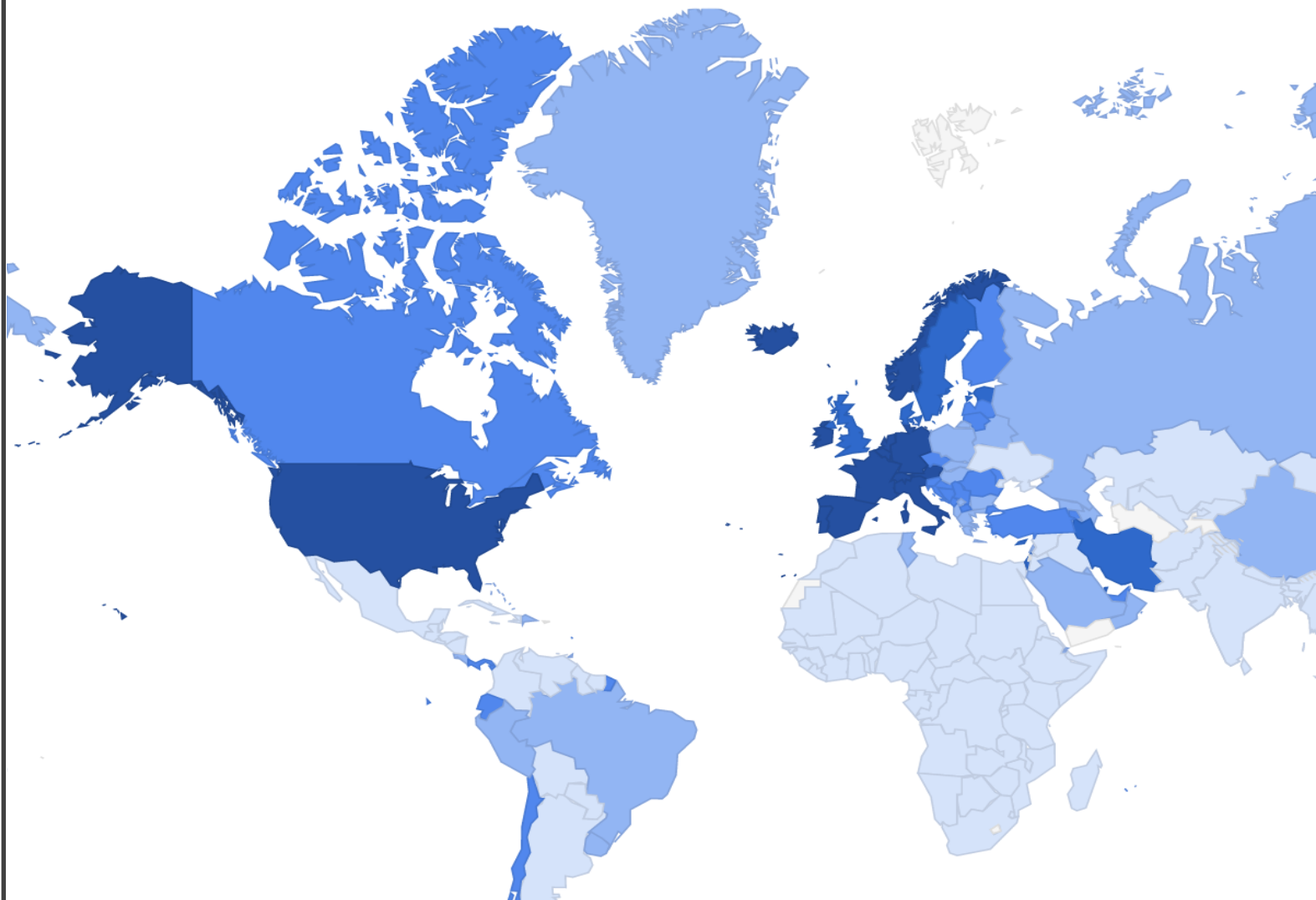
# ***FORCE MAJEURE DEFINED***

Such clauses generally set forth the limited circumstances under which a party may terminate or fail to perform without liability due to the occurrence of an unforeseen event.

