



**STATE OF
NORTH CAROLINA
FORCE MAJEURE LAW
COMPENDIUM
(during COVID-19 pandemic)**

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A. Introduction

This memorandum will seek to provide a North Carolina 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 North Carolina

1. Introduction

The effects of COVID-19 have had a crushing effect on North Carolina businesses, regardless of their size or industry. As North Carolina businesses continue to deal with the economic impacts of the COVID-19 pandemic, they are looking at their contractual obligations under existing contracts to determine if they will be liable for any non-performance of their contractual duties. “Force majeure” clauses are common in the commercial contract setting and allow a party’s performance to be excused if the occurrence of certain events outside of the party’s control (and which events were contemplated by the parties at the time the contract was negotiated) caused the party to be unable to perform. If a contract does not contain a force majeure clause, a party may still be able to seek relief in North Carolina under common law principles such as the doctrines of impossibility or frustration of purpose, or under the Uniform Commercial Code as enacted in North Carolina.

2. Requirements to Obtaining Relief Using Force Majeure

Similar to a number of other states, the North Carolina General Statutes do not define the term “force majeure”. Additionally, we have found no case law in North Carolina which specifically addresses the application of force majeure clauses in the context of pandemics or other health emergency events, though that may well change after COVID-19. In fact, there is little modern law in North Carolina which even analyzes the use of force majeure clauses in contracts at all. In any event, such clauses are enforceable in the state, and courts will interpret them using general rules for contracts under North Carolina law.ⁱ

An opinion worth noting is *Certainfeed Gypsum*ⁱⁱ, a recent case out of the North Carolina Business Court which analyzed force majeure clauses in commercial contracts. In that matter, the Court specifically analyzed the language of the force majeure provisions together with the related negotiations, while also noting that it would be guided by and would adhere to certain general principles of contract construction under North Carolina law.ⁱⁱⁱ The opinion indicated a court should first look to the plain language of a contract in an attempt to determine the intention of the parties.^{iv} If the language is unambiguous, then “the intention of the parties is inferred from the words of the contract”^v and the court “cannot look beyond the terms of the contract to determine the intention.”^{vi} If the language is ambiguous, then the court should look at the surrounding circumstances to try to determine the intent of the parties - for example, “the language used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.”^{vii} Additionally, the court should examine “the entire instrument” and “cannot

reject what the parties inserted or insert what the parties elected to omit.”^{viii} Reinforcing that concept, the court in *Certainfeed Gypsum* added that “[w]hen faced with ambiguity, the Court cannot substitute its own intent, but can only enforce the agreement reached by the parties.”^{ix}

Based on the foregoing, a party seeking protections under a force majeure clause in a contract governed by North Carolina law has the burden to prove the contracting parties contemplated that the event in question should be included within the scope of the clause, and thus that the parties intended performance to be excused; and the best proof is express, unambiguous language. To illustrate with respect to the current crisis, the World Health Organization declared COVID-19 as a “pandemic”, which refers to a new disease that is prevalent worldwide or over a broad area crossing international boundaries. In response, numerous U.S. state and local governments issued “stay-at-home” orders and closed or restricted the operations of various types of businesses, leading to massive unemployment. In such circumstances, a clause specifically listing “pandemics” would seem to be virtually a sure bet to be interpreted by a court to include COVID-19 as a force majeure event which was contemplated by the parties. Other terms that might suffice include the more localized “epidemics” as well as more general language such as “public health emergencies” or “adverse government actions or orders”. Probably less certain, but still presenting a possibility of success in a COVID-19 situation, are the “catch-all” clauses sometimes seen in force majeure provisions that are intended to cover unforeseen circumstances other than those expressly listed (e.g., “all other acts beyond the control of the parties”). However, the bottom line still is that there is presently insufficient case law in North Carolina to provide any sort of definitive answer; and further, it appears that few existing contracts contemplate these types of events, except for possibly in language like “adverse government actions or orders” (though that, along with the case law as already noted, could well change dramatically in the future).

3. Scope of Relief

Consistent with the discussion above, the courts should first look to the language of the contract to help determine the scope of relief available to the party invoking the force majeure clause. Generally, a force majeure clause will allow a party to suspend performance of its obligations under the contract which it is unable to perform due to the force majeure event, but only during the continuance of the event. Often, force majeure clauses additionally will expressly provide that a party which is in position to mitigate damages caused by the force majeure event has a duty to do so, or has a duty to exercise reasonable care and diligence to avoid or lessen the consequences of the event. Where contracts are silent or ambiguous on this point, in North Carolina, the courts may apply the “doctrine of avoidable consequences” (also known as the “duty to minimize damages”) in breach of contract matters.^x However, given the scarcity of cases in North Carolina which specifically analyze force majeure clauses, it is not clear whether a court would apply this doctrine to a force majeure dispute.

It is worth noting that North Carolina courts have supported the broad legal policy which provides that contracting parties (especially in the commercial context) generally have

the freedom to bind themselves as they see fit, including where a contract expressly provided that a party does *not* have a duty to mitigate damages arising from a breach (although such provisions are perhaps less common compared to contracts which either provide an express duty to mitigate or are silent on the issue).^{xi} Accordingly, a party seeking to invoke a force majeure clause should, like the court, look to the language in the contract to determine if it expressly provides for, or perhaps prohibits, certain relief.

Lastly, it is also important for the party seeking protections under the force majeure clause to pay close attention to any notice requirements or cure periods provided by its terms. Failure to strictly adhere to the express terms of the clause could limit such party's relief.

