

Business Litigation in the COVID-19 Era: Contract (non-insurance) Litigation

July 20, 2020



CCJ/COSCA Pandemic Rapid Response Team



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Welcome from the CCJ/COSCA Pandemic Rapid Response Team (RRT)

Chief Justice Nathan Hecht
Supreme Court of Texas

Chief Judge Mary Ellen Barbera
Maryland Court of Appeals

Chief Judge Janet DiFiore
Court of Appeals and the State of New York

J. Joseph Baxter
Supreme Court of Rhode Island

David Slayton
Texas Office of Court Administration

Corey Steel
Nebraska Judicial Branch



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Webinar Overview

I. Welcome, Judge Jennifer Bailey, Eleventh Judicial Circuit Court of Florida (Miami-Dade County)

II. Webinar Housekeeping/Q&A Logistics, Paula Hannaford-Agor, Project Director, Civil Justice Initiative, NCSC

III. A Primer on Commercial Contract (non-insurance) Litigation

- Professor John Chung, Rodger Williams University School of Law

IV. Common Scenarios to Expect

- Judge Christopher Yates, Michigan Business Court
- Paul Kessimian, Partner, Partridge, Snow & Hahn, LLP

V. Q & A



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Housekeeping and Logistics

- Participants are all muted except panelists.
- Questions will be fielded through the Zoom Q&A box. We encourage you to submit questions through the Zoom Q&A box. This can be done throughout the webinar. During the Q&A portion, panelists will respond to questions and comments.
- The webinar is being recorded and will be made available to participants following the webinar, and it will be posted to the NCSC website at www.ncsc.org/pandemic.
- Materials from presenters will be available at www.ncsc.org/webinar-materials.



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Force Majeure

Neither party shall be held liable or responsible to the other party nor be deemed to have defaulted under or breached this Agreement for failure or delay in fulfilling or performing any term of this Agreement to the extent, and for so long as, such failure or delay is caused by or results from causes beyond the reasonable control of the affected party including but not limited to fire, floods, embargoes, war, acts of war (whether war be declared or not), acts of terrorism, insurrections, riots, civil commotions, strikes, lockouts or other labor disturbances, acts of God or acts, omissions or delays in acting by any governmental authority or the other party.



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Restatement (2d) of Contracts

Section 261. Discharge by Supervening Impracticability.

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.



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Restatement (2d) of Contracts

Section 263. Destruction, Deterioration or Failure to Come Into Existence of Thing Necessary for Performance.

If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction, or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.



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Restatement (2d) of Contracts

Section 264. Prevention by Governmental Regulation or Order.

If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.



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Restatement (2d) of Contracts

Section 265. Frustration by Supervening Frustration.

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.



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Restatement (2d) of Contracts

Section 266. Existing Impracticability or Frustration.

- (1) Where, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.
- (2) Where, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises, unless the language or circumstances indicate the contrary.



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Restatement (2d) of Contracts

Section 269. Temporary Impracticability or Frustration.

Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.



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Restatement (2d) of Contracts

Section 270. Partial Impracticability.

Where only part of an obligor's performance is impracticable, his duty to render the remaining part is unaffected if

- (a) it is still practicable for him to render performance that is substantial, taking account of any reasonable substitute performance that he is under a duty to render; or
- (b) the obligee, within a reasonable time, agrees to render any remaining performance in full and to allow the obligor to retain any performance that has already been rendered.



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Restatement (2d) of Contracts

Section 151. Mistake Defined.

A mistake is a belief that is not in accord with the facts.



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Restatement (2d) of Contracts

Section 152. When Mistake of Both Parties Makes Contract Voidable.

- (1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.
- (2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.



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Restatement (2d) of Contracts

Section 153. When Mistake of One Party Makes Contract Voidable.

Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and

- (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
- (b) the other party had reason to know of the mistake or his fault caused the mistake.



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Restatement (2d) of Contracts

Section 154. When a Party Bears the Risk of Mistake.

A party bears the risk of a mistake when

- (a) the risk is allocated to him by agreement of the parties, or
- (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
- (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.



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UCC § 2-615. Excuse by Failure of Presupposed Conditions

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

- (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.



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UCC § 2-615. Excuse by Failure of Presupposed Conditions

- (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
- (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.





