

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

**Rose A. Suriano, Esq.**

Member and Co-Chair, Litigation

**Stuart J. Polkowitz, Esq.**

Member, Litigation

**John D. Fanburg, Esq.**

Managing Member and Chair, Healthcare Law

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

# Sign Up for Our Litigation Updates

- To sign up for our email updates on the COVID-19 crisis please visit: [bracheichler.com/subscribe-to-insights](https://bracheichler.com/subscribe-to-insights) or email [akatz@bracheichler.com](mailto:akatz@bracheichler.com)

## Follow Us on Social Media for Updates



**Like Us  
on Facebook ▶**

[facebook.com/  
bracheichlerllc](https://facebook.com/bracheichlerllc)



**Follow Us  
on LinkedIn ▶**

[linkedin.com/company/  
brach-eichler-llc](https://linkedin.com/company/brach-eichler-llc)



**Follow Us  
on Twitter ▶**

[@BrachEichler](https://twitter.com/BrachEichler)

# Contact Us

**Rose A. Suriano, Esq.**

Member and Co-Chair, Litigation

[rsuriano@bracheichler.com](mailto:rsuriano@bracheichler.com) | 973-403-3129

**Stuart J. Polkowitz, Esq.**

Member, Litigation

[spolkowitz@bracheichler.com](mailto:spolkowitz@bracheichler.com) | 973-403-3152

**John D. Fanburg, Esq.**

Managing Member and Chair, Healthcare Law

[jfanburg@bracheichler.com](mailto:jfanburg@bracheichler.com) | 973-403-3107