Force Majeure During and After COVID-19

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Force Majeure Basics

- Party asserting FM defense has the burden
- FM depends almost entirely upon express provision
- Common law sometimes serves as "gap filler"

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Force Majeure

Fundamental issues:

- Definition of "force majeure"
- Common limitations / additional requirements?
- What level of causation/degree of impact
- What protection is provided and for what duration?

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Definition of Force Majeure

Scope of "Force Majeure"

- Most Clauses: laundry list + catch-all
- Examples of expressly enumerated items
 - <u>"Acts of God" and natural disasters</u> (e.g., fire, flood, hurricane, tornado, etc.);
 - <u>human events</u> (e.g., war, insurrection, riots, terrorist attacks, other civil disturbance, etc.);
 - <u>governmental events</u> (e.g., changes in laws or regulations, or governmental actions or restrictions that prevent performance);
 - <u>commercial disturbances</u> (e.g., labor disputes, shortages or interruptions of materials, transportation interruptions, etc.).

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"Act of God" / "Natural Disaster"

· "Act of God"

- Ft. Worth COA: "defies precise, legal definition"
- Pattern Jury Charge, Workers' comp: "caused directly and exclusively by the violence of nature, without human intervention"

"Natural Disaster"

- "Natural" "brought about by nature as opposed to artificial means"
- "disaster" "a calamity, a catastrophic emergency"

What about COVID-19?

- Creation/Release At least <u>some</u> allegations of human involvement
- Spread WHO says spread by human to human contact

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