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## COVID-19 and Cancelled 2020 College Football Games Contracts: Force Majeure?

Drew Thornley

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## ARTICLE

# COVID-19 AND CANCELLED 2020 COLLEGE FOOTBALL GAME CONTRACTS: FORCE MAJEURE?

DREW THORNLEY\*

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## I. INTRODUCTION

As is true for so many areas of life, the COVID-19 pandemic greatly impacted the 2020 college football season. Some universities cancelled or postponed their regular seasons to the spring 2021 semester. Some conferences cancelled their regular seasons, only to reinstate them later. Some conferences changed their regular-season schedules to conference-only games, meaning no conference team could play against a non-conference team. Some universities played at least ten regular-season games, while others played only a few. Several games were cancelled during the season due to team-specific COVID issues.

To say the least, the season was an unorthodox one. Given how uncharted the waters were for a college football season amid a global pandemic, it is perhaps unsurprising that the COVID-19 pandemic has given rise to legal questions in the area of college sports. This Article examines some of these questions, focusing on issues revolving around game contracts and game cancellations, specifically force majeure clauses

within college football game contracts. The chief claim advanced in this Article is that even if the COVID-19 pandemic was a sufficient force majeure-triggering event, the participation of Power Five conference teams in mostly conference-only schedules undermines any force majeure defense that these conference's teams possibly have against breach-of-contract claims brought by non-Power Five teams whose games against Power Five teams were cancelled because of COVID-19.

Part II provides a timeline of notable events leading to the start of the 2020 Football Bowl Subdivision (FBS) college football season. Specifically, the timeline's (and the Article in general's) focus is on conferences and teams within the FBS of the National Collegiate Athletic Association (NCAA). Part III explores cancellation-clause language that was common in college football game contracts prior to the COVID-19 pandemic. Part IV argues for excusing teams from abiding by their game contracts due to COVID-19, but ultimately argues against excuse. Part V briefly explores legal claims non-Power Five teams might file because of cancelled games.

## II. BACKGROUND AND TIMELINE

As early as March 2020, COVID-19 impacted NCAA events, causing the cancellation of many spring games and tournaments, most notably the NCAA Division I Men's Basketball Tournament.<sup>1</sup> Though a fall sport, COVID-19 affected college football as well, with offseason, on-campus weight training and workout programs cancelled, and with the vast majority of schools missing out entirely on spring practice and spring games.<sup>2</sup> As the pandemic grew, so did uncertainty about the prospects for the fall football season. Concerns included whether there would be a season and, if so, how the season would be structured.<sup>3</sup>

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1. See *NCAA Cancels Men's and Women's Basketball Championships Due to Coronavirus Concerns*, NCAA (Mar. 17, 2020, 1:17 PM), <https://www.ncaa.com/live-updates/basketball-men/d1/ncaa-cancels-mens-and-womens-basketball-championships-due> [https://perma.cc/3J6C-USCA] (referencing NCAA's decision to cancel remaining winter and spring championships due to health concerns).

2. See Paul Myerberg, *College Football Programs Trying to Make Sense of What's Next While Dealing with Coronavirus*, USA TODAY (Mar. 13, 2020, 9:13 AM), <https://www.usatoday.com/story/sports/ncaaf/2020/03/13/coronavirus-impacts-college-football-schools-spring-practice/5033380002/> [https://perma.cc/52VM-6JGR] (noting several college football programs cancelled spring practices, games, and recruiting events).

3. See Bryan Flynn, *The Uncertainty of the 2020 College Football Season*, JACKSON FREE PRESS (Aug. 19, 2020, 11:37 AM), <https://www.jacksonfreepress.com/news/2020/aug/19/uncertainty-2020-college-football-season/> [https://perma.cc/74V2-A3GF] ("The only thing certain about the 2020 college football season is uncertainty.").

Major decisions about the fall 2020 FBS season were made during the summer and early fall of 2020 by the various conferences of the FBS, which are divided into two groups: Power Five conferences<sup>4</sup> and non-Power Five (Group of Five) conferences.<sup>5</sup> The Power Five conferences are the Atlantic Coast Conference (ACC), Big Ten Conference, Big 12 Conference, Pac-12 Conference, and Southeastern Conference (SEC).<sup>6</sup> The Group of Five conferences are the American Athletic Conference, Conference USA, Mid-American Conference, Mountain West Conference, and Sun Belt Conference.<sup>7</sup>

A timeline of notable decisions by conferences within each of these two groups follows:

1. Power Five

- July 9, 2020: Big Ten announced a conference-only schedule.<sup>8</sup>
- July 10, 2020: Pac-12 announced a conference-only schedule.<sup>9</sup>
- July 29, 2020: ACC announced a schedule comprising of ten conference games and one non-conference game per conference member.<sup>10</sup> Further, the announcement indicated Notre Dame—

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4. See *infra* Appendix (categorizing respective teams in each Power Five conference).

5. See *id.* (listing respective teams in each Group of Five conference).

6. Brian Geisinger, *Power Five Conferences Look to Pressure NCAA, Consider Staging Own Fall Sports Championships*, ACC SPORTS (Aug. 2, 2020), <https://accsports.com/acc-news/power-five-conferences-look-to-pressure-ncaa-considering-staging-own-fall-sports-championships/> [https://perma.cc/9LF2-CA9H].

7. *Group of Five Conferences*, OWL APPS, [http://www.owlapps.net/owlapps\\_apps/articles?id=62735468&lang=en](http://www.owlapps.net/owlapps_apps/articles?id=62735468&lang=en) [https://perma.cc/957T-Y6RZ].

8. *Big Ten Statement on 2020-21 Fall Season*, BIG TEN (Aug. 5, 2020, 8:45 AM), <https://bigten.org/news/2020/8/5/big-ten-announces-plans-for-2020-football-season-medical-protocols-for-all-sports.aspx> [https://perma.cc/2W8C-QTHE].

9. Mark Schlabach & Heather Dinich, *Pac-12 Follows Big Ten in Moving to Conference-Only Schedule for Fall Sports*, ESPN (July 10, 2020), [https://www.espn.com/college-sports/story/\\_/id/29442474/pac-12-follows-big-ten-moving-conference-only-schedule-fall-sports](https://www.espn.com/college-sports/story/_/id/29442474/pac-12-follows-big-ten-moving-conference-only-schedule-fall-sports) [https://perma.cc/VA32-7FA3].

10. Michael Shapiro, *ACC Announces Football Schedule Model for 2020*, SPORTS ILLUSTRATED (July 29, 2020), <https://www.si.com/college/2020/07/29/acc-football-schedule-2020-notre-dame> [https://perma.cc/549W-X4HB].

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usually competing as an independent program<sup>11</sup>—would be included in the ACC’s schedule exclusively for the 2020 season.<sup>12</sup>

- July 30, 2020: SEC announced a conference-only schedule.<sup>13</sup>
- August 3, 2020: Big 12 announced nine conference games and one non-conference game per conference member.<sup>14</sup>
- August 11, 2020: Big Ten and Pac-12 cancelled the fall football season.<sup>15</sup>
- September 16, 2020: Big Ten announced it will resume the season, playing a conference-only schedule.<sup>16</sup>
- September 24, 2020: Pac-12 announced it will resume the season, playing a conference-only schedule.<sup>17</sup>

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11. See Pat Forde, *Notre Dame’s Conference Independence Debate Could Flare Up in Pandemic-Shortened Season*, SPORTS ILLUSTRATED (May 14, 2020), <https://www.si.com/college/2020/05/14/notre-dame-conference-independence-debate-coronavirus> [https://perma.cc/S6ZM-4N5T] (describing potential future ramifications of Notre Dame’s lack of conference affiliation).

12. See Shapiro, *supra* note 10 (“The Fighting Irish will be eligible to compete for the ACC championship for the first time, per the conference.”).

13. Mason Woods, *SEC Announces Conference-Only Schedule for 2020*, TIDE 100.9 (July 30, 2020), <https://tide1009.com/sec-announces-conference-only-schedule-for-2020/> [https://perma.cc/D6LJ-NTDA].

14. *Big 12 Conference Adopts 9+1 Football Schedule*, BIG 12 (Aug. 3, 2020, 8:15 PM), <https://big12sports.com/news/2020/8/3/big-12-conference-adopts-9-1-football-schedule.aspx> [https://perma.cc/8QNE-JQF3].

15. Max Cohen, *Big Ten, Pac-12 Cancel Fall Football Seasons Over Coronavirus Concerns*, POLITICO (Aug. 11, 2020, 3:17 PM), <https://www.politico.com/news/2020/08/11/big-ten-football-cancel-393129> [https://perma.cc/33SS-EKN8].

16. *The Big Ten Conference Adopts Stringent Medical Protocols; Football Season to Resume October 23–24, 2020*, BIG TEN (Sept. 16, 2020, 9:12 AM), <https://bigten.org/news/2020/9/16/the-big-ten-conference-adopts-stringent-medical-protocols-football-season-to-resume-october-23-24-2020.aspx> [https://perma.cc/U399-CDWT]; *Big Ten Announces Schedule for 2020 Football Season*, BIG TEN (Sept. 19, 2020, 10:45 AM), <https://bigten.org/news/2020/9/19/big-ten-announces-schedule-for-2020-football-season.aspx> [https://perma.cc/GT32-N63B].

17. Connor Grott, *Pac-12 to Play 7-Game Football Schedule Starting in November*, UPI (Sept. 24, 2020, 8:56 PM), [https://www.upi.com/Sports\\_News/2020/09/24/Pac-12-to-play-7-game-football-schedule-starting-in-November/7811600993576/](https://www.upi.com/Sports_News/2020/09/24/Pac-12-to-play-7-game-football-schedule-starting-in-November/7811600993576/) [https://perma.cc/7B6K-QCV6].

## 2. Non-Power Five (Group of Five)

- August 4, 2020: Sun Belt Conference announced eight conference games and up to four non-conference games per conference member.<sup>18</sup>
- August 5, 2020: American Athletic Conference announced eight conference games per member and non-conference games at the discretion of members.<sup>19</sup>
- August 7, 2020: Conference USA announced eight conference games and up to four non-conference games per member.<sup>20</sup>
- September 24, 2020: Mountain West Conference announced it will resume the season beginning in October and play a conference-only schedule.<sup>21</sup>
- September 25, 2020: Mid-American Conference announced it will also resume the season and play a conference-only schedule.<sup>22</sup>

The 2020 collegiate football season began with Austin Peay vs. Central Arkansas on August 29, 2020,<sup>23</sup> and ended with the College Football Playoff National Championship between Ohio State and Alabama on

18. Brad Kercheval, *Sun Belt Football Schedule 2020: Teams to Play Eight League Games, Four Nonconference Opponents Allowed*, CBS SPORTS (Aug. 4, 2020, 1:40 PM), <https://www.cbssports.com/college-football/news/sun-belt-football-schedule-2020-teams-to-play-eight-league-games-four-nonconference-opponents-allowed/> [<https://perma.cc/XM5G-UJBH>].

19. Andrea Adelson, *American Athletic Conference Approves 8+4 Schedule for 2020*, ESPN (Aug. 5, 2020), [https://www.espn.com/college-football/story/\\_/id/29601297/american-athletic-conference-approves-8+4-schedule-2020](https://www.espn.com/college-football/story/_/id/29601297/american-athletic-conference-approves-8+4-schedule-2020) [<https://perma.cc/MM3F-ZF5G>].

20. Adam Rittenberg, *Conference USA Approves 8+4 Schedule for 2020*, ESPN (Aug. 7, 2020), [https://www.espn.com/college-football/story/\\_/id/29616701/conference-usa-approves-8+4-schedule-2020](https://www.espn.com/college-football/story/_/id/29616701/conference-usa-approves-8+4-schedule-2020) [<https://perma.cc/9LW8-BY6D>].

21. Dennis Dodd, *Mountain West Votes to Play College Football This Fall: Eight-Game Season Starts Oct. 24*, CBS SPORTS (Sept. 24, 2020, 10:33 PM), <https://www.cbssports.com/college-football/news/mountain-west-votes-to-play-college-football-this-fall-eight-game-season-starts-oct-24/> [<https://perma.cc/R2PG-FW9L>].

22. Heather Dinich & Adam Rittenberg, *Mid-American Conference to Play Six-Game Football Season Starting Nov. 4*, ESPN (Sept. 25, 2020), [https://www.espn.com/college-football/story/\\_/id/29971477/source-mid-american-conference-play-six-game-football-season-starting-nov-4](https://www.espn.com/college-football/story/_/id/29971477/source-mid-american-conference-play-six-game-football-season-starting-nov-4) [<https://perma.cc/5HWH-HYX8>].

23. *Central Arkansas Edges Austin Peay in First Game of College Football Season*, NCAA (Aug. 30, 2020, 1:04 AM), <https://www.ncaa.com/live-updates/football/fcs/central-arkansas-storms-back-beat-austin-peay-first-di-college-football-game-season> [<https://perma.cc/YZ3N-C9MV>].

January 11, 2021.<sup>24</sup> According to CBS, “nearly every FBS college football program that participated in the 2020 season saw cancellations or postponements during the season. In total, 139 games were nixed from the schedules, while some games were able to come together on less than three days’ notice.”<sup>25</sup> Some FBS conferences fared better than others regarding the number of scheduled games that were ultimately played.<sup>26</sup> For example, the SEC successfully held sixty-nine out of its seventy-one scheduled games, including its SEC Championship Game,<sup>27</sup> while the Big Ten held forty-nine out of sixty-three.<sup>28</sup>

### III. FORCE MAJEURE IN COLLEGE FOOTBALL GAME CONTRACTS PRIOR TO THE COVID-19 PANDEMIC

*Force majeure* is a French term meaning superior force.<sup>29</sup> Concerning contracts, force majeure refers to an unforeseen event beyond the parties’ reasonable control that precludes a party from fulfilling its contractual obligations.<sup>30</sup> A force majeure clause in a contract typically lists which exceptional, unforeseen events are sufficient to trigger the clause and, thus,

24. 2021 CFP National Championship, COLLEGE FOOTBALL PLAYOFF, <https://collegefootballplayoff.com/sports/2021/1/14/game-recap-2021.aspx> [<https://perma.cc/2552-LM9J>].

