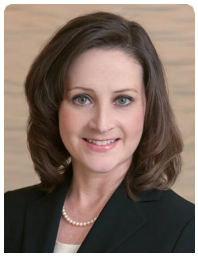
Change Order

Published by the Construction Law Section of the North Carolina Bar Association • Section Vol. 31, No. 1 • September 2016 • www.ncbar.org

The Chair's Column



M. Riana Smith

The Construction Law Section: An Example of Collegiality

"Collegiality" is defined as: "Conducive to good will among colleagues; friendly and respectful; working or acting together willingly for a common purpose or benefit; marked by camaraderie.

I believe these definitions describe our section amazingly well. In fact, the collegiality shared between attorneys in our section is one of its characteristics I am most proud of and frequently share with others – both attorneys and non-attorneys alike. I am not sure of the genesis of how this came to be – perhaps it came about because section members continually have cases with one another, or maybe it is the practice of construction law itself, or maybe it is the result of careful cultivation started by the founders of our section, or the result of seasoned attorneys' mentoring new attorneys in the ways of professionalism. Most likely it is a combination of all of these, but whatever the reason, I am grateful to be a part of it.

My focus for this bar year is to continue to cultivate and strengthen this sense of community through section involvement, member resources, legal education, service to the community, and good times. There are a number of ways the section works to achieve these goals. Building on what prior chair Holt Gwyn started, there will be socials following each of the council meetings scheduled throughout the year, as well as several planned receptions at the upcoming annual meeting. In addition, there will be opportunities to get our "hands dirty" for a good cause through our continued participation with Habit for Humanity, informative continuing legal education programs, and involvement with committees – just to name a few.

If you are a section member who has not been as involved as you would like or experienced the colle-

Continued on page 3

NORTH CAROLINA BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

www.ncbar.org
919.677.0561
@NCBAorg

Climate Change and Change Orders: Consideration Of Force Majeure

By David A. Senter and Jonathan W. Massell

As the world evolves, so too do the types of force majeure events that parties should contemplate when drafting construction contracts. One hot item that parties should be particularly careful to consider is climate change and the effect it may have on the determination of force majeure events. A typical construction contract will define a force majeure event as including "unusually severe or abnormal weather." Due to shifting weather patterns resulting from climate change it is unclear whether the unusual is now the usual or whether the abnormal is now the norm. While most courts still agree that extreme weather events are unforeseeable in the legal sense and constitute force majeure events, the judicial determination of "unusually severe or abnormal weather" may shift just like weather patterns are shifting.

Force Majeure

Since at least the 19th century, the common law has added wiggle room when it comes to contracts. For example, nonperforming parties may be excused if timely performance was rendered difficult or impossible due to an act of God or the acts of third parties. "Force majeure" is a French term that means "superior force," and is defined in the law as "[a]n event or effect that can be neither anticipated nor controlled," especially an unexpected event that prevents a party from doing something that it had agreed to do. *Black's Law Dictionary* (10th ed. 2014). Force majeure encompasses both a judicial doctrine excusing nonperformance

Continued on page 3

Inside this Issue...

The Chair's Column, continued from the front page

giality I am speaking of first-hand, please join us at the section's Annual Meeting being held Friday, Sept. 30 – Saturday, Oct. 1, to see for yourself. The Annual Meeting and CLE Program will be held in New Bern, situated along the beautiful Neuse River. This year's annual meeting is a joint program with the Litigation Section, focusing on practical skills for practicing lawyers. Lindsey Powell, Bryan Scott and Jon Ward have done an exceptional job creating a useful program for all practice levels and lined up experienced litigators to discuss all aspects involved when litigation arises. Those arriving early are invited to attend a reception Thursday night beginning at 6 p.m. at the Chelsea, 335 Middle Street, New Bern. At lunch on Friday, we will have our annual meeting and introduce the officers, committee co-chairs, and elect our 2017 council members. Then, following Friday's CLE, there will be a Women in Construction reception for all to enjoy, followed by a cocktail hour(s) with drinks and food.

I am excited about my upcoming year as chair of the section and the ability to build on what past chairs, council members, and committee chairs have already done. I also want to thank Stephanie Eaton for her outstanding job as chair during the 2015-2016 term. As we start into the section's "new" year, I hope each of you will find ways to be more involved with the section and support its activities and goals.

M. Riana Smith is a partner with Strauch Green & Mistretta, PC and is the current chair of the Construction Law Section of the North Carolina Bar Association.

Climate Change, continued from the front page

and the contractual allocation of the risk of nonperformance. The end result is the same: force majeure excuses a party from performing a contract in the face of an unusual event beyond its control.

