

# Force Majeure Based on COVID-19

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## 1 Introduction

Does the COVID-19 pandemic excuse contract performance under the doctrine of *force majeure*? In many cases, yes. The answer will often turn on the degree of impairment of the pandemic on the ability to perform.

In California, the defense of *force majeure* does not depend on being expressed in a contract. It is available by statute.<sup>2</sup>

Following is a summary of the *force majeure* defense under California law. No California case has been found where *force majeure* was asserted based on an epidemic or pandemic. When the defense is based on COVID-19, parties and the courts must draw principles from cases involving other circumstances.

## 2 Force Majeure Defined

“No [one] is responsible for that which no [one] can control.”<sup>3</sup> From this statutory and common sense maxim flows the defense of *force majeure*. So called “acts of God”<sup>4</sup> are a subset of *force majeure* and are within the rule.<sup>5</sup> *Force majeure* is a potential defense both of contract and tort claims.<sup>6</sup>

*Force majeure* falls in two categories: operation of law; and irresistible, superhuman cause. The defense is codified as follows:

The want of performance of an obligation, or of an offer of performance, ***in whole or in part, or any delay therein, is excused*** by the following causes, to the extent to which they operate:

1. When such performance or offer is ***prevented or delayed*** by the act of the creditor, or ***by the operation of law***, even though there may have been a stipulation that this shall not be an excuse;

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<sup>2</sup> Cal. Civ. Code § 1511 (Deering 2020).

<sup>3</sup> Cal. Civ. Code § 3526 (Deering 2020).

<sup>4</sup> “Acts of God” are discussed below.

<sup>5</sup> *Conlin v. Coyne*, 19 Cal. App. 2d 78, 87 (1937).

<sup>6</sup> See, e.g., *Johnson v. W. Air Express Corp.*, 45 Cal. App. 2d 614, 621 (1941) (*force majeure* upheld as defense to alleged negligence in airplane crash).

however, the parties may expressly require in a contract that the party relying on the provisions of this paragraph give written notice to the other party or parties, within a reasonable time after the occurrence of the event excusing performance, of an intention to claim an extension of time or of an intention to bring suit or of any other similar or related intent, provided the requirement of such notice is reasonable and just; [or]

2. When it is ***prevented or delayed by an irresistible, superhuman cause***, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; ... .<sup>7</sup>

## 2.1 Operation of Law

As serious as the health impact is of coronavirus disease 2019 (COVID-19), the governmental actions taken to attempt to contain it may be as much or more grounds for invoking the *force majeure* defense.

As of this writing, the governmental actions are still evolving. They presently include an order for “all individuals living in the State of California to stay home or at their place of residence, except as needed to maintain continuity of operation of the federal critical infrastructure sectors, critical government services, schools, childcare, and construction, including housing construction.”<sup>8</sup> This is in addition to prior orders and “recommendations” for closure of bars, nightclubs, restaurants other than take-out, houses of worship, and other gatherings of 10 or more people. California Governor Gavin Newsom issued an executive order that authorizes local governments to halt evictions for renters, homeowners, and commercial tenants, slows foreclosures, and protects against utility shutoffs for Californians affected by COVID-19.<sup>9</sup>

It is foreseeable these and other governmental actions may be alleged to impede performance of some contracts. Whether they excuse performance depends on the extent and nature of the impairment.

“[A]n action for breach of contract does not lie when its performance is prevented by operation of law.”<sup>10</sup> “[T]here is no liability for breach of a contract whose performance has

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<sup>7</sup> Cal. Civ. Code § 1511 (Deering 2020) (emphasis supplied).

<sup>8</sup> Executive Department, State of California, Executive Order N-33-20; <https://covid19.ca.gov/stay-home-except-for-essential-needs/>

<sup>9</sup> Executive Department, State of California, Executive Order N-28-20; <https://www.gov.ca.gov/2020/03/16/governor-newsom-issues-executive-order-to-protect-renters-and-homeowners-during-covid-19-pandemic/>

<sup>10</sup> *Nat'l Pavements Corp. v. Hutchinson Co.*, 132 Cal. App. 235, 238 (1933) (citing Cal. Civ. Code § 1511, subcontractor excused from performance to general contractor when city lawfully cancelled the general contractor's contract).