25. David Cobb, Ben Kercheval & Barrett Sallee, *College Football Sees 139 Games Canceled or Postponed During 2020 Regular Season due to COVID-19 Issues*, CBS SPORTS (Oct. 16, 2020, 12:21 PM), <https://www.cbssports.com/college-football/news/college-football-sees-139-games-canceled-or-postponed-during-2020-regular-season-due-to-covid-19-issues> [<https://perma.cc/8CV5-CQV8>].

26. By contrast, only a handful of games involving a team from the Football Championship Subdivision (FCS)—an NCAA Division, one subdivision below the FBS—were held in the fall because the FCS conferences moved their seasons to spring 2021. See Sam Herder, *FCS Conferences and Their 2021 Spring Season Formats*, HERO SPORTS (Feb. 22, 2020), <https://herosports.com/fcs-football-conferences-2021-spring-season-formats-bzbz> [<https://perma.cc/E7QN-7AZ8>] (describing the FCS conferences’ 2021 seasons).

27. See *2021 Standings*, SEC SPORTS, <https://www.secsports.com/standings/football> [<https://perma.cc/PQP6-ZJ4M>] (showing the record of each SEC member team for the 2020 season). The SEC, which has fourteen member schools, played a ten-game, conference-only schedule. *Id.* So, seventy regular-season games were scheduled. *Id.*

28. See *2020 Football Standings*, BIG TEN, <https://bigten.org/standings.aspx?standings=18> [<https://perma.cc/8G4S-6E9D>] (displaying the record of each Big Ten member team for the 2020 season). Penn State and Rutgers were the only teams in the fourteen-team conference to play all nine of their scheduled regular-season games. *Id.*

29. *Force Majeure*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/force%20majeure> [<https://perma.cc/PT9Z-6GQG>].

30. See Brian Beckerman et al., *Tour de Force: Tracking the Evolution of COVID-19 As a Force Majeure Event*, JD SUPRA (June 2, 2020), <https://www.jdsupra.com/legalnews/tour-de-force-tracking-the-evolution-of-98432/> [<https://perma.cc/49RW-T76V>] (“The doctrine of force majeure excuses nonperformance, or delayed performance, by one or both parties to a contract due to the occurrence of an unforeseeable event.”).



relieve the parties of their respective contractual obligations.<sup>31</sup> Therefore, force majeure operates as an affirmative defense to a claim of breach of contract.<sup>32</sup>

As a contract-excuse doctrine, force majeure was not created by English common law but rather by contracts between parties.<sup>33</sup> As such, the specific language in a force majeure clause is crucially important.<sup>34</sup> The issue of “[d]etermining whether a force majeure clause can be invoked is a fact intensive inquiry, as it depends on the specific language of a contract. Generally, force majeure clauses are interpreted narrowly,”<sup>35</sup> meaning “only the events listed and events similar to those listed will be covered.”<sup>36</sup> Thus, the specific requirements for invoking force majeure as an affirmative defense to non-performance of a contract depend on the specific language in the contract at issue and, where applicable, on any other requirement(s)

31. See James Carter et al., *COVID-19, Force Majeure and Frustration: An In-Depth Analysis*, DLA PIPER (June 9, 2020), <https://www.dlapiper.com/en/poland/insights/publications/2020/06/covid-19-force-majeure-and-frustration> [<https://perma.cc/MZ3W-H2H7>] (“A typical force majeure clause sets out the circumstances (generally involving an unforeseen supervening event) where a party is excused from performing their contractual obligations, and the contractual consequences that will follow where the clause is triggered. Such clauses often also prescribe a procedure that the parties must follow to avoid liability for non-performance on the occurrence of a trigger event.”).

32. See Beckerman et al., *supra* note 30 (recognizing force majeure is often used as an affirmative defense).

33. See Carter et al., *supra* note 31 (“Unlike many civil law systems, English law provides no universal concept or definition of force majeure, which instead operates only to the extent contractually agreed. For this reason, the ability of a party to invoke force majeure (and the effect this will have on the contract in question) will depend on the presence of a force majeure clause and its particular terms.”); see also Iain Elder et al., *COVID-19: Force Majeure Event?*, SHEARMAN & STERLING (Mar. 12, 2020), <https://www.shearman.com/Perspectives/2020/03/COVID-19—Force-Majeure-Event> [<https://perma.cc/DPT7-ABCG>] (“A party’s ability to claim relief for a force majeure event therefore depends upon the terms of the contract, and the force majeure provision in particular. Force majeure provisions are express terms and will not ordinarily be implied into contracts governed by English law.”).

34. See Elder et al., *supra* note 33 (emphasizing claiming relief on force majeure grounds depends on contractual terms).

35. Lawrence P. Rochefort & Rachel E. McRoskey, *The Coronavirus and Force Majeure Clauses in Contracts*, AKERMAN (Apr. 6, 2020), <https://www.akerman.com/en/perspectives/the-coronavirus-and-force-majeure-clauses-in-contracts.html> [<https://perma.cc/47WT-Q882>]; see *Allegiance Hillview, L.P. v. Range Tex. Prod., LLC*, 347 S.W.3d 855, 865 (Tex. App.—Fort Worth 2011, no pet.) (stating the court will examine the business activities surrounding the contract and avoid unreasonable interpretations).

36. Janice M. Ryan, *Interpreting Force Majeure Clauses*, VENABLE LLP (Mar. 18, 2020), <https://www.venable.com/insights/publications/2020/03/interpreting-force-majeure-clauses> [<https://perma.cc/Q5RW-BYEB>].

imposed by the relevant state's common law.<sup>37</sup> Because this Article does not focus on the specifics of force majeure in any particular state, the author will explore several common requirements within the context of COVID-19's impact on college football game contracts.

As an initial matter, a court must find that the event at issue triggers the contract's force majeure clause.<sup>38</sup> If the court does not, then force majeure is not available as a defense.<sup>39</sup> Alternatively, if the court finds that the event does trigger the force majeure clause, other requirements must still be met. Again, contracts and state laws vary regarding these additional requirements, but some common requirements include the following: (1) the event was unforeseeable;<sup>40</sup> (2) the event actually prevented performance of the contract;<sup>41</sup> (3) the party seeking to be excused from performance complied with the duty to mitigate damages to the other party; and (4) the party invoking force majeure provided timely, proper notice to the other party.<sup>42</sup>

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37. For an informative article discussing specific force majeure requirements in California, Florida, Illinois, New York, and Texas, see Rochefort & McRoskey, *supra* note 35.

38. See Carter et al., *supra* note 31 (“First, the party calling force majeure will always need to establish that one of the prescribed events has occurred.”).

39. See Joseph E. Foster, *A Short Primer on Force Majeure and Related Defenses*, AKERMAN (Apr. 27, 2020), <https://www.akerman.com/en/perspectives/a-short-primer-on-force-majeure-and-related-defenses.html> [<https://perma.cc/H49B-EYW9>] (“[I]n general, absent specific language in the force majeure clause to the contrary, the courts view the parties as having allocated the risk of such unspecified future events to the obligor.”).

40. See generally Mark Augenblick & Alison B. Rousseau, *Force Majeure in Tumultuous Times: Impracticability As the New Impossibility*, PILLSBURY (2012), <https://www.pillsburylaw.com/images/content/3/9/v2/3990/BylinedArticleForceMajeureinTumultuousTimesJournalofWorldInvestm.pdf> [<https://perma.cc/B6LB-5J67>] (listing reasons why force majeure defenses fail).

41. See Tom Cummins et al., *Force Majeure Under Common Law*, ASHURST (Mar. 17, 2020), <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide—force-majeure-under-common-law> [<https://perma.cc/656V-RB68>] (contending the party seeking relief must show “[the force majeure event] prevented, hindered or delayed [it] from performing its contractual obligations as [a] result of the event”).

42. See Lisa M. Richman et al., *Force Majeure and COVID-19: Frequently Asked Questions*, MCDERMOTT WILL & EMERY (Mar. 20, 2020), <https://www.mwe.com/insights/force-majeure-and-covid-19-frequently-asked-questions/> [<https://perma.cc/5UE3-54UJ>] (“Some general features common to most *force majeure* provisions include: [t]he event was outside the reasonable control of a party; [t]he event was not reasonably foreseeable by the parties, and the effects therefore could not be avoided; [t]he relevant event materially affects the ability of one or more of the parties to perform their contractual obligations; and [t]he party or parties took all reasonable steps to try to provide notice and to avoid or mitigate the relevant event or its consequences.”); Jeffrey D. Neuburger & Jordan M. Horowitz, *The Coronavirus and Force Majeure Clauses*, NAT’L L. REV. (Mar. 2, 2020), <https://www.natlawreview.com/article/coronavirus-and-force-majeure-clauses> [<https://perma.cc/733L-HMY3>]; Daniel J. Melman & Miriam Kurien Tyrell, *Contractual Force Majeure Clauses and the COVID-19 Global Pandemic*, PEARL COHEN (Mar. 21, 2020), <https://www.pearlcohen.com/>

Part IV explores each of the aforementioned requirements and COVID-19's impact on force majeure clauses in college football game contracts.

Prior to the outbreak of the COVID-19 pandemic, the typical force majeure clause in a contract for a college football game did not mention "pandemic(s)." For example, a game contract signed in 2017 between Houston and Washington State contains the following force majeure clause,

If it becomes impossible to play the football game for reasons of power failure, strikes, severe weather conditions, riots, war, or other unforeseen catastrophes or disasters beyond the control of either party, this agreement may be terminated by either UH or Washington State. The football game shall be cancelled, and neither party shall be responsible to the other for any loss or damage. No such cancellation shall affect the parties' obligations as to subsequent games covered by this agreement. Notice of a force majeure event shall be given as soon as possible after the event by the affected team.<sup>43</sup>

As a more recent example, the 2020 game contract between Ohio State and Bowling Green states,

If it becomes impossible to play the football game for reasons of power failure, strikes, severe weather conditions, riots, war, or other unforeseen catastrophes or disasters beyond the control of either party, this Agreement may be terminated by either OSU or the Visiting Team, the football game shall be cancelled, and neither party shall be responsible to the other for any loss or damage. No such cancellation shall affect the parties' obligations as to subsequent games, if any, covered by this Agreement.<sup>44</sup>

Prior to the COVID-19 pandemic, some game contracts specifically mentioned pandemics in their force majeure clauses, though this was certainly not the norm.<sup>45</sup> More often, schools' force majeure clauses in

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contractual-force-majeure-clauses-and-the-covid-19-global-pandemic [https://perma.cc/Z487-5Q Q3].

43. Joseph Duarte, *Read the Fine Print: Breaking Down UH's Nonconference Football Contracts*, HOUS. CHRON. (July 31, 2020, 2:09 PM), <https://www.houstonchronicle.com/texas-sports-nation/college/article/Houston-Cougars-nonconference-football-game-15449515.php> [https://perma.cc/29DV-VCYS].

44. *Football Contract*, THE OZONE 3, <http://theozone.net/wp-content/uploads/2020/05/BGSU-Game-Contract-2020.pdf> [https://perma.cc/8QYE-GJX7].

45. See David Donovan, *Covid-19 Already Blowing Dust Off 'Force Majeure' Clauses*, N.C. LAWS. WKLY. (Mar. 19, 2020), <https://nclawyersweekly.com/2020/03/19/covid-19-already-blowing-dust-off-force-majeure-clauses/> [https://perma.cc/2XSH-JHPQ] ("Prior to this [COVID-19] crisis many [force majeure clauses] neglected to specifically mention pandemics.").

game contracts mentioned “epidemic(s).” As an example, the force majeure clause in a 2020 game contract between Illinois and Bowling Green states,

It is herein agreed that neither party to this agreement shall be held liable for delay or failure in performance or shall be required to [pay] liquidated damages under Paragraph 8 herein for a canceled or defaulted game resulting from events or acts which are beyond control of such party, including events of limitation, such as: acts of God, athletic program termination, strikes, lockouts, riots, acts of war, **epidemics**, governmental or NCAA or other controlling athletic conference failures, earthquakes or other disasters. The proceeding notwithstanding, any financial obligations incurred by the party capable of performing shall be shared equally by the non-performing party. Notice of any such events shall be given as soon as possible.<sup>46</sup>

Given that many college football game contracts executed prior to the COVID-19 pandemic did not mention epidemics in their force majeure clauses and that even fewer mentioned pandemics, the effect of COVID-19 on these clauses was and still is unclear.<sup>47</sup> Both conferences and universities found themselves in uncharted waters. Was cancelling a game on force majeure grounds legitimate? Should the COVID-19 pandemic excuse universities from their contractual obligations to play games? These questions are explored in depth in Part IV.

#### IV. EXCUSE FROM PERFORMANCE ON FORCE MAJEURE GROUNDS?

Though the central claim advanced in this Article is that force majeure should not excuse breaches of game contracts, a look at the contrary position is worthwhile. As such, this Part discusses potential arguments in favor of excuse on force majeure grounds, but then argues against excuse

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46. Chris Hummer, *Force Majeure and College Football: Why Millions Are on the Line*, 247SPORTS (July 29, 2020), <https://247sports.com/Article/College-football-non-conference-game-settlements-force-majeure--149646635/> [<https://perma.cc/SBV2-DSUV>].

47. See Rachel Lenzi, *Covid-19 Makes Its Way Into Negotiations of College Sports Contracts*, BUFFALO NEWS (Jun. 14, 2020), [https://buffalonews.com/sports/college/covid-19-makes-its-way-into-negotiations-of-college-sports-contracts/article\\_f2e8556a-30a2-5710-976a-d48287d7a90e.html](https://buffalonews.com/sports/college/covid-19-makes-its-way-into-negotiations-of-college-sports-contracts/article_f2e8556a-30a2-5710-976a-d48287d7a90e.html) [<https://perma.cc/7PB5-ELTU>] (“The pandemic has compelled more college and university athletic departments . . . to add language to contracts that provides legal and financial protection from potential losses if an event is postponed or canceled because of Covid-19.”); see also Jon Blau, *IU Football: Resolution of Canceled Games Could Become Murky*, INDYSTAR (July 11, 2020, 2:25 PM), <https://www.indystar.com/story/sports/college/indiana/2020/07/11/iu-football-resolution-canceled-games-could-murky/5421048002/> [<https://perma.cc/N3KV-X73R>] (demonstrating arguments for and against a court finding Indiana’s force majeure clause covered pandemics).

on such grounds. Since this Article focuses solely on force majeure, this Part does not explore potential common-law excuses, such as impossibility, impracticability, or frustration of purpose.

