

## North Carolina – Force Majeure Law

There is little modern North Carolina case law analyzing the use of force majeure clauses in contracts. Nevertheless, force majeure clauses are enforceable and are to be construed like any other contractual provision under North Carolina law. See e.g., *Certainfeed Gypsum NC, Inc. v. Duke Energy Progress, LLC*, 2018 WL 4199077, at \*4, 2018 NCBC 90 (N.C. Super., 2018). As such, while little case law appears to directly discuss or analyze force majeure clauses under North Carolina law, one can look to general contract principles to determine how North Carolina courts will analyze the enforceability of force majeure contract provisions and potentially excuse nonperformance of a contractual obligation. Further, just as in other jurisdictions, North Carolina recognizes common law principles of impossibility and frustration of purpose which, if proven, may be used to excuse performance. However, such principles are narrowly applicable.

The *Certainfeed Gypsum* matter is one of the few modern cases discussing and analyzing force majeure clauses in a commercial contract setting. See generally, *Certainfeed Gypsum*, 2018 WL 4199077. In this case, the defendant agreed to supply plaintiff with gypsum, a byproduct of coal-fire electric power plants. *Id.* at \*1. However, defendant Duke decreased its use of coal-fire electric power plants over the years thereby leaving it without enough byproduct to meet its contractual obligations to plaintiff. *Id.* Notably, the contract had a force majeure provision providing for excused performance in the case of certain events occurring which was at the center of the arguments set forth in the lawsuit. *Id.* at \*\*24-26. With that in mind, the Court specifically looked to and analyzed the language of the force majeure provision and negotiations relating thereto, but noted that the Court is “guided by” and will adhere to North Carolina principles of contract law. The Court concluded its opinion with a finding, among others, that the defendant’s supply obligation under the contract and nonperformance thereof was not excused by force majeure. *Id.* at \*34.

With the above in mind, it is clear that general contract principles of North Carolina are of the utmost importance. Thus, the following principles should be kept in mind: (1) the primary purpose of contractual interpretation is to ascertain the intention of the parties at the time of execution (*Lane v. Scarborough*, 200 S.E.2d 622, 624 (N.C. 1973)); (2) if the terms of a contract are unambiguous, then the court cannot look beyond the terms of the contract to determine the intention of the parties (*Stovall v. Stovall*, 698 S.E.2d 680, 684 (N.C. App., 2010)); (3) courts are to give intention to all provisions of a contract and cannot reject what the parties inserted or insert

what the parties elected to omit from the contract (*Weyerhaeuser Co. v. Carolina Power & Light Co.*, 127 S.E.2d 539, 541 (N.C. 1962)); and (4) it must be presumed that the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean (*Carter v. Barker*, 617 S.E.2d 113, 116 (N.C. App., 2005)). Thus, with regard to force majeure provisions which are specifically set forth in a contract, the court must ascertain the intent of the parties with regard to including such provision, determine whether ambiguity exists, and if no such ambiguity exists, keep in mind that the court is not to insert additional terms into a contract nor is the court to reject terms that are specifically provided for in the contract. Accordingly, just as the Court did in *Certainited Gypsum*, it appears that North Carolina courts will construe a force majeure provision according to its plain terms and give meaning to all terms set forth therein.

Additionally, North Carolina does recognize the applicability of common law principles of impossibility and frustration of purpose that may excuse contractual obligations. Specifically, under North Carolina law, "impossibility of performance is recognized . . . as excusing a party from performing under a[] . . . 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.*, 274 S.E.2d 206, 209 (N.C. 1981); *See also Steamboat Co. v. Transportation Co.*, 82 S.E. 956 (N.C. 1914) (applying doctrine to contract between ship owner and party leasing it for ferrying purposes when ship was destroyed by fire through no fault of parties); *Barnes v. Ford Motor Co.*, 382 S.E.2d 842 (1989) (affirming trial court's instruction on doctrine of impossibility where subject matter of lease, a tractor, was destroyed); *Blount-Midyette & Co. v. Aeroglide Corp.*, 119 S.E.2d 225, 227 (N.C. 1961) ("In contract in which performance depends on continued existence of a given thing, there is an implied condition that an impossibility of performance arising from the destruction of the thing shall excuse performance . . ."). With that in mind, impossibility of performance is a narrow doctrine under North Carolina law that excuses a party from performing an executory contract only if the subject matter of the contract is destroyed without fault of the party seeking to be excused from performance and the contract between the parties did not allocate the risk that the subject matter of the contract might be destroyed. *Id.*

Likewise, and in contrast to a force majeure provision, the doctrine of frustration of purpose is premised on the basis of giving relief in a situation where the parties could not reasonably have protected themselves by the

terms of the contract against contingencies which later arose. *WRI/Raleigh, L.P. v. Shaikh*, 644 S.E.2d 245 (N.C.App., 2007). A party wishing to assert a frustration defense must prove: (1) there was an implied condition in the contract that a changed condition would excuse performance; (2) the changed condition results in a failure of consideration or the expected value of the performance; and (3) the changed condition was not reasonably foreseeable. *Fairfield Harbour Property Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 715 S.E.2d 273, 284 (N.C. App., 2011). Accordingly, a party wishing to assert such a defense cannot do so if the occurrence was reasonably foreseeable. *Brenner*, 274 S.E.2d at 209.

Notwithstanding the above common law defenses, it is important to note that a contractual provision which specifies the allocation of risk will control over common law principles of impossibility and/or frustration of purpose. For example, in *Barnes*, 382 S.E.2d 842, the Court of Appeals of North Carolina noted that a lease agreement at issue required the defendant to maintain insurance on a tractor to protect the defendant's ownership of the equipment from fire. *Barnes*, 382 S.E.2d at 844-45. However, the defendant argued that because the tractor was in plaintiff's care at the time of the fire at issue, that the parties impliedly allocated the risk of loss to the plaintiff. *Id.* at 844. In analyzing the defendant's argument, the Court noted that if the allocation of risk of loss was on plaintiff, the doctrine of impossibility would not be available to avoid performance. *Id.* However, the Court found that there was an risk of loss provision in the agreement and noted that the clause "contemplates that the parties at least implicitly agreed that the defendant had assumed the risk of loss due to fire." *Barnes*, 382 S.E.2d at 844-45. Accordingly, the *Barnes* Court found that the contractual provision relating to the risk of loss controlled over defendant's argument that the parties had impliedly allocated the risk of loss. *Id.* See also *Fairfield Harbour*, 715 S.E.2d at 284 ("[B]ecause the contractual agreement entered into by the parties allocated the potential risk involved in the frustrating event at issue to the Defendant, the trial court appropriately granted Plaintiff's motion for a directed verdict.").

Thus, in summary, if a force majeure clause is set forth in the contract as to certain occurrences (such as fire or a pandemic), the contractual provision will control under North Carolina law. Moreover, while little case law analyzes force majeure provisions, it is safe to assume that North Carolina courts will analyze the applicability of such provisions similarly to the *Certainited Gypsum* matter. As such, barring any ambiguities in the contract language, North Carolina courts will enforce force majeure



provisions, as written, and will only excuse nonperformance if the nonperforming party is without fault.