

## Force Majeure in the Aftermath of Hurricane Harvey

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**PRACTICES** Corporate, Environmental, Franchise and Distribution, Healthcare and Life Sciences, Insurance Recovery

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As Hurricane Harvey continues to cause far-reaching disruptions, it is important to understand how to effectively assert or respond to assertions of force majeure. This summary outlines the steps to take to assert force majeure, and initial considerations for those who have received several notices of force majeure from counterparties.

While it is tempting to rely upon general notices asserting the occurrence of force majeure, affected parties should keep in mind that whether or not an event qualifies as force majeure depends heavily upon the contract at hand and each contract might have its own specific notice requirements. Even if an event is force majeure, that may not excuse all performance. Finally, in the aftermath of the significant economic losses and ongoing disruptions of Hurricane Harvey, parties may encounter disputes and could be important to have considered, at the outset, how to invoke force majeure or to respond to force majeure assertions by counterparties.

### Force Majeure Action Items

1. Determine the extent to which your business may be impacted by Hurricane Harvey and consequential business and supply chain interruptions.
2. Identify which contracts, if any, your business may be unable to perform timely or completely.
3. Identify the contracts for which your business has received a notice of force majeure from the counterparty.
4. Review all potentially affected contracts for force majeure language.
5. If applicable, carefully comply with any notice requirements necessary to invoke force majeure.
6. Understand each party's obligations (including any mitigation or allocation requirements) under an impacted contract following the invocation of a force majeure clause by either party.
7. If the contract terms are ambiguous, or if the contract does not address force majeure, closely review relevant law to determine the options or obligations of the parties.

### Is Hurricane Harvey "Force Majeure"?

It is important to closely review the definition (if any) of a "force majeure" to ensure that the event qualifies as force majeure. Typically, to qualify as force majeure, the contract's definition of force majeure must name the specific event or the definition must refer generally to circumstances beyond a party's reasonable control and the event must qualify as such. If the implicated contract does not contain a definition of "force majeure," the existence of the clause itself may be sufficient to assert an excuse to the alleged failure to perform. Where possible, courts will rely on the parties'

contract to determine whether a specific event rises to the level of force majeure. In ascertaining whether a force majeure provision applies, a Court's primary concern is to ascertain the true intent of the parties as expressed in the contract. Importantly, the party invoking the clause would have the burden of establishing the occurrence of a force majeure event.

Additionally, it is important to ensure that a causal connection exists between such force majeure event and a party's inability to perform under the contract at hand. The mere occurrence of a catastrophic event does not provide a party with the ability to seek protection under a force majeure clause—such party must be unable to perform because of the catastrophic event. Such analysis not only requires a close inspection of the contract, the company, and the crisis at hand, but a review of the impact of a force majeure event on the party's overall business and industry.

## **Review Requirements Set Forth in the Contract and under Applicable Law**

Generally, a party seeking to invoke a force majeure clause must provide notice to the other parties within a specific timeframe. If the party does not provide adequate and proper notice within the required period, a party's ability to gain protection under the contract's force majeure clause may be null. Further, a force majeure clause will often provide for detailed steps that a party must strictly follow once such party invokes the protection, as a means of mitigating any damage caused by the abdication of any party's duties under the contract.

For example, a party invoking a force majeure clause may be required to:

- Provide a specific plan of action for how the parties will move forward under the contract and when, if ever, operations will resume fully;
- Exercise "commercially reasonable efforts" or "best efforts" or act "in good faith" in order to get operations up and running quickly;
- Pay for more expensive materials or enter into subcontractor arrangements in order to mitigate damages under the contract; and/or
- Allocate its limited supply of products, if a supplier, between customers (in which case, such action may exacerbate the supplier's relationship with smaller customers that may acutely rely on prompt deliveries to keep its business afloat and avoid bankruptcy).

Finally, many contracts contain exclusivity provisions requiring a party to purchase goods from a specific supplier or sell goods to a specific customer. Under such contracts, the triggering of a force majeure clause may allow a buyer or seller to exit this exclusive relationship for the duration of the force majeure (or longer, potentially) and take their business elsewhere, potentially disrupting the economic assumptions underlying the parties' decision to enter into the agreement.

## **An Event of Force Majeure May Not Excuse All Performance**

Finally, unless the occurrence of a force majeure provides for a blanket termination right under a contract, the force majeure provision will typically specify certain obligations that are excused or suspended during a force majeure. Complete dismissal of all duties under the contract may only occur if the disruption lasts for several months – and typically, that is positive, since the loss of key contracts can have lasting consequences.