#### A. *Excuse*

Whether a party may invoke a force majeure clause to excuse its contractual obligations depends on examining several factors relating to the specifics of the contract.<sup>48</sup> The inquiry then varies from contract to contract, but the first question a court must ask is whether the event is sufficient to trigger the contract's force majeure clause.<sup>49</sup>

##### 1. Does the COVID-19 pandemic qualify as a force majeure-triggering event?

The first argument universities seeking excusal from game contracts on COVID-19 grounds would need to advance is that the COVID-19 pandemic was sufficient to trigger the contract's force majeure clause. Such an argument might be made from one of several angles. Obviously, the clearest-cut case for triggering a force majeure clause would be one where the force majeure clause at issue specifically mentions pandemics.<sup>50</sup> Again, however, such is not the case for the overwhelming number of pre-COVID-19 game contracts.

Arguably, the next best option for parties seeking an excuse from performance is to have a signed contract, whose force majeure clause mentions epidemics. Pandemics and epidemics are not interchangeable. The Centers for Disease Control and Prevention (CDC) defines an epidemic as “an increase, often sudden, in the number of cases of a disease above what is normally expected in that population in that area,” with “that area” referring to a specific community.<sup>51</sup> Comparatively, the CDC defines a pandemic as “an epidemic that has spread over several countries or continents, usually affecting a large number of people.”<sup>52</sup> However, suppose a force majeure clause allows for an epidemic to excuse

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48. Leonard A. Ferber & Debra K. Lefler, *Force Majeure: A Practical Perspective for Commercial Relationships*, KATTEN 1 (Apr. 13, 2020), <https://katten.com/force-majeure-a-practical-perspective-for-commercial-relationships> [<https://perma.cc/KK2B-6PVV>].

49. *Id.* at 1–2.

50. Rochefort & McRoskey, *supra* note 35.

51. *Principles of Epidemiology in Public Health Practice, Third Edition an Introduction to Applied Epidemiology and Biostatistics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/csels/dsepd/ss1978/lesson1/section11.html> [<https://perma.cc/R5JR-DUBL>].

52. *Id.*

performance. In that case, certainly, it implicitly allows for a pandemic to excuse performance, given that a pandemic is akin to an epidemic, except on a mass geographic scale.<sup>53</sup> The logic of such a position can be illustrated by the absurdity of the opposite position. Imagine a university seeks, due to the COVID-19 pandemic, excusal from a game contract containing a force majeure clause that lists epidemics (but not pandemics). The judge responds, “Your contract’s force majeure clause specifically mentions epidemics but not pandemics. Had COVID-19 been limited to your geographic area, you would be in good shape, but since it affects most of the world, you’re out of luck.” Logically, this formalistic interpretation makes no sense.

But what if a contract’s force majeure clause mentions neither pandemics nor epidemics? In such situations, parties seeking performance excusal would need the presence of certain other language in their respective force majeure clauses. Such language could come in a variety of forms.<sup>54</sup>

a. Act(s) of God

Force majeure clauses routinely include the phrase “act(s) of God” in their lists of unforeseeable events that would trigger the clause.<sup>55</sup> For example, the 2020 game contract between UCLA and New Mexico State provides, in relevant part,

If either party is delayed or prevented from the performance of its obligations hereunder by reasons beyond such party’s reasonable control due to a “Force Majeure Events” defined as **acts of God**, fires, flood, earthquake, war, public disaster, strikes or labor difficulties, governmental regulation or order or any other similar cause beyond the party’s reasonable control, such party shall not

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53. Di Zhu et al., *Revealing the Spatial Shifting Pattern of COVID-19 Pandemic in the United States*, NATURE (2021), <https://www.nature.com/articles/s41598-021-87902-8.pdf> [<https://perma.cc/XG5Z-SFPA>].

54. “Many force majeure clauses in sports and entertainment contracts do not cover pandemics—either by specific omission or because the language of the clause is not broad enough. Force majeure clauses often include ‘acts of God’ and ‘governmental actions.’ Some clauses include broad ‘catch-all’ phrases at the end of a laundry list of uncontrollable situations, such as ‘or other circumstances beyond the party’s control.’ In any event, the precise wording is key. For example, force majeure clauses might not be invocable because of the existence of COVID-19, but might become invocable because of the resulting governmental or NCAA action, such as a shutdown, closure of ports of entry, interstate travel ban or limitation, or an executive order prohibiting large gatherings, etc.” *How Contract Provisions and Common Law Principles Will Impact the Sports Business*, GOULSTON & STORRS (Aug. 31, 2020), <https://www.goulstonstorr.com/publications/how-contract-provisions-and-common-law-principles-will-impact-the-sports-business/> [<https://perma.cc/TM92-TB22>].

55. *Id.*

be liable to the other for breach of its obligations under this Agreement (to the extent that the breach resulted from a Force Majeure Event).<sup>56</sup>

Act(s) of God is defined in numerous ways by courts and others, such as an “overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado,”<sup>57</sup> an “unusual, extraordinary, and unprecedented event . . . that could not be foreseen or avoided,”<sup>58</sup> and “[n]othing less than such a fortuitous gathering of circumstances preventing the performance of a duty as could not have been foreseen or overcome by the exercise of reasonable prudence, care and diligence . . . .”<sup>59</sup>

Whether the phrase act(s) of God applies to the COVID-19 pandemic will surely be addressed by courts hearing COVID-based force majeure claims. “If the language of the clause does not specifically include or exclude viral pandemics, whether such an occurrence is considered an act of God is uncertain.”<sup>60</sup> Considering “the once-a-century nature of a pandemic on the scale of COVID-19, ‘act of God’ clauses will no doubt be a frequent legal topic of discussion in the near future.”<sup>61</sup> Commentators agree, writing,

56. Hummer, *supra* note 46 (emphasis added).

57. *Act of God*, Black’s Law Dictionary (11th ed. 2019).

58. *Abarca v. Shoes*, No. 23455/07, 2010 WL 3617246, at \*3 (N.Y. Sup. Ct. Apr. 23, 2010).

59. *Holden v. Toye Bros. Auto & Taxicab Co.*, 1 La. App. 521, 523 (La. App. 1925) (citing *Southern Pacific Co. v. Schover*, 114 F. 466, 467 (8th Cir. 1902)); see *Prashant Enters. Inc. v. State*, 206 A.D.2d 729, 730 (N.Y. App. Div. 3d Dept. 1994) (internal citations omitted) (“Fundamentally, an act of God is an unusual, extraordinary and unprecedented event . . . . Additionally, an act of God denotes ‘those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight. . . . If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God.’” (quoting *Michaels v. New York Cent. R. R. Co.*, 30 N.Y. 564, 571 (1864))).

60. Pessin Katz Law, P.A., *Force Majeure Clauses: Is a Viral Pandemic an Act of God For Purposes of Allowing You to Get Out of Your Contractual Obligations*, JD SUPRA (Mar. 23, 2020), <https://www.jdsupra.com/legalnews/force-majeure-clauses-is-a-viral-66092/> [<https://perma.cc/6S WG-EX9G>]. “[I]t is unclear whether, in the absence of an express reference to epidemics in a force majeure clause, courts will find COVID-19 to be an Act of God.” Andrew C. Smith et al., *Tour de Force: What Constitutes an “Act of God,” and Other Developments in Force Majeure Law*, PILLSBURY (June 15, 2020), <https://www.pillsburylaw.com/en/news-and-insights/tour-de-force-what-constitutes-act-of-god-force-majeure-law.html> [<https://perma.cc/9TH9-77CP>]; see Karen Graham, *Oklahoma Governor Asks Trump to Declare COVID-19 an ‘Act of God’*, DIGIT. J. (Apr. 26, 2020), <https://www.digitaljournal.com/world/oklahoma-governor-asks-trump-to-declare-covid-19-an-act-of-god/article/570802> [<https://perma.cc/RCS2-YTN9>] (“Herein lies a problem with the COVID-19 pandemic. It is unclear whether the coronavirus qualifies as an Act of God.”).

61. Travis Hines, *Iowa State Needs to Cut Two Non-Conference Games; Which One Should Stay?*, AMES TRIBUNE (Aug. 4, 2020), <https://www.amestrib.com/story/sports/college/football/2020/08/04/>

Contracts typically stipulate the state law that will govern any disputes that arise under a contract. Thus, we are about to witness state courts across the U.S. determine whether the COVID-19 crisis constitutes an “act of God” excuse under masses of contracts. There is a fair degree of variability across states on what constitutes an “act of God”, and how force majeure clauses are interpreted by courts.<sup>62</sup>

Parties seeking excusal from game contracts should argue the COVID-19 pandemic is an act of God. The crux of such an argument is that the COVID-19 pandemic was out of their control, and it affected them in the same way as a natural disaster or emergency like an earthquake, tornado, or tsunami would. As support for this position, some courts have ruled that certain events unrelated to weather excuse contractual obligations because

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iowa-state-needs-to-cut-two-non-conference-games-which-one-should-stay/42144059/ [https://perma.cc/849C-RN5G].

62. Carolyn Casey, *Does COVID-19 Constitute an “Act of God” Under Force Majeure?*, EXPERT INST. (May 26, 2020), <https://www.expertinstitute.com/resources/insights/does-covid-19-constitute-an-act-of-god-under-force-majeure/> [https://perma.cc/C7MV-CBN9]. Attorneys from Pillsbury Winthrop Shaw Pittman LLP write, “There is a dearth of recent case law addressing whether the phrase ‘Act of God’ covers a pandemic or epidemic (for example, H1N1 in 2009 or Ebola in 2014). On the one hand, courts may find that the occurrence of these prior global health crises made COVID-19 foreseeable which, in many jurisdictions, puts it outside the scope of a force majeure clause. On the other hand, courts may conclude that COVID-19’s sweeping impact puts it on a different scale than prior health crises and therefore is covered by catch-all language. What is clear, however, is that the term ‘Act of God’ will take on heightened significan[ce] in the post-COVID-19 world.” Smith et al., *supra* note 60; see Amanda M. Waide & Christina Hull Eikhoff, *Litigation Advisory: Is the COVID-19 Outbreak an “Act of God”? Why It May Matter for Your Contracts*, ALSTON & BIRD (Mar. 25, 2020), <https://www.alston.com/en/insights/publications/2020/03/is-the-covid-19-outbreak-an-act-of-god/> [https://perma.cc/S5K5-DCEP] (expressing how parties “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”). In discussing COVID-19’s possible inclusion as an act of God under Georgia case law, Seyfarth attorneys write, “Without inclusion of an item akin to ‘pandemic,’ contracting parties seeking to suspend or avoid performance of their contractual obligations are likely to look to ‘act of God’ as a savior. But the Georgia case law on what constitutes an ‘act of God’ is silent with respect to whether a pandemic counts as one. And, not all ‘act of God’ provisions are equal; some by their terms expressly or contextually limit qualifying acts of God (e.g., to weather-related events). Although the Georgia case law is silent with respect to whether pandemics or viral outbreaks constitute an ‘act of God,’ principles guiding the ‘act of God’ jurisprudence suggest that when these cases wind their way through the courts, we will see a patchwork of judicial decisions and jury verdicts . . . . We predict that until the Georgia Supreme Court provides clarity (or the Georgia General Assembly does so via legislation), the unique words of such clauses, the facts at issue in particular cases, and the admitted variability of judicial analysis will render this messy terrain for businesses.” Rebecca Woods & Ryan F. Swindall, *Georgia Law on “Act of God” and the COVID-19 Pandemic*, SEYFARTH (Mar. 16, 2020), <https://www.seyfarth.com/news-insights/georgia-law-on-act-of-god-and-the-covid-19-pandemic.html> [https://perma.cc/G5FB-8AQ8].



they are acts of God and that certain statutes' references to act(s) of God or act(s) of nature include a pandemic within the meaning of those phrases.<sup>63</sup> The latter finding was made on September 1, 2020, by a Minnesota state trial court in *Free Minnesota Small Business Coalition v. Walz*.<sup>64</sup> On March 19, 2021, the United States District Court for the Southern District of Texas, in a case addressing whether the COVID-19 pandemic qualifies for the WARN Act's natural-disaster exception,<sup>65</sup> offered support in case law for the position that the COVID-19 pandemic qualifies as a natural disaster.<sup>66</sup> Backed by such support, the court ruled COVID-19 "qualifies as a 'natural' disaster because human beings were not responsible for starting or consciously spreading the virus."<sup>67</sup> Likewise, other court holdings support the argument that the COVID-19 pandemic could qualify as an act of God.<sup>68</sup>

#### b. Governmental Actions or Regulatory Authority

Another possibility for excuse from performance is a force majeure clause's reference to a rule from the government or other regulatory body, such as the conference of which the university is a member. This would have been a rock-solid option had a game been scheduled during a government-ordered quarantine.<sup>69</sup> If a college football game would have

63. See *infra* notes 65–67 and accompanying text.

64. *Free Minn. Small Bus. Coalition v. Walz*, No. 62-CV-20-3507, 2020 Minn. Dist. LEXIS 256, at \*50–51 (Minn. Dist. Ct. 2020) (classifying COVID-19 as a natural event, without any vaccine or cure, "which may authorize the Governor to declare a peacetime state of emergency").

65. See *Easom v. US Well Servs., Inc.*, No. H-20-2995, 2021 WL 1092344, at \*11 (S.D. Tex. Mar. 22, 2021) (determining "whether COVID-19 is a natural disaster under the WARN Act" because "[u]nder the WARN Act, an employer is not required to give employees notice" if such layoff is due to natural disaster).

66. See *id.* at \*8 (referencing decisions of other courts reaching similar conclusions that COVID-19 qualifies as a natural disaster).

67. *Id.* The court stated Congress was primarily concerned with a drought, which destroyed crop harvests across the country, when it passed the WARN Act. *Id.* at \*11. It also explained that "[t]he human-centered effect of COVID-19 is not a reason for finding that viral or bacterial pandemics are not natural disasters under the WARN Act. In sum, the WARN Act does not exclude a virus outbreak from the natural-disaster exception. The dictionary definition of natural disaster, other court decisions, and the statutory language support the conclusion that the COVID-19 pandemic is a natural disaster under the WARN Act." *Id.*

68. See Angela C. Zambrano et al., *Is COVID-19 an Act of God?*, WESTLAW (June 3, 2020), [https://today.westlaw.com/Document/Ie2abd644a5d911eabea3f0de9fb69570/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://today.westlaw.com/Document/Ie2abd644a5d911eabea3f0de9fb69570/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) [https://perma.cc/5URC-MD3V] (concluding COVID-19 has natural origins, notwithstanding conspiracy theories, which provides support for the argument that it is an act of God).

