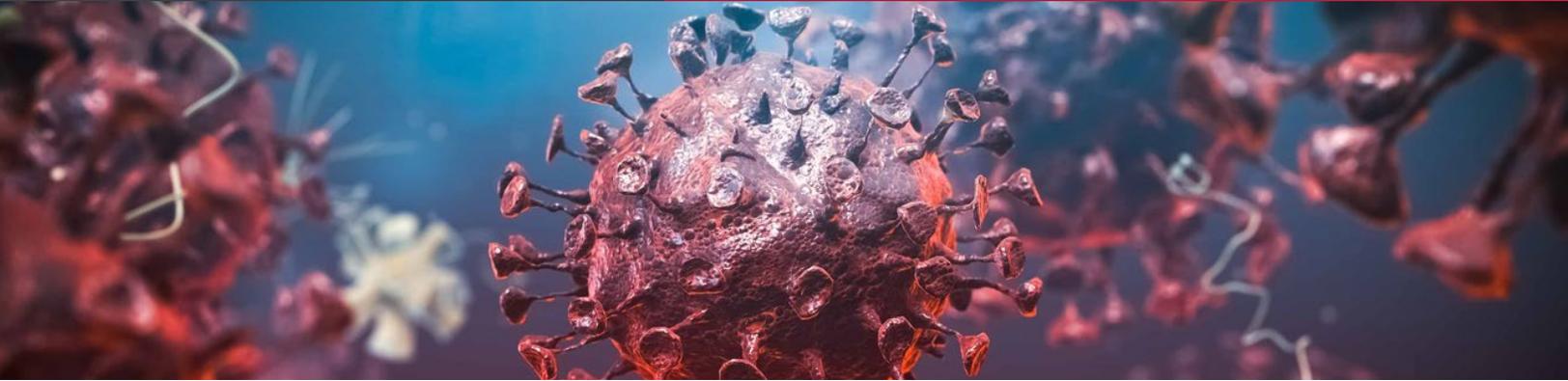




COVID-19: WHAT ARE YOUR RIGHTS UNDER A CONTRACT IF YOU ARE DAMAGED OR BLAMED FOR THE DAMAGE?

by Gray Reed's COVID-19 Task Force
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The coronavirus (COVID-19) pandemic is shutting down businesses and markets worldwide, causing panic and uncertainty. Most have already been damaged by COVID-19, and others will be sued and blamed for those damages. What are your rights and obligations? There are a myriad of legal issues to be considered, which are summarized below. We are here to help. In fact, Gray Reed recently represented ConocoPhillips and Jani-King, and prevailed in trial court and on appeal on a key issue presented (*force majeure*).

FORCE MAJEURE

Today, contracts often contain *force majeure* clauses that list specific events that relieve parties of their obligation to perform. Whether COVID-19 constitutes *force majeure* and a defense will likely turn on the particular language in your contract. We recommend you closely review your contracts, and we can advise on whether COVID-19 is covered. The analysis needs to include whether pandemic is specifically listed, whether it is covered by a catch-all provision (raising questions of foreseeability that can vary depending on the date of the agreement), and what the link is between the failure to perform and COVID-19. We also recommend you devise a strategy in the event a *force majeure* provision is invoked by your contract party.

IMPOSSIBILITY-OF-PERFORMANCE

This defense generally applies when a supervening and unexpected event makes performance of the contract impracticable or impossible. Courts have only applied this defense in a few scenarios, such as the person necessary for performance dies or becomes incapacitated, the specific thing necessary for performance is destroyed or deteriorates, or a change in the law makes performance illegal. Applicability is usually fact specific. There is no doubt many will argue this defense should cover COVID-19, and we may see new law made in this area. Of note, economic hardship or increased costs of performance alone are usually not enough to implicate *force majeure* or an impossibility defense.

UNIFORM COMMERCIAL CODE (UCC) PROVISIONS

The UCC has provisions that may apply to the sale or lease of goods that are disrupted by COVID-19. Sections 2.615 and 2A.405 state that delays in delivery are not a breach if performance has been made impracticable by (1) the occurrence of a contingency, the non-occurrence of which was a basic assumption on which the contract was made, or (2) by good faith compliance with a governmental order or regulation.

ACTS OF GOD

For centuries, the law has recognized that events caused by an Act of God may be a defense to liability. The defense is typically recognized in cases involving the fury of Mother Nature – hurricanes, floods, and storms, and is generally a natural act that is so unusual or unprecedented that a reasonable person would not be expected to guard against it. To apply, the unnatural event cannot be mixed with any fault of the person asserting the defense. Many will argue that COVID-19 is an Act of God that should excuse them from breach or liability, and this is another area where new law could be made.

CONCLUSION

COVID-19 raises issues across all industries and areas of the law. Gray Reed is a full service firm and we are here to guide you through these difficult times. For your convenience, click [this link](#) to access our other resources regarding the applicability of COVID-19 to construction, employment, energy, family law, healthcare, insurance and tort (to come).