# *Force Majeure*



# COVID-19's UNPRECEDENTED GLOBAL IMPACT



# COVID-19'S BUSINESS IMPACT

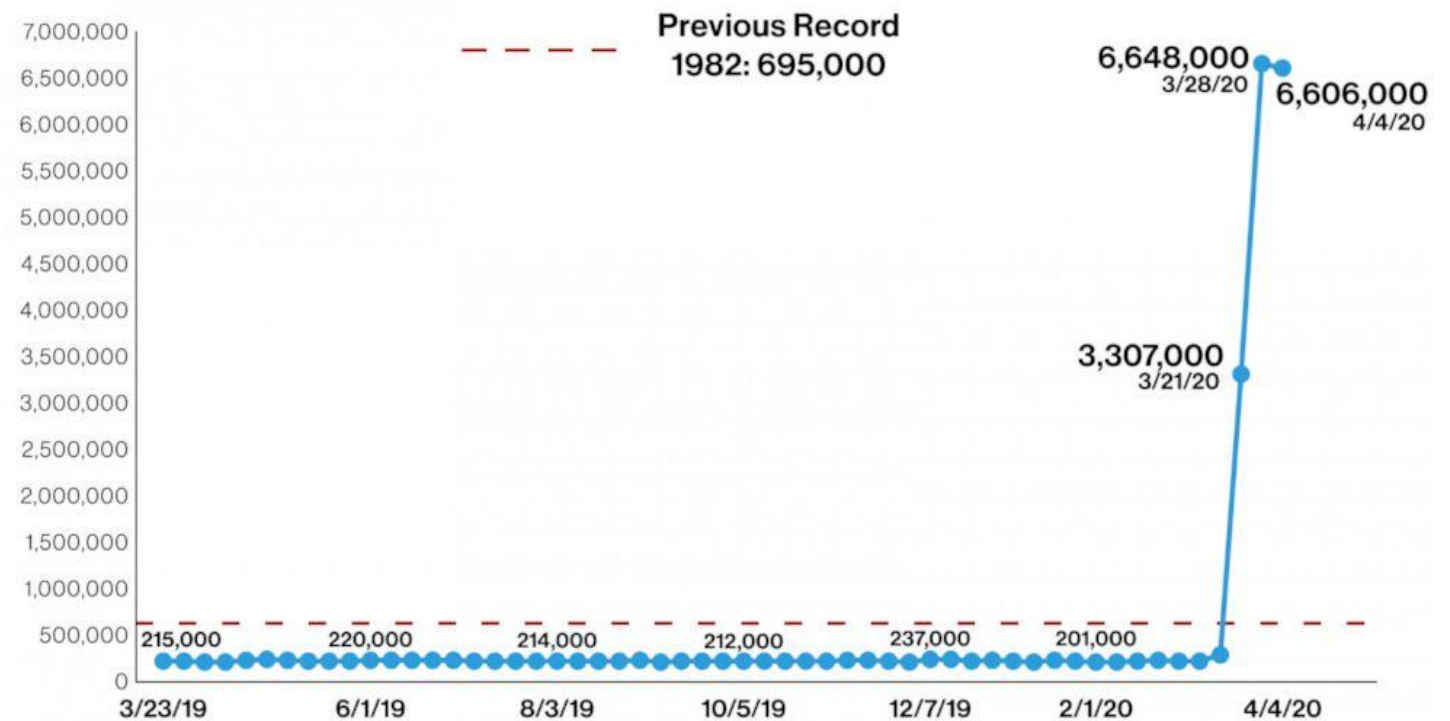
Dow Jones values in 2020



# COVID-19'S BUSINESS IMPACT

## Unemployment Insurance

INITIAL CLAIMS PER WEEK



SOURCE: US Department of Labor

abc NEWS

# COVID-19'S BUSINESS IMPACT



# COVID-19's SIGNIFICANT IMPACT ON CONTRACTS

- **Leases**
- **Manufacturing Contracts**
- **Supply Contracts**
- **Purchase Agreements**
- **Sales Contracts**
- **Franchise Agreements**
- **Travel/Hospitality Contracts**

# ***FORCE MAJEURE CLAUSES***





## ***Force Majeure: Common Commercial Lease Provision***

---

*“Any deadlines or requirements to perform obligations in this Lease (other than financial) which cannot be met because of delays caused by governmental regulations, inability to procure labor or materials, strikes, acts of God, or the occurrence of other events beyond the control of Landlord or Tenant (“Force Majeure”) shall be extended by the amount of time caused by such delays.”*

## *Force Majeure* – Common Issues

Does the *force majeure* clause apply to the financial results of unforeseeable acts, or just unforeseeable acts themselves?

