



# STATE OF NEW JERSEY FORCE MAJEURE LAW COMPENDIUM (during COVID-19 pandemic)

Prepared by

**Mitchell Taraschi**

*Partner, Connell Foley LLP*

*Construction Law and Commercial Litigation*

[www.connellfoley.com](http://www.connellfoley.com)

[mtaraschi@connellfoley.com](mailto:mtaraschi@connellfoley.com)

973.840.2439

**Lauren F. Iannaccone**

*Associate, Connell Foley LLP*

*Commercial Litigation*

[www.connellfoley.com](http://www.connellfoley.com)

[liannaccone@connellfoley.com](mailto:liannaccone@connellfoley.com)

973.840.2492

## **A. Introduction**

This memorandum will seek to provide a New Jersey exemplar for the USLAW NETWORK Compendium of Law on relevant considerations with respect to invoking “force majeure” clauses in contracts in light of the ongoing COVID-19 crisis.

## **B. Force Majeure in New Jersey**

### **1. Introduction**

COVID-19 has uniformly caused significant business disruption, leaving many companies with uncertainty about their, and their business partners’, obligations to perform, and potential liabilities for the failure to perform, contractual obligations. These business disruptions -- including those attributed to supply chain disturbances, government-mandated closures and labor shortages -- require companies to evaluate their existing contracts to determine what rights may exist. In making such an evaluation, questions have been raised concerning what relief may be obtained if performance is rendered impracticable or impossible by the international pandemic. To inform this issue, businesses are looking to the fine print in their contracts and specifically to the force majeure provisions therein. Even in the absence of a force majeure clause, performance may be excused in the proper circumstances. In either case, cooperation and compromise between business partners, without resort to litigation, may be the best and least costly path to resolving these disputes.

### **2. Requirements to Obtaining Relief Using Force Majeure**

A force majeure clause in a contract “[p]rovides a means by which the parties may anticipate in advance a condition that will make performance” of that contract “impracticable” or impossible.<sup>1</sup> If an unforeseen event or circumstance renders performance impracticable, the parties may “[g]enerally [be] excused from performance.”<sup>2</sup> Examples of events that may trigger a force majeure clause under New Jersey law include flood, power failure, storms, and acts of God; an act of God may include “all misfortunes and accidents arising from inevitable necessity which human prudence could not foresee or prevent.”<sup>3</sup>

Force majeure clauses can be either general, in which case the language captures a wide array of circumstances, or specific, in which case the language identifies and contemplate specific events. A general clause will often read that it includes conditions or contingencies beyond the parties’ control. A specific clause will identify circumstances that would excuse performance. A force majeure clause will be “narrowly interpreted as contemplating only events or things of the same general nature or class as those specifically enumerated.”<sup>4</sup>

Notably, the doctrine of impracticality of performance involving the sale of goods is codified in Chapter Two of New Jersey’s Uniform Commercial Code at N.J.S.A. 12A:2-615. That provision states in relevant part:

Delay in delivery or non-delivery ... is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order ... <sup>5</sup>

The combined impact of the pandemic along with New Jersey Governor Murphy's various Executive Orders may well fall within this definition of "impracticality" of performance. This provision is likely to become very relevant in the aftershock of COVID-19.

If a contract does not contain a force majeure provision, New Jersey courts may still excuse performance under recognized equitable doctrines of impracticability, impossibility and frustration of purpose. "Even if a contract does not expressly provide that a party will be relieved of the duty to perform if an unforeseen condition arises that makes performance impracticable, 'a court may relieve him of that duty if performance has unexpectedly become impracticable as a result of a supervening event.'"<sup>6</sup> Similarly, performance is excused if performance of a contract is impossible, such as where performance is dependent upon a condition precedent. Notably, however, impossibility is not available if the promisor has assumed the risk of impossibility.<sup>7</sup> Under the doctrine of impossibility or impracticability of performance, a party is excused from performance of his contract obligations "where performance has become literally impossible, or at least inordinately more difficult, because of the occurrence of a supervening event that was not within the original contemplation of the contracting parties."<sup>8</sup>

Finally, frustration of purpose arises when "[t]he obligor's performance can still be carried out, but the supervening event fundamentally has changed the nature of the parties' overall bargain."<sup>9</sup> "The frustration must be so severe that it is not fairly to be regarded as the risks that the party invoking the doctrine assumed under the contract. Relief from performance of contractual obligations on the theory of frustration of purpose will not be lightly granted; the evidence must be clear, convincing, and adequate."<sup>10</sup>

Although no case law in New Jersey addresses force majeure clauses in the context of pandemics, based on the above, businesses that cannot perform as a result of COVID-19 may be excused from performance either pursuant to an applicable force majeure clause or, in the alternative and dependent upon the facts at issue, due to excuse provisions in the UCC or the equitable doctrines of impracticability, impossibility and frustration of purpose.