69. See generally Esther Fung, *'Act of God' Legal Theory Allows Restaurant Rent Relief During Coronavirus Restrictions, Court Rules*, WALL ST. J. (June 18, 2020, 6:24 PM),

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violated a government's quarantine order, the argument for excuse would be iron-clad. However, to the author's knowledge, no government-imposed lockdowns were in place that would have affected a 2020 college football game.

That said, parties seeking excuse might have a solid argument if their contract's force majeure clause mentions an order by a regulatory body, such as their respective conference or even the NCAA. For example, the 2020 game contract between Florida (which is a member of the Southeastern Conference) and New Mexico State asserts,

In the event of fire, flood, hurricane, tornado, or other weather-related occurrences such as a flooded field, lightning, earthquake, war, invasion, hostilities, labor dispute, rebellion, insurrection, confiscation by order of the government, **military or public authority or prohibitory governmental authority, including that of the Southeastern Conference or the National Collegiate Athletic Association**, or any circumstances making it impossible or impractical to play the game, both parties shall be relieved of any and all obligations of this agreement.<sup>70</sup>

Given that Power Five conferences either mandated conference-only schedules or—as was the case with the ACC and the Big 12—schedules that allowed for just one non-conference game, such clauses would be promising for Power Five schools seeking performance excuse. Since the conference members are subject to the rules of their respective conferences, the argument would be that the school's hands were tied, that they had no choice but to abide by their respective governing body's mandate.

### c. “Catch-All” Language

Additionally, a force majeure clause's “catch-all” language might provide relief for parties seeking excuse from performance. Such a clause is meant to incorporate other events into the force majeure clause that, though not

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<https://www.wsj.com/articles/act-of-god-legaltheory-allows-restaurant-rent-relief-during-coronavirus-restrictions-court-rules-11592519051> [<https://perma.cc/6VCW-5GR4>] (discussing a court ruling which the “force majeure provision in a restaurant lease excuse[d] the tenant's obligation to pay full rent during the time a stay-at-home order was implemented to slow the spread of Covid-19”).

<sup>70</sup> Hummer, *supra* note 46.

specifically listed in the force majeure clause, are unforeseeable events which trigger the force majeure clause.<sup>71</sup>

Recognizing that not all potential events can be specified or anticipated in a contract, a force majeure clause that is written generously will include language to expand the covered events beyond those listed in the contract. For example, it may introduce the list with a phrase like “including, but not limited to” or similar language to broaden the scope. Alternatively, or additionally, the clause may end the list with a “catch-all” phrase, such as “and any other events, including emergencies or non-emergencies,” to cover other, unforeseeable events.<sup>72</sup>

For example, as stated previously, the 2020 game contract between Florida and New Mexico State maintains,

In the event of fire, flood, hurricane, tornado, or other weather-related occurrences such as a flooded field, lightning, earthquake, war, invasion, hostilities, labor dispute, rebellion, insurrection, confiscation by order of the government, military or public authority or prohibitory governmental authority, including that of the Southeastern Conference or the National Collegiate Athletic Association, **or any circumstances making it impossible or impractical to play the game**, both parties shall be relieved of any and all obligations of this agreement.<sup>73</sup>

Another example, as stated previously, is the 2020 game contract between UCLA and New Mexico State which proclaims,

If either party is delayed or prevented from the performance of its obligations hereunder by reasons beyond such party's reasonable control due to a “Force Majeure Events” defined as acts of God, fires, flood, earthquake, war, public disaster, strikes or labor difficulties, **governmental regulation or order or any other similar cause beyond the party's reasonable control**, such party shall not be liable to the other for breach of its obligations under this Agreement (to the extent that the breach resulted from a Force Majeure Event).<sup>74</sup>

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71. Paula M. Bagger, *The Importance of Force Majeure Clauses in the COVID-19 Era*, ABA (Mar. 25, 2021), <https://www.americanbar.org/groups/litigation/committees/commercial-business/boilerplate-contracts/force-majeure-clauses-contracts-covid-19/> [https://perma.cc/3BMK-53WB].

72. Ryan, *supra* note 36.

73. Hummer, *supra* note 46 (emphasis added).

74. Hummer, *supra* note 46.

Given that such catch-all phrases, if included in game contracts, likely follow a specific list of triggering events, “[t]he rule of *ejusdem generis*, which literally means ‘of the same class[,]’ may also be relevant.”<sup>75</sup> This rule states that general wording is interpreted in light of a specific list of triggering events when the general wording follows the specific list.<sup>76</sup> “In this context it means that when a broad ‘catch-all’ phrase, such as ‘anything beyond the reasonable control of the parties[,]’ follows a list of more specific *force majeure* events, the catch-all phrase will be limited to events analogous to the listed events.”<sup>77</sup> Obviously, then, a strong case for using catch-all language to invoke force majeure would exist when such catch-all language follows a list of triggering events, including epidemics or some other similar word or phrase, such as public-health crisis.

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75. Damian McNair, *Force Majeure Clauses*, DLA PIPER 1 (2011), <https://www.dlapiper.com/~media/files/insights/publications/2012/06/iforce-majeurei-clauses/files/forcemajeureclauses/fileattachment/forcemajeureclauses.pdf> [<https://perma.cc/S8K4-5J27>].

76. *See id.* (providing an overview on force majeure clauses and their application).

77. *Id.*; see Jennifer Roach & Matthew Ridings, *Force Majeure & Commercial Contracts*, THE BUREAU OF NAT'L AFFS., INC. 3 (Mar. 2020), <https://www.thomsonhine.com/uploads/1137/doc/ForceMajeureCommercialContracts.pdf> [<https://perma.cc/LE94-HS9H>] (“Within the catch-all provision, courts are guided by the interpretative doctrine of *ejusdem generis*, which provides that the catch-all is limited to the same general kind or class of those things which are specifically mentioned.”).

2. If COVID-19 is a sufficient triggering event, other requirements must be met.

If the COVID-19 pandemic is determined to be a legitimate force majeure-triggering event, other requirements must still be met in order to excuse nonperformance.<sup>78</sup> As noted in Part III, these requirements vary, depending on the contract's specific language and whether the relevant state common law imposes on the parties any requirement(s) not listed in the contract. The following is a look at several common requirements.

- a. The force majeure-triggering event was unforeseeable.

Some states require that a listed force majeure-triggering act be unforeseeable, while other states do not.<sup>79</sup> And even if a state does not require a listed force majeure-triggering event to be unforeseeable, unforeseeability might still be required for a party to avail itself of a force majeure clause's "catch-all" provision.<sup>80</sup>

If the force majeure clause does not contain foreseeability or control language, there may be ambiguity around what the party claiming force majeure must show for their performance to be excused. Is the party excused simply because a listed event occurred? Or must they also show that they could not foresee, or take precautions to avoid, the event? The way that state courts resolve this ambiguity varies. Some states' laws—like California—may require that the foreseeability and control elements be read into a force majeure clause, even if the clause is silent on that point. Other states' laws—including Texas, Oklahoma, and Wyoming—suggest that a force majeure event need not be unforeseeable if the clause does not expressly include foreseeability as a factor.<sup>81</sup>

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78. See *supra* Part III.

79. See Rochefort & McRoskey, *supra* note 35 (analyzing state-specific requirements for force majeure in New York, Florida, California, Texas, and Illinois).

80. See Trey B.G. Sandoval III et al., *State of Texas Force Majeure Law Compendium (During COVID-19 Pandemic)*, US L. NETWORK, INC 2 (2020), [https://www.uslaw.org/files/Compendiums2020/COVID19\\_ForceMajeure\\_2020/Texas\\_USLAW\\_Compndium\\_COVID19\\_Force\\_Majeure\\_2020.pdf](https://www.uslaw.org/files/Compendiums2020/COVID19_ForceMajeure_2020/Texas_USLAW_Compndium_COVID19_Force_Majeure_2020.pdf) [<https://perma.cc/M3UU-TB3T>] (stating how one Texas court concluded a party must "demonstrate that a specific incident falling within the catch-all language was not foreseeable").

81. Steve Neeley, *Is COVID-19 a Force Majeure Event that Excuses Performance on Renewable Energy Construction Projects?*, HUSCH BLACKWELL (May 6, 2020) (footnote omitted), <https://www.emergingenergyinsights.com/2020/05/is-covid-19-a-force-majeure-event-that-excuses-performance-on-renewable-energy-construction-projects/> [<https://perma.cc/6MM4-NGYM>].

That the pandemic was unforeseeable is not a foregone conclusion considering that epidemics and pandemics occurred before the COVID-19 pandemic, some college-football game contracts' force majeure clauses listed epidemics and pandemics as triggering events, and epidemic and pandemic insurance was available to parties prior to the COVID-19 pandemic.

Even with a sufficiently broad force majeure provision containing a catch-all, the question of whether COVID-19 falls within the scope of that provision has no clear answer. The focal point of the analysis is the element of reasonable foreseeability—that is, whether the COVID-19 pandemic was unforeseeable when the contract was executed such that it falls within the scope of the catch-all and can constitute a valid basis for invoking force majeure.<sup>82</sup>

Attorneys from Freshfields, arguing in favor of unforeseeability, point to case law that sheds light on how courts might rule on the issue of whether the COVID-19 pandemic was unforeseeable, writing,

The issue of whether a pandemic is foreseeable is a novel one—the lack of severe outbreaks in the United States in recent memory means that no court has weighed in on this directly. But we can learn from other, similar cases. For example, in *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444 (3d Cir. 1983), the court noted that a hurricane is considered a *force majeure* event. Reasoning by analogy, coronavirus would likely be considered unforeseeable, because the exact timing, nature, and severity of the outbreak is similar to a hurricane: one may know that some sort of outbreak will likely happen at some point, but the event and its impacts are unpredictable enough that the event can support a *force majeure* defense. Similarly, in *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312 (S.D.N.Y. 1989), when considering equipment failures, the court found that “the fact that routine mechanical breakdowns were foreseen, does not necessarily mean major breakdowns were foreseeable.” The overall theme in these cases is that while certain classes of events may be expected—hurricanes, equipment failures, war, and even pandemics—the fact that we know that they are likely to happen at some point does not mean that they are foreseeable for the purposes of a *force majeure*

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82. Emil Petrossian, *Force Majeure and Other Contractual Issues in a COVID-19 World*, RISK MGMT. (July 8, 2020), <http://www.rmmagazine.com/2020/07/08/force-majeure-and-other-contractual-issues-in-a-covid-19-world/> [https://perma.cc/C9NT-MRNX].

defense. Rather, the unpredictable nature of these type of events mean that they are likely to be considered unforeseeable.<sup>83</sup>

Indeed, many others have averred that the COVID-19 pandemic was likely not foreseeable, particularly because of the rarity of such largescale viral diseases.<sup>84</sup> “The present situation involving COVID-19 is unprecedented . . . .”<sup>85</sup> Attorneys opine “the occurrence and rapid spread of COVID-19 was unforeseeable at the beginning of [2020],”<sup>86</sup> and “[i]t is likely that . . . courts will find Covid-19 unforeseeable, given that most Americans are experiencing a pandemic and associated quarantine orders for the first time.”<sup>87</sup> Others have written of the “unprecedented and unforeseeable disruption caused by the COVID-19 pandemic”<sup>88</sup> and stated “[i]n principle and until not long ago, Covid-19 was considered an unforeseeable event.”<sup>89</sup>

Any party seeking excuse from contractual performance due to the COVID-19 pandemic will certainly advance such an argument. Should universities find themselves defending breach-of-contract claims for

83. Timothy Harkness et al., *Coronavirus, Force Majeure and Foreseeability: Was the Current Pandemic Foreseeable, and What Would This Mean for Contract Claims?*, FRESHFIELDS (Mar. 24, 2020), <https://blog.freshfields.us/post/102g2t1/coronavirus-force-majeure-and-foreseeability-was-the-current-pandemic-foreseeab> [<https://perma.cc/V5F7-CVRQ>].

84. See, Cleve Clinton & Bill Drabble, *Can COVID-19 Trigger a Force Majeure Defense?*, TILTING THE SCALES (Mar. 24, 2020), <https://www.tiltingthescales.com/2020/03/24/can-covid-19-trigger-a-force-majeure-defense/> [<https://perma.cc/C4A2-MQUH>] (“COVID-19 was probably not foreseeable itself . . .”).

85. Michelle Quinn, *April Employment Contract Impossible To Perform: COVID-19 an Unforeseeable Event?*, MONDAQ (Apr. 23, 2020), <https://www.mondaq.com/canada/employment-and-workforce-wellbeing/922800/april-employment-contract-impossible-to-perform-covid-19-an-unforeseeable-event> [<https://perma.cc/HJ75-J8N8>].

86. Schuyler Moore, *Responding to COVID-19: How to Limit Damages After a Breached Contract*, HOLLYWOOD REP. (Mar. 16, 2020), <https://www.hollywoodreporter.com/business/business-news/covid-19-how-limit-damages-a-breached-contract-1284818/> [<https://perma.cc/95TW-UNBJ>].

87. Stefan Hasselblad, *How to Tell If COVID-19 Qualifies As Force Majeure in Your Contracts*, IDAHO BUS. REV. (June 16, 2020), <https://idahobusinessreview.com/2020/06/16/how-to-tell-if-covid-19-qualifies-as-force-majeure-in-your-contracts/> [<https://perma.cc/CM4B-Q2JD>].

88. Michael Weil & Nicholas Horton, *California Executive Order Allows Businesses to Assert an 'Unforeseeable Business Circumstances' Exception to California WARN Act for Events Caused by COVID-19; Notice Must Be As Soon As Practical*, ORRICK (Mar. 23, 2020), <https://blogs.orrick.com/employment/2020/03/23/california-executive-order-allows-businesses-to-assert-an-unforeseeable-business-circumstances-exception-to-california-warn-act-for-events-caused-by-covid-19-notice-must-be-as-soon/> [<https://perma.cc/THH7-UKLH>].

89. Jordi Sellarés-Serra et al., *Covid-19 and Distressed Solar PPAs in Spain*, PV MAG. (Mar. 25, 2021), <https://www.pv-magazine.com/2021/03/25/covid-19-and-distressed-solar-ppas-in-spain/> [<https://perma.cc/TZ47-KQUN>].

cancelling game contracts, they would be wise to focus their arguments regarding unforeseeability on the enormous breadth of COVID-19's global impact, arguing that, though a viral disease might be foreseeable, one with the global impact of COVID-19 surely was not.

b. The force majeure-triggering event prevented performance.

