



## Litigation & Trial Practice ADVISORY ■

**MARCH 25, 2020**

### Is the COVID-19 Outbreak an “Act of God”? Why It May Matter for Your Contracts

by [Christy Eikhoff](#) and [Amanda Waide](#)

Is the coronavirus (COVID-19) pandemic an “act of God”? It may sound like a philosophical or theological question – but it’s very likely to be a *legal* one. Why? Because the occurrence of an act of God potentially extinguishes liability for a party in breach of a contract.

An act of God designation can be legally significant in the following ways:

- **Contractual force majeure** – Traditional force majeure language often includes an act of God in the delineation of force majeure events
- **Impossibility** – Common law recognizes the defense of impossibility to excuse some contractual breaches, often invoking the act of God concept
- **Impracticability** – Act of God may be a relevant factor in determining whether performance has become impracticable within the common law or the Uniform Commercial Code

### Contractual Force Majeure

The concepts of [force majeure](#) and act of God are intertwined – indeed, *force majeure* literally means a *higher power* or *superior force*. But not all force majeure events are acts of God, nor vice versa. Instead, an act of God is typically identified as one of several events that could trigger an excuse for nonperformance under a force majeure provision.

Take for example the force majeure provision in *Tug Blarney LLC v. Ridge Contracting Inc.*, which provided:

Neither C&K nor the Tug shall be responsible for any loss or damage, or delay or failure in performing hereunder arising from: *act of God*, act of war, act of public enemies, pirates or thieves, arrest or restraint of princes, rulers, dictators, or people, or seizure under legal process ...; strikes or lockouts or stoppages or restraints of labor from whatever cause, either partial or general; or riot or civil commotion.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

As illustrated here, act of God is usually just one of a series of enumerated unfortunate events that parties imagine at the onset of a contractual relationship that may disrupt their performance down the road.

## Impossibility

Even if a contract lacks a force majeure provision, contractual counterparties may nevertheless be able to rely on the common-law doctrine of “impossibility of performance” as a defense to excuse delay or nonperformance. For example, Georgia has codified this doctrine at O.C.G.A. § 13-4-21, specifically invoking “act of God” in the statutory language: “[i]f performance of the terms of a contract becomes impossible as a result of an ‘act of God,’ such impossibility shall excuse nonperformance, except where, by proper prudence, such impossibility might have been avoided by the promisor.”

## Impracticability

The impracticability defense is similar to the impossibility defense but is invoked when an unanticipated circumstance has made performance of the contractual promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. While not all states recognize impracticability as a common-law doctrine, the Uniform Commercial Code has codified it at U.C.C. § 2-615. Additionally, the Restatement (Second) of Contracts recognizes the defense of commercial impracticability and specifically references an “act of God” in its definition in Section 261. According to the Restatement, to prevail on a defense of commercial impracticability, a party must show that a supervening event, either an *act of God* or an act of a third party, made performance impracticable and that the event was not foreseeable or the fault of either party.

## So What Is an Act of God?

The term “act of God” has endured from ancient law and is said to “comprehend all misfortunes and accidents arising from inevitable necessity which human prudence could not foresee or prevent.” *Black’s Law Dictionary* defines an “act of God” as “[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado.”

### ***An economic crisis is not an act of God***

While the definition of act of God is broad enough to cover any number of “misfortunes and accidents,” courts have developed patterns of rulings to establish what are *not* acts of God. Economic downturns, no matter how severe, are not recognized by courts as acts of God. In *Langham-Hill Petroleum Inc. v. Southern Fuels Co.*, the court found that a dramatic drop in world oil prices did not constitute an act of God to trigger a force majeure clause in an oil purchase agreement, despite the court’s “sympathy for [the party’s] plight.” The court explained that “[a] *force majeure* clause is not intended to buffer a party against the normal risks of a contract.”

Similarly, courts found that the impossibility defense was unavailable to a party seeking to excuse nonperformance because of the 2008 economic crisis: “The economic downturn of 2008 was not an ‘act of God.’” Courts remain consistent on the principle that mere *economic* misfortune is usually not within the scope of an act of God.

### ***A natural phenomenon can be an act of God***

On the other hand, it is generally not a stretch for a court to designate a natural phenomenon – such as an extreme weather event – as an act of God. Multiple courts found Hurricane Katrina to be an act of God. And even less extreme weather events, like abnormally cold weather, can meet the definition if they are unusual and unexpected.

### ***The unknown and unexpected***

But between the fairly bright lines of *no* act of God for economic downturns and *yes* act of God for adverse weather events lies a vast gray area of ambiguity for events that may fall somewhere in between. A few examples:

- A sudden power failure at a wedding on a hot summer night?
  - An act of God
- An unexplained sinking of a ship?
  - Not an act of God
- A rat infestation of a grocery store?
  - Maybe an act of God, depending on the degree of human preventability

The body of act of God case law can be as confounding and unpredictable as acts of God themselves.

### **Where Does COVID-19 Fall?**

There is a dearth of case law interpreting act of God language in the context of pandemics or viral outbreaks. Doubtless, parties whose contractual performance will have been hindered by the coronavirus pandemic will invoke act of God as a contractual or common-law defense, reasoning that an unknown and unexpected natural phenomenon occurred such that their nonperformance of a contractual obligation should be excused. Meanwhile, parties seeking to enforce contracts or impose liability may seize on the economic fallout of the outbreak and argue that the actual hindering force was not the coronavirus, but its economic effects.

One clue for guidance in the contract setting may be the *other events* listed as force majeure: many courts interpreting force majeure provisions will look to the *specific* examples of force majeure events to cabin the interpretation of the *broader* terms, such as act of God.

Therefore, determining whether a pandemic or viral outbreak may be an act of God could depend on what other misfortunes the parties imagined would excuse obligations under the contract. In any event, it will depend on the particulars of the contract language, the circumstances of nonperformance, and the degree of preventability. As to certain legal outcomes? God only knows.

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

You can subscribe to future advisories and other Alston & Bird publications by completing our [publications subscription form](#).

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Amanda M. Waide  
404.881.4409  
amanda.waide@alston.com

Matthew P. McGuire  
919.862.2279  
matt.mcguire@alston.com

Christina Hull Eikhoff  
404.881.4496  
christy.eikhoff@alston.com

Jason Rottner  
404.881.4527  
jason.rottner@alston.com

Anthony M. Balloon  
404.881.7262  
tony.balloon@alston.com

Doug Scribner  
404.881.7752  
doug.scribner@alston.com

Stephanie D. Clouston  
214.922.3403  
stephanie.clouston@alston.com

David Venderbush  
212.210.9532  
david.venderbush@alston.com

Daniel F. Diffley  
404.881.4703  
dan.diffley@alston.com

Deborah Yoon Jones  
213.576.1084  
debbie.jones@alston.com

# ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2020

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777  
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500  
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719  
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111  
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, TX 75201 ■ 214.922.3400 ■ Fax: 214.922.3899  
LONDON: 5th Floor, Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225  
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100  
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444  
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260  
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001  
SILICON VALLEY: 950 Page Mill Road ■ Palo Alto, CA 94304-1012 ■ 650.838.2000 ■ Fax: 650.838.2001  
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333