

# Force Majeure and Covid-19

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FORCE MAJEURE

What will we  
cover?

and what  
won't we?

# What Is Force Majeure?

- ▶ In Louisiana, Force Majeure is a legal principle that is created by statute.
- ▶ Many contracts will contain a force majeure clause, which alter the parties obligations in a contract depending on their language.

# Louisiana Statutes

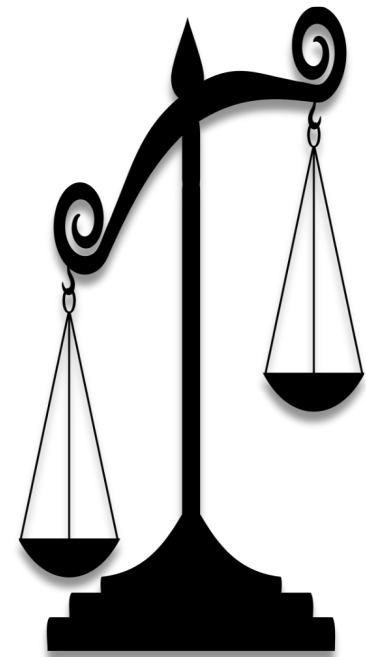
- ▶ La. Civ. Code art. 1873:
  - ▶ “An obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible.”
- ▶ La. Civil Code art. 1876:
  - ▶ When a party’s entire performance has been made impossible, the contract is dissolved and the other party may recover for any performance already rendered.

# What is a fortuitous event?

- ▶ One that, at the time the contract was made, could not have been reasonably foreseen. La. Civ. Code art. 1875.
- ▶ “Fortuitous event” and “Force majeure” (irresistible force) used interchangeably, also synonymous with the common law concept of “act of God”
- ▶ Example- Hurricane Katrina. Payne v. Hurwitz, 07-0081 (La. App. 1 Cir. 1/16/08); 978 So. 2d 1000, 1005.

# What's Not a Fortuitous Event?

- ▶ A change in the law has not been found to be a “fortuitous event.”
- ▶ **Mark Investments, Inc. v. Motwane's Am., Inc.**, 483 So. 2d 1187 (La. App. 4 Cir.1986).
- ▶ **Liquidation of Canal Bank & Trust Co.**, 30 So. 2d 841 (La. 1947)



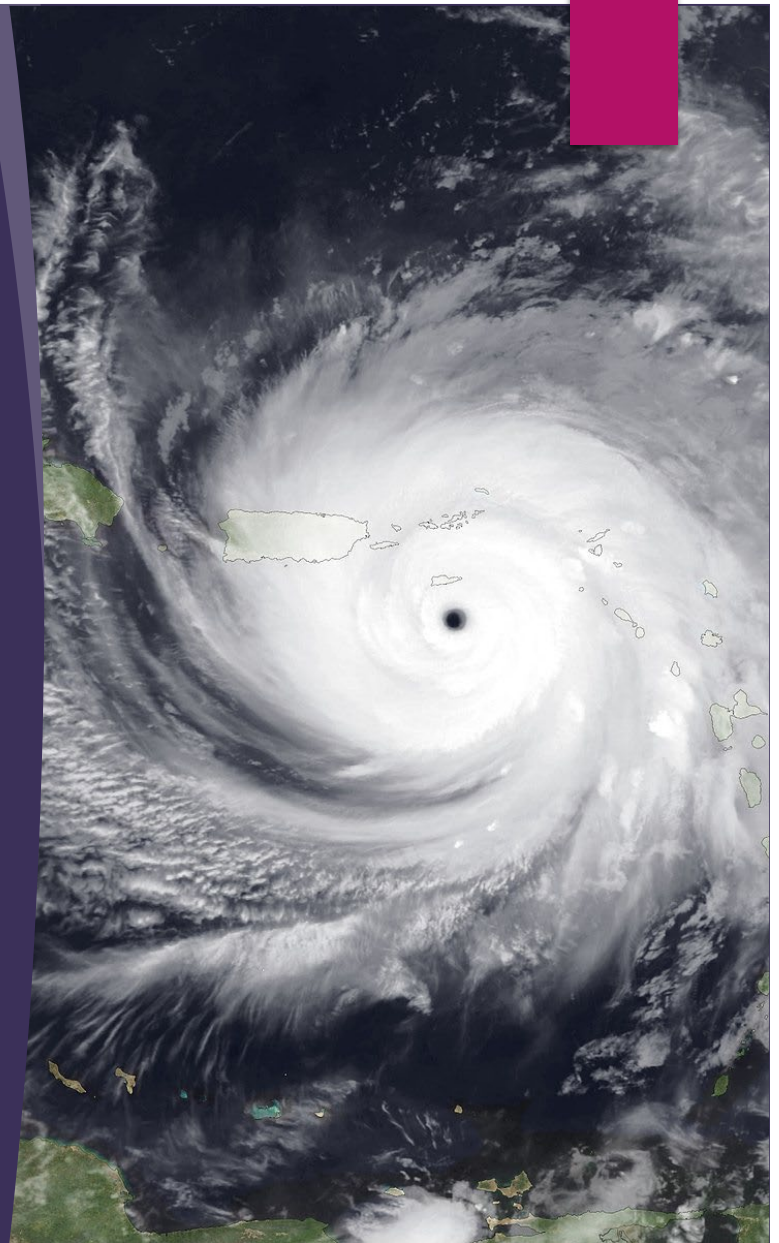
# What Is Impossible?

