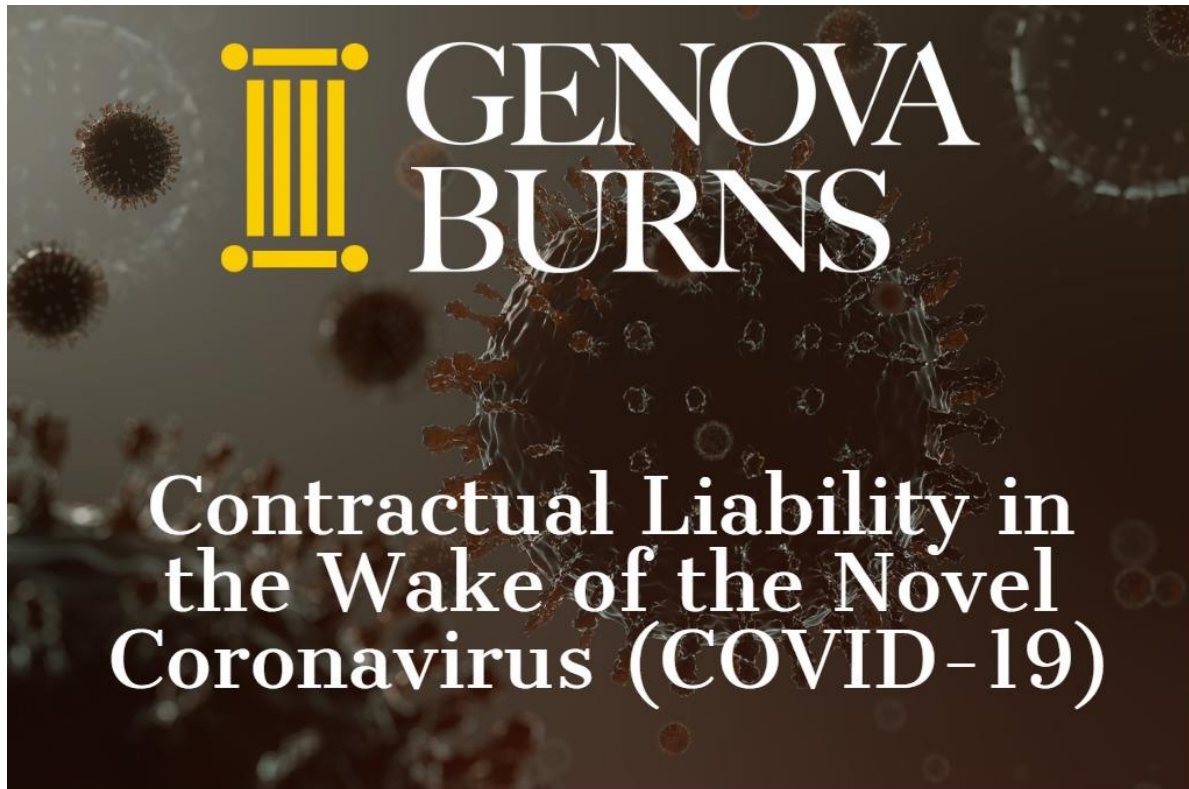


Contract Liability in the Wake of the Novel Coronavirus (COVID-19)

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The worldwide spread of [COVID-19](#) has presented real-world complications to people and businesses with ongoing obligations that are becoming increasingly difficult to meet in the face of quarantines, travel restrictions and the like. Because our firm's litigators and transactional attorneys have been receiving so many inquiries lately about legal issues and potential defenses which may apply to current and future commercial contracts, the following are key issues to bear in mind.

CHECK TO SEE IF YOUR CONTRACT HAS A FORCE MAJEURE CLAUSE.

A force majeure clause is a provision in a contract which allows both parties to delay or eliminate performance where specified circumstances outside the control of the parties occur. Often times, because such clauses are rarely if ever invoked, they are added as boilerplate language in contracts without any negotiation or much thought.

A "force majeure" generally means an event that no human foresight could anticipate, or which, if anticipated, is too strong to be controlled. These clauses are designed to

excuse an innocent party's partial performance or failure to perform under the contract in cases of natural emergencies or "acts of God," such as earthquakes or floods.

Usually, whether or not a party's delay or lack of performance will be excused by a force majeure clause will depend on the wording of it and the particular circumstances or event allegedly outside of a party's control – with the caveat that most force majeure clauses are narrowly construed by courts in many states, including New Jersey and New York. For example, contracts that include language like "pandemic," "epidemic" or similar events rendering performance impossible would likely excuse a party's performance due to [COVID-19](#).

Although global health emergencies and pandemics are generally an unexplored area of force majeure litigation, and are not expressly identified in most force majeure provisions, there may be language in your clause which provides relief in light of the other contractual terms, the surrounding circumstances and purpose of the contract.

IF YOUR CONTRACT DOES NOT HAVE AN APPLICABLE FORCE MAJEURE PROVISION, YOU OR THE OTHER PARTY MAY STILL BE ABLE TO EVADE CONTRACTUAL COMMITMENTS UNDER THE DOCTRINES OF IMPOSSIBILITY AND FRUSTRATION OF PURPOSE.

A successful breach of contract defense under the doctrine of impossibility (or impracticability) of performance, excuses a party from having to perform its contract obligations where performance has become literally impossible, or at least inordinately more difficult, because of the occurrence of a supervening event that was not within the original contemplation of the contracting parties. The supervening event must be one that had not been anticipated at the time the contract was created, and one that fundamentally alters the nature of the parties' ongoing relationship.

The doctrine of frustration of purpose may also be available as a defense to an action for breach. Frustration of purpose arises when the contracting party's performance can still be carried out, but the supervening event fundamentally has changed the nature of the parties' overall bargain. In New Jersey, relief from performance of contractual obligations pursuant to this theory are not lightly granted: the breaching party's evidence of frustration must be, among other things, clear, convincing and adequate.

In sum, you should first closely analyze the terms of your existing contract to see if it includes a force majeure clause and whether COVID-19 is arguably, either directly or indirectly, a force majeure event. Parties that do not have an applicable force majeure provision in their contract may attempt to rely on the impossibility and frustration of purpose doctrines as defenses to their non-performance. Going forward, we strongly recommend that force majeure clauses in your contracts are carefully designed so that pandemics like COVID-19 are considered and you are protected to the fullest extent possible.

[Our team](#) can be reached 24 hours a day, seven days a week if there are any questions during this unprecedented situation. Please don't hesitate to [contact us](#). We wish you all the best in light of the various challenges and pressing issues many of you will face in the coming weeks and months.