A party is not automatically excused from performance on force majeure grounds just because an event is sufficient to trigger a force majeure clause. Indeed, there must be a sufficient causal nexus between the event and the non-performance.<sup>90</sup> In other words, courts will inquire whether the triggering event actually prevented performance.<sup>91</sup> As the Supreme Court of New York wrote, “Interpretation of force majeure clauses is to be narrowly construed and ‘only if the *force majeure* clause specifically includes the event that actually prevents a party’s performance will that party be excused.’”<sup>92</sup> Indeed, the following examples of force majeure clauses from 2020 game contracts reveal that the drafters intended there to be a causal link between any triggering event and non-performance:

If it becomes impossible to play the football game **for reasons of** power failure, strikes, severe weather conditions, riots, war, or other unforeseen catastrophes or disasters beyond the control of either party, this agreement

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90. See *Easom v. US Well Servs., Inc.*, No. H-20-2995, 2021 WL 1092344, at \*9 n.4 (S.D. Tex. Mar. 22, 2021) (discussing plaintiffs’ argument challenging the existence of a sufficient “causal link between COVID-19 and the [defendant’s] layoffs”); see also *Aukema v. Chesapeake Appalachia, LLC*, 904 F. Supp. 2d 199, 210 (N.D.N.Y. 2012) (declining to accept defendant’s argument that a New York regulation prevented defendant’s performance under lease terms). In *Aukema*, terms of the oil and gas leases at issue “provide that the leases expire . . . if the land has not been operated by the [defendant] lessee in the production of oil or gas.” *Id.* at 209. Plaintiffs established termination of the leases, as it was undisputed defendants did not conduct any operations upon the leaseholds. *Id.* Defendants then argued a state regulation banning their only viable method of drilling constituted a force majeure event, thus extending the leases. *Id.* However, the court concluded the regulation banned only one type of drilling and did not preclude the use of conventional drilling methods. *Id.* at 210. Therefore, there was no casual connection between the event (the state regulation banning one type of drilling) and defendant’s non-performance (failing to drill whatsoever). *Id.*

91. *Aukema*, 904 F. Supp. 2d at 210.

92. *Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433, 434 (N.Y. App. Div. 2009) (quoting *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 NY2d 900, 902–03 (1987)); see *Miller Expl. Co. v. Energy Drilling Co.*, 130 F. Supp. 2d 781, 787 (W.D. La. 2001) (“Force majeure typically appears as a defense offered by a party who fails to perform a contract because an act of God or other uncontrollable event prevents performance.”) (citing *Matador Drilling Co., Inc. v. Post*, 662 F.2d 1190, 1197–98 (5th Cir. 1981)); see also *Aukema*, 904 F. Supp. 2d at 210 (“Finally, ‘a force majeure clause must include the specific event that is claimed to have prevented performance.’” (quoting *Phibro Energy, Inc. v. Empresa de Polimeros de Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989))).



may be terminated by either UH or Washington State. The football game shall be cancelled, and neither party shall be responsible to the other for any loss or damage. No such cancellation shall affect the parties' obligations as to subsequent games covered by this agreement. Notice of a force majeure event shall be given as soon as possible after the event by the affected team.<sup>93</sup>

It is herein agreed that neither party to this agreement shall be held liable for delay or failure in performance or shall be required to [pay] liquidated damages under Paragraph 8 herein for a canceled or defaulted game **resulting from** events or acts which are beyond control of such party, including events of limitation, such as: acts of God, athletic program termination, strikes, lockouts, riots, acts of war, epidemics, governmental or NCAA or other controlling athletic conference failures, earthquakes or other disasters. The proceeding notwithstanding, any financial obligations incurred by the party capable of performing shall be shared equally by the non-performing party. Notice of any such events shall be given as soon as possible.<sup>94</sup>

Though the author aims to make a case for performance excused, this requirement is problematic concerning that end. Parties advancing the argument that the COVID-19 pandemic was the actual reason they were unable to play certain scheduled games will likely encounter opposing arguments that maintain that these parties played other games during the season. Such arguments will reason that since COVID-19 did not prevent these schools from playing conference games, it cannot justify cancelling non-conference games.<sup>95</sup> As such, perhaps the best argument schools seeking non-performance might make concerning COVID-19 actually preventing performance is that COVID-19 was the reason their respective conferences mandated conference-only schedules; thus, COVID-19 indirectly prevented them from performing.<sup>96</sup>

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93. Duarte, *supra* note 43 (emphasis added).

94. Hummer, *supra* note 46 (emphasis added).

95. *See id.* (analyzing how such conduct could show schools “were willing to play football in 2020—just not with their prior scheduled opponent”); *see also* 2020 College Football Schedule and Results, SPORTS REFERENCE, <https://www.sports-reference.com/cfb/years/2020-schedule.html> [<https://perma.cc/6RXN-L9N8>] (cataloging the games played during the pandemic, including conference games).

96. *See, e.g.,* Ben Kercheval, *Pac-12 Follows Big Ten's Lead, Moves to Conference-Only College Football Schedule for 2020 Season*, CBS SPORTS (July 10, 2020, 7:21 PM), <https://www.cbssports.com/college-football/news/pac-12-follows-big-tens-lead-moves-to-conference-only-college-football-schedule-for-2020-season/> [<https://perma.cc/8DSV-UTH6>] (summarizing the Pac-12's response to a spike in COVID-19 cases by moving to conference-only schedule).

- c. The party seeking to be excused could not have mitigated the other party's damages.

Some states require that a party seeking to invoke force majeure attempt to mitigate damages to the other party.<sup>97</sup> This requirement is problematic for the same reason as the previous requirement. Opponents will again argue that the playing of conference games proves that mitigation was possible, if not by playing the game as scheduled, then by rescheduling the game.<sup>98</sup> Here again, schools seeking performance could argue they are bound to follow their respective conference's rules (in this case, a conference-only schedule); thus, playing the game as scheduled and rescheduling it during the same season were not possible. As such, according to this argument, mitigation was not possible, at least in regard to playing the game during the 2020 season.

- d. Timely, proper notice of force majeure invocation was given to the other party.

This requirement should not be problematic at all. Obviously, the specifics of timing and manner of force majeure invocation depend on the language of the relevant force majeure clause, but the author doubts that any school invoking force majeure due to COVID-19 would run into problems with this requirement, given how well publicized the conferences' scheduling decisions were.<sup>99</sup> As such, no parties should have been caught unaware.

#### B. *No Excuse*

The author contends Power Five universities that cancelled game contracts with Group of Five universities should not be excused based on the COVID-19-pandemic-motivated innovations of their respective contracts' force majeure clauses. For many, perhaps most, of the affected contracts, the author maintains that COVID-19 is not a sufficient force majeure-triggering event, and even if it is, the other requirements (via

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97. See generally *Force Majeure and Common Law Defenses: A National Survey*, SHOOK HARDY & BACON (Apr. 2020), <https://www.shb.com/-/media/files/insights/force-majeure-and-common-law-defenses-survey.pdf> [<https://perma.cc/JEA8-P6QD>] (providing information as to each state's requirement of a duty to mitigate with respect to force majeure clauses).

98. See sources cited *supra* note 95; Cobb, Kercheval & Sallee, *supra* note 25 (emphasizing COVID-19's impact on sports, including causing the postponement or cancellation of college football games).

99. See *supra* notes 8–10, 13–17, 18–22 and accompanying text.

contract language or state common law) for successfully invoking force majeure are not all met.

### C. *Not a Triggering Event*

For many, if not most, cancelled game contracts, the cancelling party will have a difficult time making the case that the COVID-19 pandemic is a sufficient force majeure-triggering event, based on the triggering categories explored previously.<sup>100</sup> Obviously, contracts that do not mention pandemic or epidemic will not be able to use the easiest route to trigger their respective force majeure clause.

Likewise, these parties should not be able to point to language in their respective force majeure clauses regarding a government order since (again, to the author's knowledge) no government-mandated lockdown was in place that would have affected these parties' abilities to play their cancelled games. On the other hand, if any force majeure clauses listed rules imposed on a party by their respective athletic conference, the case for such parties would be much stronger. However, for reasons discussed below, a cancelling party should not be excused from performance even if a conference rule is found to trigger a force majeure clause.

As for act of God language, just as parties can make the argument that the COVID-19 pandemic is an act of God that triggers a force majeure clause, an equally strong, if not stronger, argument might be made that it is not.<sup>101</sup> Indeed, some lawyers have already advanced the argument that the COVID-19 pandemic is unlikely to qualify as an act of God,<sup>102</sup> and such

100. See *supra* Part IV.A.1.

101. See Robert B. Milligan & Darren W. Dummit, *COVID-19 Update: Force Majeure Under California Law in Business and Commercial Disputes*, SEYFARTH (Mar. 26, 2020), <https://www.seyfarth.com/news-insights/covid-19-update-force-majeure-under-california-law-in-business-and-commercial-disputes.html> [<https://perma.cc/CS8Y-CYKB>] (“[O]ne could argue . . . that while the virus may not have been man-made, the spread of the virus and resulting epidemic is certainly man-made, and therefore not an ‘act of God’ in the traditional sense.”); see also Menachem J. Kastner et al., *Commercial Tenants Raising Impossibility of Performance and Frustration of Purpose*, COZEN O’CONNOR (May 6, 2020), <https://www.cozen.com/news-resources/publications/2020/commercial-tenants-raising-impossibility-of-performance-and-frustration-of-purpose> [<https://perma.cc/FTM2-ZNEC>] (“The bottom line is that epidemics, pandemics, and plagues are not wholly unforeseeable. Indeed, we have seen various force majeure clauses in leases that specifically reference epidemics, pandemics, or plague, albeit that these provisions expressly carve out payment of rent as not being subject to force majeure.”).

102. *Contract Law: Is COVID-19 Considered an Act of God?*, CIPPARONE & CIPPARONE (Dec. 10, 2020), <http://www.cipparonepa.com/contract-law-is-covid-19-act-of-god/> [<https://perma.cc/7A3D-WWB8>] (concluding COVID-19 likely will not fall under the category of act of God). Likewise, New York Governor Andrew Cuomo stated the COVID-19 pandemic is not an act of God.

an argument has already been made in litigation.<sup>103</sup> A court might be persuaded by the United States District Court for the Western District of Texas's holding in *Jada Restaurant Group, LLC v. Acadia Insurance Company*,<sup>104</sup> that a virus is not a "force of nature" for purposes of Texas Insurance Code Section 542A.001(2)(c).<sup>105</sup>

In sum, cancelling parties might not be best suited to argue that the COVID-19 pandemic should be included in their respective contracts' catch-all provisions, especially if their contracts only list weather-related events as triggering events, considering that courts construe force majeure language narrowly.

#### D. Other Force Majeure Requirements

Even if COVID-19 is found to be a sufficient triggering event for a given cancelling party (and, for purposes of argument, the author concedes that it will be), the author maintains that said party will not be able to invoke force majeure successfully due to other deficiencies. In other words, even if a

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See Brady Dennis et al., *Even As Deaths Mount, Officials See Signs Pandemic's Toll May Not Match Worst Fears*, WASH. POST (Apr. 8, 2020), [https://www.washingtonpost.com/politics/even-as-deaths-mount-officials-see-signs-pandemics-toll-may-not-match-worst-fears/2020/04/07/cb2d2290-78d1-11ea-9bee-c5bf9d2e3288\\_story.html](https://www.washingtonpost.com/politics/even-as-deaths-mount-officials-see-signs-pandemics-toll-may-not-match-worst-fears/2020/04/07/cb2d2290-78d1-11ea-9bee-c5bf9d2e3288_story.html) [<https://perma.cc/R7ZZ-5DKF>] ("This is not an act of God we're looking at . . . . It's an act of what society actually does.") (quoting New York Governor Andrew Cuomo); see also Christina B. Burgess et al., *Securitization Disclosure and Document Updates for 2020 and 2021*, NAT'L L. REV. (Dec. 23, 2020), <https://www.natlawreview.com/article/securitization-disclosure-and-document-updates-2020-and-2021> [<https://perma.cc/GR2X-94GY>] ("The pandemic also has affected force majeure clauses in securitization documents. Initially, the outlook was that COVID-19 was not an 'act of God' but an event akin to prior, less invasive, public health emergencies, such as the Swine Flu epidemic or the Ebola outbreak."). Though the author takes no position on this argument, some have advanced the argument that the COVID-19 pandemic "is not an act of God as it could be man-made . . . ." *COVID-19 & the Doctrine of Commercial Impracticability*, MAXWELL INVS. GRP. (Apr. 13, 2020), <https://maxwellinvestmentsgroup.com/2020/04/13/covid-19-the-doctrine-of-commercial-impracticability/> [<https://perma.cc/QC57-LF3R>]. On the topic of the human factor within the COVID-19 pandemic, see Woods & Swindall, *supra* note 62 ("Similarly, 'an act of God means a casualty which is not only not due to human agency, but is one which is in no wise contributed to by human agency, and that an act which may be prevented by the exercise of ordinary care is not an act of God.'").

103. See Daphne Zhang, *COVID-19 Not 'Act of God' Manufacturer Tells Calif. Court*, LAW360 (Jan. 13, 2021), <https://www.law360.com/articles/1344356/covid-19-not-act-of-god-manufacturer-tells-calif-court> [<https://perma.cc/VU7M-659Z>] (indicating a metal manufacturer argued COVID-19 was not an act of God to compel its debtor to pay more than \$4 million in debt "after the company tried to invoke a 'force majeure' provision in the parties' contract to allegedly avoid payment").

104. *Jada Rest. Grp. v. Acadia Ins. Co.*, SA-20-CV-00807-XR, 2020 WL 5362071 (W.D. Tex. Sept. 8, 2020).

105. *Id.* at \*3 ("Further, the Court finds that a virus is not a 'force of nature' for the purposes of this statute.").

court finds the COVID-19 pandemic to be sufficient to trigger a contract's force majeure clause, the author does not believe each of the other requirements for successfully invoking force majeure can be satisfied. At best, the necessary force majeure requirements are not all met. At worst, potentially only one of them is.

