

**COVID-19 Defenses to Litigation:
How Effective Are the Defenses of Force Majeure, Impossibility of Contract and
Frustration of Contractual Purpose in Light of the COVID-19 Pandemic?¹**

Panelists:

Hon. Rosemary Gambardella, U.S. Bankruptcy Court, District of New Jersey

Sydney J. Darling, Walsh Pizzi O'Reilly Falanga LLP

David B. Grantz, Meyner and Landis LLP

Marc D. Miceli, SM Law PC

Moderator: Anthony Sodono, III, McManimon, Scotland & Baumann, LLC

I. COVID-19 Related Defenses to Breach of Contract Claims

A. General Rule

Promises are not excused for supervening events.

“Contract liability is strict liability. It is an accepted maxim that *pacta sunt servanda*—contracts are to be kept. The obligor is therefore liable in damages for breach of contract even if [such party] is without fault and even if circumstances have made the contract more burdensome or less desirable than [such party] had anticipated.” Restatement (Second) of Contracts.

B. Force Majeure

i. What is a force majeure clause?

A force majeure clause provides a means by which the parties may anticipate in advance a condition that will make performance of that contract impossible or impracticable. See Facto v. Fantagis, 390 N.J. Super. 227, 231-32 (App. Div. 2007). If the unforeseen events or circumstances render performance impracticable or impossible, the parties may be excused from performance. See id. A force majeure clause is construed like any other contractual provision and in light of the contractual terms, the surrounding circumstances, and the purpose of the contract. Id. at 233.

ii. General or Specific force majeure clauses

Force majeure clauses are either general or specific. A general clause will include generally “conditions or contingencies beyond the parties’ control,” whereas a specific clause will identify circumstances or events that would excuse performance. See Facto, 390 N.J. Super. at 231-32. If an event is specifically listed, there is no need to demonstrate it unenforceable. Only where a party attempts to rely upon general language will that party be required to demonstrate unforeseeability. See TEC Olmos, LLC v. Conocophillips Co., 555 S.W.3d 176, 183 (Tex. App. 2018); but see Gulf

¹ Adam Levitsky, Javier Lopez and Eric Holes of Meyner and Landis LLP assisted the panelists with legal research and preparation of this outline.

Oil Corp. v. Fed. Energy Regulatory Comm'n, 706 F.2d 444, 454 (3d Cir. 1983) (listed events must be unforeseeable).

- iii. Other considerations
 - a. Whether performance is delayed or totally excused; and
 - b. Whether the required notice invoking the clause was provided.
- iv. Key issues courts are facing:
 - a. Assuming the COVID-19 Pandemic is not an event covered by specific terms used in force majeure provision to define force majeure event, is it of the same general nature of class as those specifically enumerated such that it would fall under a catch-all clause or general force majeure clause?
 - b. Is the failure to comply with the contractual obligation at issue proximately caused by the COVID-19 Pandemic?
 - c. If the force majeure provision specifically states that the provision does not apply to an “inability to pay” or “lack of money,” is the inability to pay as a result of the business effects of the COVID-19 excluded?
- v. Note: if you declare force majeure and cease performance, and it turns out the declaration was not warranted, you could wind up as the party in breach of the contract.
- vi. If the parties to the contract elect to allocate the risk of supervening events by including a force majeure clause in their contract, the terms of the contract control – not any available affirmative defenses such as impossibility.

C. Impossibility/Impracticability of Contract

- i. This generally means death or other destruction of the subject matter.
- ii. Impracticability (some states treat as interchangeable with impossibility) is where performance is made excessively burdensome by a supervening event that (1) the party to be excused did not cause and did not assume the risk of occurring; (2) was inconsistent with a basic assumption of the parties; and (3) was unforeseeable (but not inconceivable—i.e., a reasonable party would not have guarded against it in the contract). (See Restatement (Second) of Contracts § 261; U.C.C. § 2-615; CISG Art. 79.)
- iii. Defense has not been widely accepted by courts in response to Covid-related breaches. Most of the case law is out of the SDNY. The general conclusion is that the government-mandated shutdowns do not render contractual performance impossible. The doctrine of impossibility cannot be applied where the underlying purpose of the contract is not destroyed.

D. Frustration of Contractual Purpose

- i. Elements (Restatement (Second) of Contracts)
 - a. The party's principal purpose in making the contract must be frustrated;
 - b. Without that party's fault;
 - c. By the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made.
- ii. It is distinct from the problem of impracticability in that there is no impediment to performance by either party.

