

# Florida Practice Alert: Does the Coronavirus Excuse Contract Performance?

A Lexis Practice Advisor® Article by Meghan O. Serrano, Shumaker, Loop & Kendrick, LLP



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The response to coronavirus (COVID-19) in Florida has resulted in many emergency orders issued at the state and local levels requiring businesses to close. In addition, the CDC's social distancing recommendations may make business operations impossible or impractical. Many businesses are, or will be faced with, circumstances in which it is impossible or impractical to comply with the terms of contracts to which they are a party. Counseling business clients as to whether COVID-19 excuses performance under a contract requires specific analysis of the contract's language in light of relevant Florida case law. This article provides guidance to practitioners as they review these contracts to determine whether COVID-19 either qualifies as a force majeure event pursuant to the contract or creates a defense to contractual performance. Although the case law discussed in this article often focuses on real estate and construction contracts, the principles discussed are generally applicable to business contracts in Florida.

For further guidance, see [Considerations for Florida Commercial Landlords and Tenants During the COVID-19 Crisis](#).

## Force Majeure

Force majeure is French for "[superior force](#)." "A force majeure clause is a contractual clause that excuses performance of contractual obligations—either wholly or for the duration of

the force majeure—upon the occurrence of a covered event that is beyond the control of either party to the contract. A permissible force majeure clause covers events that may or may not happen, but whether they do is beyond the control of [either party]. This type of clause is not an opt-out provision; it is limited in scope." *Princeton Homes, Inc. v. Virone*, 612 F.3d 1324, 1332 (11th Cir. 2010) (internal citations and quotation marks omitted).

### Contract Language and Interpretation

For example, the force majeure clause in the standard residential real estate contract form approved for use by the Florida Board of Realtors and the Florida Bar provides: "Buyer or Seller shall not be required to perform any obligation under this Contract or be liable to each other for damages so long as performance or non-performance of the obligation, or the availability of services, insurance or other required approvals essential to Closing is, is disrupted, delayed, caused or prevented by Force Majeure." This contract defines "Force Majeure" as "hurricanes, floods, extreme weather, earthquakes, fire, or other acts of God, unusual transportation delays, or wars, insurrections, or acts of terrorism, which, by exercise of reasonable diligent effort, the non-performing party is unable in whole or in part to prevent or overcome." Although pandemics are not specifically mentioned here, arguably, a pandemic could be considered an "act of God" and the resulting unavailability of services which may be essential to closing could excuse performance delays under this contract. Notably, while COVID-19 has ended seasons for many sports, the NBA [made headlines](#) when it was reported that the NBA players' collective bargaining agreement has a force majeure clause which is unique because it specifically references "epidemics." Under this collective bargaining agreement, an epidemic is a force majeure event that allows the NBA to substantially

reduce the amount owed to players or cancel the collective bargaining agreement altogether.

Courts interpreting whether a force majeure provision excuses performance or performance delays closely examine the language of the contract and the circumstances causing the delay or lack of performance. So long as the force majeure clause does not render the contract illusory, “force majeure clauses broader than the scope of impossibility are enforceable under Florida law.” *Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849, 857 & n.6 (11th Cir. 2009). Thus, a force majeure provision excusing delays for “any cause . . . not within the reasonable control of the company” is enforceable. *St. Joe Paper Co. v. State Dep’t of Env’tl. Regulation*, 371 So. 2d 178, 180 (Fla. Dist. Ct. App. 1979).

For example, delays in performance of a construction contract due to weather were deemed excused because the force majeure provision in the parties’ contract expressly provided that “excessive rains” were a “condition” beyond the builder’s control, and thus were covered by the force majeure clause in the contract. *Devco Dev. Corp. v. Hooker Homes, Inc.*, 518 So. 2d 922, 923 (Fla. Dist. Ct. App. 1987). In another construction contract, the court found that the heart attack suffered by the president of the developer excused the performance delays where the contract called for the construction of nine homes “to be completed within six months from the date of the agreement ‘barring strikes, non-availability of materials or other causes beyond control of second party (Better Construction).’” *Camacho Enterprises, Inc. v. Better Const. Co.*, 343 So. 2d 1296, 1297 (Fla. Dist. Ct. App. 1977). Following a hurricane in Tallahassee, electrical service interruptions were held to be excused based on the force majeure provision in the parties’ agreement that obligated services to be provided “unless the company is prevented from delivering electric energy hereby agreed to be furnished by the Act of God, or cause or causes beyond its control[.]” *Florida Power Corp. v. City of Tallahassee*, 18 So. 2d 671, 672, 675 (Fla. 1944).

### Timing

Critical to the analysis of whether a force majeure provision will excuse full performance or performance delays caused by COVID-19 is timing. If the contract was signed at a time when the parties were aware of the public health emergency caused by COVID-19 but chose not to specifically address it, they may be deemed to have assumed the risk that performance could be impacted but nonetheless obligated themselves to perform. See, e.g., *Sarasota-Manatee Airport Auth. v. Racing Wheels, Inc.*, 5 B.R. 309, 313 (Bankr. M.D. Fla. 1980) (“The [lessee]’s third defense of economic frustration is equally without merit for not only was the risk of failing to procure the necessary zoning changes foreseeable, it was

clearly contemplated by the parties and the failure to make provision in the lease agreement for a denial of the zoning change indicates an assumption of such risk on the part of the [lessee].”); *Miami Beach v. Championship Sports, Inc.*, 200 So. 2d 583 (Fla. Dist. Ct. App. 1967) (holding that if the risk of the event that has supervened to cause the alleged frustration was foreseeable, there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.).