1. The force majeure-triggering event was unforeseeable.

An epidemic or pandemic is always a possibility, as each has happened before.<sup>106</sup> Indeed, many force majeure clauses in a variety of industries list epidemics and/or pandemics as triggering events, indicating that viral diseases are not unforeseeable.<sup>107</sup> Moreover, some contractual parties even purchased pandemic insurance before the COVID-19 pandemic. Wimbledon did, for example, and it paid off when the 2020 tournament was cancelled due to COVID-19.<sup>108</sup>

Some have already claimed the COVID-19 pandemic was not unforeseeable,<sup>109</sup> while others, when discussing each side of the foreseeability debate, have posed interesting arguments against unforeseeability.<sup>110</sup> Undoubtedly, courts will be called upon to determine

106. See Jocelyne Piret & Guy Boivin, *Pandemics Throughout History*, FRONTIERS IN MICROBIOLOGY 1, 2 (Jan. 15, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7874133/pdf/fmicb-11-631736.pdf> [<https://perma.cc/JT5A-XAN8>] (providing timeline of pandemics).

107. See *ICC Force Majeure Clause 2003: ICC Hardship Clause 2003*, INT'L CHAMBER OF COM. 9 (Feb. 2003), <https://iccwbo.org/content/uploads/sites/3/2017/02/ICC-Force-Majeure-Hardship-Clause.pdf> [<https://perma.cc/NDK3-92FB>] (listing "epidemic" as a triggering event in its model force majeure clause).

108. *Wimbledon Shows How Pandemic Insurance Could Become Vital for Sports, Other Events*, INS. J. (Apr. 13, 2020), <https://www.insurancejournal.com/news/international/2020/04/13/564598.htm> [<https://perma.cc/QPC7-977A>] ("The Wimbledon tennis tournament had the foresight to buy around £1.5 million (US\$1.9 million) per year in pandemic insurance following the SARS outbreak in 2003, said GlobalData in a recent bulletin. Paying out roughly £25.5 million (US\$31.7 million) in premiums over that 17-year period, Wimbledon is set to receive an insurance payout of around £114 million (US\$142 million) for this year's cancelled tournament . . .").

109. See Eric Helmy, *This Pandemic Was Foreseeable. Hospital Systems That Chose Not to Adequately Prepare May Be Liable for Failure to Protect First Responders From Foreseeable Harm (But Beware Workers' Comp Bar)*, NW. BUS. L. LLC (Mar. 27, 2020), <https://www.nwbizlaw.com/blog/2020/march/this-pandemic-was-foreseeable-hospital-systems-t/> [<https://perma.cc/KW3H-CX6M>] (arguing the pandemic was foreseeable because "potential outbreaks of infectious disease have been known for decades").

110. See Harkness et al., *supra* note 83 ("[W]ith the economic downturn produced by the coronavirus, it is likely that this issue will be seriously litigated in the years to come. Zealous lawyers are unlikely to concede the point, and foreseeability is [a] question of fact, and therefore may be ultimately decided by juries. Finally, it may be that as public awareness grows about the pandemic, and

whether the COVID-19 pandemic was unforeseeable. As such, regarding game contracts with force majeure clauses that did not list epidemics or pandemics as triggering events, non-cancelling parties should assert that the COVID-19 pandemic was not unforeseeable, and that the cancelling parties could have accounted for a pandemic in their respective force majeure clauses but simply did not.

2. The force majeure-triggering event prevented performance.

The COVID-19 pandemic did not truly prevent performance of any game cancelled before the 2020 FBS college football season. The author discusses this requirement in conjunction with the next—the requirement that the party seeking to be excused could not have mitigated the party’s damages—because the next requirement cannot be met for the same reason as this one, and this argument is the most crucial position advanced in this Article.

3. The party seeking to be excused could not have mitigated the other party’s damages.

Firstly, the COVID-19 pandemic did not actually prevent any Power Five school from keeping on its regular-season schedule games against any Group of Five school because each Power Five school played a regular-season schedule.<sup>111</sup> The following is a list of the number of games (regular-season and post-season) each Power Five school played during the 2020 college football season:

- Atlantic Coast Conference<sup>112</sup>
  - Boston College: 11
  - Clemson University: 12
  - Duke University: 11
  - Florida State University: 9
  - Georgia Institute of Technology: 10
  - North Carolina State University: 12
  - Syracuse University: 11

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we learn just how predictable it was (and how we failed to take steps to prevent it), questions about whether the pandemic was ‘foreseeable’ may be subject to more scrutiny.”)

111. See *2020 College Football Schedule and Results*, *supra* note 95 (showing the college football games every participating school played, including Power Five schools, during the 2020 season).

112. *2020 Football Standings*, THE ACC, <https://theacc.com/standings.aspx?standings=45> [<https://perma.cc/94QZ-3JB6>].

- University of Louisville: 11
- University of Miami: 11
- University of North Carolina: 12
- University of Notre Dame (included in conference for 2020 season only): 12
- University of Pittsburgh: 11
- University of Virginia: 10
- Virginia Polytechnic Institute and State University: 11
- Wake Forest University: 9
  
- Big Ten Conference<sup>113</sup>
  - University of Illinois: 8
  - Indiana University: 8
  - University of Iowa: 8
  - University of Maryland: 5
  - University of Michigan: 6
  - Michigan State University: 7
  - University of Minnesota: 7
  - University of Nebraska: 8
  - Northwestern University: 9
  - The Ohio State University: 8
  - Pennsylvania State University: 9
  - Purdue University: 6
  - Rutgers: 9
  - University of Wisconsin: 7
  
- Big 12 Conference<sup>114</sup>
  - Baylor University: 9
  - Iowa State University: 12
  - University of Kansas: 9
  - Kansas State University: 10
  - University of Oklahoma: 11
  - Oklahoma State University: 11
  - Texas Christian University: 10
  - University of Texas at Austin: 10

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113. 2020 Football Standings, *supra* note 28.

114. 2020 Football Standings, BIG 12 CONF., <https://big12sports.com/standings.aspx?standings=159&path=football> [<https://perma.cc/5MNY-CYHG>].

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- Texas Tech University: 10
- West Virginia University: 10
  
- Pac-12 Conference<sup>115</sup>
  - University of Arizona: 5
  - Arizona State University: 4
  - University of California, Berkeley: 4
  - University of California, Los Angeles: 7
  - University of Colorado: 5
  - University of Oregon: 6
  - Oregon State University: 7
  - University of Southern California: 6
  - Stanford University: 6
  - University of Utah: 5
  - University of Washington: 4
  - Washington State University: 4
  
- Southeastern Conference<sup>116</sup>
  - University of Alabama: 13
  - University of Arkansas: 10
  - Auburn University: 11
  - University of Florida: 12
  - University of Georgia: 10
  - University of Kentucky: 11
  - Louisiana State University: 10
  - Mississippi State University: 11
  - University of Mississippi: 10
  - University of Missouri: 10
  - University of South Carolina: 10
  - University of Tennessee: 10
  - Texas A&M University: 10
  - Vanderbilt University: 9

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115. 2020 *Football Standings*, PAC-12 (2020), <https://pac-12.com/football/standings?year=2020> [https://perma.cc/J59Q-HE3C].

116. 2020 *Southeastern Conference Year Summary*, SPORTS REFERENCE, <https://www.sports-reference.com/cfb/conferences/sec/2020.html> [https://perma.cc/8ZUG-GSJT].



Thus, the average number of games played by schools in the ACC, Big Ten, Big 12, PAC-12, and SEC, respectively, was 10.87, 7.5, 10.2, 5.25, and 10.5.

Secondly, a range of options are available for Power Five schools to mitigate damages to non-Power Five schools, including playing the games as scheduled, rescheduling the games, or paying liquidated or other damages.<sup>117</sup> In some cases, a school might have chosen to pay damages to the other party, but if not, paying damages would be one avenue to mitigate. Moreover, if a Power Five school felt a non-Power Five opponent's COVID-19 testing protocols were inadequate, that Power Five school could have helped the non-Power Five school by paying for additional or different tests. In such a case, the parties could have agreed to deduct the cost of doing so from the game payout to the non-Power Five team or, as a sign of good faith, the Power Five team could have absorbed the cost entirely.

Fundamentally, the COVID-19 pandemic did prevent the playing of games. There is simply no logical justification for playing conference opponents but not non-conference opponents. Had Power Five conferences not changed their regular-season schedules, certainly a Power Five school's game against a non-Power Five school could have been justifiably cancelled just before the game had COVID-19 infections directly impacted either team (as was the case for several games cancelled during the 2020 season),<sup>118</sup> but that is not what happened here. Rather, the games were cancelled well before the regular season began.<sup>119</sup> As such, Power Five conferences' decisions to play a full regular season against conference opponents from a variety of states cannot be justified by the argument that playing a conference-only schedule was an effort to protect the health and safety of Power Five teams.

The irrationality of this is highlighted by the fact that, for some of the cancelled games, the Group of Five opponent is geographically closer to the cancelling Power Five school than are some of the Power Five schools that

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117. See Jesse Rubinstein, *How Contract Provisions and Common Law Principles Will Impact the Sport Business*, JDSUPRA (Sept. 4, 2020), <https://www.jdsupra.com/legalnews/how-contract-provisions-and-common-law-33248/> [<https://perma.cc/Z9DD-CQHH>] (“Normally, these non-conference games result in large guarantee payments for the teams involved.”).

118. See Cobb, Kercheval, & Sallee, *supra* note 25 (discussing the postponement of college football games during the 2020 season due to COVID-19).

119. See, e.g., Brett Vito, *Texas A&M AD Bjork Says School Doesn't Owe UNT for Canceled Game*, DENTON REC.-CHRON. (July 31, 2020), [https://dentonrc.com/sports/texas-a-m-ad-bjork-says-school-doesnt-owe-unt-for-canceled-game/article\\_290cb6c1-da29-597a-9e68-43ecc07ab97c.html](https://dentonrc.com/sports/texas-a-m-ad-bjork-says-school-doesnt-owe-unt-for-canceled-game/article_290cb6c1-da29-597a-9e68-43ecc07ab97c.html) [<https://perma.cc/B8CR-QL6M>] (commenting on the cancelled football game between Power Five conference school Texas A&M and non-Power Five conference school North Texas).

remained on (or were added to) the cancelling school's schedule.<sup>120</sup> A glaring example of this reality was the cancellation of the Louisiana State University (LSU) (Power Five) vs. Nicholls State (Group of Five) game.<sup>121</sup> LSU, located in Baton Rouge, Louisiana, is 68.3 miles from Nicholls State,<sup>122</sup> located in Thibodaux, Louisiana, yet LSU played games at Auburn (418 miles away),<sup>123</sup> Vanderbilt (586 miles away),<sup>124</sup> Arkansas (530 miles away),<sup>125</sup> Florida (587 miles away),<sup>126</sup> and Missouri (748 miles away).<sup>127</sup> Likewise, Texas A&M's (Power Five) game against the University of North Texas (UNT) (Group of Five) was cancelled.<sup>128</sup> Texas A&M, located in College Station, Texas, is 210 miles from UNT,<sup>129</sup> located in Denton, Texas. Yet Texas A&M played away games against Mississippi State (570

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120. See *infra* notes 121–143 and accompanying text.

121. See *Nicholls at LSU Football Game Canceled*, NICHOLLS STATE UNI. ATHLETICS (July 30, 2020, 6:00 PM), <https://geauxcolonels.com/news/2020/7/30/nicholls-at-lsu-football-game-canceled.aspx> [https://perma.cc/347Y-33WN] (describing the cancellation of Nicholls State's first football game against LSU due to COVID-19).

122. GOOGLE MAPS, <https://www.google.com/maps/dir/Louisiana+State+University,+Baton+Rouge,+LA+70803/Nicholls+State+University,+East+1st+Street,+Thibodaux,+LA/> [https://perma.cc/X3SZ-2558].

123. GOOGLE MAPS, <https://www.google.com/maps/dir/Louisiana+State+University,+Baton+Rouge,+LA+70803/Auburn+University,+Auburn,+AL/> [https://perma.cc/5MS5-RZ32].

124. GOOGLE MAPS, <https://www.google.com/maps/dir/Louisiana+State+University,+Baton+Rouge,+LA+70803/Vanderbilt+University,+West+End+Avenue,+Nashville,+TN/> [https://perma.cc/7ZYR-8HLL].

125. GOOGLE MAPS, <https://www.google.com/maps/dir/Louisiana+State+University,+Baton+Rouge,+LA+70803/University+of+Arkansas,+Fayetteville,+AR/> [https://perma.cc/WD6E-7ZER].

126. GOOGLE MAPS, <https://www.google.com/maps/dir/Louisiana+State+University,+Baton+Rouge,+LA+70803/University+of+Florida,+Gainesville,+FL+32611/> [https://perma.cc/V6T5-2Q2B].

127. GOOGLE MAPS, <https://www.google.com/maps/dir/Louisiana+State+University,+Baton+Rouge,+LA+70803/University+of+Missouri,+Columbia,+MO/> [https://perma.cc/837Q-VKK3].

128. Vito, *supra* note 119.

129. GOOGLE MAPS, <https://www.google.com/maps/dir/Texas+A%26M+University,+400+Bizzell+St,+College+Station,+TX+77843/University+of+North+Texas,+Union+Circle,+Denton,+TX/> [https://perma.cc/BSC8-4KLE].

miles away),<sup>130</sup> Alabama (630 miles away),<sup>131</sup> Auburn (743 miles away),<sup>132</sup> Tennessee (758 miles away),<sup>133</sup> and South Carolina (1,038 miles away).<sup>134</sup> South Carolina (Power Five) cancelled games against three in-state non-Power Five opponents<sup>135</sup>: Wofford (94.1 miles away),<sup>136</sup> East Carolina (272 miles away),<sup>137</sup> and Coastal Carolina (128 miles away).<sup>138</sup> However, South Carolina played on the road against Florida (358 miles away),<sup>139</sup>

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130. GOOGLE MAPS, <https://www.google.com/maps/dir/Texas+A%26M+University,+400+Bizzell+St,+College+Station,+TX+77843/Mississippi+State+University,+75+B.+S.+Hood+Road,+Mississippi+State,+MS+39762/> [https://perma.cc/3LWA-AU6N]; *Texas A&M Aggies Schedule 2020*, ESPN, [https://www.espn.com/college-football/team/schedule/\\_/id/245/season/2020](https://www.espn.com/college-football/team/schedule/_/id/245/season/2020) [https://perma.cc/J3CT-T6UQ].