II. Notable Cases Under State Law

A. Three Basic Tenants of Contract Law Seen Throughout Cases²

- i. Courts generally interpret a contract to mean what it says.
- ii. Promises generally are not excused for supervening events.
- iii. Parties may contractually allocate the risk of supervening events. This does not mean one party can simply walk away from all obligation and liability.
 - a. BKNY 1, Inc. v. 132 Capulet Holdings, LLC, 2020 N.Y. Misc. LEXIS 9898, 2020 NY Slip Op 33144(U) (Sept. 23, 2020) (rejecting impossibility defense where defendant restaurant was closed for two months due to COVID-19 but lease expressly allocated risk of government shutdown to tenant); but see Richards Clearview, LLC v. Bed Bath & Beyond, Inc., No. 20-1709, 2020 U.S. Dist. LEXIS 160078, 2020 WL 5229494 (E.D. La. Sept. 2, 2020) (harm of enforcing contract far outweighs harm of excusing performance where defendant tenant was only 10 days late paying rent).
 - b. Zhao v. CIEE, Inc., No. 2:20-cv000240, 2020 U.S. Dist. LEXIS 158148, 2020 WL 5171438 (D. Me. Aug. 31, 2020) (granting motion to dismiss claims by college student that defendants were unjustly enriched and/or breached their contracts regarding a study abroad program for Spring 2020 where plaintiff had assumed the risk in the contract).
 - c. 35 E. 75th St. Corp. v. Christian Louboutin L.L.C., No. 154883/2020, 2020 WL 7315470, 2020 NY Slip Op 34063(U) (2020) (granting summary judgment in favor of landlord despite existence of force majeure clause extending time for performance to mirror delay because

² See Timothy Murray, *Corbin on Contracts: Force Majeure and Contractual Waivers in Light of COVID-19* (LexisNexis 2020).

tenant not totally shut down and effect of pandemic akin to a market change)

- d. FTC v. A.S. Research, LLC, 2020 U.S. Dist. LEXIS 128182 (D. Col. July 21, 2020) (denying defendant’s attempt to revoke consent to a pre-COVID settlement agreement with plaintiff based on frustration of purpose).

B. Additional takeaways from cases³

- i. Performance is excused only if the non-occurrence of the supervening event was a basic assumption of the parties.
 - a. Daversa-Evdyriadis v. Norwegian Air, 2020 U.S. Dist. LEXIS 173854 (C.D. Cal. Sept. 17, 2020).
- ii. Performance is excused only to the extent that the supervening event caused non-performance.
 - a. However, some courts have held that a partial or temporary disruption does not excuse performance. *See, e.g.,* Dr. Smood N.Y. LLC v Orchard Houston, LLC, 2020 NY Slip Op 33707(U) (2020) (since plaintiff café ordered to stop indoor dining and not counter service or pickup orders, it was only partial frustration—not enough to excuse performance); BKNY 1, Inc. v 132 Capulet Holdings, LLC, 2020 NY Slip Op 33144(U) (Sept. 23, 2020) (two-month closure in a nine-year lease did not frustrate the overall purpose of the contract); Greater N.Y. Auto. Dealers Assn, Inc. v City Spec, LLC, 2020 NY Slip Op 51596(U) (2020) (“four-month closure out of a five-year lease did not frustrate the overall purpose of the Lease”).
- iii. Where parties do not specify certain force majeure events or rely upon a catch all, performance is excused only if the supervening event was unforeseeable.
 - a. Belk v. Le Chaperon Rouge Co., No. 1:18cv1954, 2020 U.S. Dist. LEXIS 117985, 2020 WL 3642880 (N.D. Ohio July 6, 2020) (enforcing settlement agreement entered into on March 12, 2020).
 - b. Siegal v. Geico Cas. Co., No. 1:20-cv-04306, 2021 U.S. Dist. LEXIS 40759, 2021 WL 825667 (N.D. Ill. March 4, 2021) (refusing to allow plaintiff to invoke frustration of purpose principles to support claim against insurer for disgorgement of premiums).

³ See Timothy Murray, *Corbin on Contracts: Force Majeure and Contractual Waivers in Light of COVID-19* (LexisNexis 2020).

