



STATE OF PENNSYLVANIA FORCE MAJEURE LAW COMPENDIUM (during COVID-19 pandemic)

Prepared By

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A. Introduction

This memorandum will seek to provide a Pennsylvania 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 Pennsylvania

1. Introduction

As a result of the COVID-19 pandemic, many Pennsylvania businesses are unable to perform under existing contracts. Whether or not these businesses will be liable for their inability to perform, will turn on the language of the agreements they have entered into. A common provision in such an agreement is a “Force Majeure” clause, which typically lists a series of events (such as war, strife, labor strikes, natural disasters) which the parties to a contract have agreed upon as excuses for nonperformance. The basic purpose of force majeure clauses is to relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated.

2. Requirements to Obtaining Relief Using Force Majeure

Pennsylvania case law addressing force majeure clauses is surprisingly sparse. Moreover, there is little to no case law analyzing force majeure clauses with respect to diseases or pandemics.

Generally, in Pennsylvania, in order to use a force majeure clause as an excuse for non-performance, the event alleged as an excuse must have been beyond the party’s control and not due to any fault or negligence by the non-performing party.¹ Further, the non-performing party has the burden of proof, as well as a duty to show what action was taken to perform, regardless of the occurrence of the excuse.

Moreover, the interpretation of a force majeure clause will be determined on a case by case basis, and will turn on the specific language used in the contract provision.² Accordingly, whether a force majeure clause is applicable will be dependent on whether the event alleged to have excused performance is specifically contained in the force majeure clause at issue. Pennsylvania courts will interpret such clauses narrowly.³ Events not provided for in the written agreement will not ordinarily excuse performance.⁴ Catchall phrases in force majeure

¹ Martin v. Pennsylvania, Department of Environmental Resources, 120 Pa. Commw. 269, 548 A.2d 675 (1988).

² Sunseri v. Garcia & Maggini Co., 148 A.2d 81 (Pa. 1929).

³ Id. (holding that a contractual provision excusing the defendant’s obligation in the event of a “crop failure” meant a total crop failure and if the parties’ intention had been to excuse for a partial crop failure, the parties would have included such language in the provision).

⁴ Id. citing Dorn v. Stanhope Steel, Inc., 534 A.2d 798 (Pa. Super. 1987) (holding that contingencies not provided for in a written agreement will not ordinarily excuse performance).

clauses such as “other similar causes beyond the control of the parties” is limited to things of the same kind and nature as the particular events mentioned.⁵

Historically, the Pennsylvania courts have been very strict in their application of force majeure, only allowing it as an excuse for performance when the event is particularly described in the contract. A contract excusing buyer’s refusal to accept deliveries “in case of strikes or other contingencies arising which are beyond the control of the buyer and which cause stoppage or partial stoppage of the plant or business of the buyer,” was held to be inadequate to excuse acceptance of deliveries although a financial depression had caused the closing of buyer’s steel plant.⁶

Even where a force majeure event has occurred, the nonperforming party must demonstrate due diligence to overcome the force majeure event.⁷

3. Scope of Relief

Generally, the remedy in the event of a force majeure is as provided for in the parties’ contract.⁸ The court will look to and grant relief regarding only the level of nonperformance in fact made impossible by the force majeure event.⁹ The nonperforming party has an ongoing duty of due diligence.¹⁰

4. Other Considerations

A recent Pennsylvania Supreme Court decision, addressing a statutory and constitutional challenge to the Governor’s executive order relating to COVID-19, could have a significant impact on the interpretation of force majeure clauses in COVID-19 cases.

In *Friends of Devito v. Wolf*, 2020 Pa. LEXIS 1987, four Pennsylvania businesses brought a lawsuit challenging an executive order closing all non-life sustaining businesses to control the spread of the coronavirus. The court was tasked with deciding whether the COVID-19 pandemic was a natural disaster such that the Governor’s authority under Pennsylvania’s Emergency Code – which grants the governor emergency powers – was triggered.

The Court ultimately held that COVID-19 was, in fact, a natural disaster. While there is certainly an argument to be made that the Court’s holding is limited to the interpretation of the governor’s emergency powers under the Pennsylvania Emergency Code, the court specifically held that the “COVID-19 pandemic is, **by all definitions**, a natural disaster and a catastrophe of massive portions”. (Emphasis added.)

⁵ *Morgantown Crossing, L. P. v. Manufacturers & Traders Trust Company*, 2004 U.S. Dist. LEXIS 22949 (E.D.Pa. 2004).

⁶ *Cleveland & W. Coal Company v. Cyclops Steel Co.*, 278 Pa 346, 123 A. 320 (1924).

⁷ *Golf Oil Corp. v. Fed. Energy Regulatory Commission*, 706 F.2d 444 (3rd Cir. 1983).

⁸ *Morgantown Crossing*, supra.

⁹ *Golf Oil Corp.*, supra.

¹⁰ *Id.*

Many force majeure clauses identify natural disasters as an event that will excuse a party's performance. Litigation related to COVID-19 and force majeure clauses will likely turn to the Pennsylvania Supreme Court's decision in *Friends of Devito* to support a finding that COVID-19 is in fact, a natural disaster.

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.