

Doctrine of Impossibility: Coronavirus As a Defense for Non-Performance

Article

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Even if a contract does not have a force majeure clause, a party's obligation to perform may still be discharged under the doctrine of impossibility. The doctrine of impossibility refers to situations when it is impossible for a party to a contract to perform.

Florida courts are reluctant to excuse performance that is not impossible but merely inconvenient, profitless, and expensive. However, even if performance is impossible, a party may not be able to use the doctrine of impossibility as a defense to non-performance if the party:

1. knew of the facts, at the time the contract was executed, that made performance impossible;
2. assumed the risk of impossibility; or
3. could have acted to prevent the event rendering performance impossible.

Ultimately, determining whether a party can successfully use the doctrine of impossibility as a defense is a factually intensive inquiry. The findings of Florida courts are too numerous to catalog due to the multiple of varied factual situations. Moreover, courts have used the doctrine of impossibility as a device to allocate risk among the parties to a contract.

In allocating risk under the doctrine of impossibility, courts have analyzed the following factors, furthering the depth and scope of the factual inquiry:

1. the degree of hardship imposed on a party;
2. the foreseeability of the event making performance impossible; and
3. the language of the contract in determining the allocation of the relevant risks.

The coronavirus and the indirect effects of the coronavirus – such as government orders and supply chain deficiencies – provide a multitude of factual situations that may give rise to a defense based on the doctrine of

impossibility. An important factual inquiry may revolve around when the parties' executed the contract. For example, China reported a cluster of cases of the coronavirus on January 7, 2020. Thus, if a party entered into a contract after January 7, 2020, a court may find that, at the time the contract was executed, a party assumed the risk or knew of the facts which led to performance being impossible.

The doctrine of impossibility as a defense to non-performance is fact specific and depends on the specific language of the contract, we encourage you to seek out a lawyer to analyze your agreement and the facts specific to your matter.