

Part 4
**COVID-19 Crisis:
Is Your Business Protected?**

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March 31, 2020

Force Majeure Clauses in Contracts: Do They Protect You or Your Company Against COVID-19 or a State of Emergency?

What Is a *Force Majeure* Clause?

- Allows a party to a contract to terminate or, in some cases, modify a contract or extend the time to perform. It is intended to excuse or delay performance.

What Does a Typical *Force Majeure* Clause Say to Provide Protection?

- Each clause varies and many vary to conform with the specific circumstances of the parties to the contract. However, most *force majeure* clauses provide that a party will not be liable for failure to perform its obligations because of a labor strikes, fires, floods, earthquakes or “Acts of God.”
- Some clauses may be broader and include language such as “or other conditions or circumstances beyond your control or fault.”
- Other contracts simply allow for an extension of time to perform, which may be commensurate with the delay or for a reasonable time, depending on the contract language and circumstances.

How Have Courts in New Jersey Construed These Clauses?

- In New Jersey (and many other states) these clauses are construed narrowly as courts do not like to excuse performance unless a contract specific allows for it.
- The clause is interpreted to include only those events or things of the same or general nature of the specifically enumerated reasons.

How Have Courts in New Jersey Construed These Clauses? *(continued)*

- Now, many contracts cannot be performed because the government has mandated shutdowns as a result of the pandemic.
- Is a “pandemic” an Act of God? Nothing on point in NJ, but if the *force majeure* is broad enough, it will provide protection as most contracts will not include a “pandemic” as a reason to excuse performance, but you can argue that it is a cause beyond your control and was not foreseeable.

Is There any Protection Where a *Force Majeure* Clause is not Broad Enough or is Specific to the Industry?

Impossibility or Impracticability of Performance

- In some circumstances, a party will be excused from performance if performance has become unexpectedly impossible or impractical as a result of a supervening act such as a state of emergency or pandemic.
- Need extraordinary circumstances.

Is There any Protection Where a *Force Majeure* Clause is not Broad Enough or is Specific to the Industry? *(continued)*

Impossibility or Impracticability of Performance

- The circumstances are so vitally different from what was reasonably to be expected or contemplated at the time the contract was entered into.
- Fact-sensitive Inquiry-
Thus, facts and circumstances are key

e.g., Personal services contract - need the particular skill or knowledge of a particular person who is no longer available

Is There any Protection Where a *Force Majeure* Clause is not Broad Enough or is Specific to the Industry? *(continued)*

Frustration of Purpose

- This applies when a supervening event has fundamentally and severely changed the nature of the parties overall bargain or the purpose of the agreement.
- Supervening event was not contemplated or foreseeable and fundamentally changes the nature of the parties ongoing relationship without the fault of either party.

Other Remedies

- **Rescission**
A contract is terminated based on equitable principles
- **Reformation**
A contract is reformed to change its terms, it is extended, modified or changed to fit the circumstances
- **Extreme Equitable Remedies Applied Sparingly by the Courts**

Extending Performance Deadlines

- In some contracts, a *force majeure* clause simply extends the time for the party to perform. The language of the contract becomes important.
- Extension may be for a reasonable time or commensurate with the extent of the delay.
- This prevents default, liquidated damages, and delay damages.
- Invoked to prevent penalties for nonperformance or delay in performance.

Business Interruption/Income Coverage

CAVEAT: Each Insurance Policy is Different

- The actual coverage limits, deductibles, exclusions, and scope of coverage will depend on a reading of your policy.

Business Interruption (a/k/a Business Income) Loss Coverage is a Form of Commercial Property Insurance

- May be included within your commercial property coverage
- May be standalone

All Risks versus Covered Cause of Loss

- All Risk
- Covered cause of loss (Named Peril)

All Policies Require a *Direct Physical Loss* to Your Property, Which Causes a Suspension of Your Business Operations

- Insured's property
- Contingent loss/Dependent property
- Civil authority
- Leader property

Conditions Required Before Coverage is Triggered

Direct Physical Loss

Contamination?

- *Gregory Packaging v. Travelers Prop. & Cas. Co*

Off site condition?

- *Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co.*

Conditions Required Before Coverage is Triggered *(continued)*

Business must be suspended due to direct physical loss

A mere reduction in business, where the customers have gone away (as opposed to either the business being forced to close or access being denied based on a “stay at home” order), is not likely to trigger coverage.

Executive Order 107 – Essential Retail Business Services

- Grocery stores, farmers' markets, food banks/stores
- Pharmacies and medicinal marijuana dispensaries
- Medical supply stores
- Gas stations
- Convenience stores
- Stores within healthcare facilities
- Hardware and home improvement stores
- Retail functions of banks and other financial institutions
- Laundromats and dry-cleaning services
- Stores that sell supplies for children under five years old
- Pet stores
- Liquor stores
- Auto maintenance and repair services
- Printing and office supply shops
- Retail mail and delivery stores
- Mobile phone retail and repair shops *(added 3/24/20)*
- Bicycle shops, but only to provide service and repair *(added 3/24/20)*
- Livestock feed stores *(added 3/24/20)*
- Nurseries and garden centers *(added 3/24/20)*
- Farming equipment stores *(added 3/24/20)*
- Child care centers *(but only while serving children of essential workers starting April 1) (added 3/25/20)*
- Realtors, but only to show houses 1-on-1 *(open houses are prohibited) (added 3/30/20)*
- Firearms retailers, by appointment only and during limited hours *(added 3/30/20)*
- Microbreweries or brewpubs for home delivery only *(added 3/30/20)*

What May Be Covered

- Business income:
 - Lost “net income”
 - Continuing normal operating expenses, including payroll
 - Some policies may not cover Officers’, Executives’, Managers’ salary
 - Rental value (if you are a landlord and purchase this coverage)
- Extra expenses
- Extended business income

How Are the Insurers Responding to Business Interruption Claims?

- Denying the claims
- Why?
 - No direct physical loss
 - Virus or bacteria exclusion
- New ISO endorsement – BUSINESS INTERRUPTION: LIMITED COVERAGE FOR CERTAIN CIVIL AUTHORITY ORDERS RELATING TO CORONAVIRUS

Legislative Efforts to Support Availability of Business Income Coverage

- States:
 - New Jersey (A-3844)
 - Ohio (H.B. 589)
 - Massachusetts (S.D. 2888)
 - New York (A.10226)
- Federal
 - Potential Federal program to reinsure COVID-19 business interruption claims

What Should You Be Doing?

- Prepare note(s)—
 - Why have your business operations been suspended?
Damage/contamination to property, civil authority, supplier, lack of access to property?
 - Dates of business suspension

What Should You Be Doing? *(continued)*

- Compile:
 - 3-5 years' financial statement
 - 3-5 years' federal tax returns
 - Monthly P&Ls
 - Any financial budgeting/forecasting developed prior to changes in business
 - Payroll records—particularly important if filing for loan under federal program
 - Set up special General Ledger Account (and backup documentation) for Expenses Related to COVID-19—e.g., extra payroll, temporary facility
 - Place insurer on notice of claim

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