- iv. Subjective inability to perform (*e.g.*, financial hardship) does not excuse performance.
 - a. Shin v. Young Yoon, 2020 U.S. Dist. LEXIS 189519 (E.D. Cal. Oct. 13, 2020) (refusing to allow defendant to defer payment on a stipulated judgment based on economic hardship arising from COVID-19).
 - b. RPH Hotels 51st St. Owner, LLC v. HJ Parking LLC, 2021 NY Slip Op 30286(U) (Jan. 28, 2021) (rejecting impossibility and frustration of purpose defenses of defendant parking garage where landlord sued for past due rent).
 - c. MEPT 757 Third Ave. LLC v. Grant, 2021 NY Slip Op 30592(U) (March 1, 2021) (granting summary judgment in favor of landlord against guarantor of lease and rejecting argument based on tenant's business model).
- v. Inability to perform due to the failure of a third party typically does not excuse performance.
 - a. Martorella v. Rapp, No. 20 MISC 000153 (MDV), 2020 Mass. LCR LEXIS 104, 2020 WL 2844693 (Mass. Land Ct. June 1, 2020) (dismissing action for return of deposit brought by buyer or property at public auction where buyer was relying upon financing that did not come through as a result of COVID).
- vi. Even when performance is excused, the party excused may not retain money paid for services not rendered.
 - a. Example: College tuition cases –Moran v. Stonehill Coll., Inc., No. 2077CV00431, 2021 Mass. Super. LEXIS 1, 2021 WL 965754 (Mass. Super. Feb. 16, 2021); Hannibal-Fisher v. Grand Canyon Univ., 2021 U.S. Dist. LEXIS 42180, 2021 WL 842134 (D. Ariz. March 5, 2021); Milanov v. University of Michigan, No. 20-56, Mich. Clms., 2020 Mich. Ct. Cl. LEXIS 1, 2020 WL 7135331 (Mich. Ct. Cl. July 27, 2020); Ford v. Rensselaer Polytechnic Inst., 2020 U.S. Dist. LEXIS 236692, 2020 WL 7389155 (N.D. N.Y. Dec. 1, 2020); Rosado v. Barry Univ. Inc., 2020 U.S. Dist. LEXIS 204355, 2020 WL 6438684 (S.D. Fla. Oct. 30, 2020); Hiatt v. Brigham Young Univ., 2021 U.S. Dist. LEXIS 3269, 2021 WL 66298 (D. Utah Jan. 7, 2021); Gibson v. Lynn Univ., Inc., No. 20-81173, 2020 U.S. Dist. LEXIS 222214, 2020 WL 7024463 (S.D. Fla. Nov. 29, 2020) (at issue was also whether the school policy created a contract between the school and the student).

C. Other Landlord cases

- i. Cab Bedford LLC v. Equinox Bedford Ave, Inc., 2020 NY Slip Op 34296(U) (Dec. 22, 2020) (finding for the landlord and refusing to reallocate the risks for which the parties contracted).
- ii. 98-48 Queens Blvd. LLC v. Parkside Mem. Chapels, Inc., 2021 NY Slip Op 50049(U) (Jan. 26, 2021) (COVID did not excuse funeral home from paying rent where force majeure clause read, “[N]othing in this section shall excuse Tenant from the prompt payment of any rental or other charge . . .”).
- iii. 1140 Broadway LLC v. Bold Food, LLC, 2020 NY Slip Op 34017(U) (N.Y. Sup. Ct. Dec. 03, 2020) (rejecting frustration of purpose argument of commercial tenant where office space leased could still be occupied but its business was rendered unprofitable by shutdowns).
- iv. Backal Hospitality Group LLC, et al. v. 627 West 42nd Retail LLC, No. 154141/2020, 2020 N.Y. Misc. LEXIS 4050, 2020 WL 4464323 (Aug. 3, 2020) (finding in favor of defendant/tenant where lease for event space contemplated scenario where governmental order prohibited operations and said parties would “reach an agreement regarding the collection of rent at the conclusion of the governmental restriction”).
- v. Intern. Plaza Assoc. L.P. v. Amorepacific US, Inc., No. 155158/2020 (N.Y. Co. Sup. Ct. Dec. 14, 2020) (“[L]oss and at times a lack of income due to [COVID-19] is not just part of the up and downs [sic] during a commercial tenant’s lease period.”).
- vi. SVAP III Riverdale Commons LLC v. Coon Rapids Gyms, LLC, No. 02-CV-20-3652, 2020 Min. Dist. LEXIS 361 (Dec. 18, 2020) (ruling in favor of landlord reasoning that, despite the lease’s mandate that the premises be used as a gym, tenant could have sought permission for other uses).
- vii. Palm Springs Mile Assoc., Ltd. v. Kirkland’s Stores, Inc., No. 20-21724-Civ-Scola, 2020 U.S. Dist. LEXIS 163880, 2020 WL 5411353 (S.D. Fla. Sept. 9, 2020) (defendant’s failure to pay rent not directly linked to COVID-19 or government restrictions).

