

FORCE MAJEURE, IMPOSSIBILITY & FRUSTRATION OF PURPOSE:

COVID-19 AND BEYOND

Presented by the Business Law
Section of the Florida Bar



What is a Force Majeure Clause?

- “Superior strength”
- Limit the liability of a contracting party for nonperformance of contractual obligations upon the occurrence of a force majeure event



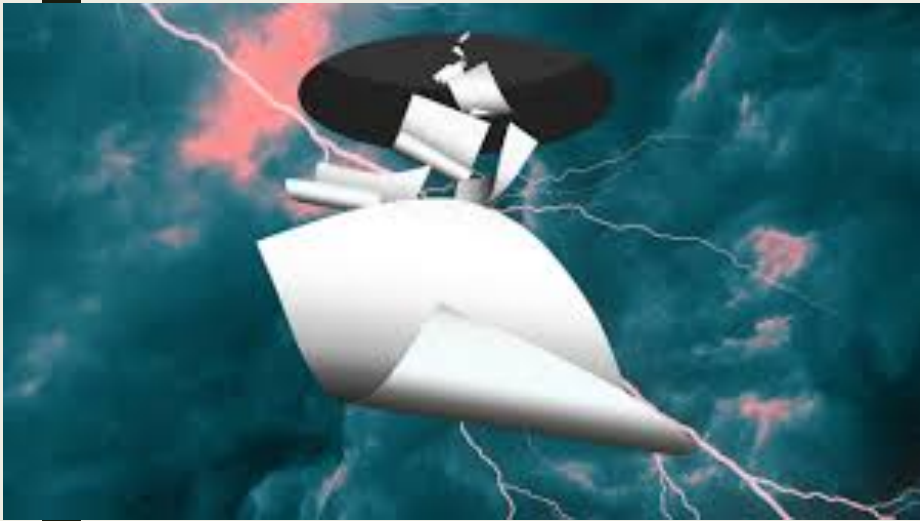
Force Majeure Events

Performance excused if an event:

- Is not reasonably foreseeable;
- Is beyond reasonable control;
- Materially affects the ability to perform contractual obligations; and
- All reasonable steps were taken to provide notice and avoid or mitigate the event or its consequences.



Common Qualifying Events



- Acts of God
- Strikes, lockouts, or other industrial disturbances
- Wars, blockades, or riots
- Epidemics/ Pandemics
- Material or labor restrictions by any governmental authority
- Unusual transportation delays

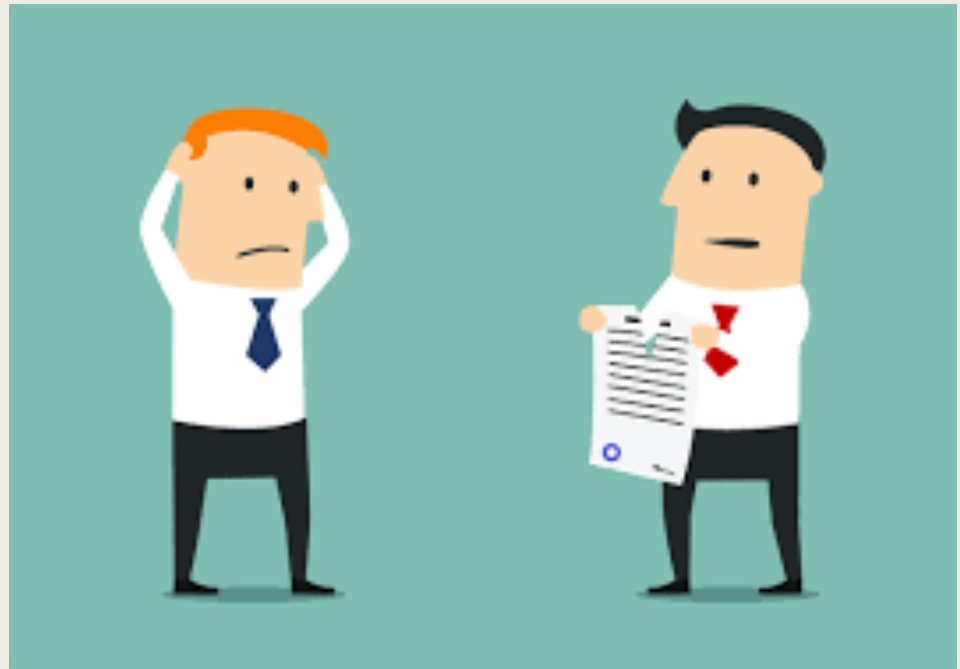
Applicable Contracts

- Leases
- Sale of real estate
- Construction agreements
- Pre-paid events and services

