

Insights: Alerts

Impact of the COVID-19 Pandemic on Contract Defenses Under Washington Law

May 4, 2020

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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 business may rely on when an epidemic or government orders impairs contractual performance ([here](#) and [here](#)) and recently analyzed these defenses under [California](#), [Colorado](#), [Florida](#), [Georgia](#), [New York](#), and [North Carolina](#) law. Like these other jurisdictions, Washington recognizes several defenses to nonperformance of a contract due to events that are beyond the parties' control. These include contract based defenses – enforcement of a *force majeure* clause – as well as the common-law defenses of impossibility, impracticability, and frustration of purpose, which excuse nonperformance even where a contract lacks a *force majeure* provision. This Legal Alert addresses these defenses to non-performance of contractual obligations, below.

Force Majeure Contract Defense

Washington enforces contractual *force majeure* clauses, which are “contractual provision[s] allocating the risk if performance is rendered impossible or impracticable, especially as a result of an event that the parties could not have anticipated or controlled.” *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wash. App. 819, 821, 142 P.3d 209, 210 n.1 (2006) (citation omitted). While there is little Washington case law determining whether the *force majeure* clause excused non-performance of contractual obligations, one thing is clear—before seeking to invoke such a defense, parties should ensure they comply with all prerequisites, particularly any notice requirements. “Failure to comply with a *force majeure* provision's notice requirements can preclude a party from using the defense.” *Puget Soundkeeper All. v. Rainier Petrol. Corp.*, No. C14-0829JLR, 2017 WL 6515970, at *9 (W.D. Wash. Dec. 19, 2017).

Impossibility and Impracticability

Washington recognizes impossibility and impracticability defenses, which are often referenced and applied together. See, e.g., *Evans v. Cty. of Spokane*, 112 Wash. App. 1059, 2002 WL 1797485, at *7 (2002) (unpublished) (“[A] thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.”). Under both defenses, a party to contract is excused from performing if a basic assumption of the contract is unexpectedly and unavoidably

destroyed and performance becomes impracticable or impossible, such as when a contract requires transportation by boat and the subject boat is destroyed. See *Smugglers Cove, LLC v. Aspen Power Catamarans, LLC*, No. C19-277 MJP, 2020 WL 758107, at *3 (W.D. Wash. Feb. 14, 2020) (applying Washington law); *Metro. Park Dist. v. Griffith*, 106 Wash. 2d 425, 440, 723 P.2d 1093, 1102 (1986) (en banc).

Showing impossibility or impracticability is a high burden. It isn't enough that the contract "becomes more difficult or expensive than originally anticipated." *Pub. Util. Dist. No. 1 v. Wash. Pub. Power Supply Sys.*, 104 Wash. 2d 353, 364, 705 P.2d 1195, 1204 (1985) (en banc). Nor does a party's inability to pay constitute an inability to perform, even if payment becomes more difficult because of unforeseen circumstances. *Id.*; see also *Carpenter v. Folkerts*, 29 Wash. App. 73, 77, 627 P.2d 559, 562 (1981) (financial inability to pay encumbrances and clear title to property was insufficient to discharge seller's performance under land sale contract). Instead, a party must show "extreme and unreasonable difficulty, expense or injury." *Pub. Util. Dist.*, 104 Wash. 2d at 364, 705 P.2d at 1204. If a party successfully shows impossibility or impracticability, the court will rescind the contract and "attempt[] to restore the parties to the positions they would have occupied had they not entered into the contract." *Graham v. Ho*, No. 79523-6-I, 2020 WL 1640255, at *7 (Wash. Ct. App. Mar. 23, 2020) (quoting *Bloor v. Fritz*, 143 Wash. App. 718, 739, 180 P.3d 805, 817 (2008)).

The novel effects that COVID-19 has had on businesses may be enough to meet this stringent standard. Where a company's contractual obligations directly depend on being open and operable, the company likely has a good impossibility or impracticability defense based on stay-at-home orders that require it to close its premises.

Frustration of Purpose

Frustration is a related but distinct defense under Washington law. Instead of remedying impediments to performance like impossibility and impracticability, the frustration defense addresses "a change in circumstances [that] make[s] one party's performance virtually worthless to the other." Restatement (Second) of Contracts § 265 cmt. a. The frustrated purpose of the contract must be "so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense." *Felt v. McCarthy*, 130 Wash. 2d 203, 208, 922 P.2d 90, 93 (1996) (en banc) (citations omitted) (frustration defense did not apply where defendant's ability to run successful business park was not the parties' shared purpose in entering land sale contract). More simply, the purpose necessary to support a frustration defense must have been the reason *both* parties entered the contract. *Wash. State Hop Producers, Inc., Liquidation Tr. v. Goschie Farms, Inc.*, 112 Wash. 2d 694, 706, 773 P.2d 70, 76 (1989) (en banc) (the frustration defense requires a purpose without which "there would neither have been an offer nor an acceptance" (citation omitted)).

In addition to a shared purpose, the frustration defense requires substantial frustration. *Felt*, 130 Wash. 2d at 210, 922 P.2d at 94 (decline in property value from \$310,000 to \$50,000 was insufficient because "a decline in market value is not sufficient in and of itself to support a finding of frustration"). "It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract." *Id.* at 208, 922 P.2d at 93 (quoting Restatement (Second) of Contracts § 265 cmt. a). Thus, it may be difficult for companies to argue that their revenues have substantially declined because of COVID-19, which Washington courts may deem one of the hazards of doing business.

Finally, any party seeking to assert a frustration defense needs to ensure it exhausts all options, judicial or otherwise, to remedy the frustration before seeking to avoid performance. See *Scott v. Petett*, 63 Wash. App. 50, 61, 816 P.2d 1229, 1236 (1991) (frustration defense doesn't apply where "party fails to attempt to remedy the problem through available administrative or legal procedures").

Change in Law or Regulation

Section 264 of the Restatement (Second) of Contracts also recognizes a defense based on impossibility due to a government regulation or order, like the various COVID-19-related stay-at-home orders. The defense excuses performance where "supervening governmental action prohibits a performance or imposes requirements that make it impracticable." Restatement (Second) of Contracts § 264 cmt. a. The Washington courts have not adopted this Restatement section but have applied it hypothetically. See *Bob Spain Real Estate Servs., Inc. v. Cox*, 185 Wash. App. 1038, 2015 WL 422371, at *6–7 (2015) (unpublished) (acknowledging that "Washington courts have yet to explicitly adopt Restatement § 264," but determining that the defendant failed to satisfy its requirements). But with the rising number of businesses impacted by local, state, and federal COVID-19 orders, it is possible the Washington courts will revisit the issue.

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 #COVID-19KTSTaskForce@kilpatricktownsend.com. For Washington-specific questions, you may also contact the attorneys listed below.

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