Any contractual clause that achieves the goal of reallocating the risk of nonperformance caused by fortuitous supervening events is a "force majeure clause," even if it is not called that. For example, the American Institute of Architects (AIA) and ConsensusDocs standard construction contracts include their force majeure clause under the heading "Delays and Extensions of Time" while the Engineers Joint Contract Documents Committee (EJCDC) standard contract simply identifies its force majeure concept under "Delays." The Federal Acquisition Regulations (FARs), incorporated into federal contracts, still include a reference to "acts of God." In each of these cases, force majeure clauses are contractual provisions, and they are "construed in each circumstance with exacting attention to the specific wording of the provisions as the scope and effect of the clause may vary with each contract." Knowing this, careful drafting is essential for force majeure clauses to fulfill their purpose.

Regardless of what they are called, how they are drafted, or what legal system they are found in, three common characteristics define force majeure provisions: unforeseeability, external causation, and unavoidability.

New Events, or the (Foreseeable) New Normal? Climate Change, its Effects, and "Unusually Severe or Abnormal Weather"

Extreme, catastrophic weather events like Hurricane Katrina and Superstorm Sandy, fit the three characteristics of traditional force majeure doctrine: They are beyond the parties' control, they are external forces, and usually there is very little that can be done to prevent them or their effects. Few courts would disagree that extreme weather events are unforeseeable in the legal sense. Of course it is conceivable, and even likely, that a Category 5 hurricane will strike Miami, Florida within a 100-year span. But the likelihood of a Category 5 hurricane hitting Miami this year is 3 percent. Jocelyn L. Knoll & Shannon L. Bjorklund, "Force Majeure and Climate Change: What is the New Normal?", *8 J. Am C. Construction Law*, no. 1, Feb. 2014, at 71-72. This event is so abnormal, that it is unforeseeable, but what about weather variations?

"Weather can be 'abnormal' in four distinct respects—temperature, humidity, precipitation and wind velocity." 5 *Bruner & O'Connor Construction Law* § 15:43. Climate change can generate two of these four "abnormal" weather events that usually affect construction. It is indisputable that average temperatures have risen worldwide, and average temperatures in the United States have risen at approximately twice the global rate. Knoll, "Force Majeure and Climate Change", at 33 (citing United States Environmental Protection Agency, Climate Change Indicators in the United States 1). Increased temperatures have correlated strongly with changing precipitation patterns. More specifically, "an increasing percentage of precipitation has come from intense, single-day events (whether as rain or snow)." *Id.* at 34.

Standard contracts addressing non-catastrophic weather delays refer to "abnormal" (AIA A201 § 15.1.5.2, EJCDC C-700 Art. 4.05.C.2.) or "unusually severe" (FARs (b)(1)(x)) weather, or to "adverse weather conditions not reasonably anticipated" (ConsensusDocs 200). These concepts are too vague to be useful. To decide whether an event qualifies, courts often examine past weather data – although the timeframe the courts analyze can range "from as little as five years to as much as 86 years." *Id.* at 63 (citing various cases). The most common timeframe seems to be ten years, probably based on a widely recognized procedure developed by the United States Army Corps of Engineers. *Id.*; 5 *Bruner & O'Connor Construction Law* § 15:36. Even without considering the potential effects of climate change, and even when the parties have agreed to a source of data and a time frame for data, contracts can be confusing. Once the reality of climate change is acknowledged, the obvious problem with the current approach is that "[a] focus on historical weather data is fundamentally problematic because *it assumes that historical patterns will continue in the future*." Knoll, "Force Majeure and Climate Change", at 68 (emphasis in original). This should benefit contractors – the "new normal" may look pretty abnormal when compared to the last 100 years – unless the judge analyzing the contract has been listening to the news a lot and overestimates how "foreseeable" record-breaking temperatures and downpours should be. *See Id.* at 72-74.

The pitfalls of "unusually severe or abnormal weather" clauses are illustrated by three cases decided over the past 10 years. Al-

though all cases involve rain delays, each involves a clause from a different standard form contract and different lessons can be learned from each.

Ryll International, LLC v. Department of Transportation, CBCA 1143, 11-2 BCA ¶ 34,809, 2011 WL 2714000 (U.S. Civilian BCA Jun. 30, 2011):

Ryll International, LLC ("Ryll") entered into a fixed price contract with the Federal Highway Administration ("FHWA") to crush and stockpile soil and gravel in Katmai National Park, Alaska. The contract incorporated the Federal Acquisition Regulation (FAR) clause for commercial services. The contract provided that if Ryll failed to comply with the contract or give adequate assurances of future performance, the government could terminate for cause, except in the case of excusable delays, which included delays due to "unusually severe weather." **Ryll** at p. 3. Ryll's work was delayed from the outset and the FHWA ultimately terminated Ryll when it failed to complete the work within the specified time period.