131. GOOGLE MAPS, <https://www.google.com/maps/dir/Texas+A%26M+University,+400+Bizzell+St,+College+Station,+TX+77843/The+University+of+Alabama,+Tuscaloosa,+Alabama/> [https://perma.cc/8ADU-ZKPT]; *Texas A&M Aggies Schedule 2020*, *supra* note 130.

132. GOOGLE MAPS, <https://www.google.com/maps/dir/Texas+A%26M+University,+400+Bizzell+St,+College+Station,+TX+77843/Auburn+University,+Auburn,+AL/> [https://perma.cc/YQ2H-KMLN]; *Texas A&M Aggies Schedule 2020*, *supra* note 130.

133. GOOGLE MAPS, <https://www.google.com/maps/dir/Texas+A%26M+University,+400+Bizzell+St,+College+Station,+TX+77843/Tennessee+State+University,+John+A+Merritt+Boulevard,+Nashville,+TN/> [https://perma.cc/YJ5W-E44D]; *Texas A&M Aggies Schedule 2020*, *supra* note 130.

134. GOOGLE MAPS, <https://www.google.com/maps/dir/Texas+A%26M+University,+400+Bizzell+St,+College+Station,+TX+77843/University+of+South+Carolina,+Columbia,+SC/> [https://perma.cc/WZP7-9BE4]; *Texas A&M Aggies Schedule 2020*, *supra* note 130.

135. Ben Portnoy & Alan Blondin, *South Carolina, Coastal Carolina Reschedule Football Game That Was Canceled by COVID*, THE STATE (Apr. 20, 2021, 5:20 PM), <https://www.thestate.com/sports/college/university-of-south-carolina/usc-football/article250814489.html> [https://perma.cc/WS3W-LZ2Q].

136. GOOGLE MAPS, <https://www.google.com/maps/dir/University+of+South+Carolina,+Columbia,+SC+29208/Wofford+College,+Wofford+Campus+Drive,+Spartanburg,+SC/> [https://perma.cc/WX4R-MD8E]; see Portnoy & Blondin, *supra* note 135 (detailing South Carolina's rescheduled 2020 nonconference games, including playing Wofford in 2024).

137. GOOGLE MAPS, <https://www.google.com/maps/dir/University+of+South+Carolina,+Columbia,+SC+29208/East+Carolina+University,+East+5th+Street,+Greenville,+NC/> [https://perma.cc/YCH7-5Q3B]; see Portnoy & Blondin, *supra* note 135 (outlining plans for South Carolina to play East Carolina in 2027 rather than 2020).

138. GOOGLE MAPS, <https://www.google.com/maps/dir/University+of+South+Carolina,+Columbia,+SC+29208/Coastal+Carolina+University,+Chanticleer+Drive+East,+Conway,+SC/> [https://perma.cc/5J9L-GC8X]; see Portnoy & Blondin, *supra* note 135 (reporting South Carolina rescheduled its 2020 nonconference game against Coast Carolina to 2025).

139. GOOGLE MAPS, <https://www.google.com/maps/dir/University+of+South+Carolina,+Columbia,+SC+29208/University+of+Florida,+Gainesville,+Florida/> [https://perma.cc/UWQ3-YP59]; *South Carolina Gamecocks Schedule 2020*, ESPN, [https://www.espn.com/college-football/team/schedule/\\_/id/2579/season/2020](https://www.espn.com/college-football/team/schedule/_/id/2579/season/2020) [https://perma.cc/JGL5-3CD3].

Kentucky (418 miles away),<sup>140</sup> Vanderbilt (442 miles away),<sup>141</sup> Ole Miss (546 miles away),<sup>142</sup> and LSU (735 miles away).<sup>143</sup>

One could and should argue playing against geographically closer out-of-conference opponents is at least as safe, if not safer, than playing games against conference opponents located farther away, given reduced travel time.<sup>144</sup> And though the examples listed are examples of a team playing away games, the argument holds for playing home games against far-away teams, as well. Regardless of which team is the visiting team, a team is travelling a greater distance to play a conference opponent than against non-conference opponents located closer to its campus.

The COVID-19 pandemic did not prevent Power Five schools from playing against non-conference opponents, including Group of Five opponents, considering Power Five schools still played their regular seasons against almost entirely conference-only opponents. As such, even if courts rule that the COVID-19 pandemic is a sufficient force majeure-triggering event, courts should not find a sufficient causal connection between the COVID-19 pandemic and the cancellation of games. For this reason alone, schools should not be able to use force majeure to excuse their non-performance.

Admittedly, however, Power Five schools can argue their hands were tied due to their respective conference's decision to play mostly or entirely conference-only schedules. For example, such would be the case for the cancelled game between Florida and New Mexico State because the Southeastern Conference (of which Florida is a member) changed its 2020 regular season to a conference-only schedule.<sup>145</sup> The force majeure

140. GOOGLE MAPS, <https://www.google.com/maps/dir/University+of+South+Carolina,+Columbia,+SC+29208/University+of+Kentucky,+Lexington,+Kentucky/> [https://perma.cc/CR C5-X77Y]; *South Carolina Gamecocks Schedule 2020*, *supra* note 139.

141. GOOGLE MAPS, <https://www.google.com/maps/dir/University+of+South+Carolina,+Columbia,+SC+29208/Vanderbilt+University,+West+End+Avenue,+Nashville,+TN/> [https://perma.cc/V2CB-BWZ8]; *South Carolina Gamecocks Schedule 2020*, *supra* note 139.

142. GOOGLE MAPS, <https://www.google.com/maps/dir/University+of+South+Carolina,+Columbia,+SC+29208/University+of+Mississippi,+University,+MS/> [https://perma.cc/6T2Y-YJHB]; *South Carolina Gamecocks Schedule 2020*, *supra* note 139.

143. GOOGLE MAPS, <https://www.google.com/maps/dir/University+of+South+Carolina,+Columbia,+SC+29208/Louisiana+State+University,+Baton+Rouge,+LA/> [https://perma.cc/79 XK-5YVV]; *South Carolina Gamecocks Schedule 2020*, *supra* note 139.

144. See *Travel FAQs*, CTFS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/faqs.html> [https://perma.cc/LYB9-72FX] (warning travel increases risks of getting and spreading COVID-19).

145. *SEC Announces New 2020 Football Schedule*, SEC (Aug. 17, 2020), <https://www.secsports.com/article/29682732/sec-announces-new-2020-football-schedule> [https://perma.cc/399C-DRFM].

clause for that game's contract lists "military or public authority or prohibitory governmental authority, including that of the Southeastern Conference or the National Collegiate Athletic Association" as force majeure-triggering events.<sup>146</sup> Teams in such situations would certainly assert that the game cancellation was not their decision and, as such, should not be found to be in breach of contract. Even so, non-Power Five schools with games against Power Five opponents cancelled due to the scheduling changes mandated by Power Five conferences should not be foreclosed from seeking and receiving a remedy for their damages. The author explores this in Part V.

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146. Hummer, *supra* note 46.

4. Timely, proper notice of force majeure invocation was given to the other party.

This requirement should be no hurdle for cancelling parties, but meeting the notice requirement is a moot point considering the other deficiencies.

#### V. POTENTIAL LEGAL CLAIMS AGAINST CANCELLING SCHOOLS

Power Five member institutions should not be excused from their 2020 game contracts with non-Power Five schools. As such, non-breaching non-Power Five schools could advance legal claims. Depending on the schools' agreement's terms, "the university cancelling the game may still owe the other school some level of compensation for breaking the agreement, . . . [and] [i]f the cancelling university refuses to pay, then it would not be surprising if the other school would elect to file a lawsuit."<sup>147</sup>

However, just because a non-Power Five school could bring a legal claim against the Power Five school or conference that cancelled a game does not mean it will bring those claim(s). Perhaps partly because suing a Power Five school or conference could jeopardize the prospects for playing future games against them.<sup>148</sup> Indeed, the author is not aware of a single claim that has been filed against a Power Five team or conference. Some schools are at least exploring their options, though.<sup>149</sup>

Even if non-Power Five schools file claims, they likely will not proceed to trial. Rather, parties will probably settle out of court. "What a judge would consider unforeseeable is truly unknowable, which makes it all the more likely these disputes will be settled out of court. . . . There are arguments on both sides, which makes it sensible for parties to come to a resolution outside of court."<sup>150</sup> Accordingly,

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147. *Cancellation of Non-Conference College Football Games May Lead To a New Battle in the Courtroom*, IND. UNIV. (July 10, 2020, 1:55 PM), [https://www.newswise.com/politics/iu-expert-cancellation-of-non-conference-college-football-games-may-lead-to-a-new-battle-in-the-courtroom/?article\\_id=734525](https://www.newswise.com/politics/iu-expert-cancellation-of-non-conference-college-football-games-may-lead-to-a-new-battle-in-the-courtroom/?article_id=734525) [<https://perma.cc/AKA9-3JAP>].

148. See Jeremy Mauss, *Will Mountain West Teams Still Get Paid for Cancelled Games vs. Power 5 Schools?*, MOUNTAIN W. WIRE (July 11, 2020), <https://mwwire.com/2020/07/11/will-mountain-west-teams-still-get-paid-for-cancelled-games-vs-power-5-schools/> [<https://perma.cc/ESJ9-FAGH>] ("The options for the [Air Force] Falcons could be to sue Purdue and/or the Big Ten over cancelling the game but that could put a huge sour taste in the mouths of not only those two parties but any other Power [Five] team in the future.")

149. See *id.* (stating the Air Force athletics director was disappointed with the cancellation against Purdue and was contemplating a resolution of its contract).

150. Blau, *supra* note 47.

[S]ettlements are much more likely, providing short-term relief for the party while also maintaining relationships for the future. And that's the rub with all of this legal talk. Lawyers are involved everywhere, but those 247Sports spoke with said in-court litigation is unlikely between athletic departments. Smaller schools rely on being able to schedule these games into the future for their own survival.<sup>151</sup>

Indeed, many schools affected by game cancellations are actively seeking to resolve the situation amicably, whether by paying liquidated damages, as specified in their respective contract, or by rescheduling the cancelled game for a future season.<sup>152</sup> However, even the latter remedy could be an insufficient remedy for some non-Power Five schools, given that some of their athletic budgets depend on the large game payments they receive for matchups against Power Five schools.<sup>153</sup> Such schools could have extreme difficulty weathering the period of time before playing a future game. In fact, “[s]ome schools can’t afford to push the game four years into the future. A million dollars can make the difference for smaller, leaner athletic departments hoping to save jobs.”<sup>154</sup> Even if the parties cannot reach a mutually agreeable resolution, the author believes at least two legal claims potentially exist for non-breaching non-Power Five schools.

#### A. *Breach of Contract*

Non-Power Five schools could sue their cancelled Power Five opponents for breaches of contract, arguing the latter are not excused by their respective force majeure clauses, either because the COVID-19 pandemic does not trigger a force majeure clause or because, though the force majeure is triggered, other force majeure requirements are not met.<sup>155</sup>

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151. Hummer, *supra* note 46.

152. The author partially bases this assertion on off-the-record interviews with some officials from Group of Five conferences. *See id.* (“What happens if a contract is broken and force majeure doesn’t provide cover? Likely not much in most cases. The term ‘make good’ will come up often with schools rescheduling contests at a future date at a similar compensation rate.”).

153. *See generally* Aria Gerson & Steve Berkowitz, *More Than \$100 Million at Stake if Other Power 5 Schools Eliminate Non-Conference Games*, USA TODAY (July 11, 2020, 4:04 PM), <https://www.usatoday.com/story/sports/ncaaf/2020/07/11/if-more-conferences-cancel-guarantee-games-coronavirus-138-million-could-stake/5420850002/> [<https://perma.cc/3EZQ-26ZM>].

154. Hummer, *supra* note 46.

155. *See* Blau, *supra* note 47 (“The Big Ten may have decided to cancel all non-conference games, not IU. But that doesn’t necessarily let IU off the hook for breaching its contract, Grow said. And while the Ball State contract includes a force majeure that refers to unforeseen catastrophes, a judge could say IU should have listed ‘pandemic’ or ‘global health emergency,’ as other event contracts or collective bargaining agreements have.”).

Surely a central contention in a breach-of-contract claim from a non-Power Five school would be that the Power Five school cancelled its contract due to the COVID-19 pandemic, yet the pandemic did not prevent said Power Five school from playing games against conference opponents (and, in some cases, against non-conference opponents). This argument is even stronger regarding Power Five schools that played against Power Five non-conference schools in bowl games or the College Football Playoff. In essence, the non-Power Five school would ask, “why play a season full of opponents but not play us?” Further, “[t]hen there is the idea that if conferences are able to play within its own league then maybe that does not fall under force majeure for those non-conference games. That is a very valid question because why can you play games against certain teams and not others.”<sup>156</sup> On this point,

The ACC, for example, is discussing a number of scheduling models. One [of] the main scenarios involves ACC teams playing at least one, but not all, of their out-of-conference games. Another would have Notre Dame, a football independent, playing as part of the league schedule. In both cases, the league would be choosing to play some non-conference opponents—like keeping Clemson vs. South Carolina to protect a traditional rivalry—but not others. In those all-[too]-real scenarios, the parties that had games canceled would have strong legal grounds to chase their contractually-mandated payment.<sup>157</sup>

As outlined in Part IV, non-Power Five schools should, depending on the language of the relevant force majeure clauses, argue that (1) the COVID-19 pandemic was insufficient to trigger the force majeure clause or (2) even if the pandemic was a force majeure-triggering event, force majeure should not be granted as an affirmative defense, due to the fact that the invoking party does not meet certain other force majeure requirements.

Regarding the former argument, non-Power Five schools’ positions will obviously depend on what the relevant force majeure clause includes. The best-case scenario for potential claimants would be that the force majeure clause does not specifically mention epidemics or pandemics (or any language relating to viral diseases or public-health crises). In such cases, the claimants should argue that the COVID-19 pandemic should not be considered an act of God and should not be included in any catch-all

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156. Mauss, *supra* note 148.

157. Hummer, *supra* note 46.



provision. Moreover, the claimants should argue that the Power Five schools had the opportunity to include such events in the force majeure clause but did not do so. As such, the COVID-19 pandemic should not trigger the force majeure clause.