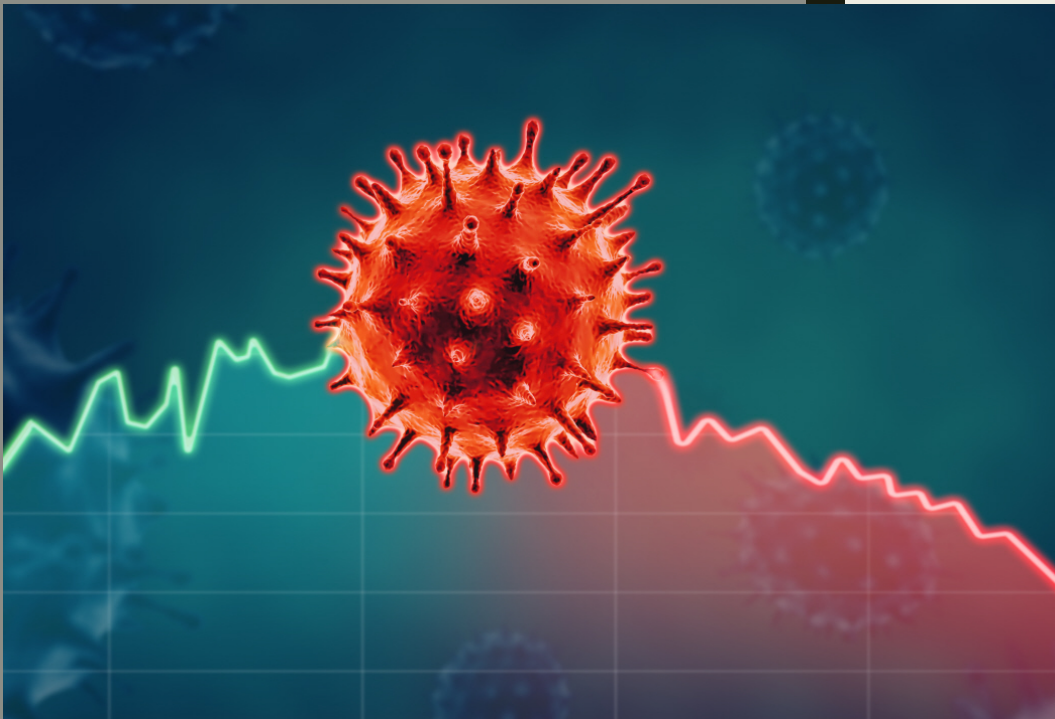


Potential Remedies

- Delay
- Excused performance
- Rescission



COVID-19



- Epidemic/Pandemic
- Act of governmental authority/ Compliance with government orders
- Act of God

Court Trends: Spanish Influenza

Citrus Soap Co. v. Peet Bros. Mfg. Co.
194 P. 715 (Cal. App. 1920)

- “Contingency of delay in performance” provision
- Performance excused: Spanish influenza epidemic and related quarantine caused production and delivery delays



Florida Interpretation



ARHC NVWELFL01, Ltd. Liab. Co. v. Chatsworth (S.D. Fla. 2019) noted that force majeure clauses are to be **narrowly construed**, meaning that a court should limit these clauses' application as much as supported by the language of the provision.



St. Joe Paper Co. v. State Dep't of Env'tl. Regulation (Fla. 1st DCA 1979) explained that Florida precedent allows broad force majeure clauses as long as they do not render the contract illusory.



Home Devco/Tivoli Isles LLC v. Silver, 26 So.3d 718, 722 (Fla. 4th DCA 2010) explained that Florida precedent allows broad force majeure clauses as long as they do not render the contract illusory.

Court Trends: Florida

Performance excused

- Hurricane preventing the power company from performing its obligation to provide power was an act of God. *Florida Power Corp. v. City of Tallahassee*, 18 So.2d 671 (Fla. 1944).
- Excessive rain qualified as “any other condition” within the force majeure clause, which excused the delayed construction of a home. *Devco Dev. Corp. v. Hooker Homes, Inc.*, 518 So. 2d 922 (Fla. 2d DCA 1987).
- Government denial of the permit for a gate excused the gate builder's performance. *Marathon Sunsets, Inc. v. Coldiron*, 189 So. 3d 235 (Fla. 3d DCA 2016).

