

Insights: Alerts

Impact of the COVID-19 Pandemic on Force Majeure Defenses Under Florida Law

April 22, 2020

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We previously wrote about the contract defenses that business may rely on when an epidemic or government orders impairs contractual performance ([here](#) and [here](#)) and recently analyzed the *force majeure* defense under [Georgia](#), [North Carolina](#), and [Texas](#) law.

Here are some considerations when evaluating Florida *force majeure* defenses:

- *Force majeure* is a contract defense available to a party when the contract includes a clause excusing the non-performance of one or both parties to the contract because of a *force majeure* event. Similar common law defenses of commercial impracticability or frustration of purpose may be asserted even where a contract does not include a *force majeure* clause. This Legal Alert does not address the common law defenses as applied under Florida law.
- A *force majeure* clause is “a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled.” *ARHC NVWELF01, LLC v. Chatsworth at Wellington Green, LLC*, No. 18-80712-MIDDLEBROOKS/BRANNON, 2019 WL 4694146, at *3 (S.D. Fla. Feb. 5, 2019) (citation omitted) (applying Florida law in construing *force majeure* clause).
- In Florida, “[f]orce majeure clauses are typically narrowly construed, and will generally only excuse a party’s nonperformance if the event that caused the party’s nonperformance is specifically identified.” *Id.* (citation omitted).
- Unlike many other states, Florida does not limit *force majeure* clauses to unforeseeable events. “[F]orce majeure clauses broader than the scope of impossibility are enforceable under Florida law, including those allowing foreseeable as well as unforeseeable events to excuse timely performance. *Home Devco/Tivoli Isles LLC v. Silver*, 26 So. 3d 718, 722 (Fla. 4th DCA 2010).
- But parties should ensure that they aren’t seeking to excuse performance based on risks inherent in contracting. “A *force majeure* clause is not intended to buffer a party against the normal risks of a contract.” *Chatsworth at Wellington Green*, 2019 WL 4694146, at *4 (citation omitted).

Our [COVID-19 Task Force](#) stands ready to help you navigate the unique business challenges posed by the pandemic and shelter-in-place orders. If you are interested in discussing a specific area of interest for your business, we recommend you reach out to your primary Kilpatrick Townsend point of contact. General questions may also be submitted via email to #COVID19TSTaskForce@kilpatricktownsend.com

Related People



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