

## UPDATE: New York Federal District Court Cites two Pennsylvania Supreme Court Cases When Recognizing Right to Invoke Force Majeure Provision in Light of the Coronavirus (COVID-19) Pandemic

At the onset of the coronavirus (COVID-19) pandemic, four Pennsylvania businesses challenged Governor Tom Wolf's statutory authority to close non-essential (or non-life sustaining) businesses to mitigate the public health effects of the pandemic. In that case, *Friends of Danny Devito v. Wolf*, 227 A.3d 872 (Pa. 2020), the petitioners argued Governor Wolf lacked the statutory authority under the Pennsylvania Emergency Management Services Code to issue an executive order mandating the temporary closure of inessential businesses. The Pennsylvania Supreme Court disagreed and recognized that the COVID-19 pandemic qualified as a natural disaster under the Pennsylvania Emergency Code, 35 Pa.C.S.A. § 7102. Section 7102, which defines "natural disaster" as any "catastrophe which results in substantial ... hardship, suffering or possible loss of life." The *Devito* Court determined that the catchall term "catastrophe which results in substantial ... hardship, suffering or possible loss of life" sufficiently captured the effects associated with the COVID-19 pandemic, and therefore, the pandemic qualified as a *natural disaster* per 35 Pa.C.S.A. § 7102.

Later in 2020, in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), the Pennsylvania Supreme Court, citing *Devito*, again recognized the coronavirus pandemic as a natural disaster sufficient to empower Pennsylvania Courts to provide relief aimed at preventing the disenfranchisement of voters pursuant to the Pennsylvania Election Code, 25 Pa.Stat.Ann. 3150.11-3150.17. There, the Pennsylvania Supreme Court stated it had "no hesitation in [again] concluding that the ongoing COVID-19 pandemic constitutes a natural disaster."

Recently, the above cases were cited by the United States District Court of the Southern District of New York, one of the Country's preeminent Federal Courts, concerning the application of *force majeure* contract language. In *JN Contemporary Art LLC v. Phillips Auctioneers, LLC*, No. 20-CV-4370, 2020 WL 7405262 (S.D.N.Y. Dec. 16, 2020), the District Court concluded that a party could invoke a contractual *force majeure* provision to terminate a contract on the ground that the COVID-19 pandemic is a natural disaster that precipitated government-imposed restrictions on business operations.

In reaching this holding, the District Court could not rely on New York law because neither the New York Court of Appeals nor the U.S. Court of Appeals for the Second Circuit had entertained the question of whether the COVID-19 pandemic qualified as a natural disaster. Instead, the District Court relied upon the Pennsylvania holdings *Devito* and *Boockvar*. Integral to both holdings was the Pennsylvania Supreme Court's determination that the COVID-19 pandemic qualified as a natural disaster under the Emergency Management Service Code's catchall clause. Relying, in part, on those determinations, the *JN Contemporary Art* Court opened the door for other jurisdictions to similarly apply a *force majeure* provision.

**Comment:** While new public health developments suggest an ongoing return to normalcy in 2021 and 2022, the COVID-19 pandemic continues to frustrate contract performance of all kinds, which may continue to result in residual contract disputes from alleged breaches taken place during and occasioned by the pandemic. While *force majeure* contract performance litigation case law is scant in Pennsylvania, the *Devito* and *Boockvar* cases, which have now been cited in other jurisdictions' developing case law, may play an integral role in any contract performance litigation involving interpretation of a *force majeure* provision. The Pennsylvania Supreme Court has now twice held that the term "natural disaster," which often appears in *force majeure* clauses, now unquestionably includes the COVID-19 pandemic. Of

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course, it is important to note that in different jurisdictions statutes can contain competing definitions of natural disaster and choice of law provisions in contracts may preclude the use of sympathetic holdings from other jurisdictions.