Defense failed

- Government modification of one of its programs which was a “significant source” of income to tenant, was not force majeure event because there was no showing that the inability to pay was a *direct result* of the government action. *ARHC NVWELFL01, Ltd. Liab. Co. v. Chatsworth* (S.D. Fla. 2019).
- Closure of the primary approved coal mine did not excuse performance where supplier could source the amount of coal from *any* approved source. *Gulf Power Co. v. Coalsales II, LLC*, 522 Fed. Appx. 699 (11th Cir. 2013).
- Force majeure included event that affected “the ability of the Olympic Games to be held” was too ambiguous to include terrorism acts which did not prevent the games. *Carton Tours, Inc v. ESA Services, Inc.*, 833 So.2d 873 (4th DCA 2003).

What if There is no Force Majeure Clause?



IMPOSSIBILITY OF
PERFORMANCE



FRUSTRATION OF
PURPOSE

Impossibility of Performance

- Defense applied only in narrow circumstances.
- Uniform Commercial Code Section 2-615:
Delay in delivery or non-delivery is not a breach of contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made, or by compliance in good faith with any applicable governmental regulation or order.



Defense of Impossibility - Factors

- The degree of hardship imposed on a party
- The foreseeability of the event
- Language of the contract determining allocation of the relevant risks

Florida Application



- Death or incapacity of a person necessary for performance.
 - *CNA Int'l Reinsurance Co. v. Phoenix*, 678 So. 2d 378 (Fla. 1st DCA 1996)
- Destruction of a specific thing necessary for performance.
 - *La Gasse Pool Constr. Co. v. Ft. Lauderdale*, 288 So. 2d 273 (Fla. 4th DCA 1974)
- Prohibition or prevention by law.
 - *Harvey v. Lake Buena Vista Resort, LLC*, 568 F. Supp. 2d 1354 (M.D. Fla. 2008)

Impossibility: Original vs. Supervening

Original:

- Impossibility of performance existing when contract was made, so that the contract was to do something that was impossible from the outset.

Supervening:

- Impossibility develops after the contract is formed and exists when the subject matter is no longer capable of being performed due to an *unforeseen supervening act* for which the promisor is not responsible.

Frustration of Purpose

Defense available where the party can demonstrate:

- The event was not caused by a party to the contract;
- The event was unforeseen by the parties; and
- It is physically or commercially impossible to fulfill the contract OR the obligation to perform has been drastically transformed.



Frustration of Purpose: Defined

Black's law dictionary:

- A court-created doctrine under which a party to a contract will be relieved of his or her duty to perform when the objective purpose for performance no longer exists (due to reasons beyond that party's control). This doctrine excuses a promisor in certain situations when the objectives of contract have been utterly defeated by circumstances arising after formation of agreement, and performance is excused under this rule even though there is no impediment to actual performance.

Restatement of Law: Frustration of Purpose

Restatement 2d of Contracts § 265 Discharge by
Supervening Frustration:

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Restatement of Law Comments

- The purpose that is frustrated must have been a principal purpose of that party and must have been so to the understanding of both parties;
- The frustration must be substantial and must be so severe that it is not to be regarded as within the risks assumed under the contract;
- The non-occurrence of the frustrating event must have been a basic assumption; and
- Relief will not be granted if it may be inferred from either the language of the contract or the circumstances that the risk of the frustrating occurrence, or the loss cause



Origins of Frustration of Purpose

Krell v. Henry, 2 K.B. 740 (C.A. 1903)

- Renter paid deposit and agreed to rent a London apartment for two days in order to observe the King's coronation parade.
- Court held that the contract was premised on implied condition – the occurrence of the King's coronation parade. When the parade was canceled, the renter's duty to perform was discharged by the frustration of his purpose in entering the contract.



Example: Events Contracts

7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach., 909 P.2d 408 (Ct. App. Ariz. 1995).

- Kuhn and 7200 Partners entered a contract regarding a convention to be held at 7200 Partners resort.
- Citing risk of terrorism in international travel a result of the Gulf War, Kuhn cancelled meeting.
- 7200 Partners sued for liquidated damages, pursuant to contract, Kuhn claimed frustration of purpose and impracticability.
- Ultimately, the defenses failed as Kuhn never established that both parties had a common understanding that Kuhn's principal purpose in entering the contract was a convention in which international personnel would be present and because mere economic negative impact was not enough to establish impracticability defense.

