

Construction Contracts in the Age of the Pandemic

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As the COVID-19 virus continues to spread, developers, contractors, and subcontractors are increasingly seeing their ability to perform impacted directly or indirectly by its effects on the economy. From supply chain issues and delivery of building products from China to the health and availability of the labor workforce, performance issues are already arising. However, the construction contracts currently in place most likely do not specifically address a pandemic and its effects on a party's ability to perform.

Given the current situation, the following question naturally arises: if a company cannot perform its contractual obligations due to COVID-19 related issues, is the performance excused or not?

Under Florida law, even if a contract does not expressly include a force majeure type clause, the "impossibility" defense to a breach of contract claim is recognized under certain circumstances. If a party's ability to perform is rendered impossible due to an event that is beyond the party's reasonable control and, critically, was not foreseeable at the time of contracting, then that party may assert an impossibility defense to excuse performance, regardless of whether the contract specifically addresses the issue.

Going forward after the coronavirus episode passes, a pandemic will no longer be "unforeseeable." On the contrary, the memory of the national shutdown due to the coronavirus will last for generations.

With the occurrence of a pandemic and its profound effects on the economy and commercial actors now foreseeable, it is critical under Florida law for parties to construction contracts to expressly address and allocate the risk of such an occurrence in their contracts. In the future, if a party expects to be excused from performance of its contractual obligations due to an epidemic or pandemic, the risk of that occurrence needs to be expressly addressed in the contract and the impacted party's performance needs to be expressly excused under such circumstances. If the contract is silent about allocating the risk of such an occurrence, Florida law will assume that the party whose performance is affected assumed the risk of such an occurrence.

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If in the future you expect your performance to be excused by the occurrence of a pandemic, you need to address that risk expressly in your construction contracts moving forward. Developers, contractors, and subcontractors are well-advised to consult with legal counsel to have their contract forms reviewed to address this newly foreseeable performance risk of a pandemic.