

COVID-19 and Force Majeure Clauses – North Carolina Municipal Attorneys’ Discussion

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COVID-19 has caused attorneys and businesses across the country to review a common “boilerplate” provision in many contracts: the *force majeure* clause.

For those of us who, like me, lack French fluency, *force majeure* means “superior force.” A *force majeure* clause is a contractual provision that excuses performance by a party—either temporarily or permanently—when that “superior force” prevents such party from performing under a contract. The “superior forces” commonly listed in contracts include “acts of God”, “terrorism”, and “natural disasters”—all occurrences that are generally thought to be unexpected and beyond the control of the parties at the time that the contract is made.

There are no modern reported appellate cases in North Carolina directly interpreting application of a *force majeure* clause, and the diversity of *force majeure* clauses and contract terms makes it difficult to predict how North Carolina courts will treat these provisions. Is COVID-19 a *force majeure* event excusing performance? Unfortunately, the best answer is . . . “it depends.”

Below are a few practical tips for municipal attorneys who might be called upon to interpret these contractual provisions and advise their clients in the coming weeks and months.

- (1) **Carefully review the exact language of the force majeure clause.** Not all *force majeure* clauses are created equal. Some, including standard construction industry contracts like the ConsensusDocs Series 200 Agreement copied below, explicitly address failure to perform owing to an “epidemic” or “adverse governmental actions.” Many other clauses lack such specificity. For example, standard terms and conditions used in a large number of state and local government purchase contracts in North Carolina reference a “catastrophic natural event” or “act of God.” A court might be more willing to find a “force majeure” event when a clause lists events described in more detail than an “act of God”, though there is insufficient case law in North Carolina to provide a definitive answer. In any event, the plain language of the clause will govern a court’s interpretation—review it carefully before asserting a position on your client’s behalf.

- a. **ConsensusDocs200 – Standard Agreement and General Conditions Between Owner and Constructor**

6.3 DELAYS AND EXTENSIONS OF TIME

6.3.1 If Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of Constructor include, but are not limited to, the following: (a) acts or omissions of Owner, Design Professional, or Others; (b) changes in the Work or the sequencing of the Work ordered by Owner, or arising from decisions of Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by Owner pending dispute resolution or suspension by Owner under §11.1; (e) transportation delays not reasonably foreseeable; (f) labor disputes not involving Constructor; (g) general labor disputes impacting the Project but not specifically related to the Worksite; (h) fire; (i) Terrorism; (j) epidemics; (k) adverse governmental actions; (l) unavoidable accidents or circumstances; (m) adverse weather conditions not reasonably anticipated. Constructor shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8.

b. **Typical Terms and Conditions in a N.C. State/Local Government Purchase Contract**

FORCE MAJEURE: Neither party shall be deemed to be in default of its obligations hereunder if and so long as it is prevented from performing such obligations by an act of war, hostile foreign actions, nuclear explosion, earthquake, hurricane, tornado, or other catastrophic natural event or act of God.

(2) **Understand the interplay with notice and termination provisions.** Often, parties are required to give timely notice to invoke the protections of a *force majeure* clause. Units should anticipate receiving notices and, to the extent possible with limited staff, document when any notices are received from vendors. A vendor's failure to provide timely notice might prove crucial in a later dispute. Additionally, if a *force majeure* event occurs, a *unit* also might have a termination right. The contract might, however, require a unit to exercise such right within a specific period of time. Care should be taken to exercise this right in strict accordance with the terms of the contract.

(3) **Advise your clients to keep detailed records of vendor performance during this time.** Documenting performance carefully can protect and aid your client in a dispute with a vendor or contractor. There may be instances in which a *force majeure* clause applies, but contractors otherwise able to perform might attempt to use those clauses as a shield. A decrease in a vendor or contractor's profit margin, standing alone, likely does not trigger excusing performance under a *force majeure* clause. Proving a direct causal link between the specified event in the clause and nonperformance is essential to asserting a *force majeure* defense—and closely monitoring performance can make or break that causal link.

(4) **Consider what other defenses might be raised.**

a. In the absence of an applicable *force majeure* clause, two common law defenses might be available to a contractor or vendor under North Carolina law: (1) impossibility of performance; and (2) frustration of purpose. North Carolina courts generally have construed these doctrines narrowly.

i. The doctrine of impossibility excuses performance where, as the name suggests, a party's performance is rendered "impossible." See, e.g., *Barnes v. Ford Motor Co.*, 95 N.C. App. 367, 382 S.E.2d 842, 845 (1989). For example, performance by a HVAC contractor to install a new HVAC system in city hall would be rendered "impossible" if the building burned to the ground prior to installation due to no fault of the contractor or the city.

ii. By contrast, frustration of purpose occurs when performance is not literally rendered "impossible" by a changed condition, but instead when an unforeseen event causes "a failure of the consideration or a practically total destruction of the expected value of the performance." *WRI/Raleigh, L.P. v. Shaikh*, 183 N.C. App. 249, 254, 644 S.E.2d 245, 245 (2007). For example, if the city contracted with a band to play at an annual spring festival now scheduled to be held under a statewide

limit on mass gatherings of more than fifty people, the doctrine might apply to excuse performance.

- b. A non-performing supplier of goods also might assert a defense found in the Uniform Commercial Code: commercial impracticability. G.S. § 25-2-615 excuses a seller's duties under a sale contract where performance becomes "commercially impracticable" due to "unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting." See G.S. § 25-2-615, cmt. 1. To invoke the defense, a seller must establish that: "(1) performance has become impracticable; (2) the impracticability was due to the occurrence of some contingency which the parties expressly or impliedly agreed would discharge the promisor's duty to perform; (3) the promisor did not assume the risk that the contingency would occur; and (4) the promissory seasonably notified the promisee of the delay in delivery or that delivery would not occur at all." See *Alamance Cnty Bd. Of Educ. v. Bobby Murray Chevrolet, Inc.*, 121 N.C. App. 222, 227, 465 S.E.2d 306, 310. In the only reported case interpreting this provision, the North Carolina Court of Appeals held that a dealership supplying bus chassis to local boards of education assumed the risk that the dealer's manufacturer, GM, would cancel the dealer's purchase orders. See *id.* Further, no clause in the contract between the boards of education and the dealer conditioned the dealer's performance on the receipt of GM's buses. Failure to so condition delivery to the school boards was fatal to the dealer's defense. A supplier failing to deliver goods to a local government under an existing contract may have difficulty avoiding liability under a commercial impracticability defense if the contract with the unit did not expressly condition performance on ability to obtain the goods in question from another supplier.
- (5) **Plan for the future now.** While contracting activity may decrease overall in the coming months, local governments will continue to enter into contracts and purchase orders. You may wish to alert your unit's staff to the existence and effect of *force majeure* clauses. COVID-19 is no longer an "unforeseen" event, and going forward, units should be wary of attempts by contractors or vendors to excuse performance due to the disease or its effects.