Example: Lease Cases

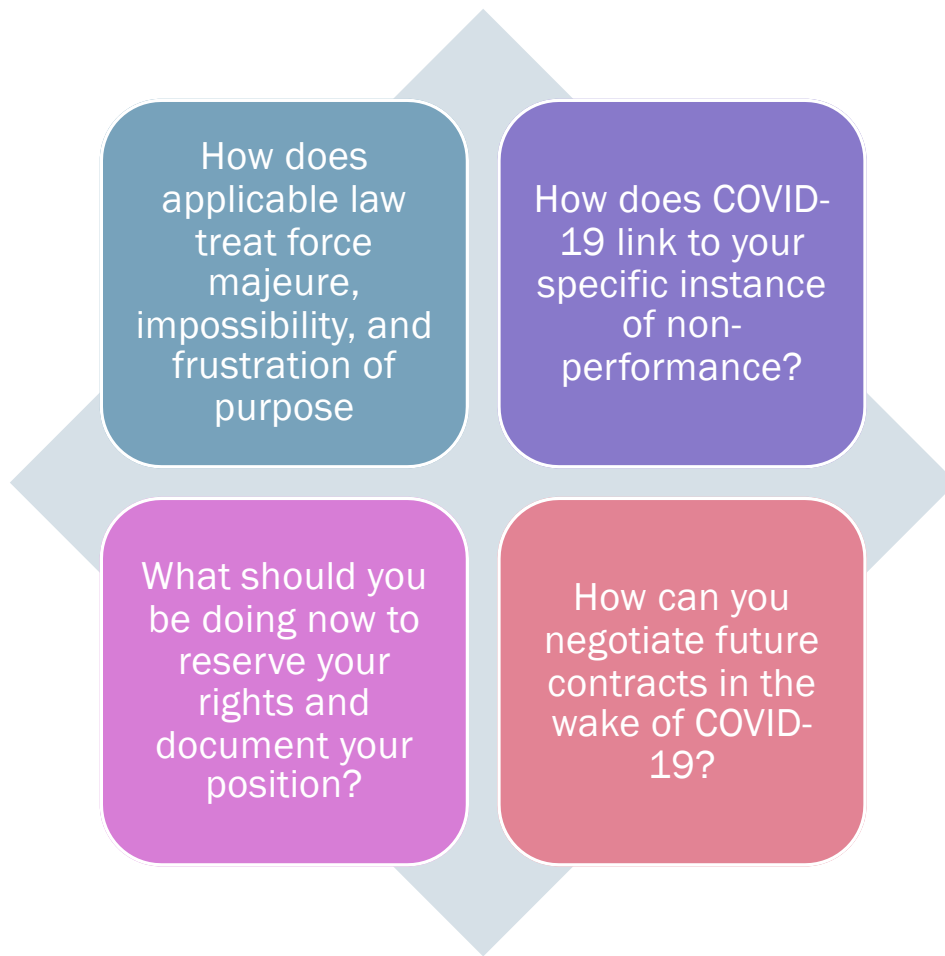
Lloyd v. Murphy, 153 P.2d 47 (1944)

- Lease provided it was "for the sole **purpose** of conducting thereon the business of displaying and selling new automobiles (including the servicing and repairing thereof and of selling the petroleum products of a major oil company) and for no other **purpose** whatsoever without the written consent of the lessor" except "to make an occasional sale of a used automobile."
- Following onset of WWII, U.S. government ordered that the sale of new automobiles be discontinued, but later modified the to permit limited sales. So, the parties agreed to permit the sale of used automobiles and other legitimate business and a reduction in rent, if necessary.
- Dealer vacated the premises and repudiated the lease. Landlord sued for declaratory judgment and back rent.
- Court found that the value of the lease was not destroyed; the sale of automobiles was not made impossible or illegal but merely restricted, making it less profitable and more difficult to continue. Therefore, the lease was not terminated, and the lessee was not excused from further performance.



Other Issues:

- Mitigation (loans and grants)
- Leases (quiet enjoyment, possession)
- Impact of reopening with restrictions
- Revisions, resolutions, recurrences



Final Considerations



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