Ryll argued at trial that its termination for default should be set aside, because among other reasons, its delays were caused by "unusually severe weather." On Oct. 9, 2007, Ryll had requested a 20-day extension due to unusually severe weather, but the request was denied nine days later. Ryll stated that it was "undisputed" that it encountered significant adverse weather conditions between Sept. 18, and Oct. 7, 2007, during mobilization and performance of the contract work. The judge disagreed and held that the weather Ryll had encountered was not "unusually severe."

The contracting officer who denied the extension reviewed weather records from the National Oceanographic and Atmospheric Administration and found the following:

- The amount of precipitation for the period of Sept. 18 through Oct. 7, 2007, was 147 percent of the 10-year average.
- The number of days with measurable precipitation was 116 percent of average.
- The number of days with rain over .05 inches was 100 percent of average (one day).
- There were nine days where the rain amount was higher than the 10-year average for that date (Sept. 18, 20, 24, 26 through 28, 30, Oct. 4 and 5).
- There were 11 days when the rain amount was lower than the 10-year average for that date (Sept. 19, 21, 22 through 25, 29, Oct. 1 through 3). *Id.* at p. 10.

The judge summarized the law, which states that "[u]nusually severe weather is construed to mean adverse weather which at the time of year in which it occurred is unusual for the place in which it occurred." *Id.* at p. 19. "Unusually severe weather is determined based on a comparison of the conditions experienced by the contractor and the weather conditions of prior years." *Id.* The judge ultimately concluded that a review of the 10-year average of weather conditions "demonstrated that while precipitation for September 2007 in Katmai was above normal, in October 2007 it was slightly below." *Id.* The adverse weather earlier in the time period afforded Ryll for performance was not severe enough to warrant a finding of excusable delay.

Main Lesson Learned: Averages can be deceiving. During the 20-day period for which Ryll claimed delay, the amount of precipitation was 47 percent higher than the 10-year average for that same time period. That seems pretty bad, but then the judge looked at each day: Only nine individual days had a rain amount higher than the 10-year average, while 11 days had a rain amount lower than the 10-year average. Result: "The weather was not more severe than the range of weather reasonably anticipated." The opinion does not relay the daily amounts of rain, but here are some numbers that would fit the description: Historic average for 20-day period = 10 inches. Assuming daily rainfall is constant, that's 0.5 inches per day. Sep-Oct 2007 for 20-day period: 14.7 inches. Per the court's description, that could have been 11 days of 0.4 inches (4.4 inches), 8 days of 0.6 inches (4.8 inches), and one day of 5.5 inches - 5 times the expected rainfall on that day, but still on "average" not more severe than reasonably anticipated.

Daewoo Engineering & Construction Co., Ltd. v. U.S., 73 Fed. Cl. 547 (2006), *judgment aff'd*, 557 F.3d 1332 (Fed. Cir. 2009):

The United States Army Corps of Engineers (the "Corps") solicited bids for the building of a 53-mile road in the Republic of Palau. The Corps estimated that the price of constructing the road would be between $100 million and $250 million, in great part due to the humid and rainy weather and moist soils in Palau, which made it difficult to achieve the soil compaction density required by the contract. Daewoo initially proposed to build the road for $73 million. When the Corps pointed out that Daewoo was unlikely to be able to do the job at that price, Daewoo revised its proposal and submitted a final bid of $88.6 million. Daewoo was awarded the contract, which required completion of the road within 1080 days. The contract included the Corps' standard Adverse Weather Clause, which stipulated that Daewoo would be entitled to a set amount of adverse weather delay days per year based upon National Oceanic and Atmospheric Administration or similar data for the project location. **Daewoo** at 561, n. 22. The original contract provided for 61 anticipated adverse weather delay days, but was amended post-closing to a total of 90 days per year.

Construction was delayed and Daewoo sought adjustment of the contract price and the time to perform the contract. The Corps offered a 125-day no-cost time extension because of unusually severe weather during the 2001 calendar year (*in addition to the 90 adverse weather delay days stipulated in the original contract*), but refused to increase the price. Daewoo rejected the time adjustment offer and filed a complaint seeking a total of $64 million in equitable adjustments. Daewoo claimed that the weather-delay clause in the contract was misleading, and resulted in an "unreasonable and artificially shortened contract performance period." *Id.* at 561. Daewoo specifically contested the criteria for calculating adverse weather for purposes of the Adverse Weather Clause and contended that the choice of 0.5 inches of rain to denote an adverse weather day was arbitrary, and that the calculation should have included additional time for "dry-out days" (days where it did not rain, but

work was still not possible because the soil had not yet dried after previous days' rain).

