

# Current Real Estate Law in North Carolina in Light of COVID-19

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## Related Professionals

Brian T. Pearce  
336.387.5137  
bpearce@nexsenpruet.com

## Practices

Real Estate Law  
Real Estate Litigation  
Litigation

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We all have to admit it. It is a scary time. It is an uncertain time. It is a time unlike anything most of us can remember.

Ok, that has been said. Now we need to figure out how to move forward with real estate law in North Carolina. What are we facing with our real estate deals and cases?

## Real Estate Law from a Transactional Perspective

The first and most obvious question from a real estate perspective is what effect the current international situation will have on deals floating out there right now.

To start, look at whether a contractual termination right exists. For deals where there is a termination right, now is the time to determine whether you should pull the plug on the deal - if the world is just too uncertain to move forward. The ability to do so will be dependent upon the exact language of the contract in question. This termination right could be as simple as a provision in a purchase contract that allows a buyer to terminate during due diligence or a provision in a lease that allows a tenant or landlord to terminate at a certain point in a lease. The termination right could also be a little more hidden in the form of a condition that allows for a termination right to arise when the condition fails. Now is as good of a time as any to review those real estate contracts to see when those termination rights may arise. In doing so, you'd be wise to make sure the dates to exercise such termination rights are correctly calendared so appropriate decisions can be made.

While not a termination right, a contract may have a force majeure provision that excuses performance. Typically, a force majeure provision will define certain circumstances that neither party has control over. These circumstances are those that render performance under the contract impossible or at least very difficult. In most contracts where a force majeure provision is included, the applicable circumstances are specifically spelled out so the parties know what is and is not a force majeure event. However,

it is also not rare that the provisions include a catchall for “other events outside the parties control” or something of the sort.

Given that we have not seen a pandemic like COVID-19 in the modern era in North Carolina, it is unclear whether the North Carolina courts would consider COVID-19 as force majeure event. This determination would likely be made on a case by case basis. Along those lines, we do know that force majeure clauses have historically been interpreted narrowly. However, I do not know that we have ever had to deal with a national event like the current one facing us so it is uncertain if that strict construction would continue with respect to COVID-19.

Going forward and to eliminate any question, if one wants to account for this type of situation in the future, it would be wise to add “pandemic, epidemic, or national health emergency” to the force majeure list in a force majeure clause.

If there is not a termination right in the contract, there are a few legal theories a party to the real estate contract may use to argue an ability to terminate the contract. These theories would include impossibility of performance and frustration of purpose. Impossibility of performance is pretty simple to define. It occurs when performance is literally impossible for a reason not the fault of the party seeking to be excused from performance under the contract. *Crossman v. Life Care Centers of America, Inc.*, 738 S.E.2d 737 (N.C. Ct. App. 2013). Under this doctrine, we will have to wait and see if it becomes literally impossible for parties to perform under these contracts. It appears we may be moving closer and closer to that position. As we see more and more mandatory shutdowns, it may actually become literally impossible for parties to comply with their real estate contractual obligations. Examples of this could be a tenant not being able to continuously operate as required under a lease because executive order forbids them to operate. Or, it could be a seller not being able to record a deed conveying a property to a buyer because a register of deeds office is closed.

Frustration of purpose does not require an impossibility of performance but instead deems that performance “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.” *WRI/Raleigh, L.P. v. Shaikh*, 183 N.C. App. 249, 644 S.E.2d 245 (2007). One would think that the current pandemic qualifies as a fortuitous event that has supervened in real estate contracts. Thus, the question would be whether it has caused failure of consideration for those contracts or a total destruction of performance under those contracts. These will be questions for courts to decide in the future.

## Real Estate Law from a Litigation Perspective

From a real estate litigation perspective, the North Carolina courts have provided us with some guidance in the form of Orders and other guidance from Chief Justice Beasley of the North Carolina Supreme Court. The first Order from Chief Justice Beasley in this regard was entered on March 13, 2020. Chief Justice Beasley ordered:

That all superior court and district court proceedings be scheduled or rescheduled for a date no sooner than 30 days from the issuance of this order, unless:

1. The proceeding will be conducted remotely;

1. The proceeding is necessary to preserve the right to due process of law (e.g., a first appearance or bond hearing, the appointment of counsel for an indigent defendant, a probation hearing, a probable cause hearing, etc.);
1. The proceeding is for the purpose of obtaining emergency relief (e.g., a domestic violence protection order, temporary restraining order, juvenile custody order, judicial consent to juvenile medical treatment order, civil commitment order, etc.); or
1. The senior resident superior court judge, chief business court judge, or chief district court judge determines that the proceeding can be conducted under conditions that protect the health and safety of all participants.

The Order did not apply to proceedings where a jury had already been empaneled or to grand juries that had been empaneled. It also did not prohibit a judge or judicial officer from exercising any in chambers or ex parte jurisdiction as provided by law. The Order did encourage the courts to “liberally grant additional accommodations to parties, witnesses, attorneys, and others with business before the courts who are at a high risk of severe illness from COVID-19.”

On March 15, 2020, Chief Justice Beasley and McKinley Wooten Jr., the NCAOC Director, issued a joint Memorandum wherein they dictated that for at least the next 30 days, among other things, (i) “[O]ther matters before the clerk, such as foreclosures and other special proceedings, must be postponed” and (ii) “[S]mall claim proceedings, including summary ejectments and money owed, must be postponed.” The memo also provides “our courthouses must remain open to accept filings” but that “it cannot be business as usual for our court system.

On March 19, 2020, Chief Justice Beasley entered a second Order that provided:

*[T]hat all pleadings, motions, notices, and other documents and papers that were or are due to be filed in any county of this state on or after 16 March 2020 and before the close of business on 17 April 2020 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 17 April 2020...*

*[T]hat all other acts that were or are due to be done in any county of this state on or after 16 March 2020 and before the close of business on 17 April 2020 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 17 April 2020.*

This second Order extended all deadlines with respect to litigation until April 17, 2020. This does not mean deadlines just to make filings in response to matter. Instead, it also means deadlines for things such as making upset bids in foreclosures. Accordingly, based on the two Orders and the memo, real estate litigation matters in North Carolina, along with most other matters, are basically at a standstill until at least April 17, 2020.

Please note the date of this article as it will be current as of that date. We will update this article as any important developments occur.

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