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Gimme Shelter: Force majeure clauses in the new world of pandemics, riots and natural disasters

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Prior to 2020, minimal thought was given to force majeure clauses during contract negotiation. Typically, these clauses protect contracting parties from natural disasters, like earthquakes, fires, and floods, that could impact a construction project. The AIA addresses these kinds of risks but does not even use the words “force majeure.” Fast-forward to the spring of 2020: a pandemic, riots and everchanging flood zones. What shelter does the force majeure clause in your contract give you from this storm?

The ideal force majeure clause would specifically identify the phenomenon (such as a pandemic) as a force majeure event and address whether an extension of time, additional compensation, or both are recoverable if the event occurs. For instance, a contract could state that a contractor will only receive an extension of time for a force majeure event (notably, this result usually requires specific limiting language). The AIA expressly provides for an extension of time and indicates that additional costs are potentially recoverable, too, depending on the circumstances.

Unless a contract specifically identifies the event, a force majeure clause's application is a matter of interpretation. Great caution must be exercised when drafting force majeure clauses because identifying certain events, while not identifying others, could cause the missing events not to be covered.

In Pennsylvania's state and federal courts, a contracting party that requests redress due to a force majeure event must prove the event was (1) beyond its control and (2) not caused by its fault or negligence. Courts have interpreted the party's control over the event to be a key inquiry. Courts also consider whether the party could anticipate the event's occurrence at the time of contracting. Significantly, courts have determined that an event could initially be categorized as a force majeure event but later fall outside of that classification due to the frequency with which the event occurs. As with all contracts, these factors are analyzed with the parties' mindset and knowledge at the time of contracting and with consideration given to the particular industry in which the contract falls.

While the events of 2020 can be considered unprecedented, that description may soon change. Over time, unprecedented events can become existing conditions. The longer an event exists, the more likely it will be considered a known event that the parties allocated risk for at the time of contracting.

Seek legal counsel

Moving forward, contracting parties should exercise care when drafting its force majeure clauses and analyzing if any recent events are covered by their existing contracts. Saxton & Stump attorneys [Ron Pollock](#) and [Matt Chabal](#) are available to discuss how our Construction Law team can assist with contract review and negotiation to ensure the force majeure clauses are properly written to encompass language that supports the current climate.

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