4. Other Considerations

North Carolina also recognizes the common law principles of impossibility and frustration of purpose. If the contract does not contain a force majeure clause, a party can look to these principles to seek protections under North Carolina law. North Carolina courts generally construe these doctrines narrowly.^{xii} A seller of goods may also seek relief under the Uniform Commercial Code which North Carolina has adopted and codified in Chapter 25 of the North Carolina General Statutes (the "NC UCC"). Under Section 2-615 of the NC UCC, a seller of goods may be able to seek to have its performance excused under a contract where such performance has become "commercially impracticable" because of "unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting."^{xiii} To establish such a defense, the seller has the burden to 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 promisor seasonably notified the promisee of the delay in delivery or that delivery would not occur at all."^{xiv}

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.

ⁱ See, in general, *Certainfeed Gypsum NC, Inc. v. Duke Energy Progress, LLC*, 2018 NCBC 90, No. 17 CVS 395, 2018 WL 4199077 (N.C. Super. Ct. Aug. 28, 2018).

ⁱⁱ See generally, *Certainfeed Gypsum*, 2018 WL 4199077.

ⁱⁱⁱ See generally, *Certainfeed Gypsum*, 2018 WL 4199077, at *3.

^{iv} See *Certainfeed Gypsum*, 2018 WL 4199077, at *3.

^v See *Certainfeed Gypsum*, 2018 WL 4199077, at *3, quoting *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996).

^{vi} See *Certainfeed Gypsum*, 2018 WL 4199077, at *3, citing *Stovall v. Stovall*, 205 N.C. App. 405, 410, 698 S.E.2d 680, 684 (2010) (quoting *Lynn v. Lynn*, 202 N.C. App. 423, 431, 698 S.E.2d 198, 205 (2010)).

^{vii} See *Certainfeed Gypsum*, 2018 WL 4199077, at *4, quoting *Cordaro v. Singleton*, 31 N.C. App 476, 479, 229 S.E.2d 707, 709 (1976).

^{viii} See *Certainfeed Gypsum*, 2018 WL 4199077, at *4, quoting *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962).

^{ix} *Id.* At *5.

^x See *United Labs., Inc. v. Kuykendall*, 102 N.C. App. 484, 489, 403 S.E.2d 104, 108 (1991), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993).

^{xi} See *Sylva Shops Ltd. P'ship v. Hibbard*, 175 N.C. App. 423, 427–28, 623 S.E.2d 785, 790 (2006).

^{xii} Applying the doctrine of impossibility, a party's performance is excused when the party's performance is "impossible". See *Barnes v. Ford Motor Co.*, 95 N.C. App. 367, 370, 382 S.E.2d 842, 844 (1989), "Where the continued existence of the subject matter of a contract is essential to the performance of the contract and the subject necessary for performance is destroyed without the fault of either party, the contract is discharged or may be rescinded." Citing *Blount-Midyette & Co. v. Aeroglide Corp.*, 254 N.C. 484, 487, 119 S.E.2d 225, 227 (1961). For example, the performance of a home remodeler hired to remodel a home would be rendered "impossible" if the home it was to remodel burned to the ground due to no fault of either party.

By contrast, under the doctrine of frustration of purpose, the performance of a party is still possible but such performance is excused when an unforeseen event intervenes "to cause a failure of the consideration or a practically total destruction of the expected value of the performance." See *WRI/Raleigh, L.P. v. Shaikh*, 183 N.C. App. 249, 254, 644 S.E.2d 245, 248 (2007), " 'Although the doctrines of frustration and impossibility are akin, frustration is not a form of impossibility of performance. It more properly relates to the consideration for performance. Under it performance remains possible but is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance. The doctrine of commercial frustration is based upon the fundamental premise of giving relief in a situation where the parties could not reasonably have protected themselves by the terms of the contract against contingencies which later arose.' " , citing *Brenner v. Little Red Sch. House, Ltd.*, 302 N.C. 207, 211, 274 S.E.2d 206, 209 (1981) (quoting 17 Am.Jur.2d Contracts § 401). For example, an advertiser who contracts with an entertainer to build a billboard advertising the entertainer's event scheduled for May 2, 2020, which subsequently was cancelled due to the governor's orders relating to COVID-19 and limiting social gatherings to 10 people or less, may be able to seek relief under North Carolina's doctrine of frustration of purpose.

^{xiii} See N.C. Gen. Stat. Ann. § 25-2-615, comment 1. See also North Carolina Commentary to N.C. Gen. Stat. Ann. § 25-2-615 stating, "Subsection (a) seems to accord with present N. C. contracts principles that if a party by contract charges himself with an obligation possible to be performed, he must make it good, unless its performance be rendered impossible by an act of God, the law, or the other party, and unforeseen difficulties will not excuse him. However, if the parties contract with reference to specific property, the continued existence of which is clearly contemplated by the obligations assumed, the parties are relieved from further obligations concerning property when it is accidentally lost or destroyed by fire or otherwise, rendering performance of the contract impossible. But in order for a party to avail himself of such position, he must show that the destruction of the specific thing, was without his fault." Citing *Stagg v. Spray Water Power and Land Co.*, 171 N.C. 583, 89 S.E. 47 (1916); *Sale v. Highway Commission*, 242 N.C. 612, 89 S.E. 290 (1955); *Blount-Midyette and Co. v. Aeroglide Corp.*, 254 N.C. 484, 119 S.E.2d 225 (1961). See also, *Taylor v. Caldwell*, 3 Best and S. 826 (1863) a widely followed English case.

^{xiv} Citing *Alamance Cty. Bd. of Educ. v. Bobby Murray Chevrolet, Inc.*, 121 N.C. App. 222, 227, 465 S.E.2d 306, 310 (1996).