

Insights: Alerts

Impact of the COVID-19 Pandemic on Impossibility, Impracticability, and Frustration of Purpose Contract Defenses under North Carolina Law

April 24, 2020

Written by **Chad D. Hansen**, **Richard J. Keshian** and **Jason M. Wenker**

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 recently analyzed *force majeure* clauses under [California](#), [Colorado](#), [Delaware](#), [Florida](#), [Georgia](#), [New York](#), [North Carolina](#), and [Texas](#) law.

Here are some practical considerations for evaluating defenses under North Carolina law when a contract does not contain a *force majeure* clause or such clause is inapplicable:

Impossibility of Performance:

- In North Carolina, impossibility of performance excuses a party from performing “if the subject matter of the contract is destroyed without fault of the party seeking to be excused from performance.” *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 210, 274 S.E.2d 206, 209 (1981).
- The subject matter of the contract must be physically destroyed, so impossibility would generally not apply to contracts for services. Impossibility may apply to contracts for services, however, when the location where the services were to be performed is destroyed, or when something else is destroyed that was essential to the contract. See *WRI/Raleigh, L.P. v. Shaikh*, 183 N.C. App. 249, 253, 644 S.E.2d 245, 247 (2007) (rejecting application of the doctrine of impossibility to contract for plumbing services where “the premises at issue still exist and at the time the defendant refused to perform were in the same condition as when the contract was signed.”).
- If the allocation of the risk of loss was on the party seeking to avoid performance, the doctrine of impossibility is not available to avoid performance. *Barnes v. Ford Motor Co.*, 95 N.C. App. 367, 371, 382 S.E.2d 842, 844 (1989) (finding that impossibility did not apply where a tractor was in the plaintiffs’ possession at the time of a fire destroying the tractor).

Commercial Impracticability:

- Similar but distinct from impossibility, commercial impracticability is another contract defense available in North Carolina. Impracticability means physically possible but practically impossible. The Uniform Commercial Code's version of commercial impracticability (which applies to contracts for the sale of goods) has been codified in North Carolina state statute. See N.C. Gen. Stat. § 25-2-615. North Carolina courts also apply a common law version of the doctrine of impracticability to contracts for services.
- In order to excuse performance under an impracticability theory, “a seller of goods must establish the following elements: (1) performance has become ‘impracticable’; (2) the impracticability was due to the occurrence of some contingency which the parties expressly or impliedly agreed would discharge the promisor's duty to perform; (3) the promisor did not assume the risk that the contingency would occur; and (4) the promisor seasonably notified the promisee of the delay in delivery or that delivery would not occur at all.” *Alamance Cnty. Bd. of Educ. v. Bobby Murray Chevrolet, Inc.*, 121 N.C. App. 222, 227, 465 S.E.2d 306, 310 (1996).
- “Increased cost alone will not satisfy the requirements of [commercial impracticability], nor will a rise in the market suffice. N.C. Gen. Stat. § 25-2-615, cmt. 4. However, ‘a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like’ would be sufficient.” *Id.*” *D.S. Simmons, Inc. v. Steel Grp., LLC*, No. 5:06-CV-363-BR, 2008 WL 488845, at * (E.D.N.C. Feb. 19, 2008) (applying North Carolina law and stating that “a seller cannot avail himself of this defense unless he has employed all due measures to assure himself that his source will not fail.”).

Government Orders:

- Because impossibility requires the actual, physical destruction of the subject matter of the contract, it is not likely to play a significant role in commercial contract disputes resulting directly from the effects of the pandemic. Impracticability is also rarely applied because it requires the occurrence of a highly unusual event. Both defenses may, however, play a larger role with regards to performance that cannot be accomplished because of governmental orders.
- The North Carolina Court of Appeals has observed that: “Whether governmental action will excuse a party from liability for nonperformance of a contract is a legal question for the court.” *Messer v. Laurel Hill Assocs.*, 102 N.C. App. 307, 311, 401 S.E.2d 843, 846 (1991) (“Generally, such nonperformance will be excused where performance is rendered impossible by the law, provided the promisor is not at fault and has not assumed the risk of performing, whether impossible or not”).
- Based on this language, government orders restricting performance may be more likely to excuse contract performance under either impossibility (can't physically perform) or impracticability (can't practically perform) than the pandemic itself.
- Governor Cooper has issued a “Stay At Home” order that requires many businesses deemed non-essential to shutter during the COVID-19 pandemic (as of publication that order has been extended through May 8, 2020). A business that has had to shutter or has had to provide services remotely may be able to rely on *Messer* to excuse non-performance or to excuse delayed performance.

Frustration of Purpose:

- Under the doctrine of frustration of purpose, performance remains possible, but is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance. *Brenner*, 302 N.C. at 210, 274 S.E.2d at 209 (“Although the doctrines of frustration and impossibility are akin, frustration is not a form of impossibility of performance. It more properly relates to the consideration of performance.”).
- The doctrine of frustration of purpose is not applicable where the frustrating event is reasonably foreseeable. *Holmes v. Solon Automated Servs.*, 231 N.C. App. 44, 48, 752 S.E.2d 179, 182 (2013).
- Frustration of purposes applies where it would be unreasonably burdensome to perform where a highly unusual event undermines the purpose of the contract. *Brenner*, 302 N.C. at 210, 274 S.E.2d at 209.

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.

Related People



Chad D. Hansen

t 336.607.7308
chadhansen@ktslaw.com



Richard J. Keshian

t 336.607.7322
rkeshian@ktslaw.com



Jason M. Wenker

t 336.607.7416
jwenker@ktslaw.com