**A *force majeure* clause may excuse performance made impossible by a natural phenomenon (flash floods, earthquakes, etc.), but does it excuse performance made financially impossible by a natural phenomenon?**

# Lease Considerations

- Does the “Act of God” clauses justify Landlord’s and/or tenants’ suspension of performance of their duties (primarily operating and paying rent)?
- A *force majeure* lease clause may contain a list of specific events which constitute a *force majeure*, it may be more vague to include anything out of the parties’ control, or it may define specific events and then include broad “catch-all” language, such as “for other reason whether of a like nature or not that is beyond the control of the party affected.”
- Any broad *force majeure* clause language should apply since March 11, when the World Health Organization declared it a pandemic. It is unlikely any court would decide that any tenant caused the coronavirus.
- Many *force majeure* clauses specifically include “epidemic” or “pandemic” in their laundry lists of qualifying events.

# Other Lease Considerations (Tenant)

- *“Nothing in this Section, however, shall excuse Tenant from the prompt payment of any Rent or the obligation to open for business on the Commencement Date.”*
- The intention of the parties appears to be that a tenant may be excused by a *force majeure* of complying with a continuous operation clause in the event of a pandemic, but it still must pay rent.
- Under the current circumstances, one could argue that these clauses are unenforceable because they are unconscionable and against public policy.
- Does the lease require a tenant to be open and operating continuously and/or during certain times and hours?

## Constructive Eviction

Constructive eviction and/or similar defenses may arise under commercial or retail leases, depending on the applicable law and lease terms.





# Other Lease Considerations (Landlord)

---

- What services does the lease require a landlord to provide?
- Are there timelines or deadlines for construction of tenant improvements?
- What if permits or materials are delayed or not available?
- Does the lease require a landlord to keep the building open?

# ***Force Majeure: Common Commercial Contract Provision***

---

Neither party shall be liable for any failure to make or accept one or more deliveries arising out of compliance with any law, ordinance, regulation, ruling or other governmental action arising out of acts of God, fire, flood, war, sabotage, accidents, labor disputes, shortage or failure to supply materials or equipment, interruption of or delay in transportation, or any other similar circumstance beyond the control of the party.

# ***Force Majeure: Common Commercial Contract Provision***

---

Seller shall not be responsible for cancellation or delay in delivery or performance resulting from causes beyond its reasonable control, including, but not limited to: acts of God, strikes or other labor disturbances; equipment failure; delays in transportation; inability to obtain fuel, material, or parts; war; acts of terrorism; riot; epidemics; floods; fires; unusually severe weather conditions; accidents; or other contingencies the non-occurrence of which was a basic assumption on which the purchase order was made.



# Catch-All Provisions

- Many *force majeure* clauses also contain catch-all provisions (e.g., “any other cause whatsoever beyond the control of the respective party”) that may appear to cover *any* unforeseen event.
- Courts generally interpret *force majeure* clauses narrowly and typically do not interpret a general catch-all provision to cover those not specifically enumerated in the balance of the clause.
- Some *force majeure* clauses also specify that they only apply for the length of the event triggering the clause—in those instances, a party claiming relief under the *force majeure* clause may have the burden to establish that it was actually prevented from performing for the length of time.

# ***FORCE MAJEURE CLAUSES***

Factors affecting whether a *force majeure* clause will excuse non performance:

Did the event fall under the contractual definition of “*force majeure*?”

Was the risk of non-performance foreseeable and able to be mitigated?

Was performance truly impossible?

## *Force Majeure* – Common Issues

Does the *force majeure* clause specifically refer to a pandemic, epidemic, serious illness, plague, disease, or outbreak?



# WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020

11 March 2020

Good afternoon.

In the past two weeks, the number of cases of COVID-19 outside China has increased 13-fold, and the number of affected countries has tripled.

There are now more than 118,000 cases in 114 countries, and 4,291 people have lost their lives.

Thousands more are fighting for their lives in hospitals.

In the days and weeks ahead, we expect to see the number of cases, the number of deaths, and the number of affected countries climb even higher.

WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction.

We have therefore made the assessment that COVID-19 can be characterized as a pandemic.

## *Force Majeure* – Common Issues

Does the *force majeure* clause refer to civil emergency, national emergency or government acts?