### **3. Scope of Relief**

Once a determination is made that a force majeure provision applies, the next query is what relief is available. Depending upon the language of the contract, application of a force majeure provision may permit a party to delay performance, partially perform, excuse performance, or otherwise modify the contract.<sup>11</sup> The length of the delay is generally limited to the timeframe of the force majeure event.<sup>12</sup>

Further, failure to properly and timely invoke the force majeure clause may bar a party from asserting that clause to excuse its noncompliance with the contract.<sup>13</sup>

Nevertheless, under general contract principles, a party claiming it was harmed under a contract due to force majeure events is under a legal duty to mitigate its damages.<sup>14</sup> Consequently, New Jersey law prevents a party from obtaining relief from losses that could have been reasonably avoided.

#### **4. Other Considerations**

In the coming months, we expect that New Jersey courts will confront the issue of whether the public health emergency related to COVID-19 constitutes a force majeure event. Specifically, whether the unavailability of workers, the Governor's Executive Order requiring non-essential individuals to stay home, and whether disrupted supply chains and labor shortages constitute events that trigger force majeure clauses or whether such unforeseeable circumstances warrant application of such equitable principals as impracticable, impossible or frustration of purpose and thereby excusing performance.

Reconciling the application of a force majeure provision with an international pandemic is a novel issue that New Jersey courts will need to confront. In evaluating the issue, courts will be mindful of the factors giving rise to the alleged non-performance and the contract language.

**This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.**

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<sup>1</sup> Facto v. Pantagis, 390 N.J. Super. 227, 231-232 (App. Div. 2007) (internal citation omitted).

<sup>2</sup> Id. at 233-34 (internal citation omitted).

<sup>3</sup> Id. at 232 (internal citation omitted).

<sup>4</sup> Seitz v. Mark-O-Lite Sign Contractors, 210 N.J. Super. 646,650 (Law Div. 1986).

<sup>5</sup> N.J.S.A. 12A:2-615.

<sup>6</sup> Facto v. Pantagis, 390 N.J. Super. 227, 231-232 (App. Div. 2007) (internal citations omitted); see also M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 390-91 (2002).

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<sup>7</sup> See Duff v. Trenton Beverage Co., 4 N.J. 595, 604-605 (1950).

<sup>8</sup> J.B. Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass'n, 431 N.J. Super 233, 246 (App. Div. 2013) (internal citations omitted).

<sup>9</sup> Capparelli v. Lopatin, 459 N.J. Super. 584 (App. Div. 2019) (internal citations omitted).

<sup>10</sup> Id. (internal citations and quotations omitted).

<sup>11</sup> See e.g., Duane Reade v. TPK of NJ Dev. Corp., No. A-6704-03T5, 2006 N.J. Super. Unpub. LEXIS 929, at \*17 (App. Div. Sep. 26, 2006) (affirming the trial court's decision that certain delays well within a Force Majeure clause and should act to extend the period for completion of work); M.J. Paquet v. N.J. DOT, 171 N.J. 378, 390 (2002) (modifying a contract by deleting work on the principle of impracticality).

<sup>12</sup> See e.g., Duane Reade v. TPK of NJ Dev. Corp., No. A-6704-03T5, 2006 N.J. Super. Unpub. LEXIS 929, at \*17 (App. Div. Sep. 26, 2006) (reviewing the trial court's calculation of time for performance that was extended by delays excused under a force majeure clause).

<sup>13</sup> See, e.g., U.S. v. Sunoco, Inc., 2007 U.S. Dist. Lexis 41435, \*9-10 (D.N.J. June 7, 2007) (Sonoco's failure to timely provide notice of the force majeure event pursuant to the agreement precluded it from relying on the force majeure to excuse noncompliance).

<sup>14</sup> Ingraham v. Trowbridge Builders, 297 N.J. Super. 72, 83-4 (App. Div. 1997).