The court was "puzzled" by Daewoo's misunderstanding of the purpose of the Adverse Weather Clause. "The purpose of the Weather Clause was to disclose in advance the parties' exposure for excess adverse weather days during contract performance. *The Clause did not and could not predict future weather patterns*." *Id.* (emphasis added). The Clause "does not create an implied warranty of future weather. Its purpose is to provide a contractual baseline against which to measure the contractor's entitlement to no-cost time extensions." *Id.* at 563 (internal citations omitted).

Main Lesson Learned: Even when two parties agree in advance to an estimated number of expected weather delay days, they are just giving themselves a "no-questions-asked" buffer based on an agreed-upon definition of abnormal weather. Once that buffer is exhausted, the same problems with the other kinds of clauses return.

Handex of the Carolinas, Inc. v. County of Haywood, 168 N.C. App. 1, 607 S.E.2d 25 (2005) (*While it is not clear, this case appears to interpret EJCDC or EJCDC-like language*):

Handex of the Carolinas, Inc. ("Handex") entered into a contract with Haywood County to construct an extension to an existing landfill. The county wound up retaining liquidated damages after Handex completed construction 93 days beyond the substantial completion deadline and 10 days beyond the final completion deadline. This prompted Handex to file suit against the county (and the project engineer) for breach of contract, among other causes of action.

During the course of construction, Handex submitted eight separate change order requests for additional time and money. Handex alleged that the county breached its contract by denying all but one request. The county moved for directed verdict, which was denied. The jury rendered a verdict against the county and awarded damages to Handex.

The county appealed the trial court's denial of its motion for directed verdict concerning Change Order No. 3. In Change Order No. 3 Handex had sought an additional 30 days to complete the contract due to "poor weather conditions;" specifically, snow and rain. The court of appeals affirmed.

In its analysis, the court of appeals looked to the contract's provisions governing "abnormal weather conditions," which provided that "'abnormal weather conditions' were to be determined based upon the National Weather Service's thirty-year average." **Handex** at 16. Although the parties were in agreement concerning the appropriate source of data for determining if weather conditions were "abnormal," they disputed how this data should be interpreted. The court of appeals described that "[t]he evidence before the jury provided two different interpretations of what constituted the time frame for measuring [abnormal weather conditions], thus affecting calculations of whether it was above or below the National Weather Service's thirty-year average. . ." and "[i]t was also unclear . . . whether the 'average' was to consider days of rain, or inches of rain, and where the statistical data for the weather conditions was to be collected." *Id.* As a result, the court of appeals deemed the contractual means of determining "abnormal weather conditions" ambiguous, and ruled that Handex's weather logs and data provided sufficient evidence of an "abnormal weather condition" to give the issue of the County's denial of Change Order No. 3 to the jury. *Id.*

Main Lesson Learned: Although it's a good idea for parties to contractually agree upon the source of data for determining if weather conditions are "abnormal" in a given time period, the parties open the door for disputes if they fail to stipulate how this data should be interpreted.

Bottom Line

The three cases discussed above illustrate the problems that can arise from "unusually severe or abnormal weather" force majeure clauses. Several drafting lessons can be gleaned from these cases. First, parties should specifically define "unusually severe" or "abnormal" weather. It's never a good idea to leave it to the court to make this determination. Second, in addition to defining the specific source of data for determining if weather was "abnormal" or "unusually severe," parties should delineate precisely how this data is to be interpreted, since statistical data can be subject to innumerable interpretations. Third, parties should consider limiting historical weather data to the past 10 years, as this will narrow the scope of weather events that may be deemed foreseeable, and will better reflect the "new normals" resulting from climate change. Finally, parties to construction contracts in areas with unpredictable weather should consider adopting the Corps' approach, which examines historical weather data at the outset of contract formation and predicts the number of weather-delay days that may be anticipated during the contractual period. *See* USACE Engineering Regulation § 415-1-15. Although this approach is more time-consuming on the front end, it allows parties to waste less time and resources during the construction phase dickering about whether a particular weather event qualifies as "abnormal" or "unusual" (at least until the expected number of weather-delay days is exceeded).

David A. Senter is a partner with Nexsen Pruet, PLLC in Raleigh. David's practice focuses primarily on construction law and commercial collections. He can be reached at ***dsenter@nexsenpruet.com***.

Jonathan W. Massell is an associate with Nexsen Pruet, PLLC in Greensboro. Jonathan's practice focuses primarily on construction law and business litigation. He can be reached at ***jmassell@nexsenpruet.com***.

*This article is based on a longer manuscript that was presented before the ABA Forum on Construction Law 2016 Mid-Winter Seminar: **It's A Catastrophe, But We Have a Force Majeure Clause, So No Worries, Right? Litigation Considerations**. The authors acknowledge the contributions of attorney Rudolf A. Garcia-Gallont to the original manuscript.