PROCLAMATIONS

### Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak

Issued on: March 13, 2020

★ ★ ★

### Governor Larry Hogan Declares State of Emergency, Expands Statewide Response to Novel Coronavirus

#### "STAY HOME MISSOURI" ORDER - GUIDANCE AND FREQUENTLY ASKED QUESTIONS

To further combat the spread of COVID-19 in Missouri, Governor Parson issued a "Stay Home Missouri" Order effective April 6, 2020, through April 24, 2020.

MARCH 7, 2020 | Albany, NY

**At Novel Coronavirus Briefing, Governor Cuomo Declares  
State of Emergency to Contain Spread of Virus**



NELSON MULLINS

## *Force Majeure* – Common Issues

Does the *force majeure* clause contain “catch-all” language that could create uncertainty as to whether courts will interpret the clause narrowly or broadly?

### **Examples include:**

- **Outside the parties’ control**
- **Act of God**



# Defenses To Contractual Non-Performance

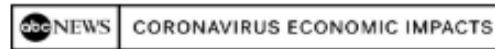
---

- Even if your contract does not contain a *force majeure* clause, or the clause does not apply, other options exist to excuse performance.
- Consider whether impossibility, impracticability, or frustration of purpose defenses could be raised under applicable law.



## Impossibility of Performance

This doctrine may apply when the performance of a party's obligation becomes objectively impossible.



### Here are the states that have shut down nonessential businesses

*At least 46 states have shut down businesses to slow coronavirus' spread.*

[News](#) > [Health](#)

#### Coronavirus Q&A: How the Bay Area's extended stay-at-home order changes the rules

The new measure lasts until May 3 and provides more restrictions

## Commercial Impracticability

Similar to Force Majeure,  
and described in  
Restatement (2d) of  
Contracts § 261 and UCC  
§ 2-615.

Some unforeseen event outside of  
the parties control that took place  
after the contract was signed has  
made it commercially  
impracticable for one of the  
parties to perform and fulfill its  
obligations under the agreement.



## Commercial Impracticability

- Not enough that the contract is simply financially impracticable
- Discharges a party's duty to perform where:
  - The party's performance is made impracticable by an event that is not the fault of the party
  - The nonoccurrence of the event was a basic assumption upon which the contract was made

## Frustration of Purpose

Applies when unforeseen circumstances or events preclude the achievement of the purpose of the contract.

- The frustrated purpose must be near total and so evident that, without it, the transaction would have made little sense.
- *Classic Example:* A commercial lease to operate a tavern, entered into before Prohibition.



# *Force Majeure* – Jurisdictional Differences

- Courts interpreting *force majeure* clauses and defenses to contractual non-performance recognize an inherent tension between enforcing contractual obligations and excusing them in exceptional and unforeseeable circumstances.
- While courts in different jurisdictions generally consider the same factors in their analysis, they apply these factors differently.
- State law varies on notice requirements.