Florida courts have excused performance due to acts of God such as those outlined above because such circumstances are clearly outside of the parties’ control: “No seller can command the sky to open up and more rain to fall, and we are not aware of anyone deliberately inflicting a heart attack on himself to delay the performance of a contractual duty.” *Stein*, 586 F.3d at 858. Arguably, however, if the contract was executed at a time when COVID-19 was known and had already been declared a public health emergency, then the impacts from this outbreak were foreseeable and therefore should have been specifically addressed in the contract. For example, in *S&B/BIBB Hines PB 3 Joint Venture v. Progress Energy Florida, Inc.*, the court held that a contractor was not entitled to recover its additional labor and materials costs incurred due to hurricanes and global economic forces through force majeure provision of fixed price contract for construction of power plants stating, “it would subvert the entire purpose of a fixed price contract to allow S&B to recover additional labor and materials costs when the benefit of a fixed price contract is to protect against price increases, labor shortages, material shortages, and the like. In contracting for the fixed price construction job, ‘the parties thoroughly addressed and allocated the risks’ inherent in the project, and S&B could have increased its prices to reflect the risks it was assuming.” *S&B/BIBB Hines PB 3 Joint Venture v. Progress Energy Florida, Inc.*, 365 Fed. Appx. 202, 205–06 (11th Cir. 2010).

## Other Defenses to Contract Enforcement

But what if the contract does not specifically include a force majeure clause? Then the party seeking to excuse its failure to perform must look to relevant statutes or affirmative defenses.

### Excused Performance pursuant to the Uniform Commercial Code

If the contract is for the sale of goods, the Uniform Commercial Code (UCC) excuses a seller from the timely delivery of goods contracted for, where his or her

performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting. Fla. Stat. Ann. § 672.615(1) (2019). This statute includes certain notice requirements and requires a factual analysis of whether the parties were aware of the subsequently intervening circumstances in order to assess whether performance is excused. *Tandy Corp. v. Eisenberg*, 488 So. 2d 927, 928 (Fla. Dist. Ct. App. 1986) (“The defense of commercial impracticability as contained in [the UCC] Florida Statutes, § 672.615, asserted by Defendant is not applicable to this case because Defendant knew at the time it entered into the contract that the product being purchased had been cancelled and would not be produced.”).

### Commercial Frustration

If performance is not excused by statute, then practitioners should consider whether any affirmative defenses may excuse performance under the contract. Some cases have specifically referred to a “force majeure” affirmative defense (*Yusem v. Butler*, 966 So. 2d 405, 414-15 (Fla. Dist. Ct. App. 2007)) but more frequently, defenses to contract performance due to unforeseen events describe impossibility or impracticability of performance, frustration of purpose, or commercial frustration. The defenses of failure of consideration, frustration of purpose, and commercial frustration are “legally equivalent” and apply only in those situations “when the very purpose of an agreement has been totally frustrated by some outside force or circumstance[.]” *1700 Rinehart, LLC v. Advance Am.*, 51 So. 3d 535, 537-38 (Fla. Dist. Ct. App. 2010) (citations omitted). However, in accordance with the long-standing principle that courts will not rewrite contracts, the doctrine of commercial frustration “does not apply where the intervening event was reasonably foreseeable and could and should have been controlled by the provisions of such contract.” *Home Design Ctr.-Joint Venture v. County Appliances of Naples, Inc.*, 563 So. 2d 767, 770 (Fla. Dist. Ct. App. 1990) (“Even under theories which permit a broader application of the doctrine of commercial frustration, the defense is not available concerning difficulties which could reasonably have been foreseen by the promisor at the creation of the contract.”); *Florida Dept. of Financial Services v. Freeman*, 921 So. 2d 608 (Fla. 2006).

### Impossibility of Performance

While defenses based on commercial frustration focus on the purpose of the agreement, defenses based on impossibility of performance examine the ability of the parties to perform. “In Florida, the doctrine of impossibility of performance ‘refers to those factual situations, too numerous to catalog, where the purposes for which the contract was made, have, on one side, become impossible to perform.’” *Ashraf v. Swire Pac. Holdings,*

*Inc.*, 752 F. Supp. 2d 1266, 1270 (S.D. Fla. 2009). Here too, “[t]he doctrine of impossibility of performance should be employed with great caution if the relevant business risk was foreseeable at the inception of the agreement and could have been the subject of an express provision of the agreement.” *Am. Aviation, Inc. v. Aero-Flight Serv., Inc.*, 712 So. 2d 809, 810 (Fla. Dist. Ct. App. 1998). See also *Walter T. Embry, Inc. v. LaSalle Nat’l Bank*, 792 So. 2d 567, 570 (Fla. Dist. Ct. App. 2001) (holding that under Florida law, “[t]he doctrine of ‘impossibility’ must be applied with caution and is not available concerning intervening difficulties which could reasonably have been foreseen and could have been controlled by an express provision of the agreement.”). Thus, there is some overlap among these defenses, but the distinction between them focuses on whether the purpose or object of the agreement has been frustrated, or whether the performance of one of the parties has become impossible or impractical.