Impossibility distinguished from frustration of purpose

Entrepreneur Emily leases space from landlord Larry so that she can open a restaurant that serves only Tibetan Speckled Lizard meat. If the city rezones the property to forbid commercial uses or if the property is destroyed by a tornado, both Larry and Emily are excused from performing the contract by impossibility.

However, if the Tibetan Speckled Lizard suddenly goes extinct, Emily may be excused from performing the contract because Larry knew her primary purpose for entering into the lease was to serve Tibetan Speckled Lizard, and the purpose has been frustrated.



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Wolverines v. Red Wolves



- The University of Michigan is scheduled to play Arkansas State University on Sept. 19, 2020.
- The contract between the schools, entered into on February 16, 2020, provides that Michigan will pay ASU \$1.8 million for the Sept. 19, 2020 game at Michigan Stadium.



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According to the game contract:

- Michigan guarantees to pay ASU \$1.8 million “on or before February 1 following the game,” and includes a \$1.8 million cancellation fee in case neither team shows up for the game.
- "No cancellation fee shall be paid if the parties mutually agree in writing to cancel a scheduled game." Arkansas State must consent to a change in date.
- No compensation or cancellation fee shall be paid by either school "in the event it becomes impossible to play the scheduled game because of inclement weather; an act of God; strike; lockout or other labor dispute; any decision, order, law, rule or regulation of the NCAA, or any other federal, state or municipal agency or official ... or the occurrence of any other material event that is beyond the reasonable control of a party."



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Dining Dilemmas

- Landlord is suing commercial restaurant tenant for non-payment of March rent and rent thereafter, and in eviction for failure to pay rent into registry for April, May, June as required under law to prevent eviction.
- Restaurant responds with a claim of force majeure: it cannot pay because the orders of the Governor and local Mayor prevented it from operating its business as a sit-down restaurant. The orders allowed continuing delivery and curbside pick-up restaurant operations.



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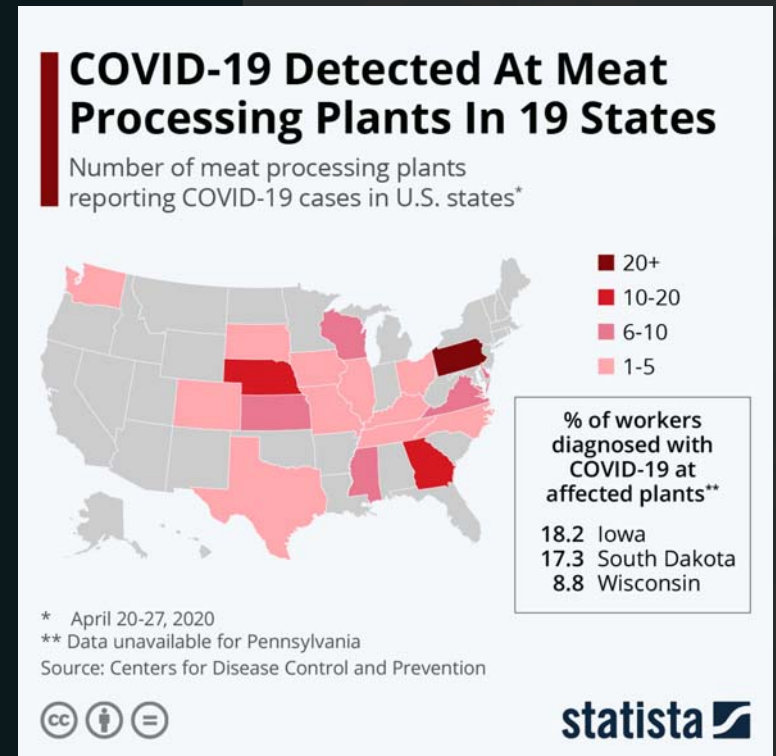
The lease's *force majeure* clause provides:

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- Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by ... laws, governmental action or inaction, orders of government.... Lack of money shall not be grounds for Force Majeure.

Where's the beef?

- Meat packing plant's employee ranks are decimated by the virus, as a result, they voluntarily close the plant for deep cleaning and two-week self-imposed quarantine for all workers. As a result, on the purchase side, cattle contracts are cancelled and on the supply side, the packer is short on the number of steaks required by its contract with a national grocery chain.



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Thank you!

For any questions about this webinar, please contact Paula Hannaford-Agor at phannaford@ncsc.org or pandemic@ncsc.org.

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