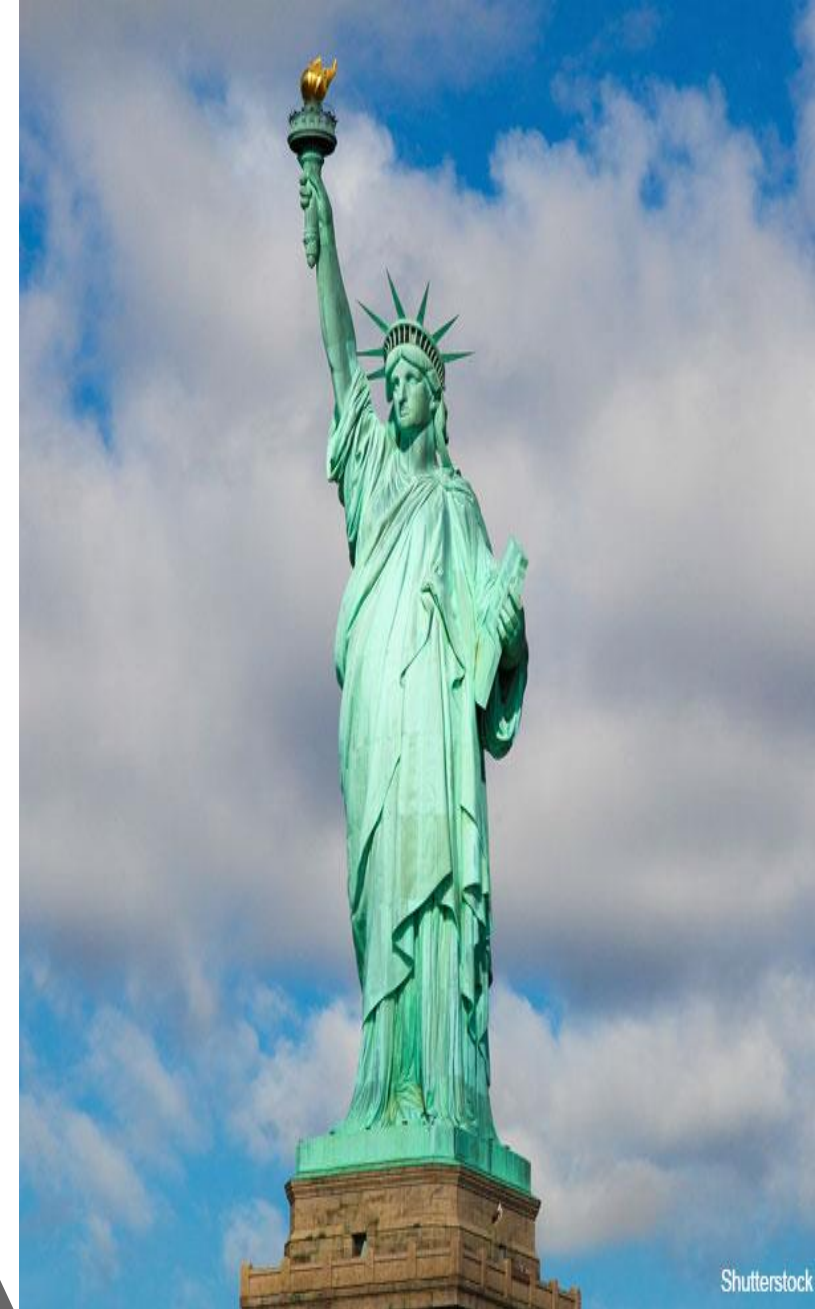
# Narrow Interpretation

- Maryland Courts have interpreted and enforced *force majeure* clauses in strict accordance with the stated terms of the *force majeure* clause.
- Nonperformance will generally only be excused if the event that causes the nonperformance is specifically identified in the exclusive list of qualifying events.
- *Force majeure* provisions will not be read into contracts even if there is no dispute that the event causing non-performance was a *force majeure* event.
- Md. Code Ann., Com. Law § 2-615 requires seller to notify buyer seasonably that there will be delay or non-delivery.



# Narrow Interpretation

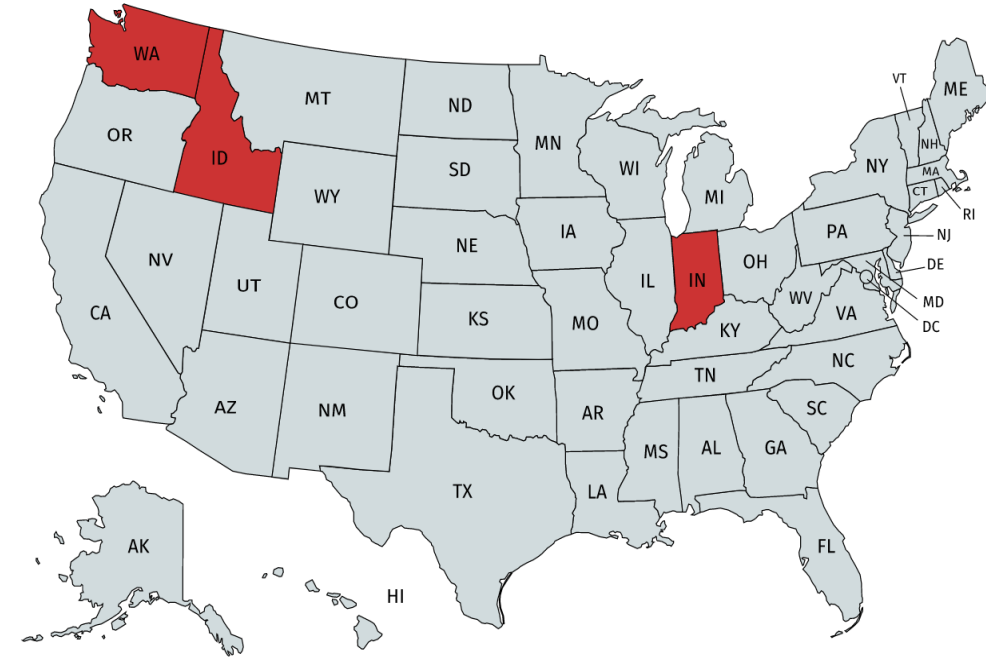
- Force Majeure clauses must specifically enumerate the force majeure event in question.
- Difficulty or financial impracticability are not enough; party invoking force majeure must show performance is physically impossible through efforts to perform.”