## Can COVID-19 Trigger Defenses to Performance?

As difficult as it may be to focus on anything other than COVID-19 at the moment, to assess the viability of these defenses, it is imperative to consider what, precisely, is alleged to have frustrated the purpose of the agreement or rendered its performance impossible. Has the government-ordered cancellation of an event due to COVID-19 “frustrated the purpose” of a contract for services to be provided at the event? Or has COVID-19 specifically rendered performance by one party impossible because all of the business’ employees are sick and the business cannot operate? Although COVID-19 is a novel virus, the idea that all employees could simultaneously become sick and the business could not operate is hardly unforeseeable. (Every attorney will recall the scene in *My Cousin Vinny* where Vinny, much to Judge Haller’s chagrin, wore the ridiculous secondhand suit to court because he could not buy a new suit to replace his muddied suit because everyone at the only clothing store in town got the flu.) More likely, contract performance is impacted by some measures taken in response to COVID-19, such as a stay-at-home order which determines that a particular business is not essential and must remain closed. See, e.g., Governor Ron DeSantis’ [Executive Order 20-91](#) issued on April 1, 2020, defining “essential” services.

It is important to focus on the terms of the contract at issue to determine whether the purpose of the contract has been frustrated or its performance is objectively impossible. For example, consider a hair salon that leases its salon space. Because the hair salon’s operations are deemed nonessential

per Governor DeSantis' Executive Order 20-91, the hair salon was effectively closed for business for all of April 2020. Does the Executive Order excuse the salon's obligation under its lease to pay rent for this month? Probably not, since the purpose of the lease is to occupy the property upon payment of consideration to the landlord, and the order did not interfere with the hair salon's right to quiet enjoyment of the property. While "impossibility of performance can include extreme impracticability of performance, courts are reluctant to excuse performance that is not impossible but merely inconvenient, profitless, and expensive to the lessor." *Valencia Ctr., Inc. v. Publix Super Markets, Inc.*, 464 So. 2d 1267, 1269 (Fla. Dist. Ct. App. 1985) (rejecting landlord's defenses of commercial frustration and impossibility where tax increase made landlord's lease with tenant unprofitable, holding that the landlord's "intent when it entered the lease was to make a profit, an intention frustrated by the tax rise; however, its property can still be used for rental, the purpose of the lease"). Thus, if the purpose of the lease is the occupancy of the property, that purpose is not "frustrated" or made impossible even if the business is temporarily unable to operate during its occupancy.

*BRE Mariner Marco Town Ctr., LLC v. Zoom Tan, Inc.* illustrates this principle. (The author represented the landlord before the district court and the Eleventh Circuit Court of Appeal.) In this case, the tenant was denied a use permit, was declined to take any appeal of the denial of the permit denial, and did not take possession of the leased property. When the landlord sued for all rent due under the lease, the tenant asserted multiple defenses arguing that performance of the lease was made "impossible" and completely frustrated due to the denial of its permit. The district court rejected these defenses, and entered summary judgment for the landlord, which the Eleventh Circuit affirmed on appeal: "Zoom Tan has, quite simply, failed to show that the zoning ordinance at issue frustrated the purpose of the contract by actually

prohibiting it from operating a tanning salon on the premises. Rather, the undisputed record reveals that Zoom Tan's failure to appeal what both parties recognize as an 'erroneous' permit denial is what frustrated its purpose for entering the lease agreement—not the zoning ordinance itself. *Zoom Tan has thus not provided us with any evidence to suggest that it was properly excused from taking possession and paying rent under the lease*, and accordingly, the district court correctly granted summary judgment to BRE." *BRE Mariner Marco Town Ctr., LLC v. Zoom Tan, Inc.*, 682 Fed. Appx. 744, 747 (11th Cir. 2017) (emphasis added).

## Practice Tips

Parties seeking to excuse performance of a contract due to COVID-19 must carefully consider whether the purpose of the contract has been frustrated due to this pandemic or whether performance has merely become more difficult as a result. Consideration of the background and relevant timing is also critical, in terms of whether the parties had notice of COVID-19 and the possibility that it could impact performance of the contract at the time it was being drafted, as well as any efforts to mitigate damages once its impacts began to be felt. Practitioners who are seeking to enforce the terms of a contract should consider in advance how these defenses may be raised and whether any have merit, based on the language of the contract or the pertinent facts surrounding performance issues. Generic references to COVID-19 as an excuse for performance, without more, are unlikely to succeed, and recent opinions indicate that the courts are already inundated with motions and claims related to COVID-19. As such, practitioners should carefully review the contract at issue as well as the relevant circumstances, including timing, to determine if a force majeure provision has been triggered or if other defenses to contract performance are available.

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