

WHITE PAPER COVID-19 and Contract Performance

Florida Realtors Legal Hotline has been flooded with questions from members who wonder if COVID-19-related issues are a valid reason to delay or excuse performance under contract. The short answer is that force majeure requires a party to show a very specific and compelling reason why they can't perform, as opposed to a more general sense that times are tumultuous. Since this is an extremely nuanced and complicated question to field, we'll try to break some of the issues surrounding this question into targeted questions and answers below

Routinely we hear these times described as unprecedented. Legally, that means there is not an abundance of legal precedence to predict how a court may rule on disputes that arise from transactions during this time. Here, we will explore some of the considerations for courts that will have to read the language of the contract, apply that language to the facts and circumstances of each transaction, and analyze that information under the law.

One thing we know is that the language of the contract matters. That language is not always consistent from contract to contract. Since the Florida Realtors®/Florida Bar "AS IS" Residential Contract for Sale and Purchase is currently the most popular contract in the state, we'll use its force majeure clause for discussion purposes.

Section 18(G) Force Majeure. Buyer or Seller shall not be required to perform any obligation under this Contract or be liable to each other for damages so long as performance or non-performance of the obligation, or the availability of services, insurance or required approvals essential to Closing, is disrupted, delayed, caused or prevented by Force Majeure. "Force Majeure" means: hurricanes, floods, extreme weather, earthquakes, fire, or other acts of God, unusual transportation delays, or wars, insurrections, or acts of terrorism, which, by exercise of reasonable diligent effort, the non-performing party is unable in whole or in part to prevent or overcome. All time periods, including Closing Date, will be extended a reasonable time up to 7 days after the Force Majeure no longer prevents performance under this Contract, provided, however, if such Force Majeure continues to prevent performance under this Contract more than 30 days beyond Closing Date, then either party may terminate this Contract by delivering written notice to the other and the Deposit shall be refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

What does this clause do?

It provides an automatic extension that comes into play when a dramatic event prevents a party's performance or closing from happening. It takes an unusual event to trigger this "force majeure" clause, as you can see from a few of the examples in the clause,

such as hurricanes, acts of God, and acts of terrorism. Once the clause is triggered, certain time periods (including the closing date, if applicable) will be extended for a reasonable time up to 7 days after the force majeure no longer prevents performance. Parties should pay attention to the time in relation to the closing date, though, since either party may terminate the contract by delivering a written notice if force majeure continues to prevent performance more than 30 days beyond the closing date.

Do all contracts contain a force majeure clause?

No. Although this is a common clause in many contracts, it doesn't exist in all of them. If it doesn't exist, then it doesn't apply, although there could potentially be other general arguments, like impossibility or frustration of purpose (see below).

Are all force majeure clauses the same?

No. The specific terms can vary, which means every analysis must look at the specific words of the executed contract to see if they apply. It's possible for the same exact facts to qualify for force majeure protection in one contract, but not another. For example, some force majeure clauses include epidemics and pandemics as covered events, while others do not.

Is the pandemic an "Act of God" as written in the clause above? Does this force majeure clause apply to COVID-19 related issues?

We don't know. Both questions would hinge on a specific court's analysis. We have had lengthy discussions about this clause among our legal team and just don't have a consensus. That's because this is an abstract concept, as opposed to a chart showing what specific events fall under the definition and what events do not. There was a Florida Supreme Court case, *Florida Power Corp. v. City of Tallahassee*, 18 So.2d 671 (Fla. 1944), but the case merely provides a general description of an act of God that makes clear it is a **very limited** definition. The Florida Power case did conclude that a hurricane preventing the power company from performing its obligation to provide power was an act of God that prevented performance, and therefore excused the power company from being liable under the contract. Weather-related factors are easier to analyze than public health emergencies.

Do courts often allow force majeure to overcome contractual obligations?

No. As a very general statement, courts interpret these clauses narrowly, which means they are stingy in their application of force majeure.

Does your department believe that this force majeure clause would apply to many of the stories you've heard on the Legal Hotline so far?