D. Cancellation of Events Cases

- i. Ellenwood v. World Triathlon Corp., No. 8:20-cv-1182-T-60AEP, 2021 U.S. Dist. LEXIS 2719, 2021 WL 62482 (M.D. Fla. Jan. 7, 2021) (upholding no refund provision in contract).
- ii. NetOne, Inc. v. Panache Destination Mgmt., 2020 U.S. Dist. LEXIS 2011239, 2020 WL 6325704 (D. Hawaii Oct. 28, 2020) (holding that the extent of recovery in restitution depends on value of services already expended by the party to whom deposits were made).

E. Additional Cases

- i. JN Contemporary Art LLC v. Phillips Auctioneers LLC, 2020 U.S. Dist. LEXIS 237085, 2020 WL 7405262 (S.D.N.Y. Dec. 16, 2020) (force majeure provision covered “natural disasters,” which the court concluded included the COVID-19 pandemic).
- ii. AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, 2020 Del. Ch. LEXIS 353, 2020 WL 7024929, (Del. Ch. Nov. 30, 2020) (COVID-19 fits within plain meaning of the term calamity as used in force majeure).
- iii. Pinero v. Zapata, 306 So.3d 1117 (Fla. Dist. Ct. App. 2020) (deadlines to comply with terms in settlement agreement were not excused due to COVID).
- iv. Rudolph v. United Airlines Holdings, No. 20 C 2142, 2021 U.S. Dist. LEXIS 27795, 2021 WL 534669 (N.D. Ill. Feb. 12, 2021) (interpreting force majeure provisions in United Airlines’ Conditions of Carriage and refusing to dismiss certain plaintiffs’ claims).
- v. Only Props., LLC v. Sylvia Wald & Po Kim Art Gallery, 2020 NY Slip Op 34179(U) (Dec. 18, 2020) (affirming a “pause” of the payments under access agreement during 73-day period that government ordered stoppage of all non-essential construction work).

III. Notable Bankruptcy Cases

- A. In re Cinemax USA Real Estate Holdings, Inc., 2021 Bankr. LEXIS 200 (Bank. S.D. Fla., Jan 26, 2021) - Debtors sought to reject certain commercial leases and delay and excuse performance of their rent under the remaining leases. The court held that performance was only excused during the time period the theaters were actually closed by the government, regardless of the reduced capacity allowed after reopening.
- B. In re CEC Entm’t, Inc., 2020 Bankr. LEXIS 3493 (Bankr. S.D. Tex., Dec. 14, 2020) - Court held that the Debtor, who operated a nationwide chain of Chuck E. Cheese venues, could not rely on the COVID pandemic to avoid its obligations to pay its rent to various lessors in several different states because the leases that had force majeure clauses each expressly required that the Debtor remain obligated to pay rent despite the force majeure provisions.
- C. In re Condado Plaza Acquisition LLC, 620 B.R. 820 (Bankr. S.D.N.Y. Oct. 5, 2020) – court refuse to extend closing date on debtor’s contract to purchase a hotel despite the fact that seller could not deliver debtor an operating hotel as a result of the COVID-19 pandemic.
- D. In re Hitz Rest. Grp., 616 B.R. 374 (Bankr. N.D. Ill, June 2, 2020) - the court found that the government shut-down orders triggered the force majeure clause under the lease and partially excused the debtor’s obligations to pay rent for April, May and June 2020. However, not all restaurant operations were prohibited (and in fact, the state

encouraged restaurants to continue to perform take-out, curbside pick-up and delivery services); and therefore held that the debtor would still need to pay rent, albeit at a discounted rate.

- E. In re Pier 1 Imps., Inc., 615 B.R. 196 (Bankr. E.D. VA, May 10, 2020) - the Court exercised its equitable powers under §105 and liberally interpreted §365(d)(3) to permit the debtor to defer its rent payments given the COVID-19 pandemic, which caused an “unforeseeable glitch in the administration of the Debtors’ Bankruptcy Cases.”

IV. Special Considerations for Lenders

With regard to secured lenders, there might be less cases involving lenders as a result of either one or all of the following consideration: (1) commercial loan agreements are less likely to contain force majeure provisions, (2) foreclosure proceedings have been stayed in many states, (3) commercial workouts or forbearance agreements have been easier to reach between lenders-borrowers than lessors-leasees.

A. Checklist for Force Majeure Evaluation Based on NJ Law

- i. Is there a force majeure provision in the Contract?
- ii. Is the force majeure provision general or specific?
- iii. Is the COVID-19 Pandemic covered by one of the specifically enumerated events in the force provision?
- iv. If there is a general or “catch-all clause” in the force majeure provision? If so, is the COVID-19 Pandemic to the specifically enumerated force majeure events?
- v. Does the language of the force majeure totally excuse performance or merely permit delayed performance?
- vi. Has the party attempting to invoke the force majeure clause provided the required notice to invoke the force majeure provision (if any) under the terms of the agreement?