STATE OF NEW MEXICO FORCE MAJEURE LAW COMPENDIUM

(during COVID-19 pandemic)

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A. Introduction

This memorandum will seek to provide a New Mexico 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 Mexico

1. Introduction

In New Mexico, as elsewhere, COVID-19 has precluded many contracting parties from performing their contractual obligations. "Force majeure" clauses may in some instances operate as releases from these obligations, where, as here, circumstances beyond the control of the non-performing party have rendered performance commercially impractical, illegal, or impossible. Nowhere do the New Mexico courts or legislature consider the widespread application of force majeure clauses to pandemics. Rather, New Mexico's statutory incorporation of force majeure is limited to its Emergency Petroleum Products Supply Act, NMSA § 12-12-12, in which—in the context of emergency petroleum products—"force majeure" is defined as "an act of God or any other cause not reasonably within the control of the supplier." New Mexico case law regarding force majeure is likewise limited. Ultimately, New Mexico courts have interpreted force majeure clauses narrowly, finding decisive the intent of the parties when contracting. Absent any force majeure language on the face of the contract, parties are likely limited to the common law defenses of impracticability or frustration of purpose.

2. Requirements to Obtaining Relief Using Force Majeure

New Mexico courts and courts applying New Mexico law have equated force majeure defenses to affirmative defenses. On these grounds, non-performing parties raising force majeure defenses carry the burden to demonstrate that performance was beyond their control. To this end, the party seeking release based on the contract's force majeure clause will bear the burden of establishing: (1) that the COVID-19-related event falls within the force majeure language contained in the contract; and (2) that the event rendered performance outside their control. If, however, the event is specifically identified in the language of the force majeure clause, it will likely be deemed representative of the parties' intent, and thereby allow the non-performing party to raise a force majeure defense.

The force majeure clause must feasibly include the COVID-19-related event and must be outside the control of the non-performer. In *Maralex Res., Inc. v. Gilbreath,* 2003-NMSC-023, 134 N.M. 308, the New Mexico Supreme Court held no force majeure defense to exist when the non-performing party failed to "come forward with evidence showing that the cessation of production was beyond their control," and thus within the contemplation of the clause. There, each party contended that it was the rightful lessee to the disputed minerals. The original lessee argued that "[t]he lease did not terminate because the problem with line pressure was beyond their control and therefore triggered the force majeure clause, which applies when production ceases due to events beyond the control of the well operators." *id.* ¶ 31(internal quotations omitted). The Court disagreed, and explained that because "New Mexico has no cases interpreting a force majeure

clause," the events constituting force majeure "depend[ ] on the specific language included in the clause," *id.* No such language existed in the lease at issue.[1]

Courts interpreting New Mexico law have indicated that force majeure clauses will be read narrowly, and that fundamental principles of contract law foreclose expansive interpretations of those clauses. *See Medite Corp. v. Pub. Serv. Co. of New Mexico*, No. CIV 96-0929BB/RLP, 1998 WL 36030323, at *6 (D.N.M. Sept. 28, 1998) (finding "[t]he proper way to interpret a force-majeure clause is to respect the parties' freedom to contract and attempt to discern the parties' intent, which is the same methodology employed in interpreting any contract provision"). However, no New Mexico state court has examined force majeure in the context of a pandemic, nor have state courts provided guidance as to un-foreseeability in the context of force majeure clauses.[2]

3. Scope of Relief

A force majeure clause will generally allow the non-performing party to suspend its performance *during* the time of the precipitating event, provided that such party makes a good faith effort to continue to perform during the force majeure event and begins performance as soon as practicable. Further, New Mexico case law sets forth the injured party's duty to mitigate in the event of a breach of contract. *See Acme Cigarette Serv., Inc. v. Gallegos*,1978-NMCA-036, ¶36, 91 N.M. 577 (holding under doctrine of 'avoidable consequences' that injured party has duty to use reasonable diligence to mitigate damages incurred either from tort or breach of contract); NMRA R.13-860 ("A party may not recover damages for any loss which the party reasonably could have avoided"). It follows that—even absent a valid force majeure defense—the movant will be unable to recover from the non-performing party those damages that it might have otherwise avoided with reasonable diligence. The determination of "reasonable diligence" will be a fact-intensive one.

4. Other Considerations

The non-performing party invoking a force majeure defense must also be sure to establish that its inability to perform under the terms of the contract **actually** prevented the performance, rather than merely increasing the financial hardship incurred in its performance of contractual obligations.

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

[1] *See also King v. Estate of Gilbreath*, 215 F. Supp. 3d 1149, 1178 (D.N.M. 2016), wherein, under a similar fact pattern, the federal district court for the District of New Mexico found the non-performer's proffered evidence "too irresolute to support a force majeure claim" when the cited testimony was both hypothetical and "not specifically directed to the relevant time period."

[2] The *Medtite* Court did speak to foreseeability with respect to force majeure clauses, noting that "[w]here a particular risk exists or is readily foreseeable at the time of contracting, and the parties merely recite a general or boilerplate force-majeure provision, courts will presume the risk has been assumed by the party whose performance will be affected by the realization of that risk." 1998 WL 36030323, at *6. The court said nothing, however, about assumption of risk by a boilerplate force majeure clause when the risk is unforeseeable.

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