- ▶ Louisiana courts limit application of the doctrine to situations where obstacles make performance actually “impossible.”
- ▶ Impossibility does not include “exceptionally difficult” or “excessively burdensome” contracts.



# The Hurricane Example

- ▶ For example, while a hurricane is a fortuitous event, that does not mean performance of all contracts becomes impossible.
- ▶ Associated Acquisitions, L.L.C. v. Carbone Properties of Audubon, L.L.C., 07-0120 (La. App. 4 Cir. 7/11/07); 962 So. 2d 1102
- ▶ Schenck v. Capri Construction Co. Inc., 194 So. 2d 378 (La. App. 4 Cir. 1967)





# Impossibility After Default



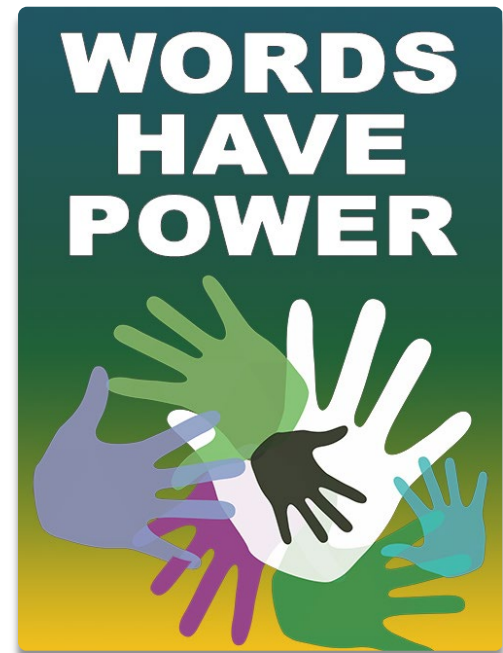
- ▶ The event rendering the performance impossible must occur BEFORE Default
- ▶ Guillard v. Copeland's of New Orleans, Inc., 07-0867 (La. App. 3 Cir. 12/5/07); 971 So. 2d 451.

# Contractual Force Majeure Clauses

A FORCE MAJEURE CLAUSE IS “A CONTRACTUAL PROVISION ALLOCATING THE RISK OF LOSS IF PERFORMANCE BECOMES IMPOSSIBLE OR IMPRACTICABLE, ESPECIALLY AS A RESULT OF AN EVENT OR EFFECT THAT THE PARTIES COULD NOT HAVE ANTICIPATED OR CONTROLLED.”  
BLACK’S LAW DICTIONARY

# Language Is Key

- ▶ Whether disruption based on a pandemic like COVID-19 will excuse performance depends on the language of the particular force majeure clause
- ▶ terms such as “disease,” “epidemic,” “pandemic,” “quarantine,” “state of emergency,” “governmental authority,” or “governmental order,”



Actions  
Speak  
Louder  
Than Words

- ▶ If your own actions caused or contributed to your inability to fulfill the contract, you won't be excused from performance
- ▶ **City of New Orleans v. United Gas Pipe Line Co.**, 517 So. 2d 145 (La. App. 4<sup>th</sup> 1987)

# Impossibility Is Still An Issue

Depending on the language of the force majeure clause, a party may still need to show performance is impossible

Compare Marionneaux v. Smith, 163 So. 206 (La. App. 1 Cir. 1935)

With Continental Oil Co. v. Crutcher, 434 F. Supp. 464 (E.D. La. 1977).

SO WHAT ABOUT  
COVID-19?

—

## Law Regarding Disease

William Roley Glover v. Samuel T. McAllister, 2 Rob. (La.) 161, 1842 WL 1652

avoidance of yellow fever was not treated like a force majeure—which would excuse the breach of contract, but it was considered as an equitable matter in assessing breach-of-contract damages.

# Louisiana Cases

- ▶ Richards Clearview, LLC v. Bed Bath & Beyond, Inc., 20-30614, 2021 WL 865310 (5th Cir. Mar. 8, 2021)
- ▶ Swiftships Shipbuilders, L.L.C. v. SBN V FNBC LLC, 20-1587, 2021 WL 1440134 (E.D. La. Apr. 16, 2021)





# Covid Is a Natural Disaster

- ▶ Outside of Louisiana, case determined covid constituted a natural disaster for force majeure
  - ▶ **JN Contemporary Art LLC v. Phillips Auctioneers LLC**, 20-4370, 2020 WL 7405262 (S.D.N.Y. Dec. 16, 2020)
  - ▶ See also **Easom v. US Well Servs., Inc.**, 20-2995, 2021 WL 1092344 (S.D. Tex. Mar. 19, 2021)



# But Did Covid Make Performance Impossible?

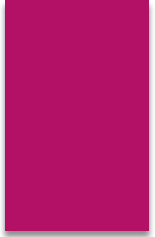
- ▶ **Easom v. US Well Servs., Inc.**, 2021 WL 1092344 (S.D. Tex. Mar. 19, 2021)
- ▶ Oil and gas case found that Covid-19 might not be the but-for cause of the economic downturn in the oil industry on March 18, 2020.

# Other Jurisdictions Covid-19 Cases

- ▶ In re Hitz Rest. Grp., 616 B.R. 374 (Bankr. N.D. Ill.2020)
- ▶ In re Cinemex USA Real Estate Holdings, Inc., 20-14695, 2021 WL 564486 (Bankr. S.D. Fla. Jan. 27, 2021)
- ▶ In re CEC Entm't, Inc., 625 B.R. 344 (Bankr. S.D. Tex.2020)

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# Recommendations for the Future



Questions?