# Broad Interpretation

- A broad *force majeure* clause does not enumerate any examples, but generally refers to events outside the performing party's control
- *Force majeure* provisions interpreted broadly; interpreted in light of the entire contract.
- Catch-all phrases construed liberally; courts determine whether a certain event was beyond the control of the party invoking the clause.
- The practical effect is that businesses may find fewer obstacles to invoking *force majeure* clauses in contracts. If litigated, however, a party may have to prove that the clause, when drafted, was intended to cover a similar situation (a public health crisis as opposed to a natural disaster).



# Practical Issues to Consider



## Practical Issues to Consider

---

- It is important to comply with any contractual notice requirements for *force majeure* or related defenses.
- Typically a lease requires prompt notice of a claim of *force majeure*. Several courts have refused tenants' *force majeure* claims when they failed to provide adequate notice under the lease.



# Commercial And Landlord/Tenant Practical Considerations

---

- In the commercial real estate context, be proactive with your landlord, tenant, or lender.
- Rather than waiting until after a payment is late or missed, proactively reach out to those with whom you do business and discuss the circumstances and your options.
- Consider modifications and forbearance agreements, setting forth in advance how the parties intend to deal with the pandemic's impact on their business relationship.

# Commercial Contract Practical Issues to Consider

---

- Check insurance agreements to see whether they will extend to the *force majeure* event.
- If non-performance or delay is at issue, make sure to keep detailed records of the circumstances and events surrounding said issues.
- If your contract does not contain a *force majeure* provision, conversations with your counterparties may still be productive, especially in circumstances where the principal purpose of any given contract may be frustrated or become impracticable due to the impacts of COVID-19.

# Negotiating a New Contract?

# Post COVID-19 Contracts

## Practical Issues to Consider

---

- With regard to any new contracts that your company may be completing or currently negotiating in the midst of COVID-19, consider the following:
  - The risks of COVID-19 are now well known, so you may not be able to rely on a *force majeure* clause as an excuse for non-performance.
  - Consider other contract provisions in order to account for COVID-19's impact on the performance of the contract.
  - Consider applicable law and how it will impact a *force majeure* defense, and related defenses.
    - What state's law governs the contract?

# Post COVID-19 Contracts

## Practical Issues to Consider

- When negotiating a new contract, consider the following:
  - Since the contract would be entered into at a time when the potential risks of COVID-19 are well known, you may not be able to rely on a *force majeure* clause as an excuse for nonperformance.
  - Other contract provisions should be considered in order to account for COVID-19's impact on the performance of the contract.
  - What is the triggering event impacting performance? (Pandemic, governmental response, economic downturn, supply chain issue, workforce issue, etc.)
  - Is there a catch-all clause?



# Insurance Considerations



# Insurance Considerations

---

# Insurance Considerations

- Businesses often carry coverage for business interruptions, and determining the scope of that coverage is important for a business to assess in making determinations.
- The language and application of such provisions vary greatly, with some requiring the physical loss of the space as the result of fire or natural disaster, and others being broader or including other requirements.
- Certain policies may require action by a governmental or health authorities before coverage is triggered. If that is the case, the timing of cancellation and whether cancellation was a choice of the company or, alternatively, the result of the decision of a governmental or health authority, may make the difference on if coverage is available.



# Insurance Considerations

---

- As courts tend to interpret insurance policies more broadly than contracts between businesses, bases for coverage may be available even when not identified by the insurance broker or denied by the carrier.
- With the global economic impact of the COVID-19 is only beginning to be assessed, insurance carriers will no doubt be significantly impacted and cautious about approving related claims.





## *Force Majeure* – Final Points



# *Force Majeure* – Final Points

- Many businesses will no doubt find themselves on both sides of this issue, as both promisor and the promisee, depending on the circumstance.
- Just as the CDC recommends that we all wash our hands and limit physical contact, best legal practice is to analyze your lease and your insurance policy, and consult your attorney, especially when each day brings new directives on a local and national level.
- *Be creative*. There are countless creative solutions available that may benefit both parties that will help preserve the business relationship and the financial stability of each.

# Other Resources

---

*Force Majeure*

