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## **NOVEL IMPACT? COVID-19 AND FORCE MAJEURE PROVISIONS**

The COVID-19 outbreak (or “COVID-19”) and its concomitant consequences for the economic health of businesses worldwide have posed unprecedented challenges to companies big and small. As a result, many companies have been forced to re-evaluate the viability of their contractual obligations or question the ability of their counterparty to comply with the contract. Under both circumstances, businesses should be aware of how they may be affected by force majeure clauses or other common law contract principles.

A party that aims to excuse its performance under a contract for reasons related to COVID-19 has a number of avenues of recourse, one of which is reliance on the force majeure clause often included in contracts.<sup>1</sup> Force majeure clauses are generally drafted to protect contracting parties from the consequences of adverse events, beyond the control of the contracting parties, that make it impracticable or impossible for a party to fulfill its responsibilities and obligations. Such clauses may excuse a party from performing under the contract. This memo will summarize the current law on force majeure clauses in New York, Delaware, and Florida.

While each jurisdiction varies in the level of flexibility with which its courts will analyze a force majeure clause, New York, Delaware, and Florida courts share a number of interpretive similarities. For example, courts require that the force majeure provision contains specific language covering the event in question. Provisions including the following triggering events may cover COVID-19: language pertaining to a public health emergency such as ‘epidemic, pandemic, plague, disease, or other outbreak; disruption of labor force, supply chains, or transportation systems; national emergency; or an act of god.’ Although the concept has not yet been tested in courts, language related to ‘acts of government’ may also apply to COVID-19, as much of companies’ economic loss has been triggered by the shutdown orders issued by state and local governments.

In addition to an analysis of whether the force majeure clause contains language that covers the triggering event, parties to a contract must also consider whether the triggering event was the cause of the inability to perform. Relatedly, parties should also consider the following: whether the triggering event made performance impossible, whether the non-performing party could have taken action to avoid non-performance, or whether the non-performing party took any mitigating action. The answers to such questions may determine the success of a party’s invocation of the force majeure clause.

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<sup>1</sup> Common law principles of impossibility and frustration of purpose may also be an option, but are more difficult to prove.

In each of the three jurisdictions, the determination of whether relief will be granted to the party who has not performed under the contract is fact-intensive. The courts scrutinize the facts of each case individually. Thus, it is vital that the severity and pervasiveness of the harm suffered be presented to the court in detail. Consultation with attorneys familiar with force majeure cases is therefore essential. It would be advantageous to obtain legal advice prior to ceasing performance, if possible.

### **New York**

In New York, the effect of a force majeure clause is dependent on its express terms; consequently, there is not a uniform rule as to when a force majeure clause will excuse performance. New York courts generally interpret force majeure clauses very narrowly. Thus, the language contained in the clause will be given its plain meaning and events not specifically listed in the clause will not likely excuse a party's performance.<sup>2</sup> The non-performing party bears the burden of proof and must show that the non-performance was an unavoidable consequence of the event.<sup>3</sup> New York courts may also require that a party seeking to excuse performance show that the triggering event was unforeseeable and makes performance objectively impossible<sup>4</sup> – a more stringent standard than is applied in other jurisdictions.

It is important to note that the New York courts will be applying traditional doctrines of contract interpretation to an unprecedented and ever-evolving set of circumstances in the state that has experienced the greatest numbers of COVID-19 infection and death in the United States. This may make New York courts' treatment of such cases more unpredictable and subject to fluctuation.

### **Delaware**

There have been few cases in Delaware interpreting force majeure clauses. However, it appears that courts in Delaware are similar to New York in that they afford particular weight to the precise language included in the contract, which gives the parties greater control over risk allocation when drafting the agreement.

In *Stroud v. Forest Gate Development Corp., Inc.*, the Delaware Chancery Court outlined the key points in the Court's analysis of a force majeure clause.<sup>5</sup> "Application of a force majeure provision, as with any other contractual provision, starts with the words chosen by the drafter." Generally, invocation of the clause is limited to events that are specifically included and described in the clause. If a party wishes to rely instead on a catch-all phrase, such as 'or any other reason whatsoever beyond the control of [the party],' the phrase "must be construed within the context established by the preceding listed causes." The Chancery Court also concluded that reliance on the force majeure clause to excuse non-performance would generally require: "first, that the delay-

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<sup>2</sup> *Reade v. Stoneybrook Realty*, 63 A.D.3d 433, 434 (1st Dept. 2009) ("only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused.").

<sup>3</sup> *Phillips Puerto Rico Core*, 782 F.2d 314, 319 (2d Cir.1985).

<sup>4</sup> *Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, 2009 WL 368508, at \*7 (W.D.N.Y. Feb. 13, 2009).

<sup>5</sup> 2004 WL 1087373 \*5 (Del. Ch. Ct., May 5, 2004).

causing event was beyond the reasonable control of [the party] and, second, that the event was not reasonably foreseeable in the ordinary course of” the business in question.<sup>6</sup>

Under Delaware law, reasonable, unextreme economic hardship cannot constitute force majeure itself. Courts will look at the nature of the initial condition preventing the performance to determine whether the condition excuses performance under a force majeure provision. It is therefore vital to determine at the outset whether the party’s inability to perform was caused by the pandemic itself or the related acts of government, rather than just collateral financial instability.

### **Florida**

Under Florida law, force majeure clauses that include foreseeable events or events that merely frustrate performance are enforceable.<sup>7</sup> “[F]orce majeure clauses broader than the scope of impossibility are enforceable under Florida law, including those allowing foreseeable as well as unforeseeable events to excuse timely performance.”<sup>8</sup> However, as with many other jurisdictions, the clause must list the triggering events with specificity such that the clause is not ambiguous and the contract is not rendered illusory.

### **Challenges to Successfully Invoking a Force Majeure Clause**

The narrow analysis that is used by many courts to evaluate a defense invoking the force majeure clause of a contract may be a large hurdle to overcome. A party seeking to use the defense may also face the challenges of proving a lack of foreseeability, defending any failure to explore alternate performance, and potential lack of timely notice.

Fox Horan & Camerini LLP  
May 2020

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<sup>6</sup> *Stroud*, 2004 WL 1087373 \*5.

<sup>7</sup> *In re Flying Cow Ranch HC, LLC*, 2018 WL 7500475, at \*2 (Bankr. S.D. Fla. June 22, 2018), *leave to appeal denied sub nom. Flying Cow Ranch HC, LLC v. McCarthy*, 2019 WL 1258780 (S.D. Fla. Mar. 19, 2019).

<sup>8</sup> *Home Devco/Tivoli Isles LLC v. Silver*, 26 So. 3d 718, 722 (Fla. 4th DCA 2010).