



Insights: Alerts

Georgia Contract Defenses to Consider as a Result of the COVID-19 Pandemic

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force page](#) and/or your email for updates.

We [previously wrote](#) about the contract defenses that businesses may rely on when an epidemic impairs contractual performance, and we have analyzed *force majeure* clauses under [Georgia](#), [Delaware](#), [Texas](#), [North Carolina](#), and [New York](#) law. In Georgia, for example, *force majeure* can be brought as both a contractual and a statutory defense.

Georgia, like other jurisdictions, has recognized common law defenses of “impracticability” and “frustration of purpose” to excuse non-performance of contractual obligations. These defenses may apply in addition to a *force majeure* contract defense, if one exists in a contract, and also where a contract does not have a *force majeure* provision. As we explain below, while Georgia courts recognize these defenses, there is scant case law upholding jury verdicts or summary judgment motions excusing contract performance based upon them. Nevertheless, the Georgia cases provide important guidance to consider in assessing contract non-performance.

This legal alert addresses three distinct defenses recognized by Georgia courts to excuse contract performance.

Impossibility

Georgia recognizes an impossibility defense. *Ideal Diamond Corporation v. Jewelers Mutual Insurance Company*, 409 F. Supp. 3d 1332, 1337-38 (N.D. Ga. 2019) (applying Georgia law); see *Tallman Pools of Georgia, Inc. v. Fellner*, 160 Ga. App. 722, 724, 288 S.E.2d 46, 48-49 (1981) (in dispute where the time to complete installation of a swimming pool was conditioned on the weather, the failure to charge the jury with the defenses of impossibility and act of God was harmful error).

This defense can be difficult to establish because a condition that is subjective or personal to your business will **not** excuse nonperformance of a contract as impossible. One event or condition that will not excuse contract performance under the impossibility defense is a company's financial inability to perform. *Elavon, Inc. v.*

Wachovia Bank, Nat. Ass'n, 841 F. Supp. 2d 1298, 1306 (N.D. Ga. 2011) (financial inability brought on by 2008 financial crisis did not excuse nonperformance); *see also Hampton Island, LLC v. HAOP, LLC*, 306 Ga. App. 542, 547–48, 702 S.E.2d 770, 775 (2010) (“[T]he fact that one is unable to perform a contract because of his inability to obtain money, whether due to his poverty, a financial panic, or failure of a third party . . . will not ordinarily excuse nonperformance.”) (citation omitted). The economic downturn caused by COVID-19 alone would likely be insufficient to demonstrate impossibility absent other factors. However, a business required to shutter for a period of time may argue it should be excused from non-performance based on impossibility resulting from a government order.

Impracticability or Frustration of Purpose

As a separate defense from impossibility, Georgia recognizes that performance may be excused as impracticable or as frustrating the purposes of the parties. Georgia law states that a party has not breached a contract by non-performance “if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made.” O.C.G.A. § 11–2–615.

This defense is an express defense under the Georgia Uniform Commercial Code. As such, the Georgia Court of Appeals has limited the defense of impracticability of performance to a seller of commercial goods. *Calabro v. State Med. Educ. Bd.*, 283 Ga. App. 113, 115, 640 S.E.2d 581, 583-84 (2006). As a result, an impracticability defense may be available for supply chain disruption issues caused by COVID-19 but may not be available for contracts for services or for other types of contracts. Note, however, that this defense would not excuse a buyer's failure to pay for the goods even if COVID-19 has frustrated the buyer's reasons for purchasing the goods. This will become important if the sales contract is for intermediate goods in a supply chain.

Similar to the impossibility defense, an economic downturn alone is not typically an impracticability because the contract in question would likely not have been formed on the basic assumption that there would be no financial crisis. *Elavon*, 841 F. Supp. 2d at 1307.

Change in Law or Regulation

Another type of event that may excuse performance is a supervening law, order, or restriction that renders contract performance impracticable or impossible. Section 264 of the Restatement (Second) of Contracts provides that if a party's performance is made impracticable by a domestic or foreign governmental regulation or order, its duty to render that performance may be discharged. The “shelter-in-place” orders where the contract is performed or where goods or services are to be delivered could potentially excuse performance for this reason. Georgia typically follows the Restatement (Second) of Contracts but, we have not found any Georgia cases excusing contract performance based on Section 264.

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

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