been made impossible by operation of law.”<sup>11</sup> “A party is not required to violate the law to avoid liability for breach of contract.”<sup>12</sup>

Some cases hold mere difficulty or delay in performance due to governmental activity, as distinguished from a complete bar to performance, may not be enough to constitute the defense of *force majeure*.<sup>13</sup> “[L]aws or other governmental acts that make performance *unprofitable or more difficult or expensive* do not excuse the duty to perform a contractual obligation.”<sup>14</sup> For example, during wartime when the government was commandeering a large amount of the same material needed for a defendant’s performance, some material was still available, and the defense of “operation of law” failed.<sup>15</sup>

These cases seem to conflict with the plain language of § 1511, quoted above. The first paragraph states “performance, in whole *or in part*, or any *delay* therein, is excused ... .” (Emphasis supplied.) Both subsections expressly state performance is excused if “prevented or *delayed*.” (Emphasis supplied.)

The “operation of law” category has the best chance of success if performance has been entirely prevented, in whole or in part. It is a closer call if performance is only delayed. The defense is weakest and may not suffice if performance is still possible but merely made more expensive or unprofitable.<sup>16</sup>

## **2.2 Irresistible, Superhuman Cause**

“‘Force majeure,’ or the Latin expression ‘*vis major*,’ is not necessarily limited to the equivalent of an act of God. The test is whether under the particular circumstances there was such an insuperable interference occurring without the party’s intervention as could not have been prevented by the exercise of prudence, diligence and care.”<sup>17</sup>

For example, the seller of certain grapes that could not be grown due to “extraordinary heat conditions” “could not be compelled to perform impossibilities, nor was it liable in

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<sup>11</sup> *Baird v. Wendt Enters., Inc.*, 248 Cal. App. 2d 52, 55 (1967) (buyer under real estate purchase contract that depended on building permit excused from purchase when permit expired and could not be renewed).

<sup>12</sup> *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 772 (9th Cir. 1986).

<sup>13</sup> *Lloyd v. Murphy*, 25 Cal. 2d 48, 55 (1944) (no defense of operation of law by car dealership because sale of automobiles was not made impossible or illegal by governmental war time action but merely restricted); *Dorn v. Goetz*, 85 Cal. App. 2d 407, 416 (1948) (sale of real property was not prevented by operation of law but merely delayed).

<sup>14</sup> *Lloyd v. Murphy*, 25 Cal. 2d at 55 (emphasis supplied).

<sup>15</sup> *Dwight v. Callaghan*, 53 Cal. App. 132, 137 (1921).

<sup>16</sup> If performance is made more expensive or unprofitable, one might consider whether a claim against the government for damages such as for a regulatory taking by inverse condemnation might lie. Those issues are beyond the scope of this article.

<sup>17</sup> *Pac. Vegetable Oil Corp. v. C. S. T., Ltd.*, 29 Cal. 2d 228, 238 (1946).

damages for a failure to comply with its contract resulting from *vis major* not attributable to any fault on its part.”<sup>18</sup>

The circumstances where the COVID-19 virus alone, as distinguished from the governmental regulations imposed because of it, is sufficient for a defense to contract performance may be limited. However, one defense approach may be to *combine* the “operation of law” and “irresistible, superhuman cause” categories, as together preventing contract performance. After all, the governmental restrictions are imposed directly because of the COVID-19 virus. One cannot be separated from the other. The practical truth is the extraordinary times visited upon our society that may prevent performance of some contracts is because of COVID-19, and the broad societal limitations the government has imposed specifically because of it.

### 3 “Act of God” Distinguished and Defined

“[A]cts of god are defined by case law and are extraordinary events of nature that have widespread impact.”<sup>19</sup>

In general, an “act of God” is a subset of *force majeure*. A *force majeure* includes acts of God, as well as “operation of law” or “irresistible, superhuman cause” events that may include human agency. An act of God is a purely natural event, not including any human activity.

“[T]he exculpatory [act of God] rule applies only when human agency does not participate in proximately causing the harm. If defendant’s negligence combines with an ‘act of God’ to cause injury, liability will result.”<sup>20</sup>

The defense that an event was an “act of God” exists and may be asserted in those limited cases where an *unanticipated* natural occurrence is the *sole* cause of a plaintiff’s injury or damage. The natural event must be “so unusual in its proportions that it could not be anticipated by a defendant.” However, it is not enough that the event merely be unforeseeable. ... In other words, if culpable conduct on the part of the defendant was a proximate cause, the defense is of no avail.<sup>21</sup>

COVID-19 alone may be considered a so-called “act of God” as a legal defense. COVID-19 along with human actions responding to it, including governmental actions, would fall under the broader category of *force majeure*.