Regarding the latter argument, claimants can certainly try to persuade a court that the COVID-19 pandemic was foreseeable, given that epidemics and pandemics are not uncommon inclusions in force majeure-triggering language and that pandemic insurance was available to guard against the possibility of an epidemic or pandemic.<sup>158</sup> However, in the author's view, the strongest argument for claimants is simply that the COVID-19 pandemic did not actually prevent the playing of the cancelled games, given that the pandemic did not prevent Power Five schools from playing any of the games they played during the 2020 season. Such an argument is even stronger when considering schools that held the vast majority of their revised regular-season schedules, such as those in the Southeastern Conference, which successfully held sixty-nine of their seventy regular-season games and the conference championship game. Moreover, claimants should argue Power Five schools did not avail themselves of various opportunities to mitigate damages, whether by playing the games as scheduled, by rescheduling the cancelled games, or by paying liquidated damages. Finally, for the limited number of cases in which the force majeure clause listed a conference rule as a triggering event, claimants should argue that the Power Five conference was not a party to the game contract. Rather, the contract was between the Power Five school and the non-Power Five school, and the fact of the matter is the former school cancelled the game against the latter school, thus breaching the game contract.

#### B. *Tortious Interference with Contract*

Non-Power Five schools might also pursue a claim for tortious interference with contract against the Power Five school's conference, on the grounds that the conference's decision to drop the non-Power Five school from the schedule induced the breach of contract by the Power Five school. The specific elements of a tortious-interference claim depend on state common law, but the typical elements are as follows: (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of said contract; (3) the defendant's intention and unjustified

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158. See *supra* notes 47, 107–108 and accompanying text.

interference with said contract; and (4) breach of said contract (i.e., injury to the plaintiff).<sup>159</sup>

In the author's view, each element is present in the Power Five conference's decisions to cancel games. First, valid contracts existed for the cancelled games. Second, the conferences knew of the existence of said contracts. Third, the conferences intentionally interfered, by virtue of their ruling that said games could not be played. As for whether such interference was unjustified, in the author's opinion, the conference loses any potential legal leg to stand on due to its decision to schedule a season's worth of games against other opponents. As such, conferences should not be able to rely on any state's affirmative defenses for a claim of tortious interference, such as a public-health and safety exception. Lastly, the contracts were cancelled as a result of said interference, thereby resulting in injury to the non-cancelling party.

To be sure, a tortious-interference claim will be tougher in states that require that the defendant acted with malice.<sup>160</sup> States vary in their respective definitions of "malice," but a common definition of malicious interference is interference without justification or excuse.<sup>161</sup> Yet even in such cases, the author believes claimants still have a strong argument. Again, these conferences kept on their member teams' schedules conference games, and in some cases, even added games against conference opponents not initially scheduled for the 2020 season. For example, the Southeastern Conference added two conference opponents to the eight conference games originally scheduled for each team in the conference.<sup>162</sup> If the Southeastern Conference was comfortable enough with the COVID-19 pandemic to add

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159. See *Tex. Jewelers Ass'n v. Glynn*, No. 03-17-00771-CV, 2018 WL 5305721, at \*3 (Tex. App.—Austin Oct. 26, 2018, no pet.) (“The elements of tortious interference with an existing contract are (1) a valid contract exists that is subject to interference, (2) the defendant willfully and intentionally interfered with the contract, (3) the interference proximately caused injury to the plaintiff, and (4) the plaintiff incurred actual damage or loss.”).

160. See *Knight Enters. v. RPF Oil Co.*, 829 N.W.2d 345, 348 (Mich. App. 2013) (requiring malice to find tortious interference).

161. See, e.g., *Hankins v. Welch State Bank*, No. 14-CV-0398-CVE-PJC, 2014 WL 5472753, at \*5 (N.D. Okla. 2014) (“In the context of a tortious interference claim, malice is ‘an unreasonable and wrongful act done intentionally, without just cause or excuse,’ and it ‘requires a showing of bad faith.’” (citing *Tuffy’s, Inc. v. City of Okla. City*, 212 P.3d 1158, 1165 (Okla. 2009))).

162. Kevin Kelley, *SEC Reveals Two Additional Conference Opponents for Each Team in 2020*, FBSCHEDULES (Aug. 7, 2020), <https://fbschedules.com/sec-reveals-two-additional-conference-opponents-for-each-team-in-2020/> [https://perma.cc/JR]8-AA5B]; Paul Kasabian, *SEC Announces 2 Non-Division Games for 2020 Conference-Only Schedule*, BLEACHER REP. (Aug. 7, 2020), <https://bleacherreport.com/articles/2903602-sec-announces-2-non-division-games-for-2020-conference-only-schedule> [https://perma.cc/9AXU-L6QV].

two conference games, then, at the least, it could have kept on the schedule two games against non-conference opponents. As another example, the ACC added Notre Dame as a conference member for the 2020 season.<sup>163</sup> The fact that the ACC was comfortable enough to add a non-conference member to its conference for the entire 2020 season reveals that the conference had no fundamental objection to playing non-conference games. In essence, the Power Five conferences took care of their own, so to speak, yet did not similarly protect non-conference teams. To the author, this is evidence of malice and bad faith.

## VI. CONCLUSION

Moving forward, force majeure clauses accounting for the possibility of a pandemic will become the norm in college football game contracts.<sup>164</sup> Indeed, some contracts are already including pandemics in their lists of force majeure-triggering events. Such language has already been added to collegiate game contracts. For example, a contract signed in May 2020 for the 2025 football game between Wisconsin and Miami (Ohio) lists as force majeure-triggering events “regional or global epidemics, pandemics, quarantines, and other similar health threats (e.g.,] coronavirus, influenza, etc.).”<sup>165</sup> Scholars explain that “the onset of the novel coronavirus

163. Bryan Driskell, *Norte Dame and ACC to Join Forces in 2020*, FANNATION (July 29, 2020), <https://www.si.com/college/notredame/football/notre-dame-football-to-join-acc-2020> [<https://perma.cc/LFY2-ZQ5B>].

164. See, e.g., Evan Petzold, *Mid-Major Colleges Could Be Crippled By Football Cancellations; So What Do Contracts Say?*, DETROIT FREE PRESS (May 27, 2020, 10:48 AM), <https://www.freep.com/story/sports/college/2020/05/27/college-football-cancellations-mid-majors-contracts-force-majeuer/5262536002/> [<https://perma.cc/K69M-KD7Q>] (“I am confident that from here forward, colleges and universities would add pandemic or virus or disease to the list of force majeure cancellation considerations if they have not already done so.”).

165. Matt Brown, *Force Majeure: Why College AD's Need to Learn Those Two French Words, Tout de Suite*, SUBSTACK (July 27, 2020), <https://extrapoints.substack.com/p/force-majeure-why-college-ads-need> [<https://perma.cc/7CJ7-TVTS>]; see Rachel Lenzi, *Covid-19 Makes Its Way Into Negotiations of College Sports Contracts*, BUFFALO NEWS (June 14, 2020), [https://buffalonews.com/sports/college/covid-19-makes-its-way-into-negotiations-of-college-sports-contracts/article\\_f2e8556a-30a2-5710-976a-d48287d7a90e.html](https://buffalonews.com/sports/college/covid-19-makes-its-way-into-negotiations-of-college-sports-contracts/article_f2e8556a-30a2-5710-976a-d48287d7a90e.html) [<https://perma.cc/BNN3-4WHD>] (explaining some teams started to include language regarding pandemics into their contracts); see also Joseph Duarte, *Sign of the Times: UH-Baylor Contract has 'Pandemic' Language*, HOUS. CHRON. (Oct. 1, 2020), <https://www.houstonchronicle.com/texas-sports-nation/college/article/Sign-of-the-times-UH-Baylor-contract-has-15614628.php> [<https://perma.cc/5RAH-9D4J>] (stating the University of Houston included specific language about COVID-19 in its recent contract with Baylor).

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pandemic warranted immediate revisitation of college football contracts.”<sup>166</sup>

However, such language was not the norm for college football game contracts before the onset of the COVID-19 pandemic, and this is certainly the case for many, if not most, of the contracts for games cancelled for the 2020 college football season, the first season after the arrival of COVID-19. It remains to be seen whether any non-Power Five schools will pursue any legal claim(s) against the Power Five schools (or their respective conferences) that cancelled their games. The author believes non-Power Five schools should pursue a legal claim because there are solid arguments that a remedy is warranted, considering COVID-19 did not prevent the playing of the cancelled games and that certain schools that cancelled games have not mitigated injuries resulting therefrom.

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166. Jessica R. Murfree & Anita M. Moorman, *An Examination and Analysis of Division I Football Game Contracts: Legal Implications of Game Cancellations Due to Hurricanes*, 31 J. LEGAL ASPECTS SPORT 123, 143 (2021).

## APPENDIX

## NCAA FBS FOOTBALL PROGRAMS (BY CONFERENCE)

*Power Five Conferences & Member Institutions*<sup>167</sup>

- Atlantic Coast Conference<sup>168</sup>
  - Boston College
  - Clemson University
  - Duke University
  - Florida State University
  - Georgia Institute of Technology
  - North Carolina State University
  - Syracuse University
  - University of Louisville
  - University of Miami (Florida)
  - University of North Carolina, Chapel Hill
  - University of Notre Dame (included in conference for 2020 season)
  - University of Pittsburgh
  - University of Virginia
  - Virginia Polytechnic Institute and State University
  - Wake Forest University
  
- Big Ten Conference<sup>169</sup>
  - Indiana University, Bloomington
  - Michigan State University
  - Northwestern University
  - Pennsylvania State University
  - Purdue University
  - Rutgers, The State University of New Jersey, New Brunswick
  - The Ohio State University

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167. Power Five Conferences & Member Institutions at the time of this writing.

168. *Atlantic Coast Conference*, NCAA, <https://web3.ncaa.org/directory/orgDetail?id=821> [<https://perma.cc/6HVP-BSFA>].

169. *Big Ten Conference*, NCAA, <https://web3.ncaa.org/directory/orgDetail?id=827> [<https://perma.cc/BKT5-S22J>].

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- University of Illinois Urbana-Champaign
- University of Iowa
- University of Maryland, College Park
- University of Michigan
- University of Minnesota, Twin Cities
- University of Nebraska, Lincoln
- University of Wisconsin-Madison
  
- Big 12 Conference<sup>170</sup>
  - Baylor University
  - Iowa State University
  - Kansas State University
  - Oklahoma State University
  - Texas Christian University
  - Texas Tech University
  - University of Kansas
  - University of Oklahoma
  - University of Texas at Austin
  - West Virginia University
  
- Pac-12 Conference<sup>171</sup>
  - Arizona State University
  - Oregon State University
  - Stanford University
  - University of Arizona
  - University of California, Berkeley
  - University of California, Los Angeles
  - University of Colorado, Boulder
  - University of Oregon
  - University of Southern California
  - University of Utah
  - University of Washington
  - Washington State University

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170. *Big 12 Conference*, NCAA, <https://web3.ncaa.org/directory/orgDetail?id=25354> [<https://perma.cc/6697-PUFC>].

171. *Pac-12 Conference*, NCAA, <https://web3.ncaa.org/directory/orgDetail?id=905> [<https://perma.cc/WB7E-4Y3J>].

- Southeastern Conference<sup>172</sup>
  - Auburn University
  - Louisiana State University
  - Mississippi State University
  - Texas A&M University, College Station
  - University of Alabama
  - University of Arkansas, Fayetteville
  - University of Florida
  - University of Georgia
  - University of Kentucky
  - University of Mississippi
  - University of Missouri, Columbia
  - University of South Carolina, Columbia
  - University of Tennessee, Knoxville
  - Vanderbilt University

*Group of Five Conferences & Member Institutions*<sup>173</sup>

- American Athletic Conference<sup>174</sup>
  - East Carolina University
  - Southern Methodist University
  - Temple University
  - The University of Tulsa
  - Tulane University
  - University of Central Florida
  - University of Cincinnati
  - University of Houston
  - University of Memphis
  - University of South Florida
  - Wichita State University

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172. *Southeastern Conference*, NCAA, <https://web3.ncaa.org/directory/orgDetail?id=911> [<https://perma.cc/5B5H-VDZ1>].

173. Group of Five Conferences & Member Institutions at the time of this writing.

174. *American Athletic Conference*, NCAA, <https://web3.ncaa.org/directory/orgDetail?id=823> [<https://perma.cc/UJD5-5ZH9>].

- Conference USA<sup>175</sup>
  - Florida Atlantic University
  - Florida International University
  - Louisiana Tech University
  - Marshall University
  - Middle Tennessee State University
  - Old Dominion University
  - Rice University
  - The University of North Carolina at Charlotte
  - The University of Southern Mississippi
  - University of Alabama at Birmingham
  - University of North Texas
  - University of Texas at El Paso
  - University of Texas at San Antonio
  - Western Kentucky University
  
- Mid-American Conference<sup>176</sup>
  - Ball State University
  - Bowling Green State University
  - Central Michigan University
  - Eastern Michigan University
  - Kent State University
  - Miami University (Ohio)
  - Northern Illinois University
  - Ohio University
  - University at Buffalo, the State University of New York
  - University of Akron
  - University of Toledo
  - Western Michigan University
  
- Mountain West Conference<sup>177</sup>
  - Boise State University
  - California State University, Fresno

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175. *Conference USA*, NCAA, <https://web3.ncaa.org/directory/orgDetail?id=24312> [https://perma.cc/VZC2-L436].

176. *Mid-American Conference*, NCAA, <https://web3.ncaa.org/directory/orgDetail?id=875> [https://perma.cc/6E5K-URYP].

177. *Mountain West Conference*, NCAA, <https://web3.ncaa.org/directory/orgDetail?id=5486> [https://perma.cc/BF2E-35VK].



- Colorado State University
- San Diego State University
- San Jose State University
- U.S. Air Force Academy
- University of Nevada, Las Vegas
- University of Nevada, Reno
- University of New Mexico
- University of Wyoming
- Utah State University
  
- Sun Belt Conference<sup>178</sup>
  - Appalachian State University
  - Arkansas State University
  - Coastal Carolina University
  - Georgia Southern University
  - Georgia State University
  - Texas State University
  - Troy University
  - University of Arkansas at Little Rock
  - University of Louisiana Monroe
  - University of Louisiana at Lafayette
  - University of South Alabama
  - University of Texas at Arlington

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178. *Sun Belt Conference*, NCAA, <https://web3.ncaa.org/directory/orgDetail?id=818> [<https://perma.cc/BHB9-9UR8>].