COVID-19 in North Carolina: Winning the Breach of Contract Fight over Force Majeure, Impossibility and Frustration of Purpose

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As the Covid-19 pandemic continues in North Carolina, contracts – whether they are real estate, construction or other commercial contracts – are all at risk of non-performance by one of the parties. Inevitably, non-performance leads to breach of contract litigation. Covid-19 litigation battles are likely to be fought over the following defenses that may excuse contract performance: force majeure provisions, the doctrine of impossibility, and the frustration of purpose doctrine.

Force Majeure

Many contracts contain force majeure clauses which generally "protect the parties in the event that a part of a contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care." Black's Law Dictionary, p. 330 (Abr. 5th ed.); see Crabtree Ave. Inv. Group, LLC v. Steak and Ale of North Carolina, Inc., 169 N.C. App. 825 (2005) (force majeure not applicable because event was not beyond defendant's control).

Although force majeure provisions exist in many contracts across North Carolina, there is very little North Carolina case law interpreting force majeure clauses. It is interesting to note that a recent Law360.com article[1] surmised that, while states such as New Jersey, Florida, and California might broadly apply force majeure clauses and thereby excuse performance, other states such as New York may be more strict in their application of force majeure provisions.

How North Carolina courts will rule upon force majeure provisions remains unknown. However, regardless if one is seeking to enforce performance or seeking to excuse performance, the critical considerations as to how North

Carolina courts likely will decide any Covid-19 breach of contract case, hinging on a force majeure clause, will include:

1. A review of the specific language of the force majeure clause, which potentially will control the determination of its applicability.
   - → Some clauses may simply refer to "Acts of God, war and terrorism." However, in light of the North Carolina Supreme Court's narrow construction of "Acts of God" in Lea Co. v N.C. Bd. Of Transportation, 308 N.C. 603 (1983) ("an act occasioned exclusively by violence of nature"), such a clause may not cover the Covid-19 pandemic.
   - → Some clauses may be more extensive such as "war, rebellion, civil disturbance, earthquake, fire, flood, strike, lockout, labor unrest, acts of governmental authorities, shortage of materials, acts of God, acts of the public enemy and, in general, any other causes or conditions beyond the reasonable control of the parties." Under this clause, both "acts of governmental authorities" and "other causes or conditions beyond the reasonable control of the parties" potentially could excuse performance as a result of the Covid-19 pandemic.
   - → Some force majeure clauses actually contain the word "pandemic."
2. Whether the party relying upon a force majeure clause provided any timely written notice of that reliance.
3. Whether the pandemic actually caused the specific breach of contract. This will be a very fact specific inquiry.

Despite the fact many contracts contain force majeure clauses, it is equally true that many contracts do not. In those situations, litigation likely will focus on the doctrine of impossibility and the frustration of purpose doctrine.

Doctrine of Impossibility

"Impossibility of performance is recognized … as excusing a party from performing under an executory contract if the subject matter of the contract is destroyed without fault of the party seeking to be excused from performance." Brenner v. Little Red School House, Ltd., 302 N.C. 207, 210 (1981). Because destruction of the subject matter of the contract is critical, the doctrine of impossibility appears to be less likely to be applicable during the Covid-19 pandemic. Nevertheless, regardless if one is seeking to enforce performance or seeking to excuse performance, winning the issue of the applicability of the doctrine of impossibility ultimately will boil down to the actual facts.

Frustration of Purpose Doctrine

In Brenner, the North Carolina Supreme Court described the frustration of purpose doctrine:

1. Frustration is not a form of impossibility of performance.
2. 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.
3. 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 that later arose.
4. If the frustrating event was reasonably foreseeable, the doctrine of frustration is not a defense.
5. If the parties have contracted in reference to the allocation of the risk involved in the frustrating event, they may not invoke the doctrine of frustration to escape their obligations.

Although many aspects of the frustration of purpose doctrine seem applicable to the Covid-19 pandemic, winning this litigation issue likely will hinge on the actual language of the contract itself (did the parties already allocate the risk involved in the frustrating event?) and whether there has been a "practically total destruction of the expected value of the performance."

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[1] https://www.law360.com/articles/1264603/how-courts-may-handle-real-estate-force-majeure-suits.