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<sup>18</sup> *Squillante v. Cal. Lands, Inc.*, 5 Cal. App. 2d 89, 90 (1935).

<sup>19</sup> *Seyedan v. Beauty Illusions, Inc. (In re Kanaan)*, Nos. 1:16-bk-10443-GM, 1:16-ap-01077-GM, 2017 Bankr. LEXIS 295, at \*6-7 (U.S.B.C. C.D. Cal. 2017).

<sup>20</sup> *Dufour v. Henry J. Kaiser Co.*, 215 Cal. App. 2d 26, 29 (1963).

<sup>21</sup> *Mancuso v. S. Cal. Edison Co.*, 232 Cal. App. 3d 88, 103-04 (1991) (citations omitted).

#### 4 Contract Language

The *force majeure* defense requires no express contract term. It is available by statute.<sup>22</sup> However, the defense is often also stated in contracts. Indeed, contract language may expressly excuse performance for *force majeure* or acts of God, including enumerated circumstances such as epidemics.<sup>23</sup>

Thus, in considering the possibility of a defense based on an epidemic or pandemic such as COVID-19, one should analyze the applicable contract language. It may provide a broader defense than what is otherwise available by statute.

#### 5 Conclusion

These are unprecedented times. The planet has suffered pandemics before, but none accompanied with the present extraordinary governmental shut down of broad segments of society. COVID-19 and resulting societal restrictions will undoubtedly result in breach of contract claims. Some contracting parties may voluntarily adjust their respective obligations.

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<sup>22</sup> Cal. Civ. Code § 1511 (Deering 2020).

<sup>23</sup> See, e.g., “**Force Majeure**: If the preparation, production or completion of motion pictures by Producer or any person to whom the services of Artist are loaned shall be prevented or materially hampered or interrupted by reason of any fire, flood, explosion, earthquake, **epidemic**, casualty, strike, lockout, boycott, labor controversy, riot, civil disturbance, accident, **act of God**, war (whether or not officially declared), embargo or delay of a common carrier, or by any present or future municipal, county, state or national statute, ordinance, law, regulation or order, or by any executive or judicial order, whether municipal, county, state or national, or by any other legally constituted authority (whether or not any of the foregoing shall be constitutional), or by any other cause or causes of the same or other kind or character beyond the control of Producer, or by reason of the Producer's inability to obtain material, transportation, power or other essential commodity required in the conduct of its business, or if the production of any motion picture or other production to which Artist is assigned hereunder shall be suspended, interrupted or postponed by any such cause, or by the death, illness or incapacity of the director or any principal member of the cast, other than Artist (the continuance of any such event being hereinafter designated as the ‘casualty period’) ... .” *Warner Bros. Pictures, Inc. v. Bumgarner*, 197 Cal. App. 2d 331, 334 n.2 (1961) (emphasis supplied); “Seller shall not be responsible to Buyer for delayed or non-shipment directly or indirectly resulting from a contingency beyond his control, such as embargo, act of government, strike, fire, flood, drought, hurricane, war, insurrection, riot, explosion, **epidemic**, pestilence, earthquake, accident, perils of the sea, tidal wave, or any other contingency beyond Seller's control not herein enumerated. *Pac. Vegetable Oil Corp. v. C. S. T., Ltd.*, 29 Cal. 2d 228, 230 (1946) (emphasis supplied); “The Contract Time will be extended in an amount equal to time lost due to delays beyond the control of the Contractor if a claim is made [therefor] as provided in paragraph 12.1. Such delays shall include, but not be limited to, acts of neglect by Owner or others performing additional work as contemplated by Article 7, or to fires, floods, labor disputes, **epidemics**, abnormal weather conditions or **acts of God**.” *Greg Opinski Constr., Inc. v. City of Oakdale*, 199 Cal. App. 4th 1107, 1112 (2011) (emphasis supplied).

But others may seek enforcement of them or damages for lack of performance, which may implicate the *force majeure* defense.

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