Probably not. Here's a major caveat: we haven't heard many specific examples of facts that prevent closings at the time of writing, such as a closing agent that stops operations

or is otherwise unable to conduct a closing. Most stories involve people citing fear of an uncertain future or volatile economic conditions, as opposed to very specific facts that prevent performance. Additionally, very few callers report parties who have taken “reasonable and diligent effort” to “prevent or overcome” any hurdles placed in their way, as described in the clause. Here’s the caveat one more time: as the legal landscape evolves daily, it’s very possible that we reach a point where we DO start hearing compelling cases in the future, possibly in the very near future.

Could other sections of the contract come into play?

Yes. Although members calling the Florida Realtors® Legal Hotline are typically asking about force majeure, it’s possible that some other part of the contract applies. For example, a buyer who is still in an inspection period under an AS IS contract may have the right to terminate if not satisfied with the property for any reason, which is the buyer’s sole discretion. A financing contingency might also be applicable, depending on the facts. If a seller has not provided a condominium rider or has not delivered condominium documents, the buyer’s right to void the contract could also be in play.

Force majeure is only one section of the contract to consider. Parties should always read the full contract to see if any other clause in the contract applies to their facts.

In addition to interpreting a specific force majeure clause, are there other similar legal theories that could apply to a party that is unable to perform?

Yes. There are two similar legal theories called *impossibility of performance* and *frustration of purpose*. Both can be used as a defense if a party is sued for failing to perform.

What is impossibility of performance?

It refers to situations where it is objectively impossible for a party under contract to perform.

Example: A sale and purchase contract cannot close because closing services are not available due to language contained in an emergency order. Under such circumstances, the impossibility of performance may be a viable defense for a seller to use, since it is objectively impossible for seller to transfer title to property to buyer on closing date. Note, however the specific facts of each case will determine the outcome.

Impossibility of performance is a viable defense only if the knowledge of the facts making performance impossible was not available to the party claiming the impossibility, from the beginning of the time when the agreement was entered. The defense is not permitted under such circumstances because if a party had such knowledge, the matter could have been addressed in the agreement. It is presumed that if the information was available and no provision was added to the agreement to address it, the risk was

assumed. In addition, the defense of impossibility of performance can't be raised if the impossibility could have been avoided or was foreseeable.

In the previous example, a sale and purchase contract cannot close due to the fact that closing services are not available where all commerce and services have been temporarily closed, due to an emergency order. Under such circumstances, the impossibility of performance may **not** be a viable defense for a seller to use if the emergency order was issued before the parties began their negotiations. This is why the specific facts of each case determine the outcome.

What is the second defense, frustration of purpose?

This refers to the scenario where one of the contracting parties finds that the primary purpose that prompted them to enter a contract, and which purpose was known by the other party, has been frustrated because of a change in circumstances.

Example: Landlord and tenant enter into a lease. Both sides are fully aware that the sole purpose behind tenant entering into the lease is so that tenant can use the premises for a very specific purpose. However, if government restrictions related to COVID-19 now prohibit the tenant from being able to use the premises as planned, frustration of purpose may apply.

How likely is it that a party will be successful in defending a breach of contract claim using these theories?

As is the case with interpreting force majeure clauses, courts grant these defenses sparingly. Given the importance of the enforceability of contracts, these theories are cautiously applied by courts. If the facts causing the impossibility could have been known, were caused by the party or could have been avoided by the party claiming the impossibility to perform, the defense will likely fail.

What happens to the escrow deposit if the buyer does not close because of COVID 19?

This is a common question right now. A buyer considering not closing does so potentially at their legal peril. A buyer who does not close must have a valid legal reason to do so. As addressed above, it is possible a buyer is not closing due to the inspection clause or some other option given under the contract. Fear and uncertainty of the future action are not enough. Any buyer who intends to argue force majeure, legal impossibility, frustration of purpose or other legal argument should consider consulting an attorney. The decision of a court will be very fact specific. A buyer taking a wait-and-see attitude and making no effort to close may find the court unsympathetic to their argument.

While this article serves as a broad overview of key concepts that excuse nonperformance, Florida Realtors® Legal Hotline lawyers are always happy to discuss

the nuances of these provisions since, as you can see, they hinge on case-by-case determinations that rest in the hands of individual courts. **The Legal Hotline number is 407.438.1409 and is available M-F from 9 am to 5 pm.**

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